

# Straddling the Federal–State Divide: Federal Court Review of Interstate Agency Actions

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*ABSTRACT: Until recently, scholarship on administrative federalism has focused on the vertical divide—the relationship between the federal and state governments. A growing body of literature, however, considers the benefits of horizontal federalism—the relationship between two or more states that work together to address shared issues. The interstate compact formalizes agreements among states about how they will work together. Often, a compact creates an interstate agency to carry out its objectives, thus functioning as an enabling act. This Note examines the nature of interstate compacts and the agencies they create, as exemplified by the Great Lakes–St. Lawrence River Basin Water Resources Compact. In light of interstate agencies’ sub-federal and supra-state status, they are subject to fewer legal and political constraints than either federal or state agencies. This Note argues that for that reason, when federal courts review interstate agencies’ interpretations of ambiguous language in their enabling compacts, they should not apply the typical Chevron deference afforded to federal agencies. Instead federal courts should apply a version of the Skidmore balancing test, which allows courts to assess the soundness of an agency’s decision-making procedures before determining how much deference to give that agency’s interpretation of its enabling compact.*

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I. INTRODUCTION

The City of Waukesha, Wisconsin is in the market for new water.<sup>1</sup> Once famous for its mineral springs, Waukesha now draws water from a depleted sandstone aquifer contaminated by levels of radium that are dangerously in excess of state and federal limits.<sup>2</sup> Under a federal deadline for supplying residents with “radium-safe water,” Waukesha has set its sights on the waters of Lake Michigan, one of the world’s largest sources of fresh water located just 15 miles to the east.<sup>3</sup>

Despite Waukesha’s proximity to Lake Michigan, the city faces significant legal hurdles in accessing the lake’s water.<sup>4</sup> Waukesha is located just outside the Great Lakes Water Basin.<sup>5</sup> For that reason, under the provisions of the Great Lakes–St. Lawrence River Basin Water Resources Compact (“GLWC”) of 2008, the city must apply for an out-of-basin diversion from an interstate agency made up of representatives from the eight states bordering the Great Lakes.<sup>6</sup>

1. Sarah Gardner, *Waukesha Fights for a Share of Lake Michigan’s Water*, MARKETPLACE (Feb. 4, 2015, 5:00 AM), <http://www.marketplace.org/2015/02/04/sustainability/water-high-price-cheap/waukesha-fights-share-lake-michigans-water>.

2. *Id.*; see also Don Behm, *Great Lakes Organization Starts Review of Wisconsin City’s Request for Water from Lake Michigan*, DULUTH NEWS TRIB. (Jan. 7, 2016, 6:25 PM), <http://www.duluthnews-tribune.com/news/3919510-great-lakes-organization-starts-review-wisconsin-citys-request-water-lake-michigan>.

3. Don Behm, *DNR to Advance Waukesha Water Diversion Bid to Great Lakes Governors*, MILWAUKEE–WIS. J. SENTINEL (Dec. 8, 2015), <http://www.jsonline.com/news/waukesha/dnr-to-advance-waukesha-water-diversion-bid-to-great-lakes-governors-b99630401z1-360964451.html>; see also Gardner, *supra* note 1. Lake Michigan is one of five lakes in the Great Lakes water system, which accounts for more than one-fifth of the planet’s surface freshwater. JARED TEUTSCH, ALL FOR THE GREAT LAKES, ON TRACK? ENSURING THE RESILIENCE OF THE GREAT LAKES COMPACT 1 (2013), <http://www.greatlakes.org/document.doc?id=1410> (“The Great Lakes . . . contain 84 percent of North America’s surface freshwater and 21 percent of the surface freshwater worldwide.”).

4. See Gardner, *supra* note 1.

5. See Behm, *supra* note 3.

6. Great Lakes–St. Lawrence River Basin Water Resources Compact (“GLWC”), Pub. L. No. 110–342, §§ 1, 2.2–3, 122 Stat. 3739, 3739, 3744 (2008). The GLWC is an interstate compact governing the Great Lakes water system. TEUTSCH, *supra* note 3, at 1–2. Ratified by the

The GLWC is a restrictive interstate compact prohibiting most diversions of water from the Great Lakes Water Basin to locations where water flows to another waterway.<sup>7</sup> An interstate compact is a congressionally approved agreement among states to address a common concern.<sup>8</sup> Frequently, it will create a multi-state agency to achieve its objectives.<sup>9</sup>

In May 2010, Waukesha began the application process to secure a water diversion,<sup>10</sup> becoming the first community located entirely outside of the basin to apply for a diversion under the GLWC.<sup>11</sup> For the diversion application to be successful, it must receive the unanimous consent of the members of the interstate agency charged with administering the GLWC—the

eight Great Lakes states, the GLWC became federal law in October 2008 when Congress approved it and President George W. Bush signed it into law. *See id.* at i. The eight states include: Minnesota, Wisconsin, Michigan, New York, Pennsylvania, Ohio, Indiana, and Illinois. *Id.* at ii; *see also* GLWC § 1, 122 Stat. at 3739; *Great Lakes–St. Lawrence River Basin Water Resources Council Members and Alternates*, GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL, <http://gslcompactcouncil.org/Membership.aspx> (last visited Mar. 5, 2016).

7. *See Great Lakes Water Use and Diversions*, TIP MITT WATERSHED COUNCIL, <http://www.watershedcouncil.org/great-lakes-water-use-and-diversions.html> (last visited Mar. 5, 2016). For a good historical review of the federal treaties and interstate compacts predating the GLWC, *see generally* Sonya F. Palay, Note, *Muddy Waters: Congressional Consent and the Great Lakes–St. Lawrence River Basin Water Resources Compact*, 36 HASTINGS CONST. L.Q. 717 (2009).

The GLWC seeks to protect the Great Lakes by prohibiting undue diversions, preventing future conflicts, and promoting consistent regional “standards for water use and conservation within the basin.” *Great Lakes Water Resources Compact and Agreement*, ALLIANCE FOR GREAT LAKES, <http://greatlakes.org/compact> (last visited Mar. 5, 2016); *see also* GLWC §§ 2.1, 4.5, 4.7, 122 Stat. at 3744, 3749–51, 3752. To accomplish this, the GLWC bans all diversions outside the water basin but allows a narrow exception for counties and communities that straddle the basin, which allows those areas to apply for permission to divert water. GLWC § 4.9, 122 Stat. at 3752–54. Straddling counties straddle the water-basin divide (i.e., water on one side of the county flows towards one water basin while water on the other side flows towards another) while straddling communities straddle the line within city limits. *See id.* To apply for a diversion, a county or community must: (1) apply for approval by the state in which the county or community is located; and (2) pass administrative review by the interstate agency designated by the GLWC. *Id.* §§ 4.4, 4.5, 4.7, 122 Stat. at 3749–51, 3752.

8. *See* CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER’S GUIDE* 11, 25–26 (2006).

9. *See infra* Part III (defining interstate compacts and discussing interstate agencies).

10. 1 CH2M HILL, *APPLICATION SUMMARY, CITY OF WAUKESHA APPLICATION FOR A LAKE MICHIGAN DIVERSION WITH RETURN FLOW*, at III (2013), [ftp://dnrftp01.wi.gov/geodata/water\\_division/waukesha\\_diversion/application/1\\_City\\_of\\_Waukesha\\_Application\\_Summary.pdf](ftp://dnrftp01.wi.gov/geodata/water_division/waukesha_diversion/application/1_City_of_Waukesha_Application_Summary.pdf).

11. *Special Report: Is Our Great Lakes Compact Ready?*, ALLIANCE FOR GREAT LAKES, <http://www.greatlakes.org/SpecialReport/GreatLakesCompact> (last updated Oct. 2, 2013); *see also* TEUTSCH, *supra* note 3, at i (“The [GLWC] will soon face its first regional test from Waukesha, Wis[consin] . . . .”); Amanda K. Beggs, Note, *“Death by a Thousand Straws”: Why and How the Great Lakes Council Should Define “Reasonable Water Supply Alternative” Within the Great Lakes Compact*, 100 IOWA L. REV. 361, 364 (2014) (“Waukesha, Wisconsin, recently began the application process to divert water out of Lake Michigan.”).

Great Lakes–St. Lawrence River Basin Water Resources Council (“Compact Council”).<sup>12</sup> Commentators are split on the application’s likely result.<sup>13</sup>

After five years of analysis, the Wisconsin Department of Natural Resources (“DNR”) has certified that Waukesha qualifies for a diversion under the “straddling-county” exception to the GLWC because it “has no reasonable water supply alternative.”<sup>14</sup> Wisconsin then forwarded Waukesha’s diversion application to the Compact Council, which began to review the application on January 7, 2016.<sup>15</sup> Over the next six months, the Compact Council will solicit public input, apply the GLWC’s provisions, and may analyze the application under the provisions of a 2010 Interim Guidance document.<sup>16</sup>

The GLWC’s straddling-county exception will receive its first major test as Waukesha’s application undergoes regional review and the Compact

12. See Behm, *supra* note 2; see also GLWC §§ 2.1, 4.5, 4.7, 122 Stat. at 3739, 3744, 3749–52 (establishing the Compact Council and providing for administrative review). The GLWC vests the Compact Council with many powers, including the power to “employ or appoint professional and administrative personnel,” to conduct investigations, sue, contract, receive appropriations, and “promulgate and enforce . . . rules and regulations” to carry out the purposes of the GLWC. *Id.* §§ 2.1, 2.5, 3.2–3, 122 Stat. at 3744, 3746. To issue formal rules and regulations, the agency must provide notice and an opportunity for public comment. *Id.* § 3.3, 122 Stat. at 3746.

Before the Compact Council considers whether to give its unanimous consent, applications for a straddling-county diversion must be reviewed by a Regional Body consisting of the Compact Council plus the two Canadian provinces bordering the Great Lakes. *Id.* § 4.9, 122 Stat. at 3752–54. What the regional review entails is not entirely clear from the GLWC, which primarily requires a public notice-and-comment period. *Id.* § 4.5(3), 122 Stat. at 3750. This requirement parallels a requirement for public notice and comment during the Compact Council’s independent review of proposals. See *id.* § 6.2, 122 Stat. at 3760.

13. Compare Cheryl Nenn, *Waukesha Has Not Proven a Need for Great Lakes Water*, MILWAUKEE–WISC. J. SENTINEL (Nov. 20, 2013), <http://www.jsonline.com/news/opinion/waukesha-has-not-proven-a-need-for-great-lakes-water-b99146762z1-232753841.html> (arguing that there are reasonable water supply alternatives and that Waukesha should instead “pursue a more balanced approach” that includes enhanced conservation efforts), with Gabe Johnson-Karp, Comment, *That the Waters Shall Be Forever Free: Navigating Wisconsin’s Obligations Under the Public Trust Doctrine and the Great Lakes Compact*, 94 MARQ. L. REV. 415, 448–49 (2010) (“In the end, Waukesha will get its water, once the city complies with the DNR’s requests for information . . . [U]ltimately Waukesha will drink clean water and the waters of the state will remain forever free.”).

14. Christopher Kuhagen, *Waukesha’s Lake Michigan Water Diversion Application Sent to Regional Body for Review*, WAUKESHA NOW (Jan. 12, 2016), <http://www.waukeshanow.com/news/waukeshas-lake-michigan-water-diversion-application-sent-to-regional-body-for-review-b99648525z1-364920401.html>; see also GLWC § 4.9(3)(d), 122 Stat. at 3754 (requiring communities in straddling counties to prove that they have “no reasonable water supply alternative”); *City of Waukesha Water Diversion Application*, WIS. DNR, [http://dnr.wi.gov/topic/wateruse/waukesha\\_diversionapp.html](http://dnr.wi.gov/topic/wateruse/waukesha_diversionapp.html) (last revised Feb. 16, 2016).

15. See Behm, *supra* note 2.

16. See TEUTSCH, *supra* note 3, at 14 (discussing the issuance of the Interim Guidance in 2010). As a guidance document, the Interim Guidance is a nonlegislative rule, a rule that lacks the force of law and as such is “not binding on agencies or citizens.” MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW § 6.1.4a, at 320 (3d ed. 2009) (citing *Viet. Veterans of Am. v. Sec’y of Navy*, 843 F.2d 528, 536–38 (D.C. Cir. 1988)).

Council determines whether to approve the application.<sup>17</sup> Commentators have identified several issues within the GLWC that are ripe for legal challenge, including: (1) inadequate procedural rules governing administrative review of applications; (2) insufficient procedural protections given the nonbinding nature of the Interim Guidance; and (3) ambiguous key terms in the compact that are not defined by the Interim Guidance.<sup>18</sup> Thus, if Waukesha is ultimately unsuccessful, the Compact Council's decision is "vulnerable to appeal" in federal court.<sup>19</sup>

If Waukesha challenges the Compact Council's interpretation of the ambiguous language in the GLWC,<sup>20</sup> current precedent is unclear about the level of deference the court should give to the Compact Council's interpretation of the GLWC.<sup>21</sup> Federal courts have not directly addressed the question.<sup>22</sup> On the one hand, as an interstate compact, the GLWC is considered to be federal law, suggesting a federal standard should apply.<sup>23</sup> On the other hand, the Compact Council is not a federal agency—it is a multi-state agency, suggesting that the federal standard might not be appropriate.<sup>24</sup>

This Note argues that when evaluating an interstate agency's interpretation of ambiguous language in its congressionally approved enabling compact, federal courts should apply *Skidmore's* balancing test<sup>25</sup> rather than *Chevron* deference, which is the default standard for reviewing a

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17. Beggs, *supra* note 11, at 364; *see also* Kuhagen, *supra* note 14.

18. *See* TEUTSCH, *supra* note 3, at iii (noting areas ripe for challenge); Beggs, *supra* note 11, at 376–77 (providing an in-depth review of the "weaknesses in the Compact's diversionary scheme" with a focus on the substantive, definitional issues). While the third point raises a substantive question (i.e., a "[l]ack of [d]efinition for [k]ey [t]erms of [a]rt"), the other two raise primarily procedural issues (i.e., a "[l]ack of [r]egulatory [p]rocess and [b]inding [g]uidance"). Beggs, *supra* note 11, at 376–77. No formal rules addressing those deficiencies have been promulgated since Teutsch's 2013 article. *See Resolutions, Guidance Statements and Other Documents*, GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL, <http://www.gslcompactcouncil.org/Resolutions.aspx> (last visited Mar. 5, 2016) (listing official agency actions chronologically).

19. *See* TEUTSCH, *supra* note 3, at ii ("Absent water-tight regional implementation rules, however, this precedent-setting application could reveal deficiencies in the application process that, if unaddressed, leave the compact vulnerable to legal challenges."); *see also* GLWC § 7.3, 122 Stat. at 3761 (providing for judicial review in the United States District Court for the District of Columbia or in the federal district containing the Compact Council's offices). The Compact Council's offices are in Chicago, Illinois, and so appeals would be made to the Northern District of Illinois. *See Contact Information*, GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL, <http://www.gslcompactcouncil.org/Contact.aspx> (last visited Mar. 5, 2016).

20. *See supra* note 18.

21. *See infra* Part IV. In addition, the GLWC does not specify the standard of deference to apply. TEUTSCH, *supra* note 3, at 15.

22. *See infra* Part IV.D.

23. Because the GLWC is an interstate compact enacted as law by both the federal government and the member states' governments, courts regard the GLWC as federal law for the purposes of judicial review. Palay, *supra* note 7, at 727 (citing *Virginia v. Maryland*, 540 U.S. 56, 66 (2003)).

24. *See infra* Part IV.A.

25. *See infra* Part II.C.

federal agency’s interpretation.<sup>26</sup> Part II outlines the federal–state administrative framework and its paradigmatic standards of judicial review. Part III presents the legal framework governing interstate agencies. Part IV discusses key issues concerning the choice of a standard for judicial review, including: (1) that interstate agencies are neither federal nor state agencies; (2) structural issues unique to interstate agencies; (3) the negative impact of those structural issues on legitimizing theories of administrative law; and (4) the fact that judicial precedent on the issue is limited and nondispositive. Part V argues that federal courts reviewing an interstate agency’s interpretation of ambiguous language in its interstate compact should apply a federal standard, concluding that courts should apply *Skidmore’s* balancing test instead of reflexively applying *Chevron* deference because *Skidmore* allows courts to assess the procedural integrity and political legitimacy of an interstate agency’s decision before granting deference.

