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A Dubious Proposition of Law: Why Judicial Deference to Agency Interpretations of Regulations Is at Odds with Nebraska Law

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Comment*

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* Trevor J. Rogers, J.D., 2022, University of Nebraska College of Law. I dedicate this article to Emily Murphy, without whom this article and law school would not have been possible. I sincerely appreciate the hard work of my friends at the *Nebraska Law Review* for their efforts in preparing this article for publication. I hope this article inspires greater examination of state administrative doctrine, especially in Nebraska.

I. INTRODUCTION

"[T]he more you explain it, the more I don't understand it."[1] For some, this quip from Associate Justice Robert Jackson in *Chenery II* adequately sums up the study of administrative law. As Chief Justice John Roberts notes, much of the struggle of understanding administrative law lies in the fact that

> [M]odern administrative agencies . . . exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; *it is a central feature of modern American government*.[2]

This blending of powers makes administrative law a controversial legal area with heated scholarly debates on the merits of the modern administrative state.

Within administrative law, the most controversial doctrines undoubtedly deal with judicial deference to agency interpretations of law. Federal deference doctrines, such as *Chevron*[3] and *Auer*,[4] require federal courts to defer to agency interpretations of statutes and regulations, subject to certain conditions. Those who have concerns about deference doctrines generally express concerns about the separation of

1. SEC v. Chenery Corp., 332 U.S. 194, 214 (1947) (Jackson, J., dissenting) [hereinafter *Chenery II*] (referencing Mark Twain).
2. City of Arlington v. FCC, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting) (emphasis added).
3. Chevron, U.S.A. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984) (requiring federal courts to defer to agency interpretations of their own statutes if Congress has not spoken to the precise question at issue and the agency's interpretation of the statute is permissible).
4. Auer v. Robbins, 519 U.S. 452, 461 (1997) (requiring federal courts to defer to an agency's interpretation of their own regulations unless plainly erroneous or inconsistent with the regulation).

powers[5] and consistency with the Federal Administrative Procedure Act,[6] while the most prominent defenders of deference point out the expertise that administrative agencies have and their relatively superior position to courts when it comes to policymaking.[7]

While lawyers, judges, and scholars have spilled an enormous amount of ink debating the merits of judicial deference to agency interpretations of law in our federal system, less common are discussions of these doctrines in state law. Since 1984, Nebraska courts have deferred to agency interpretations of their own regulations "unless plainly erroneous or inconsistent."[8] Recently, Nebraska Supreme Court Justice Jonathan Papik called this doctrine into question, arguing that the doctrine rests upon questionable decisions of federal law and that such deference is inconsistent with Nebraska's Administrative Procedure Act (Nebraska's APA).[9]

This Comment argues that Justice Papik's *Prokop* concurrence is correct. But he is correct not just because the Nebraska Supreme Court improperly adopted a questionable doctrine from federal law and because Nebraska's APA prohibits deference, but also because judicial deference to agency interpretations of regulations clashes with Nebraska Supreme Court precedent and violates Nebraska's Constitution. Part II of this Comment outlines necessary background information on relevant case law from Nebraska and federal courts, relevant history surrounding the adoption and subsequent changes to Nebraska's APA, as well as an understanding of how Nebraska fits into the larger scheme of deference doctrines amongst the states. Part III makes a case for why deference is important even though it is not a hot-button political topic. Part IV sets forth the traditional defenses of deference mentioned in *Kisor v. Wilkie* and relevant scholarly work.[10] Part IV challenges these common defenses and argues that some defenses from federal law are inapplicable in Nebraska. Finally, Part V discusses why judicial deference to agency interpretations of their own

5. *See generally* Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 616 (Scalia, J., concurring in part and dissenting in part).

6. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2425–48 (2019) (Gorsuch, J., concurring) (indicating that judicial deference to agency interpretations of regulations is inconsistent with 5 U.S.C. § 706).

7. *See* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 126 (2020).

8. Dep't of Banking & Fin. of Neb. v. Wilken, 217 Neb. 796, 801, 352 N.W.2d 145, 148 (1984).

9. Prokop v. Lower Loup Nat. Res. Dist., 302 Neb. 10, 41–43, 921 N.W.2d 375, 399–401 (2019) (Papik, J., concurring).

10. *Kisor*, 139 S. Ct. at 2400. *Kisor* is the leading case on judicial deference to agency interpretations of regulations as it is the most recent case the Supreme Court of the United States has had on the topic and the Court had the opportunity to eliminate the doctrine.

regulations is: (1) inconsistent with the plain text of the de novo review requirement in Nebraska's APA, (2) inconsistent with Nebraska case law requiring questions of law to be made independently by appellate courts, (3) in violation of basic rules of statutory construction because deference renders the de novo review requirement superfluous, (4) undercut by the fact that Nebraska courts refuse to adopt an outright deference doctrine for agency interpretations of statutes, and (5) violative of Nebraska's constitutional guarantee of the separation of powers.

II. BACKGROUND

A. Historical Backdrop: Nebraska Case Law

Nebraska courts first adopted the doctrine that courts would defer to agency interpretations of their own regulations in *Department of Banking and Finance of State of Nebraska v. Wilken*.[11] *Wilken* involved the rights of a receiver, the Department of Banking and Finance, and its rights as it pertained to a lease agreement between Wilken and The Commonwealth Company. The executed lease agreement included a provision that required additional rental payments from the appellant to the appellee dependent upon gross sales from a pending liquor license.[12] After a period of not receiving the excess rents under the agreement, the appellant brought suit.[13] As an affirmative defense, Wilken argued that the agreement violated the Liquor Control Commission's regulations that prevented third parties from having an interest in a liquor license.[14] At the time of the case, the relevant liquor control regulations stated that any license which covered premises financed or operated on a share of business profits would be considered a partnership and that only the licensee could receive a portion of the liquor profits.[15] Citing federal law, the Nebraska Supreme Court stated that the agency's interpretation of their own regulation would be controlling unless "plainly erroneous or inconsistent."[16] Ultimately, the Nebraska Supreme Court rejected Wilken's defense.[17]

B. Historical Backdrop: Federal Law

The Nebraska Supreme Court never stated why agency interpretations of their own regulations should be entitled to deference or why it

11. *Wilken*, 217 Neb. at 796, 352 N.W.2d at 145.
12. *Id.*, 217 Neb. at 797–98, 352 N.W.2d at 147.
13. *Id.*, 217 Neb. at 798, 352 N.W.2d at 147.
14. *Id.*
15. *Id.*, 217 Neb. at 800–01, 352 N.W.2d at 148.
16. *Id.*, 217 Neb. at 801, 352 N.W.2d at 148.
17. *Id.*, 217 Neb. at 801–02, 352 N.W.2d at 149.