## II. JUDICIAL REVIEW OF AGENCY ACTIONS IN THE FEDERAL–STATE ADMINISTRATIVE REGIME: A FUNCTION OF VERTICAL FEDERALISM

In the 20th century, federal and state governments in the United States increasingly used administrative agencies to enforce laws, implement policies, and advance the general welfare.<sup>27</sup> As the administrative state grew, so did the framework for modern administrative law.<sup>28</sup> This framework arose within a federal system that sharply distinguishes “between what is distinctly ‘national’ in scope and what is distinctly ‘local’ in scope.”<sup>29</sup> Scholars call this sharp divide “vertical federalism,” the relationship between the national and state governments.<sup>30</sup>

26. See *infra* Part II.C; see also *infra* Part V.

27. See JULIA BECKETT, PUBLIC MANAGEMENT AND THE RULE OF LAW 90–92 (2010) (discussing the explosive growth of the federal administrative regime in the 1930s); see also Robert Rabin, *Federal Regulation in Historical Perspective*, in FOUNDATIONS OF ADMINISTRATIVE LAW 39, 42–51 (Peter H. Schuck ed., 2d ed. 2004) (discussing the administrative state’s development after the 1930s). The growth of administrative agencies was not confined to federal and state agencies; multi-state or regional agencies (“interstate agencies”) created by interstate compacts also became more common. See Brevard Cihfield, *Introduction* to FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS, at ix, ix (1976) (noting that interstate compacts grew in number and type through the mid-1900s); see also WILLIAM KEVIN VOIT ET AL., INTERSTATE COMPACTS & AGENCIES: 2003, at 6 (2003) (“[I]n the last 75 years, more than 150 compacts have been created, most since the end of World War II.”).

28. See R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 246–57 (1992).

29. BROWN ET AL., *supra* note 8, at 26.

30. See, e.g., Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 409 (2006) (“Vertical federalism refers to the relationship between the federal government and state governments (federal-state), while horizontal federalism refers to the relationship between individual states (state-state).”). Federalism is the functional relationship between two sovereign governments. BROWN ET AL., *supra* note 8, at 25–26.

As states encounter 21st-century problems spanning geopolitical boundaries, however, they increasingly look for regional solutions to their collective concerns.<sup>31</sup> These concerns include issues like how to balance conservation and development interests and how to restore natural resources in the face of economic, population, or environmental pressures.<sup>32</sup> When states agree to work together, they commonly formalize their agreement by entering into an interstate compact, “the constitutionally permitted mechanism for states to create legal obligations to each other.”<sup>33</sup> In interstate compacts, states often create interstate agencies to implement their objectives.<sup>34</sup> Interstate compacts and interstate agencies are hallmarks of “horizontal federalism,” the relationship between coordinate sovereigns.<sup>35</sup>

Administrative law is both procedural and structural law.<sup>36</sup> As procedural law, it covers the many legal principles and procedures that apply to agencies and form the basis for judicial review.<sup>37</sup> As structural law, it covers the relationship between agencies and the various branches of government.<sup>38</sup> In the federal–state administrative framework, federal administrative law is the paradigm that sets the procedural and structural norms on which most states base their administrative systems.<sup>39</sup> For that reason, before delving into the

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31. See NICK BOLLMAN, CAL. INST. FOR CTY. GOV'T, THE NEW CALIFORNIA DREAM: REGIONAL SOLUTIONS FOR 21ST CENTURY CHALLENGES 2 (2002), <http://www.csus.edu/news/regionreport.pdf> (“Issues once successfully addressed at a local or state level now must be addressed at a regional level. The world has changed and made our challenges regional. We compete in a global economy, region-to-region, not country-to-country.”); Int’l City/Cty. Mgmt. Ass’n, *Regional Solutions to Regional Problems*, ALLIANCE FOR INNOVATION (Aug. 21, 2013), [http://transformgov.org/en/Article/103634/Regional\\_Solutions\\_to\\_Regional\\_Problems](http://transformgov.org/en/Article/103634/Regional_Solutions_to_Regional_Problems) (discussing the growing prevalence of regional agencies among local governments).

32. BOLLMAN, *supra* note 31, at 2.

33. Hall, *supra* note 30, at 407; see also *infra* Part III.A–B.

34. See Hall, *supra* note 30, at 407 (noting that a common use of “compacts [is] to create a centralized regulatory authority”).

35. *Id.* Despite the growing need for regional administrative action, most “courts and scholars have neglected federalism’s horizontal dimensions.” Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 59 (2014).

This Note, however, joins a growing body of scholarship that addresses issues of horizontal federalism, see *id.* at 60–61, and “the relationship between federalism and administrative government.” Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2025 (2008) (noting that scholars “have taken heed” of this relationship); see also Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 451 n.20 (2014) (providing a detailed overview of a burgeoning body of scholarship discussing “[a]dministrative federalism,” most of it focusing on national and state entities). For a good overview of the literature discussing horizontal federalism, see Gerken & Holtzblatt, *supra*, at 59 n.2, 60 nn.6–7.

36. ASIMOW & LEVIN, *supra* note 16, § 1.1, at 1–2.

37. *Id.* at 1.

38. *Id.* at 1–2.

39. See *id.* § 1.3, at 2 (noting that most administrative law “books . . . use predominately federal materials”). This is true even though federal and state administrative law have several notable differences. See Arthur Bonfield, *State Law in the Teaching of Administrative Law: A Critical*



administrative law controlling interstate agencies, this Note anchors its arguments in the status quo: the federal administrative framework in which Congress establishes federal agencies to enforce and interpret federal law subject to the review of federal courts.<sup>40</sup>

Subpart A discusses basic principles and legitimizing theories of federal administrative law, many of which also apply to state administrative law. Subpart B addresses external statutory and constitutional controls that help legitimize federal administrative law to set up a contrast between the federal (and state) administrative regime and the interstate administrative regime. Subpart C looks at the two primary standards of judicial deference that federal courts apply when reviewing a federal agency’s interpretation of federal law and the underlying policy justifications for both standards.

A. THREE LEGITIMIZING THEORIES OF THE FEDERAL–STATE ADMINISTRATIVE  
REGIME

Federal administrative agencies carry out the public law of the United States.<sup>41</sup> They range from independent regulatory commissions like the Internal Revenue Service, to cabinet-level executive-branch departments like the Department of Homeland Security.<sup>42</sup> Congress creates federal agencies by passing a statute called an *enabling act*, which vests an agency with its powers.<sup>43</sup> These powers may include the power to perform legislative, judicial, and executive functions.<sup>44</sup>

Because the U.S. Constitution does not expressly provide for agencies to serve legislative or judicial functions and because of separation of powers concerns, some people question whether administrative law is legitimate.<sup>45</sup> In response to these concerns, judges and scholars have developed several theories addressing the political legitimacy of federal administrative law.<sup>46</sup> These theories include: (1) the agency-as-expert theory; (2) the

*Analysis of the Status Quo*, in FOUNDATIONS OF ADMINISTRATIVE LAW, *supra* note 27, at 75–78 (discussing “area[s] of divergence between state and federal administrative law”).

40. See *infra* Part II.A–C. Conversely, state legislatures establish state agencies to enforce and interpret state law and that are subject to state courts review—the separation of the federal from the state is one of the hallmarks of vertical federalism. See *supra* text accompanying notes 33–34.

41. DONALD D. BARRY & HOWARD R. WHITCOMB, THE LEGAL FOUNDATIONS OF PUBLIC ADMINISTRATION 4–5 (3d ed. 2005).

42. *Id.*

43. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 1.01 [B], at 2 (5th ed. 2008).

44. See ASIMOW & LEVIN, *supra* note 16, § 1.1, at 1 (“[A]gencies are authorized by statute to investigate [and] prosecute [(executive functions)], to adopt rules that have the force of law [(a legislative function)], to adjudicate [(a judicial function)] . . . and to perform various other functions.”). Federal agencies exist either to regulate the public by prohibiting or requiring certain actions or to disperse government benefits to the public. *Id.*

45. See *id.* § 1.6, at 10.

46. *Id.* at 10–12 (laying out legitimizing theories).

civic–republican theory; and (3) a theory combining procedural regularity and external checks and balances.<sup>47</sup>

First, under the agency-as-expert theory, legislative delegation of technical matters to expert agencies is politically legitimate if separation of powers is preserved and agencies are protected “from unwarranted judicial or executive intrusion.”<sup>48</sup> Second, under the civic–republican theory, legislative delegations are politically legitimate if sufficient *internal* deliberative procedures exist either by enabling act or agency rule to foster deliberation, “minimize political influences,” and ensure a clear and robust rationale.<sup>49</sup> Finally, scholars emphasize that the external controls on discretion posed by the procedural protections of the Administrative Procedure Act (“APA”)<sup>50</sup> and by constitutional checks and balances that “ensure both legality and political responsiveness.”<sup>51</sup>

The theories balance “governmental efficacy and accountability.”<sup>52</sup> Government efficacy increases as the agency’s discretion increases, allowing an agency to quickly and authoritatively make and implement public policy.<sup>53</sup> Government accountability increases as the internal deliberative procedures and external procedural and constitutional controls increase.<sup>54</sup> Efficacy often comes at the expense of accountability and vice versa.<sup>55</sup> Applying all three theories, an agency’s action is likely legitimate if the agency acts within its delegated area of expertise, with sufficient deliberative procedures, and subject to the external constraints of the APA and constitutional checks and balances.

47. *Id.*

48. *Id.* at 10.

49. *Id.* at 11.

50. Administrative Procedure Act, 5 U.S.C. §§ 500–596 (2012). The APA is a “general and comprehensive” source of administrative procedural law pertaining “to rulemaking, adjudication and judicial review.” ASIMOW & LEVIN, *supra* note 16, § 1.4, at 3. Its provisions bind nearly every federal agency and strike a balance “between promoting individuals’ rights and maintaining agencies’ policy-making flexibility.” *Id.* at 3–4.

51. ASIMOW & LEVIN, *supra* note 16, § 1.6, at 11–12.

52. Sidney A. Shapiro, *The Top Ten Reasons That Law Students Dislike Administrative Law and What Can (or Should) Be Done About Them?*, 38 BRANDEIS L.J. 351, 360 (2000).

53. See BARRY & WHITCOMB, *supra* note 41, at 6–9; see also Kenneth Davis, *Discretionary Justice*, in FOUNDATIONS OF ADMINISTRATIVE LAW, *supra* note 27, at 182, 182 (examining what led to “today’s excessive discretionary power”); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, in FOUNDATIONS OF ADMINISTRATIVE LAW, *supra* note 27, at 197, 198 (arguing that justice is better served by flexible legal norms and “vague principles” such as “reasonableness” than by hard-and-fast rules).

54. See FOX, *supra* note 43, § 1.01[B], at 3 & n.3 (citing Administrative Procedure Act, 5 U.S.C. §§ 551–808 (2012)); see also *infra* Part II.B–C.

55. See *supra* notes 51–53 and accompanying text.

## B. EXTERNAL CONSTRAINTS ON AGENCY ACTIONS

While the agency-as-expert and civic-republican theories concern qualities unique to individual agencies, the theory combining procedural regularity and checks and balances concerns external controls that govern all federal agencies.<sup>56</sup> The statutory and constitutional constraints on an agency posed by the external controls help to ensure the legality and political responsiveness of the agency’s actions.<sup>57</sup> Whether imposed by the APA or any of the three branches of government,<sup>58</sup> the external controls not only ensure the legitimacy of the federal administrative system, but as this Note discusses below, they also provide the standard against which to measure the sufficiency of external constraints on interstate agencies.<sup>59</sup>

The APA is a “general and comprehensive” source of administrative procedural law that forms the baseline for procedural protections pertaining to a federal agency’s rulemaking and adjudication and to judicial review.<sup>60</sup> Its provisions bind nearly every federal agency and strike a balance between efficacy, which “maintain[s] agencies’ policy-making flexibility,” and accountability, which “promot[es] individuals’ rights.”<sup>61</sup> The APA provides a basic layer of protections to ensure sound deliberative processes by requiring that agencies engage in adequate fact finding on the record, provide opportunities for public notice and comment, and limit *ex parte* contexts.<sup>62</sup>

Congress influences federal agencies’ actions legislatively in at least five ways.<sup>63</sup> First, Congress is responsible for the APA, which controls federal agencies’ decision-making procedures.<sup>64</sup> Second, Congress establishes and may amend an agency’s jurisdiction and individualized administrative

56. See *supra* text accompanying notes 47–52.

57. See *supra* text accompanying note 51.

58. FOX, *supra* note 43, § 2.01, at 23.

59. See *infra* Part III.B. Informal, “soft” methods like political or personal influence on an agency are beyond the scope of this Note.

60. ASIMOW & LEVIN, *supra* note 16, § 1.4, at 3.

61. *Id.* at 3–4.

62. See 5 U.S.C. §§ 553(b), 554(a), 557(d) (2012).

63. FOX, *supra* note 43, § 2.01, at 23. State legislatures possess similar controls. In addition, while the Supreme Court struck down the legislative veto at the federal level as unconstitutional in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 957–59 (1983), some state constitutions permit those states to exercise a legislative veto, making legislative approval or disapproval of rules an important means of legislative control. See Olafur Olafsson, *Constitutionality of Legislative Approval of Rules*, 74 MICH. B.J. 290, 293 (1995) (addressing the Michigan legislature’s approval of agency rules granting state legislatures some control power).

64. Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 33 (2000) (noting that the majority wisdom is that the APA “facilitates legislative control by . . . standardizing agency decisionmaking procedures”); see also *supra* note 58 and accompanying text. The APA was the “hard-fought compromise” of “a pitched political battle for the life of the New Deal.” ASIMOW & LEVIN, *supra* note 16, § 1.4, at 4. A majority of states soon passed their own APAs. *Id.* at 3.

procedures in the agency's enabling act or other controlling statutes.<sup>65</sup> Third, Congress may pass new legislation to supersede or undo an agency's decision.<sup>66</sup> Fourth, Congress has the power to raise or lower an agency's appropriations.<sup>67</sup> Fifth, Congress may use its hearing and subpoena powers to investigate or audit an agency.<sup>68</sup>

The executive branch, through the President, has unilateral power under the U.S. Constitution to exercise at least four important administrative controls.<sup>69</sup> First, the President has the power of appointment, that is, the power to appoint an agency head "with the Advice and Consent of the Senate."<sup>70</sup> Second, pursuant to the duty to faithfully execute all laws, the President sets the administration's policies and prevails upon agencies to follow them.<sup>71</sup> To this end, the President often "coordinates agencies' activities [and] defends them against political opposition."<sup>72</sup> The President may also issue executive orders, which are prescriptions of executive policies that bind an agency "if based on statutory or constitutional authority."<sup>73</sup> Third, the President has the power to order an agency head to provide a written opinion about matters within the scope of the agency head's duties.<sup>74</sup> Finally, the President has the power to remove officials, a power that courts have inferred from his appointment power. The President may generally remove officials for cause in independent agencies and at will in executive agencies.<sup>75</sup>

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65. Croley, *supra* note 64, at 11; *see also* FOX, *supra* note 43, §§ 2.01, 2.03[D], at 23, 43–44 (identifying the enabling act and other controlling legislation as basic mechanisms through which Congress exerts administrative control). For example, Congress changes the tax provisions that the Internal Revenue Service enforces when it changes the Internal Revenue Code.

66. Croley, *supra* note 64, at 11.

67. *See id.*; *see also* FOX, *supra* note 43, § 2.03[D], at 43–44 (discussing controls on agency budgets). For example, if Congress disapproves of the way that the Department of Justice enforces drug laws, Congress may reduce the agency's budget.

68. *See* FOX, *supra* note 43, § 2.03[B], at 41.

69. Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, in FOUNDATIONS OF ADMINISTRATIVE LAW, *supra* note 27, at 259, 259–64.

70. U.S. CONST. art. II, § 2, cl. 2; *see also* FOX, *supra* note 43, § 3.03[A], at 57 (explaining the appointment process).

71. *See* U.S. CONST. art. II, § 3; *see also* ASIMOW & LEVIN, *supra* note 16, § 7.6, at 461; Strauss, *supra* note 69, at 264–66.

72. *See* ASIMOW & LEVIN, *supra* note 16, § 7.6, at 461.

73. *Id.* (citing Nat'l Ass'n of Gov't Emps. v. Fed. Labor Relations Auth., 179 F.3d 946 (D.C. Cir. 1999)); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 550–52 (2005)). Presidents Reagan through Obama have used executive orders to enforce "a structured system for presidential review of agency rulemaking." Stack, *supra*, at 550–52. The version currently controlling agency action is Executive Order 12,866. *Id.* at 462 (stating that the Executive Order was originally published at 58 Fed. Reg. 51,735 (1993)).

74. Strauss, *supra* note 69, at 264.

75. *See* Myers v. United States, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment . . ."); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010) (striking down as unconstitutional a double layer of for-cause restrictions on the President's removal power); Morrison v. Olson, 487 U.S. 654, 695–96 (1988)

The judicial branch influences and limits an agency's actions through the power of judicial review,<sup>76</sup> which is derived from Article III of the Constitution and further defined by statute.<sup>77</sup> Judicial review of an agency's actions helps to “maintain a separation of powers, . . . prevent arbitrariness in the law, and . . . offset the pressure exerted by political interest groups.”<sup>78</sup> The power of judicial review gives federal courts the authority to enforce both: (1) statutory; and (2) constitutional limits on an agency's actions.<sup>79</sup>

Federal courts enforce statutory limits on an agency's actions and decision-making procedures.<sup>80</sup> They ensure that an agency acts within the scope of the powers delegated to the agency in its enabling act<sup>81</sup> and enforce a “long list” of procedural protections set forth in the APA.<sup>82</sup> The depth of a

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(upholding the constitutionality of a single layer of for-cause restrictions on the President's removal power); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) (“The authority of Congress . . . to require [agencies] to act in discharge of their duties independently of executive control cannot well be doubted . . .”). The removal power varies proportionally to the independence of the agency. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 4.2.2, at 361 (4th ed. 2011). The first three powers are constitutional and not subject to limitations based on the agency's classification as “executive” or “independent.” Strauss, *supra* note 69, at 264.