was adopting the doctrine. Given that *Wilken* cited *Columbus Community Hospital*,[18] it necessarily follows that federal law was persuasive to the Court. In *Columbus Community Hospital*, the Eighth Circuit cited *Bowles v. Seminole Rock & Sand Company*.[19] Seminole Rock first established the doctrine that federal courts should defer to agency interpretations of their own regulations. *Seminole Rock* dealt with price cap regulations enacted to help the Allies' effort during the Second World War.[20] To deal with wartime inflation, the Administrator of the Office of Price Administration issued the "General Maximum Price Regulation," which restricted the maximum price that could be charged for certain goods to the highest price the merchant charged for the good during March 1942.[21] The Administrator interpreted the regulation to mean "[t]he highest price charged during March 1942 means the highest price which the retailer charged for an article actually delivered during that month or, if he did not make any delivery of that article during March, then his highest offering price for delivery of that article during March."[22] Stating that "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used in is doubt" and that "the ultimate criterion is the administrative interpretation," the Supreme Court of the United States adopted the doctrine that agency interpretations of regulations would be given deference unless "plainly erroneous or inconsistent."[23]

The Supreme Court of the United States reaffirmed *Seminole Rock* nearly fifty years later in *Auer v. Robbins*.[24] *Auer* dealt with the Fair Labor Standards Act and its applicability to public sector employees. The Act exempts "bona fide executive, administrative, or professional" employees from certain pay requirements.[25] The Secretary of Labor had significant authority under the Act to adopt rules defining the scope of this exemption.[26] Pursuant to such authority, the Secretary adopted a regulation that in order for an employee to be exempt from the Act, the employee must earn a specific minimum amount on a "salary basis."[27]

18. Columbus Cmty. Hosp., Inc. v. Califano, 614 F.2d 181 (8th Cir. 1980).
19. *Id.* at 185 (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)).
20. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 411 (1945).
21. *Id.* at 413–14. The Office of Price Administration was an independent agency within the federal government tasked with regulating the prices of certain scarce commodities to support the war effort.
22. *Id.* at 417.
23. *Id.* at 414.
24. Auer v. Robbins, 519 U.S. 452 (1997).
25. 29 U.S.C. § 213(a)(1).
26. *Id*.
27. *Auer*, 519 U.S. at 455 (citing 29 C.F.R. § 541.1(f)).

A further regulation stated that an employee would be considered to be paid on a salary basis "if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[28] The petitioners argued that they did not meet the salary basis test because their compensation was subject to potential reductions from disciplinary actions related to the quality or quantity of the work they performed.[29] The Secretary of Labor interpreted the regulation to deny exempt status only when there is a significant likelihood that such deductions will take place.[30] Finding that the Secretary's interpretation fit comfortably within the "subject to" requirement of the regulation, the Court reaffirmed *Seminole Rock* and ruled in favor of the respondent.[31]

C. History of Nebraska's APA, Scope of Review, and Questions of Law

The most extensive historical analysis on the initial passage of Nebraska's APA was written by Professor Steven Willborn in 1981.[32] Professor Willborn's research indicates that the Unicameral[33] adopted Nebraska's APA in 1945 and intended it to be modeled off of the 1946 Model State Administrative Procedure Act (1946 Model Act).[34] The 1946 Model Act, as noted by its prefatory note,[35] was influenced by Mr. Robert Benjamin's 1942 report to the Governor of New York on the state of administrative law in New York (Benjamin Report).[36] As evidence of the Benjamin Report's influence on the 1946 Model Act, the Model Act states that "[t]he report is a thorough critique of state administrative practice in New York and is at the same time a most valuable contribution to the general subject of state administrative procedure. The value of this report is by no means limited to New York State."[37]

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28. *Id.* (citing 29 C.F.R. § 541.118(a)).
29. *Id.*
30. *Id*. at 461.
31. *Id*. at 461–64.
32. *See* Steven L. Willborn, *A Time for Change: A Critical Analysis of the Nebraska Administrative Procedure Act*, 60 NEB. L. REV. 1 (1981).
33. Nebraska is the only state in the Union that has a single body legislature. *See* Neb. Legislature, *History of the Nebraska Unicameral*, https://nebraskalegislature.gov/about/history_unicameral.php [https://perma.cc/S3GB-4XVC].
34. Willborn, *supra* note 32, at 1 n.2.
35. MODEL STATE ADMIN. PROC. ACT, at 3 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1946) (prefatory note).
36. *See generally* ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK: REPORT TO HONORABLE HERBERT H. LEHMAN (1942).
37. MODEL STATE ADMIN. PROC. ACT, at 4 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1946) (prefatory note).

The Benjamin Report offers insight into the minds of those that had an influence on the adopters of Nebraska's APA, at least as it relates to the scope of judicial review of agency determinations of law. The Benjamin Report is strikingly clear that courts are to review agency interpretations of law de novo. It specifically states that "[i]t is generally agreed that quasi-judicial determinations of law should be subject to full review by the courts; and that is the rule applied by the courts, whether or not it is explicitly stated in the particular review statute."[38] The 1946 Model Act was not as explicit in its judicial review provision, but it never definitively stated that judicial review of agency interpretations of law should not be subject to de novo review.[39] Given the clear influence that the Benjamin Report had on the 1946 Model Act, it is more than reasonable to argue that the drafters of the 1946 Model Act intended for courts to make independent determinations on questions of law without deferring to an agency.

Despite the 1946 Model Act's inclusion of a judicial review provision, Nebraska's APA was not a carbon copy of the 1946 Model Act. The initial provisions of Nebraska's APA, as adopted in 1945, never included a judicial review provision.[40] A judicial review provision came along eighteen years later.[41] Regarding appeals to a district court, that provision stated that judicial review "shall be conducted as a de novo proceeding by the court without a jury"[42] whereas a subsequent review of that decision by an appellate court would be heard "in the manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record."[43] The district court de novo review provision mysteriously vanished in a subsequent amendment to Nebraska's APA in 1969.[44] Chapter 84, section 917 of the Revised Statutes of Nebraska was amended again in 1983, and the de novo review provision failed to come back.[45] Again, the district court de novo review provision failed to return in 1987 amendments to Nebraska's APA.[46] The provision was then reborn in 1989 and has survived all subsequent amendments to chapter 84, section 917.[47] Chapter 84, section 918 was not materially altered in a 1987 amend-

38. Benjamin, *supra* note 36, at 347.
39. *See* MODEL STATE ADMIN. PROC. ACT § 12 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1946).
40. *See* Act of Mar. 3, 1945, ch. 255, 1945 Neb. Laws 794. This omission of a judicial review provision, though, follows from the Benjamin Report.
41. *See* Act of Mar. 27, 1963, ch. 531, 1963 Neb. Laws 1664, 1664–66.
42. *Id*. at 1665.
43. *Id*. at 1665–66.
44. *See* Act of Apr. 16, 1969, ch. 838, 1969 Neb. Laws 3161, 3163.
45. *See* L.B. 447 § 102, 88th Leg., 1st Sess. (Neb. 1983) (amending NEB. REV. STAT. § 84-917 (Reissue 2014)).
46. *See* L.B. 253 § 19, 90th Leg., 1st Sess. (Neb. 1987).
47. *See* L.B. 213 § 1, 91st Leg., 1st Sess. (Neb. 1989).

ment[48] but was fundamentally changed in 1989 to require appellate courts to review district court decisions of APA appeals "for errors appearing in the record."[49] In light of all of these changes, the Nebraska Supreme Court set forth the rules of the road in *Slack Nursing Home v. Department of Social Services*.[50] In *Slack*, the Nebraska Supreme Court made clear that Nebraska district courts would review agency decisions de novo, while appellate courts would then review any subsequent appeal for error appearing in the record.[51]

D. Nebraska in Context

Nebraska is an outlier when it comes to modern deference doctrines. Deference is a popular topic at the federal level, but far less work has been devoted to the study of deference doctrines at the state level. However, some recent scholarship has surveyed the landscape of deference doctrines in all fifty states.[52] In more recent years, "[a]t least eight state supreme courts have issued decisions that seem to reject either *Chevron*-or *Auer*-like deference (or both). And at least two more states have rejected deference via legislation or referendum."[53] Within this rebellion, states more aggressively combat the idea that courts should defer to reasonable agency interpretations of regulations as opposed to reasonable agency interpretations of statutes.[54] Ten states currently reject *Chevron*-like deference, with another three rejecting such deference either through statute or constitutional amendment.[55] Nebraska, though, is an anomaly. Nebraska is one of only five states that has *Auer*-like deference to agency interpretations of regulations but fails to defer to reasonable agency interpretations of statutes.[56]

48. *See* L.B. 253 § 20, 90th Leg., 1st Sess. (Neb. 1987).

49. L.B. 213 § 2, 91st Leg., 1st Sess. (Neb. 1989).

50. Slack Nursing Home v. Dep't of Soc. Serv., 247 Neb. 452, 528 N.W.2d 285 (1995).

51. *Id*. at 462, 528 N.W.2d at 293–94; *see also Floor Debate on L.B. 213*, 91st Leg., 1st Sess. 3182–83 (Neb. 1989) (statement of Sen. Landis) (arguing that L.B. 213 was designed to require de novo review by district courts and a narrower scope of review by any subsequent reviewing appellate court as it relates to facts).

52. *See* Daniel Ortner, C. Boyden Gray Ctr. for the Study of the Admin. State, The End of Deference: How States (And Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines (2020).

53. *Id.* at 1.

54. *Id.* at 4.

55. *Id.* at 6–17.

56. *Id.* at 29–30.

III. WHY DEFERENCE MATTERS

Some may look at a topic like deference and wonder why it matters. During a time with a global pandemic,[57] increased racial tensions,[58] and an assault on our nation's Capitol,[59] many might pay little to no attention to a topic like judicial deference to agency interpretations of regulations. This is a mistake. Deference is important for several reasons. First, deference is all about constitutional structure. While the first thing that comes to mind for many people when they think of their constitution is a bill of rights, constitutions center around the proper structure of government.[60] Deference implicates the proper structure and roles of all three branches of government. It implicates the role of the legislative branch by being theoretically based in concerns about legislative presumptions,[61] implicates the executive branch through concerns that the executive branch may be vacuuming up the powers of all three branches of government,[62] and implicates the role of the judiciary by raising significant questions about whether deference requires courts to abdicate their judicial role to "say what the law is."[63] Structure is further implicated in Nebraska because Nebraska's Constitution includes an independent provision on the separation of powers, unlike the Constitution of the United States.[64]

Nebraska's Constitution provides a guarantee that "[n]o person shall be deprived of life, liberty, or property, without due process of

57. *See COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/index.html [https://perma.cc/4597-XFGN] (last visited Sep. 28, 2021).

58. *See* Arian Campo-Flores et al., *On the Anniversary of George Floyd's Killing, Debate About Race Reaches Across American Life*, WALL ST. J. (May 25, 2021, 4:30 AM), https://www.wsj.com/articles/george-floyd-death-anniversary 11621912455 [https://perma.cc/VBS5-4TWC].

59. *See* Shelly Tan et al., *How One of America's Ugliest Days Unraveled Inside and Outside the Capitol*, WASH. POST (Jan. 9, 2021), https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/ [https://perma.cc/Y9SF-PJWU].

60. *See* Antonin Scalia, *Learn to Love Gridlock*, *in* THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW (Jeffrey S. Sutton & Edward Whelan ed., 2020) (arguing that the true distinctiveness of the American system of government is the structure of government).

61. *See infra* section IV.A.

62. *See* City of Arlington v. FCC, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring) (indicating that *Auer* deference permits the executive branch to have powers belonging to all three branches of government in direct conflict with the centralization of power the Founders sought to prevent).

63. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Kisor*, 139 S. Ct. at 2440 (Gorsuch, J., concurring) (arguing that *Auer* deference requires a court to abdicate its proper judicial function).

64. *Compare* NEB. CONST. art. II, § 1, *with* U.S. CONST. art. I–VII.

law."[65] It also provides that each branch of government is distinct from all other branches and that no branch may "exercise any power properly belonging to either of the others, except as expressly directed or permitted in this Constitution."[66] Deference distorts this proper balance of powers because it gives the executive branch the powers of all three branches of government.[67] The executive branch acts as a mini-legislature with its ability to promulgate rules or regulations. And it engages in traditional executive action by enforcing those rules and regulations against Nebraskans. Further, the executive branch wields judicial power by being the final say on a question of law (the correct interpretation of a regulation at issue), even if the interpretation pushed by the agency is not the best interpretation of that regulation.[68]

Next, rules and regulations[69] make up a significant part of government by-products that bind the conduct of Nebraskans. Currently, the Nebraska Secretary of State tracks all rules and regulations that must go through the public notice and comment process.[70] In 2021, there were ninety-two proposed rules currently working their way through the approval process.[71] This number is roughly half of the

65. NEB. CONST. art. I, § 3.

66. NEB. CONST. art. II, § 1. Nebraska courts describe the separation of powers as the "beam from which our system of checks and balances is suspended." State *ex rel.* Spire v. Conway, 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991).

67. Nebraska case law states that the Nebraska Constitution's guarantee of the separation of powers is distinct from the separation of powers established by the Federal Constitution. The Nebraska Supreme Court defines this distinction as being absolute and "more certain and positive than the provisions of the federal Constitution." Transp. Workers of Am. v. Transit Auth. of Omaha, 205 Neb. 26, 34, 286 N.W.2d 102, 107 (1979) (citing Laverty v. Cochran, 132 Neb. 118, 121, 271 N.W. 354, 356 (1936)).