76. See FOX, *supra* note 43, § 10.01, at 251 (pointing out that while courts review and overturn a very small percentage of agency actions, usually on very narrow grounds, when a court does overturn an agency action, it may have far-reaching consequences).

77. See Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMP. L. 67, 91 & n.76 (2009); see also Administrative Procedure Act, 5 U.S.C. § 701(a)(1) (2012) (permitting judicial review “except to the extent that statutes preclude [it]”); Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1153–54 (2012) (discussing the origins of judicial review in the United States).

78. Scott Graves & Paul Teske, *State Supreme Courts and Judicial Review of Regulation*, 66 ALB. L. REV. 857, 857 (2003).

79. Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1169, 1199–200 (2009).

80. *Id.* The federal APA recognizes federal courts' power to review an agency's actions to ensure they are consistent with federal laws. *Cf.* Administrative Procedure Act, 5 U.S.C. § 701(a)(1) (permitting judicial review “except to the extent that statutes preclude [it]”). Congress may limit federal courts' jurisdiction by statute. FOX, *supra* note 43, § 10.02[A], at 252. State courts, on the other hand, “are courts of general jurisdiction,” meaning they may hear a wide range of types of civil and criminal cases. See *id.*

81. Stack, *supra* note 79, at 1199.

82. FOX, *supra* note 43, § 12.02, at 298; see also BARRY & WHITCOMB, *supra* note 41, at 104 (listing the provisions of § 706 of the APA).

federal court's review depends on the type of agency action being reviewed.<sup>83</sup> Generally, courts afford a high degree of deference to federal agencies.<sup>84</sup>

Federal courts also enforce constitutional limits on an agency's actions and decision-making procedures.<sup>85</sup> This power includes the power to ensure both *substantive* and *procedural* due process.<sup>86</sup> Substantive due process protects the public from "arbitrary, capricious, or unreasonable government actions," and procedural due process protects the public from unconstitutional methods or means of government action.<sup>87</sup> Federal courts evaluate substantive due process by asking whether "government action reasonably relate[s] to legitimate government goals."<sup>88</sup> They evaluate procedural due process by asking whether the agency's decision-making processes were consistent with existing laws and whether the decision was explained and based on facts the government disclosed to the parties.<sup>89</sup>

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83. See FOX, *supra* note 43, § 10.01, at 251 (noting that the question of what type of review to apply is among the first that a court asks). If a court finds that an agency action is illegitimate, it may issue a mandamus, injunction, or declaratory relief. See BARRY & WHITCOMB, *supra* note 41, at 77 (providing an overview of judicial review). The available standards of review include de novo review (used when an agency does not follow a procedure required by law), substantial evidence review (used to review formal adjudication and rulemaking), and rational-basis review (the "residual ground" of arbitrary and capricious). FOX, *supra* note 43, § 12.03[C], at 301–02 (emphasis omitted). An agency's interpretation of its enabling act typically gets *Chevron* deference. BARRY & WHITCOMB, *supra* note 41, at 114 (discussing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

84. See Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1278 (2008) (pointing out that "federal courts had preached deference to administrative agencies in statutory interpretation" long before *Chevron*); see also *infra* Part II.C. For an extensive survey of deference standards at the state level, see generally Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977 (2008). As evidence of judicial deference, consider that federal circuit courts, the U.S. Supreme Court, and state supreme courts consistently uphold about three-fifths of the challenges to agency actions that reach their courts. Graves & Teske, *supra* note 78, at 859–60 (finding a reversal rate of 37% for federal circuit courts, 39% for the U.S. Supreme Court, and 39% for state supreme courts).

85. Stack, *supra* note 79, at 1199–200; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

86. BECKETT, *supra* note 27, at 25–26.

87. *Id.* at 24.

88. *Id.* at 25.

89. *Id.* For a court to review procedural due process, there must be a factual issue in dispute. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 7.1.1, at 149 (2d ed. 2001). Once this threshold is met, the court will determine what due process rights a party has by applying a balancing test with origins in the *Mathews v. Eldridge* decision. *Id.* § 7.6.5, at 180 (discussing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). The court assesses such factors as: (1) the affected private interest; (2) the cost of "the risk of an erroneous deprivation" plus the benefit of improved safeguards; and (3) "the government's interest, including . . . the fiscal and administrative burdens" that improved safeguards would cause. *Id.* at 181 (quoting *Mathews*, 424 U.S. at 319).

C. JUDICIAL REVIEW OF AN AGENCY'S STATUTORY INTERPRETATIONS: TWO STANDARDS OF ADMINISTRATIVE DEFERENCE

The modern framework for judicial review of a federal agency's interpretation of its enabling act developed around several landmark U.S. Supreme Court decisions.<sup>90</sup> Some, like *Skidmore v. Swift & Co.*, defined the principles animating judicial deference prior to the APA's enactment in 1946.<sup>91</sup> Others, including *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, defined the role of the federal courts in reviewing agency interpretations under the APA.<sup>92</sup>

Generally speaking, federal courts<sup>93</sup> apply one of two standards when reviewing a federal agency's interpretation of its enabling act: (1) the default *Chevron* standard; or (2) the residual *Skidmore* standard.<sup>94</sup> Although *Chevron* is the leading case, considered by many to define the framework, the Court held in *United States v. Mead Corp.* that *Chevron* “only applies when defined requirements are met.”<sup>95</sup> Specifically, *Chevron* applies when a federal agency's interpretation carries the force of federal law because the agency acted pursuant to a legitimate delegation of federal lawmaking authority.<sup>96</sup> Where an agency's interpretation is not federal law, such as when an agency issues informal guidance, *Chevron* does not apply, and the Court applies *Skidmore* deference instead.<sup>97</sup>

In 1944, two years before the APA's enactment, the U.S. Supreme Court in *Skidmore v. Swift & Co.* considered whether an agency's informal

90. For a good review and synthesis of those decisions, see generally Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1 (2011).

91. *Id.* at 4.

92. *Id.*

93. The focus of this Note is on federal court review of interstate agency actions and so this Subpart limits its review to federal court judicial administrative deference. For a 50-state review of state deference standards, see generally Graves & Teske, *supra* note 78.

94. Criddle, *supra* note 84, at 1272–75; see also BARRY & WHITCOMB, *supra* note 41, at 114–15 (discussing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

95. Healy, *supra* note 90, at 1.

96. *Id.* at 3; see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1088 (2008) (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)). The *Mead* reading has been followed by courts and generally embraced by the scholarly community. See Eskridge & Baer, *supra*, at 1088 n.22 (citing several cases and articles to this point).

97. *Mead Corp.*, 533 U.S. at 235–38; see also Criddle, *supra* note 84, at 1275 (noting that when *Chevron* is not applicable, federal courts “consider instead whether deference is warranted under *Skidmore v. Swift & Co.*”); Eskridge & Baer, *supra* note 96, at 1088; Healy, *supra* note 90, at 1–2, 18–21. *But see Mead Corp.*, 533 U.S. at 247 (Scalia, J., dissenting) (rejecting the Court's decision to resurrect *Skidmore* because it “gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future”).

interpretation of an ambiguous statutory term was proper.<sup>98</sup> In that case, seven employees sued their employer under the Fair Labor Standards Act, demanding overtime pay for time spent on call.<sup>99</sup> The issue was what degree of deference to give the agency's interpretation of "working time" to not include on-call hours, given that Congress charged the agency with enforcing the Act.<sup>100</sup> Because the agency acted within its delegated area of expertise and pursuant to its "official duty," the agency did not serve a lawmaking role, meaning its interpretation was persuasive authority "entitled to respect."<sup>101</sup>

Courts applying *Skidmore* first consider whether Congress's intention is clear in the statute.<sup>102</sup> If the statute is unclear, federal courts then ask whether the federal agency acted pursuant to a legitimate delegation of federal lawmaking authority.<sup>103</sup> If the agency has acted without the force of federal law, the court will balance four factors in determining how much weight to give the agency's interpretation: (1) the agency's thoroughness in making the decision; (2) the strength of the agency's reasoning; (3) the interpretation's consistency with the agency's other interpretations; and (4) its "power to persuade."<sup>104</sup> The power to persuade includes factors like whether the agency acted "in pursuance of official duty" or based on "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>105</sup> Under these four factors, an agency's interpretations are persuasive but not binding.<sup>106</sup>

In 1984, the U.S. Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* decided to give federal agencies' interpretations a high degree of deference, departing from *Skidmore* because unlike judges, federal agencies are technical experts subject to control by the government's political branches.<sup>107</sup> In *Chevron*, the Court considered whether the Environmental Protection Agency had validly interpreted the term "stationary source" in the Clean Air Act Amendments of 1977 to mean pollution emitting from an entire factory rather than from an individual smoke stack.<sup>108</sup> Justice

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98. *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944).

99. *Id.* at 135.

100. *Id.* at 137-39.

101. *Id.* at 139-40; *see also* Healy, *supra* note 90, at 8-9.

102. Healy, *supra* note 90, at 7, 9.

103. *Id.* at 9.

104. *Skidmore*, 323 U.S. at 140.

105. *Id.* at 139-40.

106. Healy, *supra* note 90, at 9-10.

107. *Id.* at 17; *see also, e.g.*, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (applying a two-step analysis to determine the appropriate level of deference to give a federal agency).

108. *Chevron U.S.A. Inc.*, 467 U.S. at 840.



Stevens, writing for the Court, held that it had<sup>109</sup> and defined a two-step test for reviewing a federal agency’s interpretation of its enabling act.<sup>110</sup>

Justice Stevens’s “*Chevron* two-step” test is “a simple approach to a traditionally complicated issue in administrative law.”<sup>111</sup> Under *Chevron*, courts will uphold an agency’s interpretation of its enabling act when: (1) Congress’s intended interpretation is not clearly and unambiguously expressed; and (2) the agency’s interpretation “is based on a permissible construction of the statute.”<sup>112</sup> Congress’s intent may be considered ambiguous “when two or more reasonable, though not necessarily equally valid, interpretations exist.”<sup>113</sup> The two-step test that the *Chevron* Court used to arrive at this conclusion is now the default standard for reviewing a federal administrative agency’s interpretation of its enabling act,<sup>114</sup> and it has become “the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.”<sup>115</sup>

Justice Stevens justified *Chevron*’s departure from *Skidmore* by citing at least three reasons.<sup>116</sup> First, deference was appropriate because the agency acted pursuant to a congressional delegation of authority to set policy and interpret a federal statute with the weight of federal law.<sup>117</sup> Courts measure the extent of this delegation by looking at evidence of Congress’s intent.<sup>118</sup> Second, deference was appropriate because judgment on an agency’s interpretation “really centers on the wisdom of the agency’s policy” and an agency, unlike a court, is an “expert[] in the field.”<sup>119</sup> Thus, under the separation-of-powers doctrine, federal courts afford “considerable weight . . . to [the] executive department’s construction of a statutory scheme it is

109. *Id.* at 866.

110. Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 301–02 (1988).

111. *Id.*

112. *Id.* (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 843); *see also Chevron U.S.A. Inc.*, 467 U.S. at 843–45 (applying the standard).

113. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520.

114. Federal courts do not apply *Chevron* when reviewing a state agency’s interpretation of federal law. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (“A state agency’s interpretation of federal statutes is not entitled to the deference afforded a federal agency’s interpretation of its own statutes under *Chevron U.S.A. Inc.* . . .”).

115. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006).

116. Eskridge & Baer, *supra* note 96, at 1086–87; *see also* Criddle, *supra* note 84, at 1276–77; Sunstein, *supra* note 115, at 195–97.

117. *Chevron U.S.A. Inc.*, 467 U.S. at 865–66 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)); *see also* Healy, *supra* note 90, at 17 n.107. State agencies, on the other hand, cannot interpret federal law with the force of law. *See supra* note 114.

118. *See* *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (“Delegation of such authority may be shown in a variety of ways . . .”); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 202.

119. *Chevron U.S.A. Inc.*, 467 U.S. at 865–66; *see also* Healy, *supra* note 90, at 17 n.107.

entrusted to administer.”<sup>120</sup> Third, deference was appropriate because agencies are held accountable to the will of the people by external controls imposed by the political branches of government—the Chief Executive and Congress—while federal judges have no constituency.<sup>121</sup>

In 2001, the U.S. Supreme Court in *United States v. Mead Corp.* clarified “the relationship between *Skidmore* deference and *Chevron* deference.”<sup>122</sup> In *Mead*, the Court reviewed the federal customs agency’s decision to classify imported day planners under a four percent tariff category and not a tariff-free category.<sup>123</sup> The Court held that *Chevron* deference was inappropriate because the agency’s interpretation lacked the force of federal law.<sup>124</sup> An agency interpretation lacks the force of law if the agency either: (1) “lacked the delegated authority to make decisions with the force of law;” or (2) “did not exercise its delegated lawmaking power.”<sup>125</sup> *Mead* held that when an agency lacks the power to declare federal law, the *Skidmore* standard of judicial review applies instead of the *Chevron* standard.<sup>126</sup>

Viewed in light of *Chevron*’s rationale, the Court’s decision in *Mead* is understandable. In deciding *Chevron*, the Court justified its departure from *Skidmore* deference by citing three justifications.<sup>127</sup> The first justification for applying *Chevron* deference—that deference is appropriate when an agency acts pursuant to a congressional delegation of authority to set policy and interpret a federal statute with the weight of federal law—was not true in *Mead*, because there was no evidence of congressional intent to have the agency interpret the statute with the weight of federal law.<sup>128</sup> Although both the Court’s second and third rationales for moving from *Skidmore* to *Chevron* deference were also true in *Mead*, the Court nonetheless held that *Skidmore* was still appropriate.<sup>129</sup>

The *Mead* decision illustrates the importance of the justifications that Justice Stevens set forth in *Chevron* for departing from *Skidmore* deference.<sup>130</sup> Where just one of the *Chevron* justifications—the authority to interpret a

120. *Chevron U.S.A. Inc.*, 467 U.S. at 844.

121. *Id.* at 866 (“Our Constitution vests such responsibilities in the political branches.” (quoting *Tenn. Valley Auth.*, 437 U.S. at 195)); see also Healy, *supra* note 90, at 17 n.107.

122. Healy, *supra* note 90, at 18. See generally *Mead Corp.*, 533 U.S. 218.

123. *Mead Corp.*, 533 U.S. at 224–25; see also Healy, *supra* note 90, at 18–19.

124. *Mead Corp.*, 533 U.S. at 226–27; see also Healy, *supra* note 90, at 19.

125. Healy, *supra* note 90, at 19 (citing *Mead Corp.*, 533 U.S. at 226–27).

126. *Mead Corp.*, 533 U.S. at 234; see also Healy, *supra* note 90, at 20.

127. See *supra* notes 116–21 and accompanying text.

128. *Mead Corp.*, 533 U.S. at 229–231; see also Healy, *supra* note 90, at 19.

129. Cf. *supra* notes 119–21 (identifying *Chevron*’s second and third rationales).

130. Some scholars view *Chevron*’s justifications for departing from *Skidmore* deference to be “as important as the precise rule.” See, e.g., Eskridge & Baer, *supra* note 96, at 1086 (noting that *Chevron*’s rationale is as important as its rule); see also Criddle, *supra* note 84, at 1275 (noting that post-*Mead*, the Court “has consistently withheld *Chevron* deference when any one of these core rationales is not satisfied”).

statute with the weight of federal law—did not apply, the Court returned to the *Skidmore* test.<sup>131</sup>

In addition, each justification set forth in *Chevron* helps to ensure the federal standard of administrative deference is in line with the three legitimizing theories of administrative law.<sup>132</sup> First, the agency expertise principle is synonymous with the agency-as-expert theory, which preserves the separation of powers by keeping expert executive action free from “unwarranted” interference.<sup>133</sup> Second, the congressional delegation principle situates *Chevron* within the civic–republican theory of administrative law, which looks to the congressional delegation of power and an agency’s internal deliberative-process procedures to legitimize administrative law.<sup>134</sup> Third, the political-process-checks principle is rooted in the procedural-regulatory and checks-and-balances theory of administrative legitimacy, which “help[s] to ensure both legality and political responsiveness.”<sup>135</sup> Accordingly, each rationale supporting the movement from *Skidmore* to *Chevron* deference, helps to ensure a measure of federal administrative legitimacy.