68. Though he raises this argument in the *Chevron* context, Professor Philip Hamburger argues that the consequence of judicial deference to agency interpretations of law is a systemic bias in favor of the government, an enormously powerful party, against all those the government opposes in litigation. *See* Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016). In Nebraska, this power dynamic is represented in the *Prokop* case, where a landowner litigating against the Lower Loup Natural Resources District was, at times, pro se. Prokop v. Lower Loup Nat. Res. Dist., 302 Neb. 10, 19, 921 N.W.2d 375, 386 (2019). Justice Gorsuch criticizes this blending of powers as "denying the people their right to an independent judicial determination of the law's meaning." *Kisor*, 139 S. Ct. at 2441 (Gorsuch J., concurring).

69. *See infra* note 74.

70. NEB. REV. STAT. § 84-906.04 (Reissue 2014). The Secretary of State only tracks rules and regulations that constitute a new rule or regulation or an amendment to a duly enacted rule or regulation. *Id*. The Secretary of State does not produce reports on how many new rules, regulations, or amendments are promulgated every year.

71. *Proposed Rules and Regulations Docket*, NEB. SEC'Y OF STATE, https://www.nebraska.gov/nesos/rules-and-regs/regtrack/index.cgi [https://perma.cc/H9CP-HXXM].

total number of statutes passed in the First Session of the 107th Legislature.[72] If every proposed rule were to be approved, this would mean that roughly one-third of all government by-products governing the conduct of Nebraskans come in the form of rules and regulations in 2021.[73] Furthermore, the Nebraska Administrative Code is massive and comprises a large body of rules that can be enforced against Nebraskans.[74] This complex scheme is designed to regulate the conduct of Nebraskans. Nebraskans will inevitably engage with agencies through the rules that they enforce, so it is important to understand what is being enforced against Nebraskans and how the application of those rules might play out in litigation. Thus, even though deference is not a widely discussed topic in politics, it is of enormous importance.

IV. THE DEFENSES OF DEFERENCE

Before arguing that deference to agency interpretations of regulations is a legally inconsistent and ill-advised doctrine in Nebraska,

72. *Final Worksheet*, 107th Leg., 1st Sess. (Neb. 2021) (showing that 197 legislative bills went into effect at the end of the first session of the 107th legislature).

73. It should be noted that this comparison cannot account for certain political realities. There is no guarantee that every proposed rule or regulation will be promulgated, and the Attorney General could kill the proposed rule or regulation. *See* NEB. REV. STAT. § 84-905.01 (Reissue 2014). It is possible that a Governor could turn his or her back on the proposed rule and refuse to approve the rule or regulation. *See* NEB. REV. STAT. § 84-908(1) (Reissue 2014). Furthermore, a 1:1 comparison like this cannot account for the actual number of requirements a regulation places on Nebraskans. It is also possible that the total amount of regulatory requirements actually equals the number of statutory requirements in Nebraska. Because no governmental entity in Nebraska tracks how many proposed rules or regulations go into effect over a multi-year time span, this is the only way to compare how many statutes are enacted relative to rules or regulations.

74. There are approximately 34,281 statutes currently in effect in Nebraska and approximately 14,739 rules and regulations in place. *Compare* NEB. REV. STAT. R.S. SUPP. 2020, *with* NEB. ADMIN. CODE. This means that there are roughly 42.86% as many regulations as there are statutes in Nebraska. Certain agencies have an enormous number of regulations. Some agencies have promulgated for more rules than others. For example, the Nebraska Department of Health and Human Services has promulgated more than 3,000 regulations. *See* 15 NEB. ADMIN. CODE; 172 NEB. ADMIN. CODE; 173 NEB. ADMIN. CODE; 174 NEB. ADMIN. CODE; 175 NEB. ADMIN. CODE; 177 NEB. ADMIN. CODE; 178 NEB. ADMIN. CODE; 179 NEB. ADMIN. CODE; 180 NEB. ADMIN. CODE; 181 NEB. ADMIN. CODE; 183 NEB. ADMIN. CODE; 184 NEB. ADMIN. CODE; 185 NEB. ADMIN. CODE; 186 NEB. ADMIN. CODE; 202 NEB. ADMIN. CODE; 206 NEB. ADMIN. CODE; 390 NEB. ADMIN. CODE; 391 NEB. ADMIN. CODE; 392 NEB. ADMIN. CODE; 395 NEB. ADMIN. CODE; 400 NEB. ADMIN. CODE; 401 NEB. ADMIN. CODE; 403 NEB. ADMIN. CODE; 404 NEB. ADMIN. CODE; 405 NEB. ADMIN. CODE; 462 NEB. ADMIN. CODE; 463 NEB. ADMIN. CODE; 464 NEB. ADMIN. CODE; 465 NEB. ADMIN. CODE; 466 NEB. ADMIN. CODE; 467 NEB. ADMIN. CODE; 468 NEB. ADMIN. CODE; 469 NEB. ADMIN. CODE; 470 NEB. ADMIN. CODE; 471 NEB. ADMIN. CODE; 472 NEB. ADMIN. CODE; 474 NEB. ADMIN. CODE; 475 NEB. ADMIN. CODE; 476 NEB. ADMIN. CODE; 477 NEB. ADMIN. CODE; 479 NEB. ADMIN. CODE; 480 NEB. ADMIN. CODE; 481 NEB. ADMIN. CODE; 482 NEB. ADMIN. CODE.

this Comment will set out the classic defenses of judicial deference to agency interpretations of law. After all, courts should deviate from precedent only in exceptional circumstances, so it is important to understand why deference's defenses are incorrect.[75] A defense of deference, though, can only be analyzed by looking at case law from the Supreme Court of the United States and relevant scholarly work because the Nebraska Supreme Court has never sketched out a defense of deference.

As articulated in case law from the Supreme Court of the United States, the prominent defense of deference to agency interpretations of regulations is that deference is a form of congressional intent.[76] The Supreme Court views *Auer* deference as rooted in an idea that Congress intended for the executive branch, through the agency at issue, the regulatory ambiguity because "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[77] The Court believes the agency, as a drafter of the regulation at issue, is in a better position to construct its original meaning.[78] Additionally, the Supreme Court has indicated that regulatory ambiguities often entail making decisions about policy, which an agency is better situated to make than a court is.[79] This is especially true because agencies often have specialized expertise in technical or scientific matters and can better apply that expertise in a complex or changing situation.[80] Finally, the Supreme Court notes that deference promotes uniformity and ultimately prevents a hodgepodge of interpretations between the federal appellate courts.[81]

These defenses should be rethought, particularly when applied in Nebraska. While Congress—and ultimately any legislative body—might want the executive branch, another political branch, to play a role in policymaking, there is no evidence that shows the legislative branch ever explicitly indicated that agencies should be given deference when interpreting statutes or regulations. This assumption also creates a host of negative policy implications. Next, the common defenses of deference lack any sort of connection to the Federal APA, which makes adopting the doctrine in Nebraska all the more questionable. Third, while agencies are often considered experts, this fails to account for the large differences in the areas in which agencies regu-

75. Potter v. McCulla, 288 Neb. 741, 753, 851 N.W.2d 94, 104 (2014) (stating that stare decisis must be adhered to "unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.").
76. Kisor v. Wilkie, 139 S. Ct. 2400, 2412 (2019).
77. Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1991).
78. *Kisor*, 139 S. Ct. at 2412.
79. *Id.* at 2413.
80. *Id.*
81. *Id.* at 2414.

late, and expertise alone should not give an agency deference. Finally, uniformity in the law is not a concern in Nebraska due to the appellate court structure that Nebraska has compared to the federal government.

A. Assuming Congress Intended for Agencies to Resolve Ambiguities in Regulations, or Even Statutes, is a Bad Assumption

A consensus has existed for quite a while that the general idea that courts should defer to agency interpretations of law is rooted in a belief that Congress intended for agencies to have such power.[82] While it is not clear where this idea came from, Justice Antonin Scalia certainly pushed the idea in the *Chevron* domain.[83] Under Justice Scalia's theory, the rationale for deference is rooted in "Congress' intent on the subject as revealed in the particular statutory scheme at issue."[84] According to Justice Scalia, pre-*Chevron* courts made this determination on a statute-by-statute basis, and *Chevron* served the purpose of creating a more bright-line deference rule whenever a court found a statute ambiguous.[85]

The main issue with this assumption is that there is simply no evidence to support it.[86] Justice Scalia describes the search for congressional intent as a "wild-goose chase."[87] He ultimately defends this belief by arguing that such a presumption about congressional intent is better for the modern practice of government.[88] Scalia argues that because the act of delegation from the legislative branch to the executive branch "is the hallmark of the modern administrative state," such a presumption is better than de novo review because it creates "a background rule of law against which Congress can legislate."[89] But Justice Scalia provided no evidence for such intent by Congress, and his defense is ultimately rooted in policy considerations related to the massive growth in administrative agencies and the rules they promul-

82. *Id*. at 2412 ("We have explained Auer deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.").
83. *See* The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).
84. *Id.* at 516 (citing Process Gas Consumers Grp. v. U.S. Dep't of Agric., 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc)).
85. Scalia, *supra* note 83, at 516.
86. Professor Jack Beermann made this same argument, noting that this presumption is little more than a "legal fiction." Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 796 (2010).
87. Scalia, *supra* note 83, at 517.
88. *Id.* at 516.
89. *Id.* at 516–17.

gated over the past century.[90] Oddly enough, Justice Scalia seems to undermine his own argument when he stated, "[i]n the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all."[91] Nothing about this belief shows that Congress intended to confer discretionary power on agencies.

The opinion in *Kisor* makes the same argument but fails to show any support for such a belief. The *Kisor* majority described deference to agency interpretations of regulations as necessary due to routine delegations from Congress to agencies to implement statutes by issuing rules.[92] Essentially, the Court reasoned that a presumption of deference is justified simply because Congress bestowed considerable rulemaking authority on federal agencies.[93] The Court ultimately provided no actual evidence for such a belief. The Court never cited any document of Congress that showed it intended for the agency to have the power to resolve ambiguities. Simply giving an agency rulemaking authority is not an indication that agencies should be given deference as to the meaning of a regulation. By bestowing regulatory authority on an agency, Congress wants an agency to enact specific regulations to target a particular problem. This is not the same, though, as the power to be the final say on the meaning of a regulation that binds the public.[94]

This presumption creates a host of negative incentives at both the state and federal levels. First, the presumption creates an incentive for the legislative branch to delegate more to agencies. It is important to note that incentives and results are different things. It is possible that an incentive to delegate does not necessarily create more delegation. The issue, though, is that a system of incentives allows for the possibility of serious problems. While this Comment does not seek to argue the merits of delegation, there are serious democratic and constitutional concerns about excessive or abusive delegation, and defer-

90. *Id.* at 516.

91. *Id.* at 517.

92. Kisor v. Wilkie, 139 S. Ct. 2400, 2412 (2019).

93. *Id*.

94. *See* Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 261 (1988). Professor Sunstein argued that a delegation of power is not the same as the power to be the final say on a question of law, and that such a belief would give agencies power that they lacked under a proper understanding of the separation of powers. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 466 (1987). Justice Gorsuch's concurrence in *Kisor* also attacks this conflation as ignoring that simple fact that Congress could have easily written the Federal APA to require deference and that the Court should not accept a proposition clearly at odds with plain language of the Federal APA. *Kisor*, 139 S. Ct. at 2435.

ence permits such practices.[95] Next, the presumption permits the legislative branch to minimize the role it plays while maximizing the role that the executive branch plays. Simply put, the legislative branch is permitted to delegate up until the point that it violates the applicable non-delegation doctrine.[96] This creates a system of incentives where the legislative branch can, and probably will, minimize its role to push more responsibility for governance to the executive.[97] Finally, this presumption has likely played a role in creating today's political instability. By giving the legislative branch a permission slip to minimize its role, courts have created a system of incentives that encourages legislators to politicize issues instead of resolving genuine issues with statutes. Legislators are, in effect, mostly just campaigning for changes in the White House (or governor's mansion) and more often resort to criticizing agency officials for interpretive decisions they make instead of changing the statutory structure themselves.[98]

B. The *Kisor* Defense Lacks a Connection to the Federal APA

While the *Kisor* Court made an admirable defense of deference, its defense is ultimately inadequate because it fails to properly incorporate the Federal APA. The *Kisor* Court did not completely ignore the Federal APA. It devoted quite a few pages to a discussion of 5 U.S.C. § 706 and its relevance to the case.[99] The Court only focused

95. *See generally* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015) (arguing that delegation permits Congress, the branch closest to the general public, to collude with the executive branch, raising serious separation of powers concerns).

96. Generally speaking, Nebraska's nondelegation doctrine prohibits the legislature from delegating legislative power to the executive branch. Schumacher v. Johanns, 272 Neb. 346, 364, 722 N.W.2d 37, 51 (2006). When conferring administrative authority upon an agency, the legislature must provide standards that are "reasonably adequate, sufficient, and definite for the guidance of the agency in the exercise of the power conferred upon it and must also be sufficient to enable those affected to know their rights and obligations." Ponderosa Ridge v. Banner Cnty., 250 Neb. 944, 951–52, 554 N.W.2d 151, 157 (1996) (citing State *ex rel*. Douglas v. Neb. Mortg. Fin. Fund, 204 Neb. 445, 464–65, 283 N.W.2d 12, 24 (1979)). This standard is quite similar to the intelligible principle standard found in federal law. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citing J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

97. It is possible that this temptation is less prevalent in Nebraska. Unlike Congress, legislators in the Unicameral are term limited. Those who criticize deference as encouraging more delegation and a less active legislature often root these assertions in a presumption that an individual legislator's main goal is to be reelected. *See* Justin (Gus) Hurwitz, *Chevron's Political Domain: W(h)ither Step Three*, 68 DEPAUL L. REV. 615, 630 (2019). If legislators are term limited, they may feel less pressure to push governance responsibilities to the executive.

98. *Id*. at 629.