### III. INTERSTATE ADMINISTRATIVE LAW AND THE MULTI-STATE ADMINISTRATIVE REGIME: A FUNCTION OF HORIZONTAL FEDERALISM

While the federal government concerns itself with national, international, and even state and local matters, state governments primarily address state and local matters.<sup>136</sup> Neither the federal nor state governments on their own, however, are nearly as well-equipped to address concerns on a regional level as are coalitions of states working together with congressional consent.<sup>137</sup> Like the Great Lakes states that worked together to form the GLWC and Compact Council, state governments may address regional concerns by forming interstate compacts to be administered by interstate agencies.<sup>138</sup> These interstate compacts and the administrative bodies that they create are classic examples of how horizontal federalism (state–state relationships) may enhance the effectiveness of government within a vertical federalism framework (national–state relationships) by improving its ability to respond to matters at the sub-federal and supra-state levels.<sup>139</sup>

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131. See *Mead Corp.*, 533 U.S. at 234; see also *supra* text accompanying note 128.

132. See *supra* text accompanying notes 46–51.

133. See *supra* note 48 and accompanying text.

134. See *supra* note 49 and accompanying text.

135. ASIMOW & LEVIN, *supra* note 16, § 1.6, at 11; see also *supra* note 51 and accompanying text.

136. MARIAN E. RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 15 (1971).

137. See BROUN ET AL., *supra* note 8, at 11, 25 (noting the utility of using “sub-federal, supra-state administrative agencies” to address “multistate issues that do not typically fall within the ambit of federal authority”).

138. See *id.* at 133–47 (classifying and describing the interstate administrative bodies that administer interstate compacts).

139. See *supra* note 30 and accompanying text; see also BROUN ET AL., *supra* note 8, at 25–26 (defining federalism, generally speaking, as the functional relationship between two sovereign

This Part addresses interstate administrative law and the agencies it creates. Subpart A discusses the sources of interstate administrative law, its functions, and the justifications for multi-state agencies. Subpart B addresses the limited external constraints on most interstate agencies' actions.

### A. THE MULTI-STATE ADMINISTRATIVE REGIME

Article I, Section 10, Clause 3, of the U.S. Constitution gives states the power to form interstate compacts with congressional consent.<sup>140</sup> Interstate compacts are congressionally approved and judicially enforceable formal agreements among states.<sup>141</sup> As agreements between sovereigns, interstate compacts have characteristics of treaties; however, federal courts do not regard them as treaties.<sup>142</sup> Instead, federal courts interpret compacts to be both contracts between states and federal law; thus, they analyze the compacts under both state contract theory and federal statutory principles.<sup>143</sup> For

governmental bodies sharing governing authority and noting that American federalism is traditionally regarded as the “distinction[] between what is distinctly ‘national’ in scope and what is distinctly ‘local’ in scope”); Hall, *supra* note 30, at 407 (“Interstate compacts are central to the concept of cooperative horizontal federalism, since interstate compacts are the constitutionally permitted mechanism for states to create legal obligations to each other.”).

140. U.S. CONST. art. I, § 10, cl. 3; *see also* JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS & ADMINISTRATIVE AGREEMENTS 33 (2d ed. 2012) [hereinafter ZIMMERMAN, INTERSTATE COOPERATION]; JOSEPH F. ZIMMERMAN, INTERSTATE DISPUTES: THE SUPREME COURT’S ORIGINAL JURISDICTION 165 (2006) [hereinafter ZIMMERMAN, INTERSTATE DISPUTES]. In fact, the interstate compact’s roots pre-date even the Articles of Confederation and Perpetual Union. BROUN ET AL., *supra* note 8, at 3–4. The framers were aware that colonies used similar mechanisms to resolve disputes, so they ensured the constitution contained an analogous “mechanism to solve regional problems.” ZIMMERMAN, INTERSTATE COOPERATION, *supra*, at 33.

141. *See Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 105 (3d Cir. 2008) (“Interstate compacts are formal agreements between states . . .”); *see also* ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 140, at 44 (“A compact is a contract enforceable by courts . . .”); ZIMMERMAN, INTERSTATE DISPUTES, *supra* note 140, at 165 (noting that states may “enter into compacts with the consent of Congress”). *But see* Comment, *Some Legal and Practical Problems of the Interstate Compact*, 45 YALE L.J. 324, 332 (1935) (“[G]iven the surviving strength of the concept of state sovereignty, there can be no assurance that compacts are judicially enforceable against states without serious friction.”).

142. *See* ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 140, at 35, 44 (noting that while both compacts and treaties supersede state law and both employ a negotiations process among states, interstate compacts were distinct because: (1) the Governor lacked unilateral authority to negotiate an interstate compact while the President can negotiate treaties; (2) Congress may supersede treaties with legislation but state legislatures cannot supersede an interstate compact; and (3) courts may enforce compacts but not necessarily treaties); *see also* ZIMMERMANN & WENDELL, *supra* note 27, at 7 (noting that while “the founding fathers were [clearly] thinking of interstate agreements in a treaty context,” “the very fact that the federal Constitution forbids the states to make treaties . . . should demonstrate that there is a vital difference between them”).

143. *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 & n.8 (2013) (noting that “[i]nterstate compacts are construed as contracts under the principles of contract law” and that post-congressional approval, interstate compacts become federal law); *see also* *Alcorn v. Wolfe*, 827 F. Supp. 47, 52 (D.D.C. 1993) (citing *Carchman v. Nash*, 473 U.S. 716, 719 (1985)) (“Because the compact creating the [agency] was congressionally sanctioned in accordance with the Compact Clause, it is a federal law subject to federal construction, notwithstanding its genesis

example, once the GLWC was enacted as law by both the federal government and the member states' governments, it was regarded as federal law for the purposes of judicial review.<sup>144</sup>

In the last 80 years, state governments have increasingly used congressionally approved interstate compacts to create interstate agencies that enforce the compact's provisions by promulgating rules, resolving issues, and implementing policies and provisions.<sup>145</sup> Interstate agencies are the administrative bodies comprised of states working together to administer the terms of interstate compacts.<sup>146</sup> Interstate compacts that create an agency are the equivalent of an enabling act—both create agencies and vest them with powers, both establish the substantive and procedural standards that will govern the agency's decision, and both are considered to be federal law.<sup>147</sup>

When states use interstate agencies to work together, the interstate agencies are prime examples of the potential that horizontal federalism holds for states to address regional concerns.<sup>148</sup> Although interstate agencies may take many forms,<sup>149</sup> they usually function to accomplish multi-state objectives, coordinate interstate efforts to solve wide-reaching problems, oversee

in the enabling acts of [the state] and the District of Columbia.”); Connor B. Egan, Note, *Shaping Interstate Water Compacts to Meet the Realities of the Twenty-First Century*, 6 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 327, 327 (2013–2014) (citing Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENVTL. & ENERGY L. & POL'Y J. 237, 257–58 (2010)) (“An interstate compact is, in essence, a contract between states, which is given the effect of federal law.”); Hall, *supra* note 30, at 410–11 (“A compact is essentially a contract between states entered into through state legislation.”).

144. Palay, *supra* note 7, at 727 (citing *Virginia v. Maryland*, 540 U.S. 56, 66 (2003)).

145. See BROUN ET AL., *supra* note 8, at 140 (discussing the creation of interstate agencies including the New York–New Jersey Port Authority for regulatory, problem-solving, policy-enforcing, rule-promulgating, and other purposes); see also VOIT ET AL., *supra* note 27, at 6 (“[I]n the last 75 years, more than 150 compacts have been created, most since the end of World War II.”).

146. See BROUN ET AL., *supra* note 8, at 140, 145–46.

147. See Palay, *supra* note 7, at 727 (citing *Virginia*, 540 U.S. at 66). Compare *supra* note 43 and accompanying text (noting that enabling acts are federal and intrastate statutes vesting agencies with administrative powers), with *supra* text accompanying note 145 (noting that interstate compacts vest agencies with power to administer the compact).

148. See *supra* note 137 and accompanying text.

149. The Compact Council is only one example of an interstate administrative body. Others include: (1) administrators, e.g., American Association of Motor Vehicle Administrators; (2) advisory councils, e.g., Delmarva Advisory Council; (3) agencies, e.g., Bi-State Development Agency; (4) authorities, e.g., Buffalo and Fort Erie Bridge Authority; (5) boards, e.g., Southern Regional Education Board; (6) commissions, e.g., Bear River Commission; and (7) committees, e.g., Pacific States Radioactive Materials Transportation Committee. VOIT ET AL., *supra* note 27, at 156. Since the 1970s, most compacts have “established commissions or authorities,” and there has been “a sharp increase in environmental, river basin, and transportation compacts.” ZIMMERMAN, *INTERSTATE COOPERATION*, *supra* note 140, at 63 (citing Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 PUBLIUS: J. FEDERALISM 13, 21–22 (1994)).

complex transactions, and conserve resources.<sup>150</sup> The GLWC, for instance, is charged with “protecting, conserving, restoring, improving, and managing” the Great Lakes freshwater resources.<sup>151</sup>

The agencies often are subject to fewer bureaucratic constraints than federal agencies. By prizing governmental efficacy over accountability,<sup>152</sup> however, interstate agencies may have fewer procedural protections for the public.<sup>153</sup> For its part, the GLWC is subject only to constitutional limits, its enabling compact, and any provisions of the nonbinding Interim Guidance it chooses to follow.<sup>154</sup> The sparse procedural protections give the Compact Council flexibility in administering the GLWC but present several issues that are ripe for litigation.<sup>155</sup>

### B. EXTERNAL CONSTRAINTS ON INTERSTATE AGENCY ACTIONS

Similar to federal agencies, interstate agencies are subject to checks and balances from various branches of government, some at the state level and some at the federal level. Unlike federal agencies, however, interstate agencies are not subject to the external constraints of an APA or unilateral executive action, meaning that interstate agencies are not subject to the APA’s procedural protections and are less politically accountable.<sup>156</sup> The external constraints that interstate agencies *are* subject to help ensure the legitimacy of the interstate agency system.<sup>157</sup> Interstate agency power may be checked by: (1) Congress; (2) federal or state courts; and (3) state legislatures or executives.

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150. BROWN ET AL., *supra* note 8, at 140, 145–46 (discussing the purpose and form of the interstate agency model); *see also* ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 140, at 80 (discussing the interstate agency).

151. GLWC, Pub. L. No. 110–342, § 1.3(1)(f), 122 Stat. 3739, 3743 (2008). The Great Lakes are “the largest surface freshwater system on the planet” and are integral to the economy of North America; however, they remain vulnerable despite their size, as “less than [one] percent . . . [is] renewed annually through rainfall and snowmelt.” TEUTSCH, *supra* note 3, at i, 1.

152. *See supra* note 52 and accompanying text.

153. Matthew S. Tripolitsiotis, *Bridge over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 YALE L. & POL’Y REV. 163, 166 (2005) (stating that interstate compacts govern an interstate agency’s internal operations). Agencies are given varying degrees of administrative powers and are subjected to varying degrees of administrative procedures. BROWN ET AL., *supra* note 8, at 140–44.

154. *See* TEUTSCH, *supra* note 3, at 14 (discussing the issuance of the Interim Guidance). As a guidance document, the Interim Guidance is a nonlegislative rule, a rule that lacks the force of law and as such is “not binding on agencies or citizens.” ASIMOW & LEVIN, *supra* note 16, § 6.1.4a, at 320 (citing *Viet. Veterans of Am. v. Sec’y of Navy*, 843 F.2d 528, 536–38 (D.C. Cir. 1988)); *see also id.* § 6.1.4b, at 326–29.

155. *See* TEUTSCH, *supra* note 3, at iii (noting areas ripe for challenge); *see also supra* note 19.

156. *See* BROWN ET AL., *supra* note 8, at 381–82; *see also* ZIMMERMAN, INTERSTATE DISPUTES, *supra* note 140, at 168 (“[P]ublic authorit[ies are] insulated from the political process . . .”).

157. *See supra* text accompanying notes 47–51.

The first check is held by Congress. Congress may limit an interstate agency's actions by: (1) modifying the interstate compact prior to congressional ratification; (2) refusing to approve the agreement; (3) approving the compact conditionally; or (4) by preempting, amending, or terminating the agreement by passing a federal law.<sup>158</sup> Congress may limit an interstate agency's powers, or impose restrictions, by modifying the interstate compact's purpose, objectives, functions, powers, duties, substantive standards, administrative structure, feeds, or provisions.<sup>159</sup> Even after Congress approves an interstate compact, it may preempt the compact by passing another overriding federal statute.<sup>160</sup>

The second check is held by state and federal courts. State and federal courts may check agency actions through the power of judicial review and enforcement.<sup>161</sup> State courts gain jurisdiction when the interstate compact's provisions provide for it.<sup>162</sup> Federal courts gain jurisdiction in one of three ways: (1) if the interstate compact provides for judicial review in a federal court;<sup>163</sup> (2) under § 1331 federal question jurisdiction;<sup>164</sup> or (3) under the U.S. Constitution.<sup>165</sup>

First, federal courts gain jurisdiction when the interstate compact's provisions provide for it.<sup>166</sup> For example, the GLWC provides for judicial review in the United States District Court for the District of Columbia or in the federal district containing the Compact Council's offices.<sup>167</sup> Second, federal courts have jurisdiction under § 1331 if there is a federal question.<sup>168</sup> Once approved by Congress, interstate compacts become federal law, creating "federal questions."<sup>169</sup> Third, the U.S. Constitution gives the Supreme Court

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158. See BROWN ET AL., *supra* note 8, at 35–66 (outlining Congress's role in the compacting process).

159. VOIT ET AL., *supra* note 27, at 7.

160. JOSEPH F. ZIMMERMAN, INTERSTATE WATER COMPACTS: INTERGOVERNMENTAL EFFORTS TO MANAGE AMERICA'S WATER RESOURCES 40 (2012) ("The consent would be repealed relative to the conflicting provisions . . .").

161. See ZIMMERMANN & WENDELL, *supra* note 27, at 14–15 (discussing U.S. Supreme Court lawsuits between parties who dispute the interpretation or enforcement of the compact or to vindicate their rights and noting the possibility of a suit by a private party to assert its rights). Congress also provides a measure of accountability, reserving the power to revoke its consent to the compact. ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 140, at 82.

162. ZIMMERMANN & WENDELL, *supra* note 27, at 14.

163. *Id.*

164. See Note, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 HARV. L. REV. 1991, 2001–02 (1998).

165. ZIMMERMANN & WENDELL, *supra* note 27, at 14–15.

166. *Id.* at 14.

167. GLWC, Pub. L. No. 110–342, § 7.3, 122 Stat. 3739, 3761 (2008). The Compact Council's offices are in Chicago, Illinois, so appeals would be made to the Northern District of Illinois. See *Contact Information*, *supra* note 19 (providing the Compact Council's office address).

168. See Note, *supra* note 164, at 2001–02.

169. BROWN ET AL., *supra* note 8, at 56.

original jurisdiction over disputes between states, allowing the Court to enforce a compact if a question of enforcement or interpretation arises.<sup>170</sup>

All federal courts may enforce other constitutional checks on interstate agency actions. For example, because compacts are contracts, the U.S. Constitution's Contract Clause, which provides that states may not "impair[] the obligation of contracts," prevents one member state from violating a compact's provisions protecting other member states, such as a voting-rights provision.<sup>171</sup> In addition, the Due Process Clause and most of the provisions of the Bill of Rights apply to interstate agency actions under the Fourteenth Amendment because states comprise the membership of interstate agencies, and the Fourteenth Amendment applies to the states.<sup>172</sup>

The third and final check is held by the states. Acting through their chief executive or legislatures, states exercise limited control over interstate agencies by exercising powers of appointment, amendment, supplementation, withdrawal termination, or drafting negotiations.<sup>173</sup> The GLWC, for example, allows the chief executive of each of the eight member states or the executive's appointee to have one vote on agency matters, with most decisions requiring only a simple majority vote.<sup>174</sup>

States face barriers, however, in exercising their power to control an interstate agency's actions. For example, amending or supplementing a compact may be difficult because compacts sometimes "expressly . . . prohibit the enactment of amendments by other means or by fewer than all of the party states" or require member states to take such action only through their legislatures.<sup>175</sup> Some compacts, such as the GLWC, prohibit states from unilaterally terminating a compact.<sup>176</sup> Others require states to follow "elaborate" procedures or to wait a period of time before withdrawing from or terminating the compact.<sup>177</sup> Thus, unlike the federal government, which may unilaterally amend a federal agency's enabling act or preempt an interstate agency's actions by passing a federal law, an interstate compact's

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170. ZIMMERMANN & WENDELL, *supra* note 27, at 14.

171. See ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 140, at 35, 42-44 (connecting the Contract Clause's protection with courts' power to enforce compacts).

172. See *Bd. of Regents v. Roth*, 408 U.S. 564, 566-67, 569-70 (1972) (applying Fourteenth Amendment procedural due process to a state administrative agency's actions where there were "no statutory or administrative standards" for adjudication); see also CHEMERINSKY, *supra* note 75, § 6.3.3, at 511-19 (outlining the doctrine of incorporation).