99. Kisor v. Wilkie, 139 S. Ct. 2400, 2418–22 (2019).

on one small snippet of the text of that statute, namely the part that states that a reviewing court shall "determine the meaning or applicability of the terms of an agency action."[100] The Court never grappled with the introductory phrase of that statute that states "the reviewing court shall decide all relevant questions of law."[101] It is this phrase, in conjunction with the phrase the Court focused on, that must be analyzed, not each phrase isolated from one another. By only focusing on one phrase in the statute, the Court essentially renders the introductory clause superfluous, which violates a basic tenet of statutory construction.[102] The Court never once grappled with how deference complies with the command that courts determine the meaning of all relevant questions of law.[103]

This lack of a connection to the Federal APA makes the lack of a justification for the doctrine in Nebraska more startling. As noted above, the *Wilken* court never gave a reason for why it felt Nebraska courts must defer to reasonable agency interpretations of their regulations. By simply citing federal law, the Court essentially adopted whatever justifications existed in federal court. But no precedent, starting from *Seminole Rock*, ever squared the doctrine with the Federal APA. And no Nebraska Supreme Court opinion has justified it in light of Nebraska's APA. In light of the textual differences between Nebraska's APA and the Federal APA, it is even more necessary for a defense of deference in Nebraska to have some connection to the state's APA.[104] While Justice Papik's reference to the doctrine being ultimately adopted in Nebraska based on "a dubious proposition of

100. *Id.* at 2418; *see* 5 U.S.C. § 706.

101. 5 U.S.C. § 706.

102. *See* Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) (indicating that the canon "against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 174 (1st ed. 2012) ("If possible, every word and every provision is to be given effect.").

103. Many commentators believe that the Federal APA actually requires de novo review on the meaning of regulations, as well as statutes. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1982*, 72 CHI.-KENT L. REV. 1039, 1085–86 (arguing that section 706 of the Federal APA requires de novo review on questions of law but a more deferential approach when a statute explicitly gives an agency discretion); Beermann, *supra* note 86, at 786–87 (arguing that questions of law and questions of policy discretion are distinct and that the Federal APA requires de novo review of questions of law); *Kisor*, 139 S. Ct. at 2433 (Gorsuch J., concurring) (indicating that the obvious requirement of section 706 of the federal APA is de novo review). *But see* Nicholas R. Bednar & Kristen E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1460 (2017) (arguing that even if the Federal APA was amended, courts may not always review questions of law de novo).

104. *Compare* NEB. REV. STAT. § 84-917 (Reissue 2014), *and* NEB. REV. STAT. § 84-918 (Reissue 2014), *with* 5 U.S.C. § 706.

federal law"[105] is likely based on concerns about the separation of powers, the most dubious proposition of all is that judicial deference to agency interpretations of regulations has never been justified with the plain text of Nebraska's APA, which interferes with the desires of Nebraskans when their elected representatives adopted their own APA decades ago.

C. Rethinking Agency Expertise

Another prominent defense of deference is that agencies are experts and experts are either (a) more likely to know the original intent behind an ambiguous regulation or (b) owed deference as a result of their expertise when courts view decisions around ambiguity as being ultimately rooted in policy decisions.[106] This defense made its way into the *Kisor* opinion and is often made by academics defending deference as a doctrine.[107] Those defending deference often argue that, by virtue of their expertise, agencies are superior to courts when making decisions that are ultimately policy decisions.[108]

It is hard to argue that agencies are not experts in particular areas. Any citizen can look at the website of many state and federal agencies, look at the officials at that agency, and recognize that many individuals in leadership have significant experience that makes them subject matter experts in their respective fields. While expertise and credentials can certainly be called into question, agencies do serve as repositories of specialized knowledge given their unique role in administering statutes over decades. Plus, some agencies administer programs that often involve highly technical or scientific subjects. telecommunications, Medicaid, and patents are just a few examples of areas of law that fit this description.

This defense, though, does not actually explain why agencies should get deference. The simple fact that agencies often have specialized expertise does not *ipso facto* mean that agencies should be given deference. Courts are regularly inundated with expertise. Many litigants are sophisticated parties due to being highly regulated by state and federal agencies. Amicus briefs from a variety of subject matter experts with views across the spectrum flood federal courts at an enormous rate.[109] If expertise alone justified deference, the only real rea-

105. *See generally* Prokop v. Lower Loup Nat. Res. Dist., 302 Neb. 10, 43, 921 N.W.2d 375, 400 (2019) (Papik, J., concurring).
106. *See generally Kisor*, 139 S. Ct. at 2400.
107. *See generally* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297 (2017).
108. *Id.* at 306–07.
109. *See* Anthony J. Franze & R. Reeves Anderson, *Amicus Curiae at the Supreme Court: Last Term and the Decade in Review*, NAT'L L.J. (Nov. 18, 2020), https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/11/amicus-curiae-at-the-supreme-court.pdf [https://perma.cc/W5HZ-WVE9].

son that a court should not defer to a subject matter expert who submits an amicus brief is that amicus are often private parties.[110] This argument cannot be taken seriously, though, because no one would argue that such an action would not violate a court's duty to independently determine questions of law. But the implication of arguing that agencies, by way of their expertise, should be given deference is that agencies are the main and most prominent experts. This belief fails to consider the fact that many parties are experts, not just agencies.

This assumption also essentially treats all agencies the same. There is no distinction made between an agency dealing with, for example, labor and employment law and the regulation of food and drugs. To a certain extent, this is true. For instance, under Nebraska law, there is no real legal distinction between the Nebraska Department of Labor, the Nebraska Department of Health and Human Services, and the Nebraska Public Service Commission.[111] All are agencies because all are permitted to adopt rules and regulations.[112] So, in the legal sense, there is no distinction. But from a practical standpoint, not all agencies are the same. An agency like the Nebraska Equal Opportunity Commission is authorized to promulgate, for example, rules and regulations related to the prevention of sex discrimination in the workplace.[113] At a time when workplace retaliation claims are growing at a massive rate,[114] it is reasonable to think that private sectors lawyers have just as much expertise on the topic as the agency's lawyers and experts do.

An agency like the Nebraska Public Service Commission, though, is different. The Commission has the authority to regulate competition in the telecommunications sector in Nebraska.[115] Given the challeng-

110. Justice Scalia made a similar point in his Duke Law Journal article. He argued that expertise is a good political reason for deferring to agencies but is not a valid reason to do so from a legal standpoint. He pointed out that this same argument would justify him simply deferring to whatever Judge Learned Hand would have desired had he served on the Supreme Court while Judge Hand was alive. Scalia, *supra* note 83, at 514.

111. The only technical distinction is that the Nebraska Public Service Commission is considered a "non-code agency." *See* NEBRASKA BLUE BOOK 572 (Kate Heltzel ed., 55th ed. 2021). These agencies are insulated from direct political control by the Governor and are much akin to so-called independent agencies at the federal level.

112. *See* NEB. REV. STAT. § 84-901(1) to (2) (Reissue 2014).

113. *See* NEB. REV. STAT. § 48-1222(5) (Reissue 2010).

114. *See Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020 [https://perma.cc/3K5F-M9DP] (last visited Oct. 10, 2021).

115. Among many other delegations of authority in the telecommunications sector, the Public Service Commission has authority to implement the Federal Telecommunications Act of 1996. *See* NEB. REV. STAT. § 86-122(1) (Reissue 2014).

ing and changing landscape of technology that constantly impacts the telecommunications sector, it might be fair to argue that the Commission has some expertise that the private sector might lack. This argument should not be taken to mean that certain agencies should be entitled to deference due to the particular areas they regulate while others should receive no deference. It is rather a recognition that not all agencies are the same. To treat them the same fails to consider the distinctions in the areas they regulate that makes classifying agencies as experts less compelling.

D. Uniform Interpretations of Law Are Inapplicable in Nebraska

The *Kisor* Court also expressed concern that a judicial system without deference would be one in which citizens throughout the country could be subject to a hodgepodge of varying interpretations of genuinely ambiguous rules.[116] The Court noted that a deference rule would have prevented the various interpretations that federal courts gave to the rule at issue in *Auer*.[117] Regardless of the merits of this concern, it is entirely inapplicable in Nebraska. This concern exists because the federal court system is divided into various appellate courts, all of whom may have different interpretations on an issue the Supreme Court has not decided.

Nebraska does not have this type of appellate system. Nebraska's appellate court system only consists of the Court of Appeals and the Supreme Court, and the Court of Appeals is not divided into circuits as federal courts of appeal are.[118] This means that Nebraska courts will have uniform interpretations as to the meaning of a regulation.

V. TENSION IN NEBRASKA LAW

Deference to agency interpretations of their own regulations is in tension with Nebraska law. The most obvious area of tension is with Nebraska's APA.[119] Given the textual requirement that district courts review agency actions "de novo on the record of the agency," requiring deference to agency interpretations of regulations seems in clear conflict with the text of Nebraska's APA.[120] The doctrine also fails to comply with the requirement that Nebraska appellate courts independently review questions of law. Furthermore, deference renders the de novo review requirement of Nebraska's APA superfluous because deference in and of itself is less of a review than de novo is,

116. Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019).
117. *Id.*
118. *See* NEB. CONST. art. V, § 2.
119. *See* NEB. REV. STAT. §§ 84-901 to -920 (Reissue 2014).
120. NEB. REV. STAT. § 84-917(5)(a) (Reissue 2014).

thus reading out the de novo review requirement when an agency's interpretation of a regulation it enforces is at issue or is in question. Finally, the doctrine is undercut by the Nebraska Supreme Court's refusal to adopt a mandatory deference doctrine for agency interpretations of statutes they enforce.

A. Nebraska's APA Requires De Novo Review

Deference to agency interpretations of regulation is inconsistent with Nebraska's APA. Decisions of agencies[121] are reviewed by district courts "de novo on the record of the agency."[122] In *Medicine Creek LLC v. Middle Republican Natural Resources District*,[123] the Nebraska Supreme Court made clear that the proper standard of review for districts is the de novo standard, not a review for errors in the record.[124] The Court made clear that the district court "erroneously limited its review" by not reviewing the agency action under the de novo review standard.[125] The plain text of chapter 84, section 917(5)(a) of the Revised Statutes of Nebraska necessarily precludes judicial deference to agency interpretations of their own regulations. The plain meaning of de novo requires Nebraska courts to make independent determinations of questions of law. Dictionary meanings of de novo always mean "anew."[126] If de novo review means to review anew, then it simply cannot be the case that the judiciary must give deference to agency interpretations of their own regulations because there would be nothing to review anew. The court was simply resorting to the agency's reasonable interpretation of a regulation. If the only legal question was the proper interpretation of a regulation by an agency on appeal, then de novo review is completely impossible if deference is afforded to such an interpretation.[127]

Historical inquiry shows that past Nebraska case law has refused to give outright deference to agencies or government officials on questions of law. In 1903, the Nebraska Supreme Court stated that while agencies were perfectly permitted to act in a quasi-judicial fashion, their decisions were reviewable by courts and that courts "can and

121. *See* NEB. REV. STAT. § 84-901(1) (Reissue 2014).
122. NEB. REV. STAT. § 84-917(5)(a) (Reissue 2014).
123. Med. Creek v. Middle Republican Nat. Res. Dist., 296 Neb. 1, 892 N.W.2d 74 (2017).
124. *Id.* at 8, 892 N.W.2d at 80.
125. *Id.*, 892 N.W.2d at 80.
126. *De Novo*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting the meaning has been the same since 1536).
127. Oddly enough, the Supreme Court of the United States stated in *Kisor* that Congress was free to require courts to make interpretive decisions as to the meaning of a regulation de novo. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2422–23 (2019). Nebraska's APA explicitly does this, but the Nebraska Supreme Court still refuses to move away from deference.

should adjudicate disputes based on the rights of the parties acquired under the statute."[128] Administrative bodies are "possessed of powers of an administrative character"[129] and "may make all needful preliminary determinations to enable it to regulate"[130] but courts possess "judicial powers"[131] which enable courts to determine the "substance of the rights [under statute]."[132] In 1908, the Nebraska Supreme Court refused to give outright deference to an agency official tasked with enforcing a statute, stating that the conduct of those officials is only "entitled to some consideration in interpreting the statute."[133] A similar rationale was used fifteen years later in a case dealing with a long-standing interpretation by officials tasked with enforcing a statute.[134]

Even though this rationale dealt with statutes, Nebraska courts then made clear two years after its own APA was enacted that "where an administrative body is set up under law with legal regulations likewise set up for their guidance, their interpretation upon which they have acted, *though not necessarily controlling*, should be given weight."[135] The *Flint* rationale was again used in 1960 in *In re Application No. 5218, Water Division*, where the Nebraska Supreme Court indicated that administrative officials would not be given complete deference, but their interpretations of law would be entitled to "considerable weight."[136] All in all, Nebraska courts have a long history of refusing to defer to agencies on questions of law, and the modern practice of giving deference to agency interpretations of regulations violates Nebraska's APA and deviates from the historical practice of independently deciding questions of law.