173. See BROUN ET AL., *supra* note 8, at 98-122 (providing guidance on drafting interstate compacts including provisions regarding amendment, supplementation, and termination).

174. GLWC, Pub. L. No. 110-342, § 2.4, 122 Stat. 3739, 3744 (2008).

175. See BROUN ET AL., *supra* note 8, at 117 (noting that the default for amendment or supplementation is "by the same means used in its establishment," which may entail assent by all parties and Congress).

176. See ZIMMERMAN, *supra* note 160, at 43 ("A rule has been established . . . that one party state cannot terminate a compact."); see also GLWC § 8.5, 122 Stat. at 3763. The GLWC may be terminated, however, with only a majority vote. *Id.* § 8.7, 122 Stat. at 3763.

177. See BROUN ET AL., *supra* note 8, at 118-19 (discussing examples of withdrawal provisions).



member states often surrender complete autonomy or control over an agency's action.

#### IV. KEY ISSUES CONCERNING JUDICIAL REVIEW OF AN INTERSTATE AGENCY'S INTERPRETATION OF FEDERAL LAW

The rule controlling judicial review of federal and state agencies is clear—with few exceptions, federal courts apply *Chevron* or *Skidmore* deference to a *federal* agency's interpretation of its enabling act, which is federal law, but do not apply federal standards when reviewing a *state* agency's interpretation of federal law.<sup>178</sup> With respect to *interstate* agencies, however, the answer is less clear. On the one hand, because a congressionally approved interstate compact is federal law, a federal standard might apply.<sup>179</sup> On the other hand, however, interstate agencies are formed and administered by states, suggesting a federal standard might not apply.<sup>180</sup> Federal courts have yet to address the issue, leaving it unclear which standard of judicial review applies to an interstate agency's interpretation of its enabling compact.<sup>181</sup>

The only court to have confronted the question head-on is the Oregon Supreme Court, which held in *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission* (“*Friends*”) that a federal standard—as opposed to a state standard—should apply because an interstate agency is not a state agency.<sup>182</sup> The *Friends* court applied *Chevron* without considering whether another federal standard would be more appropriate.<sup>183</sup> In doing so, it brushed aside the question of whether an interstate agency's sub-federal and supra-state status bears any significance.<sup>184</sup> The fact that an interstate agency is neither a federal nor a state agency cannot be so lightly disregarded.<sup>185</sup>

This Part examines the issues presented by an interstate agency's sub-federal and supra-state status, specifically as they relate to the selection of a

178. See *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (“A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under [*Chevron*].”).

179. *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 & n.8 (2013) (noting that post-congressional approval, interstate compacts become federal law); see also Egan, *supra* note 143, at 327 (“An interstate compact is, in essence, a contract between states, which is given the effect of federal law.”). An interstate compact's member states also enact the compact as state law. See *supra* text accompanying note 144. Furthermore, in addition to federal statutory principles, federal courts apply contract law, primarily a state body of law, when interpreting interstate compacts. See *supra* note 143 and accompanying text.

180. See text accompanying note 155.

181. See *infra* note 265 and accompanying text.

182. See *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1173–75 (Or. 2009) (en banc); see also *infra* note 266 and accompanying text.

183. See *Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1173–75.

184. See *infra* note 267 and accompanying text.

185. See *infra* Part IV.A; see also *infra* note 267 (listing several federal circuits that have noted the importance of determining whether an agency is a federal agency when deciding whether to apply federal standards of judicial deference).

standard of judicial review. Subpart A distinguishes interstate agencies from federal and state agencies and identifies the implications for judicial review. Subpart B addresses three structural issues peculiar to interstate agencies that have repercussions for judicial review. Subpart C determines that these structural issues undermine key legitimizing theories of administrative law. Subpart D concludes by analyzing why the limited judicial precedent does not clarify the proper standard of deference.

A. NOMINE IPSA LOQUITUR: *INTERSTATE AGENCIES ARE NEITHER FEDERAL NOR STATE*

Straddling the divide between horizontal and vertical federalism, an interstate agency exists in a legal “no man’s land,” with a legal status somewhere between state and federal.<sup>186</sup> An interstate agency’s unique status as sub-federal and supra-state means that absent a choice-of-law clause, the agency is not subject to either federal or state standards of judicial review.<sup>187</sup> For that reason, a federal court reviewing an interstate agency’s interpretation of its enabling compact must refrain from reflexively applying either federal or state standards.

An interstate agency is created by a minimum of “three discrete sovereigns: two States and the Federal Government.”<sup>188</sup> As a legal entity, it is distinct from any one sovereign that played a part in its creation.<sup>189</sup> Formed by states and approved by Congress, an interstate agency may receive delegated powers from both state and federal sources.<sup>190</sup> An interstate agency, however, is neither a state nor a federal agency.

Interstate agencies are not state agencies.<sup>191</sup> Unlike state agencies, no state has “exclusive control over the area of the agency’s jurisdiction” because states creating interstate agencies contract away a portion of their sovereignty.<sup>192</sup> Each member state shares its rights and interests in the agency with the other member states and the United States and thus cannot act without another state “in areas where it previously could have acted alone.”<sup>193</sup> The U.S. Supreme Court has noted that interstate agencies “occupy a

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186. Tripolitsiotis, *supra* note 153, at 167 (citing Note, *supra* note 164, at 1991).

187. *See id.* at 167–68 (noting variations in courts’ approaches to interpreting legal voids in interstate compacts and recommending that states include a choice-of-law clause when forming them).

188. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994); *see also* Tripolitsiotis, *supra* note 153, at 167–68.

189. Tripolitsiotis, *supra* note 153, at 167, 179–80.

190. *See id.* at 167 (noting that states surrender a portion of their sovereignty to the interstate agencies they create); *see also* BROUN ET AL., *supra* note 8, at 41 (“[C]ongressional approval of administrative compacts necessarily requires that the compact impede Congress’s regulatory authority in that area; Congress, in effect, consents to the states’ intruding on its traditional domain.”).

191. Tripolitsiotis, *supra* note 153, at 181.

192. *See id.* at 167, 179.

193. *Id.* at 179–80; *see also* *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 314–15 (1990) (Brennan, J., concurring).

significantly different position . . . than do the States themselves” because while states “are the constituent elements of the Union,” interstate agencies “are creations of three discrete sovereigns.”<sup>194</sup> State law only governs interstate agencies if the compact so provides.<sup>195</sup>

Interstate agencies are not federal agencies.<sup>196</sup> Although interstate compacts become federal law with Congress’s consent, “that fact does not extend federal status to the created regulatory body.”<sup>197</sup> Unlike federal agencies, interstate agencies cannot unilaterally be created by the federal government<sup>198</sup> and are not considered federal agencies under § 701(b)(1) of the APA.<sup>199</sup> They are administered by individual states working together.<sup>200</sup> After approving a compact, “Congress has no more executory powers over [an interstate agency] than it does over any private corporation,”<sup>201</sup> and the President does not control interstate agencies or their policies because they are “not considered an executive department or independent regulatory agency.”<sup>202</sup>

As neither state nor federal agencies, interstate agencies are “orphans of the federal system,” beholden only to their enabling compact.<sup>203</sup> In addition, several federal circuits have noted that the applicability of the *Chevron* doctrine depends on the definitional status of the agency because states may lack federal expertise and the ability to uniformly interpret federal law.<sup>204</sup> Because an interstate agency is neither a federal nor state agency, a federal court is not bound to apply federal or state standards. Thus, interstate agencies’ status outside the federal system is important for the question of

194. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994); *see also* Tripolitsiotis, *supra* note 153, at 179.

195. Tripolitsiotis, *supra* note 153, at 180.

196. BROWN ET AL., *supra* note 8, at 69–70.

197. *Id.* at 69. *But see* Tripolitsiotis, *supra* note 153, at 178 (noting that while congressionally approved interstate compacts are undeniably federal law, the status of interstate agencies is “unsettled”).

198. *See Hess*, 513 U.S. at 40 (noting that interstate compacts are created by at least two states and approved by Congress).

199. *See New York v. Atl. States Marine Fisheries Comm’n*, 609 F.3d 524, 531–32 (2d Cir. 2010) (citing Administrative Procedure Act, 5 U.S.C. § 701(b)(1) (2012) and listing cases to support its conclusion that an interstate agency is not a federal agency under the APA).

200. *See BROWN ET AL.*, *supra* note 8, at 69–70 (“Courts have repeatedly noted that compact agencies are not creatures of the federal government but rather creatures of the member states.”).

201. Tripolitsiotis, *supra* note 153, at 181.

202. BROWN ET AL., *supra* note 8, at 69; *see also supra* note 156 and accompanying text.

203. Tripolitsiotis, *supra* note 153, at 181.

204. *See infra* note 267 (listing cases that focused on whether an agency was federal or not); *see also Pac. Coast Fed’n of Fishermen’s Ass’ns v. Glaser*, No. CIV S-2:11-2980-KJM-CKD, 2013 WL 5230266, at \*5 (E.D. Cal. Sept. 16, 2013).

which standard of deference to apply to their interpretations of their enabling compacts, which are federal law.<sup>205</sup>

*B. THREE STRUCTURAL ISSUES PECULIAR TO INTERSTATE AGENCIES*

The legal framework underlying interstate agencies presents three structural issues that are peculiar to the interstate administrative system. First, although interstate agencies may receive some of their delegated powers from Congress, they do not necessarily speak with the force of federal law. Second, because interstate agencies are neither federal nor state agencies, they are not subject to either the federal or state APAs. Third, interstate agencies are subject to fewer checks and balances than federal agencies.

1. Interstate Agencies Do Not Necessarily Speak with the Force of Federal Law

Whether a federal standard of judicial review applies to an agency's interpretation of federal law depends on the status of the agency.<sup>206</sup> On the one hand, if a federal agency interprets its enabling act with the weight of federal law, then *Chevron* deference applies.<sup>207</sup> On the other hand, if a state agency interprets federal law, federal courts give no deference because states cannot speak with the force of federal law.<sup>208</sup> Between those two extremes, when a federal agency interprets its enabling act without the weight of federal law, *Skidmore* applies.<sup>209</sup>

While interstate compacts carry the force of federal law, the question of whether interstate agencies speak with the force of federal law is not yet settled.<sup>210</sup> Several factors suggest they do not, including the facts that: (1) interstate agencies are comprised of a group of individual states that each lack the authority to interpret federal law with the force of federal law; (2) states appoint the agency heads; (3) the President has no role in executing the interstate agency's enabling compact and may set no policy goals for it; and (4) the agency typically receives its delegated powers from the states and may also receive them from Congress.

205. *Contra* *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1173 (Or. 2009) (en banc).

206. *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997), cited with approval in *Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014); see also *infra* note 267 (listing cases that focused on whether an agency was federal or not); *infra* note 214 and accompanying text.

207. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); see also Healy, *supra* note 90, at 19.

208. See *Orthopaedic Hosp.*, 103 F.3d at 1495 (“A state agency’s interpretation of federal statutes is not entitled to the deference afforded a federal agency’s interpretation of its own statutes under *Chevron* . . .”); see also *infra* note 286 and accompanying text (listing many circuit court cases distinguishing between federal and state agencies for the purposes of applying *Chevron*).

209. See *Mead Corp.*, 533 U.S. at 234; see also Healy, *supra* note 90, at 20.

210. Tripolitsiotis, *supra* note 153, at 178.

First, interstate agencies likely do not speak with the force of federal law because interstate agencies are comprised of a group of individual states working together, each lacking the authority to interpret federal law with the force of federal law.<sup>211</sup> For example, the Compact Council is comprised of the eight states bordering the Great Lakes.<sup>212</sup> Acting alone, a Michigan state agency could not authoritatively interpret federal law due to its lack of federal expertise and the need for the uniform interpretation of federal laws.<sup>213</sup> Entering into an interstate compact does not cure either of these two deficits—the aggregate power of multiple states is just the power of individual states added together. Thus, any interpretation of the GLWC (a federal law) by Michigan and any combination of states will still just be an interpretation of federal law by states who each lack the authority to interpret federal law with the force of federal law.

Second, interstate agencies likely do not speak with the force of federal law when states appoint the agency heads.<sup>214</sup> For example, under the GLWC, the Compact Council’s agency heads are the chief executives of the eight member states.<sup>215</sup> The chief executive has the power to appoint a representative to stand in for the executive.<sup>216</sup> The federal government plays no role in choosing the Compact Council’s agency heads—the public elects the governor and the governor chooses a representative. Unlike federal agencies, which are comprised of federal appointees, interstate agencies are primarily comprised of state appointees.

Third, interstate agencies likely do not speak with the force of federal law because the President has no role in executing the interstate agency’s enabling compact and may not set policy goals for it.<sup>217</sup> One of the hallmarks of the balance of powers in the federal administrative system is the executive branch’s power to remove agency heads either at will or for cause, depending on the type of agency.<sup>218</sup> In the case of interstate agencies, however, if the President disagrees with an agency’s action, the President is powerless to do anything about it.<sup>219</sup> The absence of executive control means that interstate agencies do not speak with the executive’s federal authority, meaning federal

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211. See *supra* notes 137–38 and accompanying text.

212. See TEUTSCH, *supra* note 3, at i–ii.

213. See *supra* note 204 and accompanying text.

214. See *supra* text accompanying notes 173–74.

215. See *Great Lakes–St. Lawrence River Basin Water Resources Council Members and Alternates*, *supra* note 6.

216. See *supra* note 6 and accompanying text.

217. See *supra* note 160 and accompanying text. The President might be able to exercise some control by way of a veto—although the U.S. Constitution only appears to require Congress’s approval, there is a long history of honoring the President’s role by presenting congressionally approved interstate compacts to the President for a signature. See Note, *supra* note 164, at 1993–94, 2008.

218. See *supra* Part II.B.

219. Similarly, at the state level even, if the Governor of Wisconsin is upset that another governor voted against Waukesha, there is nothing she or he may do about it.

courts need not worry about violating the federal separation of powers by failing to give an adequate level of deference to an interstate agency's decision.

Finally, interstate agencies do not speak with the force of federal law because while the creation of an interstate agency requires member states to surrender a portion of their sovereignty, the federal government need only give its approval.<sup>220</sup> Thus, it is only necessary that states delegate a portion of their powers—there is no guarantee the federal government will delegate anything. Even if an interstate agency could interpret interstate compacts with the force of federal law, it could only do so to the extent that Congress (and not the states) was the source of its delegated power.

## 2. Interstate Agencies Are Not Subject to the Federal APA

Federal courts seem to agree that an interstate compact is not a federal agency as defined by § 701(b)(1) of the APA.<sup>221</sup> Because an interstate agency is not a federal agency under the APA, an interstate agency is not governed by the APA's provisions. The APA provides baseline procedural protections and strikes a congressionally approved balance between administrative efficacy and accountability.<sup>222</sup> Thus, interstate agencies are not subject to the basic layer of comprehensive procedural protections that the APA provides.<sup>223</sup>

Some courts have nonetheless tried to apply the federal APA by holding that interstate agencies are “quasi-federal” in nature; however, the circuits are split over whether this is a valid designation.<sup>224</sup> Given that the U.S. Supreme Court in recent years has declined to use labels such as “quasi-legislative” and “quasi-judicial” to describe agency actions,<sup>225</sup> it is likely that the Court would also reject the “quasi-federal” designation if it granted certiorari on this circuit

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220. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (noting that three sovereigns create interstate agencies, including two states); *see also* Tripolitisiotis, *supra* note 153, at 167–68, 179, 181.

221. *See* *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 531–32 (2d Cir. 2010) (citing Administrative Procedure Act, 5 U.S.C. § 701(b)(1) (2012)) (listing cases to support its conclusion that an interstate agency is not a federal agency under the APA). Notably, states are divided on whether interstate agencies are subject to their state APAs. William S. Morrow, Jr., *The Case for an Interstate Compact APA*, ADMIN. & REG. L. NEWS, Winter 2004, at 12, 13. *Compare, e.g.*, S.D. CODIFIED LAWS § 1-26-1(1) (2012 & Supp. 2015), *with* DEL. CODE ANN. tit. 29, § 10102(1) (2003 & Supp. 2014).

222. *See supra* notes 60–62 and accompanying text.

223. *See supra* Part III.B.

224. *Compare* *Heard Commc'ns, Inc. v. Bi-State Dev. Agency*, 18 F. App'x 438, 440 (8th Cir. 2001) (adopting a three-factor test to determine quasi-agency status), *with* *Atl. States Marine Fisheries Comm'n*, 609 F.3d at 535 (rejecting the “quasi-federal” agency doctrine on the grounds that such a classification “would be in tension with [a] governing Compact, which serves as a contractual agreement between the member states”), *and* *Martha's Vineyard/Dukes Cty. Fishermen's Ass'n v. Locke*, 811 F. Supp. 2d 308, 314 (D.D.C. 2011) (“The ‘quasi-federal agency’ doctrine itself is quite uncertain in [this] Circuit; indeed, very few cases support its existence.”).

225. *See* *Morrison v. Olson*, 487 U.S. 654, 690–92 (1988).

split. Rather than force a “federal” or “state” label on the interstate agency, courts could just call it what it is—interstate—and begin to develop a body of law to govern regional efforts going forward.

### 3. Interstate Agencies Are Subject to Fewer Checks and Balances than Federal Agencies

Most interstate agencies lack important checks and balances, such as oversight by a unitary executive, legislative control of appropriations, and political accountability to the public.<sup>226</sup> While judicial review remains a strong check on agency action, significantly, there is no federal executive oversight and limited federal legislative controls. The state controls that exist are also limited. On the whole, interstate agencies face fewer external checks than do their federal counterparts, and the external checks imposed on interstate agencies are also less protective.

First, judicial review of interstate agency actions is more prone to fluctuations than federal agencies. While Article III courts typically review federal agency actions, either state or federal courts (depending on the interstate compact’s provisions) review an interstate agency’s actions.<sup>227</sup> In addition, federal courts reviewing a federal agency’s decisions apply federal standards; however, state and federal courts reviewing an interstate agency’s decisions must decide under the terms of the compact whether state or federal standards apply.<sup>228</sup> The lack of certainty about the standard with which to review interstate administrative interpretations may negatively impact uniform judicial review of an interstate compact.<sup>229</sup>

Courts also apply constitutional standards. Both interstate and federal agencies are subject to constitutional limitations like due process.<sup>230</sup> This is one area where interstate agencies may be subject to more constraints than federal agencies because unlike federal agencies, the actions of interstate agencies are subject to review under both state and federal constitutions.<sup>231</sup>

Second, interstate agencies are subject to less effective legislative control mechanisms by states than federal agencies are subject to by Congress. While both federal and interstate agencies are subject to legislative investigatory powers, only the federal legislature has the power to unilaterally modify

226. See *supra* Part III.B.

227. See *supra* notes 76–84, 166–72 and accompanying text.

228. See, e.g., *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 213 P.3d 1164, 1173 (Or. 2009) (en banc) (noting that where the enabling interstate compact does not specify a standard of review, “the Act by omission creates a situation in which [courts] are free to apply different standards of review”).

229. See, e.g., *id.* at 1173–74.

230. See *supra* notes 83–87, 172 and accompanying text.

231. See, e.g., *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 26, 31–32 (1951) (noting federal and state constitutional issues concerning the validity of an interstate compact’s delegation of authority to an interstate agency).

appropriations or statutorily amend, terminate, or preempt the decisions of an agency.<sup>232</sup> State legislatures may be prohibited from taking action absent the consent of the other member states.<sup>233</sup> For example, in the case of the Compact Council, member states are unable to make some decisions under the GLWC without unanimous consent<sup>234</sup> while the federal government could amend the GLWC's terms by simply passing a new federal statute.<sup>235</sup>

Third, the federal executive branch exercises more control over federal agencies than over interstate agencies, and state executive control is not unilateral. The President has several powers over federal agencies, such as the power to remove federal agency heads;<sup>236</sup> however, the President plays no role in an interstate agency's administration of its enabling compact and has no role in setting its policy goals.<sup>237</sup> If the President disagrees with an interstate agency's action, the President may do nothing about it. At the state level, state executives lack the control over interstate agencies that the President exercises over federal agencies.<sup>238</sup> Interstate agencies are not controlled by any single executive but by a combination of the chief executives of multiple states;<sup>239</sup> thus, a state executive wanting to take action must often get the approval of the other states before doing so.<sup>240</sup> This distinction means that the federal executive branch may act against federal agencies more swiftly and with less opposition than state executives can act against interstate agencies.

Thus, interstate agencies are subject to fewer constraints and less absolute control than federal agencies. This ultimately leaves the public without the procedural and political protections offered by executive and legislative oversight<sup>241</sup> and threatens to undermine the legitimizing theories of administrative law, as demonstrated in the next Subpart.

232. See *supra* Part III.B.

233. See Tripolitsiotis, *supra* note 153, at 180 (noting that once a state surrenders a portion of its sovereignty by entering an interstate compact, it then "needs a sister state to act in areas where it previously could have acted alone").

234. See *supra* note 12 and accompanying text.

235. See Croley, *supra* note 64, at 11; see also FOX, *supra* note 43, §§ 2.01, 2.03[D], at 23, 43-44.

236. See *supra* Part II.B.

237. See *supra* note 156 and accompanying text; see also *supra* note 219 and accompanying text.

238. See *supra* note 175-177 and accompanying text; see also ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 140, at 35, 44 (noting that interstate compacts are distinct because the state chief executive lacks unilateral authority to negotiate an interstate compact while the President may negotiate treaties).

239. See *West Virginia ex. rel. Dyer v. Sims*, 341 U.S. 22, 30-31 (1951).

240. Tripolitsiotis, *supra* note 153, at 180.

241. See Part II.B (establishing that external controls on a federal acquisition ensures the legality and political responsiveness of an agency's actions).



C. THE STRUCTURAL ISSUES OF INTERSTATE AGENCIES UNDERMINE THE  
PROCEDURAL REGULARITY AND CHECKS AND BALANCES THAT ENSURE  
ADMINISTRATIVE LEGITIMACY

The legitimizing theories of administrative law are as important for ensuring the legitimacy of interstate agencies as they are for ensuring the legitimacy of federal agencies. Just as the U.S. Constitution is silent on whether Congress can delegate legislative or judicial authority to a federal agency,<sup>242</sup> so too is the Constitution silent on whether the states and Congress can delegate administrative authority to interstate agencies.<sup>243</sup> While the Constitution gives states the power to form interstate compacts that become federal law upon congressional approval, it does not expressly provide for agencies to implement those compacts.<sup>244</sup> Thus, the legitimizing theories of administrative law serve an important role in ensuring the constitutional legitimacy of both federal and interstate agencies.

The structural issues peculiar to interstate agencies, however, undermine key legitimizing theories of administrative law. Specifically, interstate agencies threaten the: (1) agency-as-expert; (2) civic-republican; and (3) external-controls theories of administrative law.<sup>245</sup> Each theory serves an important role in establishing the constitutionality of interstate administrative law; however, each theory carries less force for interstate agencies than for their federal counterparts because of the structural issues peculiar to interstate administrative law.

First, the agency-as-expert theory does less to legitimize interstate administrative law than it does to legitimize federal law. Under the agency-as-expert theory, separation of powers plays a very important role in ensuring the legitimacy of administrative law.<sup>246</sup> Under separation of powers, federal courts defer to Congress's clearly expressed intent and give deference to the federal executive branch's construction of a statutory scheme.<sup>247</sup> The federal executive branch plays no role in the interstate administrative system—the President exercises no control over interstate agencies, and interstate agencies are not an executive department in the federal system.<sup>248</sup> Thus, in the interstate administrative system, federal courts still defer to Congress's clearly expressed intent, but separation-of-powers concerns are reduced because the federal executive plays no role.

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242. See *supra* text accompanying note 45.

243. See U.S. CONST. art. I, § 10.

244. See *id.* cl. 3.

245. See *supra* text accompanying notes 132–35.

246. ASIMOW & LEVIN, *supra* note 16, § 1.6, at 10.

247. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837 (1984); see also *supra* text accompanying note 120.

248. BROUN ET AL., *supra* note 8, at 69. Further, federalism concerns do not warrant the same degree of deference to the states as to the federal executive because enabling compacts are enforceable against the states under the Supremacy Clause. See *id.* at 62–63.

Second, the civic–republican theory of administrative law can present agency-specific issues. In general, the challenge presented by the interstate administrative system to the civic–republican theory of administrative legitimacy is not high. Under the civic–republican theory, administrative law is legitimate because Congress delegates authority to the agency and because of an agency’s internal deliberative processes.<sup>249</sup> With respect to interstate agencies, there is no question that interstate agencies can receive delegated authority from both state and federal sources,<sup>250</sup> and Congress and the states clearly can control an interstate agency’s internal procedures through its enabling compact.<sup>251</sup> That said, unlike federal agencies, interstate agencies cannot be delegated the authority to speak with the force of federal law although their pronouncements may bind all member states contractually.<sup>252</sup> Further, because many interstate compacts contain inadequate internal procedures, the civic–republican theory of administrative law can present agency-specific issues.<sup>253</sup>

Third, the role of the external-controls theory in legitimizing interstate administrative law is relegated to a fraction of its role in the federal system. The external-controls theory ensures legality and political responsiveness through procedural regularity and checks and balances.<sup>254</sup> It provides statutory and constitutional protections to ensure administrative legitimacy on a systemic basis.<sup>255</sup> Consequently, issues eroding the protections of the external-controls theory threaten the integrity of the entire interstate administrative system.

There are no external controls on procedural regularity for interstate agencies unless provisions of the compact or a member state’s administrative law provide otherwise.<sup>256</sup> An interstate agency is not a federal agency under § 701(b)(1) of the APA.<sup>257</sup> Thus, the APA’s basic layer of comprehensive procedural protections does not apply to interstate agencies.<sup>258</sup> Interstate agencies are thus only subject to the procedural provisions of their own enabling compact or other controlling law.<sup>259</sup>

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249. ASIMOW & LEVIN, *supra* note 16, § 1.6, at 11; *see also supra* note 49 and accompanying text.

250. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994); *see also* Tripolitsiotis, *supra* note 153, at 167–68.

251. *See* BROWN ET AL., *supra* note 8, at 41–42.

252. *See supra* Part IV.B.1.

253. For example, the provisions controlling the GLWC’s procedures are ambiguous and fairly sparse. *See supra* note 18 and accompanying text.

254. *See* ASIMOW & LEVIN, *supra* note 16, § 1.6, at 11–12; *see also supra* note 51 and accompanying text.

255. *See supra* note 56 and accompanying text.

256. *See* Morrow, *supra* note 221, at 12 (noting that states like South Dakota and New York provide for their state APAs to govern); *see also supra* note 221 and accompanying text.

257. *See* Administrative Procedure Act, 5 U.S.C. § 701(b)(1) (2012).

258. *See* Part IV.B.2.

259. *See* BROWN ET AL., *supra* note 8, at 69.

There are significantly fewer checks and balances on interstate agencies than on federal agencies.<sup>260</sup> While Congress has the power to control interstate agencies through the granting or withdrawal of consent or conditions on consent,<sup>261</sup> significantly, the federal executive branch exercises no controls and states cannot unilaterally check an interstate agency's actions unless the compact provides otherwise.<sup>262</sup> Further, interstate agencies lack political accountability to all interested parties.<sup>263</sup> For example, if the Compact Council were to decide against Waukesha because the Governor of Ohio objects to the diversion, the citizens of Waukesha have no direct political recourse, in contrast with the federal system, where the President is directly accountable to all American voters. Because interstate agencies are subject to fewer controls by the political branches of government, interstate agencies are less politically legitimate.

While the agency-as-expert and civic–republican theories ensure administrative legitimacy at an agency-specific level, the external-controls theory relies on statutory and constitutional protections to ensure administrative legitimacy on a system-wide basis.<sup>264</sup> Consequently, the structural issues that erode their protections threaten the integrity of the entire interstate administrative system.

#### D. JUDICIAL PRECEDENT IS LIMITED AND NOT DISPOSITIVE

No federal court has directly addressed the issue of the proper standard of judicial review to apply to an interstate agency's interpretation of its enabling compact.<sup>265</sup> The Oregon Supreme Court is the only court to have

260. See Part IV.B.3.

261. See BROWN ET AL., *supra* note 8, at 41 (“[T]he Constitution ensures that Congress maintains ultimate supervisory power over cooperative state actions that might otherwise interfere with the full and free exercise of federal authority.”).

262. See *supra* notes 232–40 and accompanying text.

263. See *supra* Part III.B.

264. See *supra* note 51 and accompanying text.

265. See *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 213 P.3d 1164, 1173 (Or. 2009) (en banc) (rejecting the agency's argument that there is “a ‘solid history’ in federal courts of applying *Chevron* deference to interstate compact agencies’ interpretations of their own organic statutes” because federal courts uniformly apply *Chevron* to federal agencies’ interpretations of federal statutes and so “may simply have been reflexive,” i.e. impulsively, without a reasoned decision). Similarly, federal courts have not directly addressed whether an interstate agency is a federal agency for purposes of applying *Chevron*. See *id.* at 1175 (“[N]one of the federal cases that discusses and applies *Chevron* to agency actions appears to focus on the agency’s status as a federal agency.”).

Of the few courts to have ruled on interstate agencies’ interpretations of federal law, nearly all simply assume *Chevron* deference applies because the interstate compact is federal law and the interstate agency is an agency. See *N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm’n*, 26 F. Supp. 2d 249, 260 (D. Mass. 1998), *aff’d*, 198 F.3d 1 (1st Cir. 1999) (noting that the interstate compact is federal law and that *Chevron* applies to agency decisions); see also *California ex rel. Van De Kamp v. Tahoe Reg’l Planning Agency*, 766 F.2d 1308, 1313 (9th Cir. 1985) (“Interpretation given a statute by the agency charged with its administration is entitled to deference from the

raised the issue, concluding in *Friends* that a federal standard—not a state standard—applies because an interstate agency is not a state agency.<sup>266</sup> This opinion is limited because the *Friends* court brushed aside the question of whether an interstate agency’s sub-federal and supra-state status bears any significance and applied *Chevron* without considering whether another federal standard would be more appropriate.<sup>267</sup> An agency’s status cannot be so lightly disregarded.

In *Friends*, the Oregon Supreme Court confronted the question of whether a state or federal standard should govern the standard for reviewing an interstate agency’s interpretation of its enabling act.<sup>268</sup> At issue was an interstate agency’s interpretation of an ambiguous provision of its enabling compact.<sup>269</sup>

Congress had directed Washington and Oregon in the Columbia River Gorge National Scenic Area Act<sup>270</sup> to form the Columbia River Gorge (“CRG”) Commission, an interstate agency, using an interstate compact that included

courts.”); *Skamania Cty. v. Columbia River Gorge Comm’n*, 26 P.3d 241, 247 (Wash. 2001) (en banc) (“When we review an agency’s construction of a federal statute, we must determine whether Congress has directly spoken on the question at issue and has clearly indicated its intent.”). One court applied a *Chevron*-like “reasonableness” test because other courts had deferred to the agency. See *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1366–67 (9th Cir. 1986) (noting other courts had deferred to the agency’s actions previously); see also Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011) (“[W]e noticed that judicial precedents tend to rely most heavily on other cases involving the agency under review . . .”).

266. See *Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1175 (“Congress . . . not the states . . . determined what powers and responsibilities would be delegated . . . and what procedures . . . must [be] follow[ed] . . .”). The court overstated its conclusion, however, when it said that the states played no role in determining the interstate agency’s powers. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (noting that interstate agencies are created by delegations from three or more sovereigns); see also *Tripolitsiotis*, *supra* note 153, at 167–68.

267. See *Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1174–75. The court declined to address the question because “none of the federal cases that discusses and applies *Chevron* to agency actions appears to focus on the agency’s status as a federal agency.” *Id.* at 1175. Contrary to this assertion, several federal circuit courts have noted the particular importance of the agency’s definitional status as “federal,” endorsing the idea that “[a] state agency’s interpretation of federal statutes is not entitled to the deference afforded a federal agency’s interpretation of its own statutes under *Chevron*.” *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997), cited with approval in *Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014); see also, e.g., *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002) (focusing on an agency’s federal status); *MCI Telecomm. Corp. v. Bell Atl.—Pa.*, 271 F.3d 491, 516 (3d Cir. 2001) (focusing on an agency’s federal status); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (focusing on an agency’s federal status); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam) (“[T]he issue here is not the one posed in *Chevron* because no federal agency is involved.” (emphasis added)).

268. See *Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1167–68, 1171, 1174–75.

269. *Id.* at 1171; see also *id.* at 1167–68 (discussing the facts).

270. Columbia River Gorge National Scenic Area Act, Pub. L. 99–663, 100 Stat. 4274 (1986) (codified as amended at 16 U.S.C. §§ 544–544p (2012)).

by reference the terms Congress laid out in the Act.<sup>271</sup> Among these terms was a requirement that the CRG Commission “adopt a management plan for the scenic area” using standards set forth in the Act.<sup>272</sup> The petitioners challenged the interstate agency’s management plan as “inconsistent, in various respects, with the requirements of the Act.”<sup>273</sup>

To decide whether the revision was, in fact, inconsistent with the Act, the court concluded that it needed to first determine whether a federal court on review would grant federal deference “to the commission’s interpretation of the Act, given . . . that the commission is not . . . a *federal* agency charged by *Congress* with implementing a federal law.”<sup>274</sup> The Oregon Supreme Court held that a federal standard applied because Congress, rather than the states, had delegated the agency’s powers.<sup>275</sup> The court considered the question of whether the interstate agency was a federal or state agency irrelevant to the analysis.<sup>276</sup>

The Oregon Supreme Court applied *Chevron* because there was a clear “congressional expectation that the [agency could] ‘speak with the force of law’ when it” interprets a statute.<sup>277</sup> The court found evidence of Congress’s intent because Congress left clear statutory gaps for the agency to fill and played a significantly greater role in designing and implementing the interstate compact than merely “memorializing . . . consent.”<sup>278</sup> Specifically, Congress passed an Act directing the states to create the CRG Commission,

271. *Id.* § 5(a), 100 Stat. at 4277–78 (codified as amended at 16 U.S.C. § 544c(a)(1) (2012)) (“[T]he States of Oregon and Washington *shall* establish by way of an interstate agreement a regional agency . . . and *shall* incorporate this Act by specific reference . . . . [These states] *shall* provide to the Commission . . . authority to carry out [its] . . . functions and responsibilities[;] . . . [and] *shall* appoint members of the Commission as provided in [this Act.]” (emphasis added)).

272. *Id.* § 6(c), 100 Stat. at 4280 (codified as amended at 16 U.S.C. § 544d(c) (2012)), *cited in Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1167–68.

273. *Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1171.

274. *Id.* at 1172.

275. *Id.* at 1175 (“Congress—not the states— . . . determined what powers and responsibilities would be delegated . . . and what procedures . . . must [be] follow[ed] . . .”). The court overstated its conclusion about what role the states played in determining the interstate agency’s powers. Although the Oregon Supreme Court correctly noted that Congress designed the interstate compact and played “a far greater . . . role” in forming the interstate agency and implementing the compact than a mere “memorializing [of its] consent to an interstate compact,” *see id.*, this fact does not negate that the interstate compact was formed by two sovereign states, Washington and Oregon, with Congress’s consent. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994); *see also Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 105 (3d Cir. 2008) (“Interstate compacts are formal agreements between states . . .”); ZIMMERMAN, INTERSTATE COOPERATION, *supra* note 140, at 44 (“A compact is a contract enforceable by courts . . .”); ZIMMERMAN, INTERSTATE DISPUTES, *supra* note 140, at 165 (noting that states may “enter into compacts with the consent of Congress”); Tripolitsiotis, *supra* note 153, at 167–68.

276. *Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1175 (“[N]one of the federal cases that discusses and applies [sic] *Chevron* to agency actions appears to focus on the agency’s status as a federal agency.”).

277. *Id.* at 1175.

278. *Id.*; *see also id.* at 1173–75.

detailing its structure and membership as well as providing processes and standards to govern the creation and operation of the management plan.<sup>279</sup>

Although the Oregon Supreme Court's opinion, which is persuasive authority for federal courts, was right to conclude that a federal standard applies instead of a state standard, it is flawed in several respects.<sup>280</sup> First, the Oregon Supreme Court mistakenly read precedent to say that federal courts do not focus on an agency's status as federal when determining whether *Chevron* should apply.<sup>281</sup> Second, the court was wrong to conclude that the sole source of an interstate agency's powers is the federal government.<sup>282</sup> Third, the court was wrong to conclude that Congress's intent controls whether an agency can interpret a statute with the force of law.<sup>283</sup> Fourth, the court conflated the test for whether *Chevron* applies to federal agencies with the proper analysis for determining whether to extend *Chevron* to new situations.<sup>284</sup> Taken together, these issues point to the conclusion that the Oregon court over-emphasized uniformity over legitimacy and efficacy over accountability.

First, the Oregon Supreme Court was wrong to assert that "none of the federal cases that discusses and applies *Chevron* to agency actions appears to focus on the agency's status as a federal agency."<sup>285</sup> Contrary to this assertion, several federal circuit courts have noted the particular importance of the agency's definitional status as "federal," endorsing the idea that "[a] state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes."<sup>286</sup> Further, state agencies may lack federal expertise and might not uniformly interpret federal law.<sup>287</sup>

Second, the Oregon Supreme Court was wrong to conclude that a federal standard should apply because the agency's sole source of delegated power came from the federal government.<sup>288</sup> Contrary to this assertion, an interstate

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279. *Id.* at 1174-75.

280. *See infra* Part V.A.

281. *Cf. Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1174-75.

282. *Id.* at 1175.

283. *Cf. id.* at 1173-75.

284. *Cf. id.* at 1175 (reducing the question to "the nature of Congress's delegation of authority").

285. *Id.*

286. *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997), *cited with approval* in *Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014); *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002); *and MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 516 (3d Cir. 2001); *and GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *see also Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam) ("[T]he issue here is not the one posed in *Chevron* because no *federal agency* is involved." (emphasis added)).

287. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, No. CIV S-2:11-2980-KJM-CKD, 2013 WL 5230266, at \*5 (E.D. Cal. Sept. 16, 2013); *see also Orthopaedic Hosp.*, 103 F.3d at 1495-96.

288. *Cf. Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1175.

agency receives its delegated powers from both state and federal sources.<sup>289</sup> The U.S. Supreme Court recognized this in *Hess v. Port Authority Trans-Hudson Corp.* when it noted that interstate agencies are created by a minimum of “three discrete sovereigns: two States and the Federal Government.”<sup>290</sup> An interstate agency’s source of power could not solely come from the federal government or else Congress would be able to unilaterally create interstate agencies that usurped state powers.

Third, the court was wrong to conclude that congressional intent controls the issue of whether an agency can interpret a statute with the force of law.<sup>291</sup> While congressional intent is a factor to consider when determining whether an agency can interpret a statute with the force of law, it is not the only factor. Courts also look at the status of the agency.<sup>292</sup> While federal agencies can interpret a federal statute with the force of federal law, states cannot.<sup>293</sup> Interstate agencies are composed of a group of states that each lack the power to interpret statutes with the force of federal law—adding the states’ powers together does not cure this deficiency. Preventing a group of states from exercising the power to speak with the force of federal law protects other states from the “tendency of negotiating states to externalize harms on outsider states and ‘exploit’ the leverage over other states that joint action creates.”<sup>294</sup>

Fourth, because *Mead* only governs review of federal agencies, the Oregon state court should have considered the U.S. Supreme Court’s justifications for adopting *Chevron* deference when determining whether *Chevron* applies to a new type of agency.<sup>295</sup> When deciding to depart from *Skidmore* and adopt the more deferential *Chevron* standard, the U.S. Supreme Court considered three factors to determine if the move would be justified: (1) congressional delegation to interpret a statute with the full weight of

289. See BROWN ET AL., *supra* note 8, at 41 (“[C]ongressional approval of administrative compacts necessarily requires that the compact impede Congress’s regulatory authority in that area; Congress, in effect, consents to the states’ intruding on its traditional domain.”); Tripolitsiotis, *supra* note 153, at 167 (noting that “state[s] effectively surrender[] a portion of [their] sovereignty” to the interstate agencies they create (quoting C. T. Hellmuth & Assocs., Inc. v. Wash. Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976))).

290. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994).

291. See *Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1174–75.

292. See *Orthopaedic Hosp.*, 103 F.3d at 1495 (“A state agency’s interpretation of federal statutes is not entitled to the deference afforded a federal agency’s interpretation of its own statutes under *Chevron* . . . .”); see also *supra* note 286 and accompanying text (listing many circuit-court cases distinguishing between federal and state agencies for the purposes of applying *Chevron*).

293. See *Orthopaedic Hosp.*, 103 F.3d at 1495; see also *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); Healy, *supra* note 90, at 19.

294. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 536 (2008).

295. *Friends of the Columbia Gorge, Inc.*, 213 P.3d at 1175 (reducing the question to “the nature of Congress’s delegation of authority”).

federal law; (2) separation-of-powers concerns; and (3) external controls imposed by the political branches.<sup>296</sup>

The justifications underlying *Chevron* deference are important considerations to take into account when deciding whether to apply *Chevron* in a new situation. The absence of even one of these justifications can mean *Chevron* deference is inappropriate. For example, when the U.S. Supreme Court decided whether to apply *Chevron* to the informal agency actions in *Mead*, the first *Chevron* justification was not present, and the Court held that *Skidmore* was still the governing standard and not *Chevron*.<sup>297</sup> The Oregon Supreme Court's analysis only touched on the first justification, but it should have considered all three.

The limited precedent, the importance of the distinction between federal and state agencies, mistaken understandings of congressional delegations, and the missing justifications for adopting *Chevron* all call into question the Oregon court's decision in *Friends* to apply the *Chevron* standard without considering whether another standard would be more appropriate. Further, the evidence of congressional intent was especially strong, so even if *Friends* were correct, its persuasive powers could be limited to interstate agencies—like the one in *Friends*—in which Congress takes an active role in the creation and operation of the interstate compact. Thus, the question of whether *Chevron* or another federal standard should apply to interstate agencies remains unresolved.

V. STRADDLING THE HORIZONTAL–VERTICAL DIVIDE: WHY THE FEDERAL COURT SHOULD REJECT *CHEVRON* DEFERENCE AND APPLY *SKIDMORE*'S BALANCING APPROACH WHEN REVIEWING MULTI-STATE ADMINISTRATIVE INTERPRETATIONS

The interstate administrative system places horizontal and vertical federalism at a crossroads. Along the “horizontal plane” are coordinate sovereign states that have agreed to work together.<sup>298</sup> Along the “vertical plane” is the hierarchical relationship between the national and state governments in which Congress approves, and federal courts review, state actions pursuant to the interstate compact.<sup>299</sup> Interstate agencies straddle the divide between horizontal and vertical federalism, existing in a “no man's land,” with a legal status somewhere between state and federal.<sup>300</sup>

Interstate agencies' unique status presents federal courts with the question of what standard of judicial review to apply when reviewing an interstate agency's interpretation of its enabling act. Interstate agencies are

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296. See *supra* text accompanying notes 116–21.

297. *Mead Corp.*, 533 U.S. at 226–27; see also Healy, *supra* note 90, at 19.

298. See Erbsen, *supra* note 294, at 494.

299. See *id.*

300. Tripolitsiotis, *supra* note 153, at 167 (citing Note, *supra* note 164, at 1991).



sub-federal and supra-state agencies that, absent a choice-of-law clause, are not subject to either federal or state standards of judicial review.<sup>301</sup> A horizontally oriented federal court might prioritize state interests at the expense of the federal government’s oversight.<sup>302</sup> A vertically oriented court would define an interstate agency as either federal (deserving federal deference) or state (deserving no deference at all), allowing federal power to “trump[] . . . countervailing” state power if a conflict existed.<sup>303</sup>

Rather than pigeonholing interstate agencies into either a horizontal or a vertical framework, federal courts should treat the status of interstate agencies with nuance. Horizontal and vertical federalism are not mutually exclusive, at least where interstate agencies are concerned.<sup>304</sup> In interstate administrative law, the horizontal and vertical planes merge to form “a hybrid ‘triangular federalism’ that encompasses the area between the horizontal base and the elevated federal point floating above it.”<sup>305</sup> Within this triangle, federal and state powers are “both distinct and entangled.”<sup>306</sup>

Developing a judicial standard of review will require an understanding of how the horizontal and vertical planes work together. A court choosing a standard of deference must select one that is doctrinally sound, that strengthens the legitimizing theories of administrative law, and that effectively balances interests of governmental efficacy and accountability. This Part argues that *Skidmore* deference does just that.

Federal courts should apply *Skidmore* deference when reviewing an interstate agency’s interpretation of its enabling compact. Subpart A argues that even though federal courts are not bound to apply a federal standard to interstate agencies because they are not “federal” agencies, courts should nonetheless choose to apply a federal standard because it provides a measure of uniformity, an existing body of case law to assist with interpretation, and balances the interests of states against each other. Subpart B argues that federal courts should reject *Chevron* because key theories of administrative legitimacy and *Chevron*’s underlying justifications are missing from interstate administrative law. Subpart C argues that courts should apply *Skidmore* because applying *Skidmore* is doctrinally sound under *Mead*’s rationale, ensures deference to interstate agencies, has some measure of constitutional legitimacy, and effectively balances the government’s interests in efficacy and accountability.

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301. See *id.* at 167–68 (noting variations in courts’ approaches to interpreting legal voids in interstate compacts and recommending that states include a choice-of-law clause when forming them).

302. See Erbsen, *supra* note 294, at 506.

303. See *id.*

304. *Id.*

305. *Id.* at 505.

306. *Id.*

A. “UNANIMITY AMONG THE FOXES OUGHT NOT PREJUDICE THE HENS”<sup>307</sup>—WHY THE COURTS SHOULD APPLY FEDERAL STANDARDS TO DISPUTES CONCERNING INTERSTATE AGENCIES

In determining the standard of judicial review to apply to an interstate agency’s interpretation of its enabling compact, an agency’s “interstate” status matters. On the one hand, an interstate agency is not “federal,” meaning that a federal standard does not necessarily apply.<sup>308</sup> On the other hand, an interstate agency is not “state,” meaning that a state standard does not necessarily apply.<sup>309</sup> Each interstate agency has a unique status as sub-federal and supra-state.<sup>310</sup> It is a creation of three distinct sovereigns that becomes an entity distinct from any one of its creating sovereigns.<sup>311</sup> A court considering the validity of an agency’s interpretation can choose to apply a state or federal standard or to develop an entirely new standard.<sup>312</sup>

In selecting a standard for judicial review of interstate agency action, a court should not apply state law. Applying a state law standard is inappropriate because interstate agencies extend beyond the jurisdictional limits of a single state.<sup>313</sup> Interstate agencies give states the ability to regulate extraterritorially within the area of the compact,<sup>314</sup> and the existence of an interstate compact typically means that the compacting states “externalize[d] harms on outsider states and [will] ‘exploit’ the leverage over other states that joint action creates.”<sup>315</sup> Federal courts should refrain from applying a state standard to prevent one state’s standard from governing all the other states in the compact and to maintain the uniformity of the federal standard of judicial review across all interstate agencies.

In selecting a standard for judicial review, a court could elect to develop its own standard. This approach has the advantage of flexibility; however, developing a new standard does not guarantee a better standard than under state or federal law. Further, because cases challenging an interstate agency’s interpretations of its enabling compact are uncommon, it would take a substantial amount of time for a body of precedent to develop. In the meantime, the uncertainty could prejudice states, interstate agencies, or the regulated parties that challenge an agency’s interpretation.

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307. *Id.* at 571.

308. *See supra* text accompanying notes 180, 186–87.

309. *See supra* note 187 and accompanying text.

310. *See supra* note 187 and accompanying text.

311. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994).

312. If a federal statute does not dictate the standard of review to apply, “the governing rule of decision . . . [is] fashioned by the federal court in the mode of the common law.” *BROUN ET AL.*, *supra* note 8, at 63.

313. *See Erbsen, supra* note 294, at 564 (noting that an interstate agency’s activity “sprawls across multiple state territories, has far-reaching effects, and involves domiciliaries of multiple states”).

314. *See id.* at 564, 580.

315. *See id.* at 536.

In selecting a standard for judicial review, a court ought to adopt an existing federal standard. Selecting a federal standard is proper for several reasons. First, a federal standard is proper because an interstate compact is federal law.<sup>316</sup> For this reason, an interstate compact is subject to construction by a court under federal statutory and contract law.<sup>317</sup> Second, a federal standard is proper because a federal court's interpretation of the interstate compact controls over a state's own interpretation under the Supremacy Clause.<sup>318</sup> Third, the selection of an existing federal standard is beneficial because existing federal standards have the advantage of being well-known to the parties and to federal courts. In addition, parties challenging or defending an agency's interpretation can use the large body of federal case law as persuasive authority for suits involving interstate agencies.

Thus, although federal courts do not necessarily have to apply state or federal standards, applying a federal standard is warranted and preferable. A federal standard is appropriate because the law being interpreted is federal, the compact is subject to federal construction, and federal standards have an existing body of precedent to aid in their application.

*B. COURTS SHOULD NOT APPLY CHEVRON DEFERENCE BECAUSE THE ABSENCE OF CHEVRON'S UNDERLYING JUSTIFICATIONS ENDANGERS THE CONSTITUTIONAL LEGITIMACY OF AFFORDING A HIGH DEGREE OF DEFERENCE TO INTERSTATE AGENCY ACTION*

When deciding whether to extend the *Chevron* test to interstate agencies, courts should consider *Chevron*'s underlying justifications for adopting such a high level of deference.<sup>319</sup> The justifications Justice Stevens gave for adopting such a high level of deference in *Chevron* are important because they ensure that *Chevron* stays anchored in the legitimizing theories of administrative law.<sup>320</sup> Where those justifications are not present, such a high level of deference is unwarranted not only because it takes judicial review off of *Chevron*'s sure footing, but also because it endangers the constitutional legitimacy of administrative law.

316. See BROWN ET AL., *supra* note 8, at 56 (noting that the formation of a compact is one of the few instances “in which state legislative action is elevated to the height of federal law”); see also *id.* at 62 (noting that interstate compacts, as substantive federal law, may be enforced against member states).

317. *Id.* at 56 (noting that congressional consent makes interstate compacts “federal law subject to federal construction” under the Compact Clause (quoting *Carcham v. Nash*, 437 U.S. 716, 719 (1985))).

318. *Id.* at 63 (“The interpretation that courts give to interstate compacts effectively controls over a state’s application of its own law as to the subject matter of the compact.”).

319. See *supra* text accompanying notes 116–21 (outlining *Chevron*'s justifications).

320. See *supra* notes 132–35 and accompanying text (connecting *Chevron*'s justifications to legitimizing theories of administrative law); see also notes 46–51 (setting forth important legitimizing theories of administrative law).

The structural issues peculiar to interstate administrative law do both. First, the structural issues peculiar to the interstate administrative system undermine key legitimizing theories of administrative law. Under the agency-as-expert theory, interstate agencies are subject to fewer separation-of-powers concerns than their federal counterparts.<sup>321</sup> Under the civic-republic theory, interstate agencies cannot speak with the force of federal law, unlike federal agencies.<sup>322</sup> Finally, under the external-controls theory, interstate agencies are subject to fewer legal and political controls than federal agencies.<sup>323</sup> Thus, interstate agencies are not as well-grounded as federal agencies in the constitutional theories of administrative legitimacy. For that reason, interstate agencies deserve a lower degree of judicial deference as a matter of constitutional theory.

Second, the structural issues peculiar to the interstate administrative system undercut *Chevron's* justifications for applying a higher level of deference than under *Skidmore*.<sup>324</sup> Under *Chevron*, a high degree of judicial deference was warranted because: (1) federal agencies act pursuant to congressionally delegated authority to *interpret statutes with the force of federal law*; (2) federal agencies are members of the executive branch, and under *separation of powers*, courts give deference “to [the] executive department’s construction of a statutory scheme it is entrusted to administer;” and (3) federal agencies are held accountable to the will of the people by the *external controls of the political branches of government*.<sup>325</sup>

The structural issues of interstate administrative law undercut each of these justifications. First, unlike federal agencies, interstate agencies lack the authority to interpret federal statutes with the force of federal law.<sup>326</sup> This undercuts *Chevron's* first justification—that Congress delegates federal

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321. See *supra* notes 246–48 and accompanying text (analyzing the effect of interstate agency’s place outside of the federal system on the agency-as-expert theory of administrative law).

322. See *supra* notes 249–53 and accompanying text (analyzing the threat that interstate agencies pose to the civic-republic theory of administrative law).

323. See *supra* text accompanying notes 254–64 (outlining why interstate agencies are subject to fewer legal and political controls).

324. See *supra* text accompanying notes 116–21 (setting forth three justifications Justice Stevens gave for departing from *Skidmore* and adopting such a high level of deference in *Chevron*).

325. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); see also *supra* text accompanying notes 116–21.

326. An interstate agency is not a federal agency nor is its promulgations considered to be federal mandates, even when the agency is comprised in part of federal officials appointed by the federal executive branch. BROWN ET AL., *supra* note 8, at 66–67 (describing the “Triple III’ compact” that created an agency administered by both federal and state officials). Interstate agencies cannot speak with the force of federal law, even if Congress purports to delegate them this power because: (1) the aggregate power of multiple states is just the power of individual states added together; (2) states appoint the agency heads; (3) the President has no role in executing the interstate agency’s enabling compact and may set no policy goals for it; and (4) the agency typically receives its delegated powers from the states and may also receive them from Congress. See *supra* Part IV.B.1.

agencies authority to interpret statutes with the force of federal law. Second, unlike federal agencies, interstate agencies are not part of the federal executive branch, and their policies are not subject to control by the President.<sup>327</sup> This undercuts *Chevron*'s second justification—that deference to the executive branch is warranted under separation of powers. Finally, interstate agencies are subject to fewer statutory and constitutional controls by the political branches of government.<sup>328</sup> This undercuts *Chevron*'s third justification—that federal agencies are politically responsive to the people through external controls.

Because the structural issues of interstate administrative law undercut *Chevron*'s justifications, the application of *Chevron* to interstate agencies would not be as squarely anchored in the legitimizing theories of administrative law. *Chevron*'s high degree of deference to federal agencies is constitutionally legitimate because *Chevron*'s justifications anchor its standard of judicial deference in the legitimizing theories of administrative law.<sup>329</sup> The application of *Chevron* to interstate agencies would be less constitutionally legitimate than to federal agencies because *Chevron*'s justifications do not apply with equal force to interstate agencies.

Thus, when deciding what standard of judicial review to apply to interstate agencies, courts should decline to apply *Chevron* deference. Such a high degree of deference is unwarranted because the structural issues peculiar to interstate administrative law undermine administrative law's legitimizing theories and also *Chevron*'s justifications for applying a higher degree of deference than *Skidmore*.<sup>330</sup>

C. THE COURT SHOULD APPLY SKIDMORE'S FLEXIBLE BALANCING TEST BECAUSE IT PROVIDES PROCEDURAL PROTECTIONS AND MAINTAINS POLITICAL-PROCESS LEGITIMACY

Federal courts should apply *Skidmore* deference to an interstate agency's interpretation of federal law because the application of *Skidmore* is doctrinally

327. See *supra* notes 217–19 and accompanying text (explaining the relationship between interstate agencies and the federal executive branch).

328. See *supra* Part IV.B.2–3 (outlining the shortage of political and constitutional checks on an interstate agency's power).

329. See *supra* notes 132–35 and accompanying text (connecting *Chevron*'s justifications to legitimizing theories of administrative law).

330. Declining to apply such a high degree of deference to supra-state agencies is consistent with the U.S. Supreme Court's treatment of supranational decision-making bodies. With respect to supranational bodies' interpretations of the North American Free Trade Agreement Court, the Court does not apply a high degree of deference because the supranational body does not interpret the Agreement "with the force of law" and because of "the lack of mechanisms of legislative oversight and executive control that provide accountability for domestic agencies." Ernest A. Young, *Toward a Framework Statute for Supranational Adjudication*, 57 EMORY L.J. 93, 108 (2007). Similarly, interstate agencies do not interpret interstate compacts with the force of federal law and are not politically accountable through the oversight of both political branches of government.

sound under the U.S. Supreme Court's rationale in *United States v. Mead Corp.* and theoretically sound because it restores a measure of constitutional legitimacy to interstate administrative law. The increased scrutiny of an interstate agency's interpretation under *Skidmore* is good policy because it promotes government accountability by encouraging agencies to adopt more formal decision-making procedures without necessarily demanding as much from interstate agencies as the federal APA demands from federal agencies.<sup>331</sup>

First, on a doctrinal level, applying *Skidmore* deference to an interstate agency's interpretation of its enabling compact is appropriate under the U.S. Supreme Court's rationale in *Mead Corp.*<sup>332</sup> In *Mead*, the U.S. Supreme Court held that *Chevron* "only applies when defined requirements are met."<sup>333</sup> When *Chevron* does not apply, *Skidmore* remains the appropriate standard of judicial review.<sup>334</sup>

*Chevron* only applies when an agency's interpretation of a statute carries the force of federal law.<sup>335</sup> An agency's interpretation of a statute only carries the force of federal law if: (1) Congress delegates the legitimate authority to interpret it with the force of federal law; and (2) the agency "exercise[s] its delegated lawmaking power."<sup>336</sup> If either factor is not present, the Court applies the *Skidmore* standard of judicial review.<sup>337</sup>

Part IV.B.1 established that interstate agencies may not interpret statutes with the force of federal law.<sup>338</sup> Although *Mead* only concerns federal agencies, its rationale applies with force here.<sup>339</sup> Under the U.S. Supreme Court's *Mead* rationale, *Skidmore* should apply to an interstate agency's

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331. Cf. Rebecca Wernicke, *Changing the D.C. Circuit's Approach to Changes in Interpretive Rules*, 82 GEO. WASH. L. REV. 1699, 1719 (2014) (discussing the benefits of "applying the *Skidmore* analysis to interpretive rules").

332. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

333. Healy, *supra* note 90, at 1.

334. *Mead Corp.*, 533 U.S. at 235-38; see also Criddle, *supra* note 84, at 1275 (stating that where *Chevron* is not applicable, federal courts "consider instead whether deference is warranted under *Skidmore v. Swift & Co.*"); Eskridge & Baer, *supra* note 96, at 1088; Healy, *supra* note 90, at 1-2, 18-21. But see *Mead Corp.*, 533 U.S. at 247 (Scalia, J., dissenting) (rejecting the Court's decision to resurrect *Skidmore* because it "gives the agency's current position some vague and uncertain amount of respect, but it does not, like *Chevron*, leave the matter within the control of the Executive Branch for the future").

335. *Mead Corp.*, 533 U.S. at 235-38; see also Healy, *supra* note 90, at 3.

336. Healy, *supra* note 90, at 19; see also *Mead Corp.*, 533 U.S. at 235-38.

337. *Mead Corp.*, 533 U.S. at 234; see also Healy, *supra* note 90, at 20.

338. *Contra* *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1173 (Or. 2009) (en banc); but see *supra* text accompanying notes 291-94 (discussing why the Oregon Supreme Court was wrong to assert in *Friends* that interstate agencies can interpret statutes with the force of federal law). This is true even if the interstate agency is partially comprised of federal officials. See *supra* note 326.

339. See note 123 and accompanying text (noting that *Mead* concerned the federal customs agency).

interpretation of federal law because the agency does not speak with the force of federal law.<sup>340</sup>

Interpreting the *Mead* decision in light of *Chevron*'s justifications, it is important to note that the Court declined to depart from *Skidmore* deference when just one of *Chevron*'s justifications was missing.<sup>341</sup> *Chevron*'s first justification—that Congress delegates federal agencies authority to interpret statutes with the force of federal law—was not present in *Mead*.<sup>342</sup> Significantly, *Chevron*'s other two justifications—that deference is warranted to the executive branch under separation of powers and that federal agencies are politically responsive to the people through external controls—are present in the case of interstate agencies.<sup>343</sup> The absence of *Chevron*'s other justifications presents an even stronger case of why *Skidmore*—not *Chevron*—should apply to an interstate agency's interpretation of its enabling act.

Second, on a theoretical level, the four *Skidmore* factors help ensure that judicial review of an agency's interpretation is consistent with the three legitimizing theories of administrative law, described above.<sup>344</sup> Under *Skidmore*, federal courts consider four factors in determining the level of deference to give: (1) thoroughness of consideration; (2) reasonableness; (3) consistency with previous pronouncements; and (4) persuasive power.<sup>345</sup> Each factor can be seen as a function of at least one theory of administrative legitimacy. A consideration of all four helps to ensure the constitutional legitimacy of the level of deference the court ultimately chooses to give.

The first factor addresses the thoroughness of an agency's procedures in determining how to interpret a statute.<sup>346</sup> This procedural inquiry is important because it allows courts to ensure there is no erosion of the deliberative processes, thus strengthening the second legitimizing theory of administrative law—the civic–republican theory.<sup>347</sup> Under the civic–republican theory, administrative law is constitutionally legitimate if internal deliberative procedures exist to foster deliberation, “minimize political influences,” and ensure a clear and robust rationale.<sup>348</sup> Ensuring thorough deliberative procedures is especially important because interstate agencies are not subject to the protective procedures of the APA, and their enabling compacts often provide sparse protective procedures.<sup>349</sup>

340. See Healy, *supra* note 90, at 8.

341. See *supra* notes 127–29 and accompanying text.

342. See *supra* note 128 and accompanying text.

343. See *supra* notes 327–28 and accompanying text.

344. See *supra* Part II.A.

345. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

346. *Id.*

347. See *supra* note 48 and accompanying text.

348. ASIMOW & LEVIN, *supra* note 16, § 1.6, at 11; see also *supra* note 48 and accompanying text.

349. See *supra* Part IV.B.2 (discussing why interstate agencies are not subject to the federal APA); *supra* notes 153–55 and accompanying text.

The second factor addresses the reasonableness of an agency's interpretation.<sup>350</sup> A reasonableness inquiry allows courts to ensure an agency's interpretation has a clear and robust rationale. This inquiry strengthens the civic-republican theory of administrative law because it helps ensure sufficient deliberative processes to yield a clear and robust rationale.<sup>351</sup>

The third factor addresses the consistency of the agency's interpretation with the agency's previous interpretations.<sup>352</sup> A consistent interpretation is more likely to be accorded deference under *Skidmore*.<sup>353</sup> This is because consistency protects public reliance, support across political administrations, and knowability, thereby providing stability and minimizing political influence.<sup>354</sup> By minimizing political influence, consistency helps ensure administrative legitimacy under the civic-republican theory of administrative law.<sup>355</sup>

The fourth factor addresses an interpretation's persuasive power.<sup>356</sup> Persuasive power includes factors like whether the agency acted "in pursuance of official duty" or based on a "body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>357</sup> Both of these factors strengthen the agency-as-expert-theory of administrative legitimacy, which ensures administrative legitimacy by allowing courts to defer to preserve separation of powers and avoid assessing the wisdom of an expert's policy judgments.<sup>358</sup>

Persuasive power could also operate as a catch-all factor, allowing plaintiffs challenging an agency's interpretation to argue that insufficient external checks and balances make an agency's interpretation less persuasive and entitled to less deference. Similarly, the court could assess the political outlets available to the party challenging the decision, and if it deems them to be inadequate, the court could give less deference under this factor. Consequently, by using the fourth factor to take into account the general circumstances of the complaint, the court can prevent the erosion of the external-controls theory of administrative law.<sup>359</sup>

Third, as a matter of policy, *Skidmore* deference is appropriate because it balances the values of governmental efficacy and accountability. Governmental efficacy and accountability often have an inverse

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350. *Skidmore*, 323 U.S. at 140.

351. *See supra* note 49 and accompanying text.

352. *Skidmore*, 323 U.S. at 140.

353. Eskridge & Baer, *supra* note 96, at 1150-51.

354. *See id.*

355. *See supra* note 49 and accompanying text.

356. *Skidmore*, 323 U.S. at 140.

357. *Id.* at 139-40.

358. *See supra* notes 48, 119 and accompanying text.

359. *See supra* notes 50-51 and accompanying text.



relationship.<sup>360</sup> As agency discretion increases, efficacy increases and accountability decreases.<sup>361</sup> As the number of procedural protections increases, accountability increases and efficacy decreases.<sup>362</sup> While *Chevron* prioritizes efficacy at the expense of accountability, *Skidmore* presents a balance of both.

The two-step *Chevron* test prizes efficacy over accountability—the only protections it offers are guarantees that Congress has not preempted an agency and the agency’s interpretation is rational.<sup>363</sup> *Mead* added a third—that the agency has the power to speak with the force of federal law.<sup>364</sup> *Chevron*’s lack of protective measures ensuring accountability may be due to the fact that the case was decided more than 30 years after the enactment of the APA, which provides a baseline of procedural protections to ensure sound deliberative processes.<sup>365</sup>

*Skidmore*, however, effectively balances efficacy and accountability by determining how much deference to award based on an assessment of an agency’s deliberative procedures.<sup>366</sup> Decided two years before the APA was enacted, *Skidmore* could not rely on the APA.<sup>367</sup> Instead, the Court adopted a standard of judicial deference that ensured a measure of accountability. Similarly, a court reviewing an interstate agency’s interpretation cannot rely on an APA to provide accountability because interstate agencies are not subject to an APA.<sup>368</sup> Thus, a court reviewing an interstate agency’s interpretation of its enabling act should also adopt a standard of judicial deference that ensures some degree of accountability.

*Skidmore*’s four-factor test does just that. Applying *Skidmore* is good policy because it encourages more formal agency procedures without necessarily requiring as many procedures as the federal APA.<sup>369</sup> Thus, *Skidmore* provides accountability without overly burdening governmental efficacy. By adopting *Skidmore*’s balancing approach for determining the level of deference to give interstate agencies, federal courts may ensure consistency with *Mead* and administrative legitimacy while balancing values of governmental efficacy and accountability.<sup>370</sup>

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360. See *supra* note 55 and accompanying text.

361. See *supra* notes 53–55 and accompanying text.

362. See *supra* notes 53–55 and accompanying text.

363. See *supra* note 112 and accompanying text.

364. See Healy, *supra* note 90, at 19; see also *Mead Corp.*, 533 U.S. at 235–38.

365. See *supra* notes 60–62 and accompanying text.

366. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

367. See *supra* note 98 and accompanying text.

368. See Part IV.B.2.

369. Cf. Wernicke, *supra* note 331, 1719 (2014) (discussing the benefits of “applying the *Skidmore* analysis to interpretive rules”).

370. See *supra* text accompanying notes 360–62.

## VI. CONCLUSION

Structural issues unique to interstate agencies undermine key legitimizing theories of administrative law and undercut *Chevron's* justifications for adopting a high standard of deference. For that reason, this Note argues that when federal courts review interstate agencies' interpretations of ambiguous language in their enabling compacts, the courts should reject *Chevron* deference and instead apply the *Skidmore* balancing test, which allows courts to assess the quality of the agency's deliberative processes before determining how much deference to award the agency's interpretation. By applying *Skidmore* deference, courts can ensure the theoretical underpinnings of interstate agency law remain strong while balancing governmental efficacy with the need for accountability.