From a logical perspective, deference cannot comport with the de novo review requirement. As most lawyers know, trial level courts engage both in factfinding and legal determinations. As a suit gets appealed, appellate courts generally are deferential to the factual findings of lower courts and make de novo determinations as to questions of law. There are always exceptions to this structure,[137] but this

128. Crawford Co. v. Hathaway, 67 Neb. 325, 368, 93 N.W. 781, 796 (1903).
129. *Id.*, 93 N.W. at 795.
130. *Id.*
131. *Id*.
132. *Id.*, 93 N.W. at 796.
133. *In re* Hastings Brewing Co., 83 Neb. 111, 116, 119 N.W. 27, 29 (1908).
134. *See* State *ex rel*. W. Bridge & Constr. Co. v. Marsh, 111 Neb. 185, 188, 196 N.W. 130, 131 (1923).
135. Flint v. Mitchell, 148 Neb. 244, 249, 26 N.W.2d 816, 819 (1947) (emphasis added).
136. *In re* Application No. 5218, Water Div., 170 Neb. 257, 274, 102 N.W.2d 416, 426 (1960) (citing *Flint*, 148 Neb. at 249, 26 N.W.2d at 819).
137. The most prominent exception is probably the standard of review for juvenile cases. "An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the findings made by the juvenile court below." State v. Juana L. (In the Interest of Mateo L.), 309 Neb. 565, 578, 961 N.W.2d 516, 526 (2021).

general framework is generally how most legal systems work. Deference morphs this typical structure. Nebraska's district courts hear appeals from administrative agencies and, under the de novo requirement, review the factual findings and determinations anew on the record of the agency. What is odd about deference is that it requires the district court to engage in a more searching review for factual issues than it does the meaning of a regulation (a question of law). One will not find this scheme anywhere else in Nebraska law.

The only possible retort to this claim is that the de novo review requirement applies only to factual determinations. It is possible that this is true. The statute makes no distinction between law and facts.[138] It is not implausible to think that the Nebraska Unicameral adopted and revised Nebraska's APA under the assumption that a reviewing court would make independent determinations of law given the Benjamin Report.[139] However, even if this is true, it does nothing about the issues surrounding a court's proper role in adjudicating executive functions. Courts, particularly appellate courts or district courts acting in an appellate or quasi-appellate fashion, exist to resolve issues surrounding questions of law. These courts are specifically designed to be deferential to facts but make independent determinations on questions of law. So, regardless of whether or not the de novo requirement is meant to cover how courts decide questions of law, judicial deference to agency interpretations of their own regulations is inconsistent with Nebraska's APA.

B. The Meaning of Regulations Is a Question of Law and Nebraska Appellate Courts Must Independently Review Questions of Law

Judicial deference to agency interpretations of their own regulations is also inappropriate in light of Nebraska Supreme Court opinions on how questions of law are to be determined by appellate courts. Under applicable precedent from the Nebraska Supreme Court, appellate courts are obligated to resolve questions of law independent from the conclusions of the trial court.[140] Historically, Nebraska courts have indicated that questions of law in administrative actions are to be reviewed anew by courts.[141] In many instances, the Court has stated that the meaning and interpretation of regulations is a question of law that appellate courts decide independently of any decision

138. *See* NEB. REV. STAT. § 84-917 (Reissue 2014).

139. *See* MODEL STATE ADMIN. PROC. ACT, *supra* note 35.

140. *See, e.g.*, Tyrell v. Frakes, 309 Neb. 85, 90, 958 N.W.2d 673, 679 (2021).

141. *See* The 20's, Inc. v. Neb. Liquor Control Comm'n, 190 Neb. 761, 765, 212 N.W.2d 344, 347 (1973) (indicating that questions of law in administrative matters are for the court to decide).

made by a trial court.[142] The proper construction of a statute is a question of law in Nebraska, and Nebraska appellate courts are obligated to make interpretive decisions independent of those made by a trial court.[143] Properly adopted and filed regulations have the effect of statutory law in Nebraska.[144]

The combination of these precedents means: (1) Nebraska appellate courts make independent decisions as to questions of law, and statutory construction is a question of law; and (2) regulations have the effect of statutory law, which means that they should be interpreted in the same fashion that statutes are interpreted. Judicial deference to agency interpretations of regulations does not fit within this framework, though. By giving deference to an interpretive question, Nebraska courts fail to follow their own precedent that requires them to make independent decisions as to questions of law. Deference necessarily means that the entity actually making the interpretation is the agency at issue, not the reviewing court. While the plainly erroneous standard does give courts some room to make interpretive decisions, that standard clearly is not the de novo review required under Nebraska's APA because the default is that the agency's interpretation will hold unless plainly erroneous.

C. Deference Renders the De Novo Review Requirement Superfluous

Judicial deference to agency interpretations of regulations violates basic rules of statutory construction in Nebraska. In making statutory construction decisions, Nebraska courts are required to interpret statutes in a fashion that, when possible, gives meaning to all parts of a statute and interpret statutes as not to render any word, clause, or sentence superfluous.[145] By deferring to acceptable agency interpretations of regulations, Nebraska courts essentially render the de novo review requirement from the text of chapter 84, section 917(5)(a) of the Revised Statutes of Nebraska superfluous because courts fail to give substantive meaning to that provision when the issue in the case centers around an agency's interpretation of a regulation it enforces. As has been already argued, de novo review precludes deference because de novo review has always meant an entirely new review by a court, and this necessarily prevents a court from deferring to any entity's interpretation of a regulation. Nebraska courts have rendered

142. *See* Christopherson v. Neb. Dep't of Health and Hum. Serv., 308 Neb. 610, 616, 956 N.W.2d 17, 21–22 (2021); Abay, L.L.C. v. Neb. Liquor Control Comm'n, 303 Neb. 214, 219, 927 N.W.2d 780, 784 (2019); McManus Enters. v. Neb. Liquor Control Comm'n, 303 Neb. 56, 62, 926 N.W.2d 660, 666 (2019).
143. *In re* Guardianship of Nicholas H., 309 Neb. 1, 8, 958 N.W.2d 661, 667 (2021).
144. Saylor v. State, 306 Neb. 147, 154, 944 N.W.2d 726, 732 (2020).
145. Ryan v. Streck, Inc., 309 Neb. 98, 109, 958 N.W.2d 703, 711 (2021).

the de novo review provision superfluous in cases dealing with agency interpretations of regulations, violating their own rules on statutory construction.

D. No Deference Is Given to Agency Interpretations of Statutes

Without any explanation, the Nebraska Supreme Court adopted the doctrine of deference to reasonable agency interpretations of their own regulations in *Wilken*.[146] Oddly enough, the Nebraska Supreme Court has rejected the idea that courts must defer to reasonable agency interpretations of statutes.[147] Even though agency interpretations of statutes they enforce are highly persuasive, the Nebraska Supreme Court, through August of 2020, has continually refused to adopt a flat-out deference doctrine as it relates to agency interpretations of statutes.[148]

By failing to defer to agency interpretations of statutes they enforce, the Nebraska Supreme Court has eliminated any argument that deference to agency interpretations of their own regulations is best seen as rooted in legislative intent. The Supreme Court of the United States made clear in *Kisor* that the prominent reason that deference should be given is that Congress intended for the agency to resolve the regulatory ambiguity at issue and that the power to resolve regulatory ambiguities is best resolved by a policymaking branch.[149] This reason for deference, however, cannot be what is guiding the Nebraska Supreme Court. The Nebraska Supreme Court, though it gives great weight to agency interpretations, resolves statutory ambiguities itself, even though it is not a policymaking branch.[150] If this justification is what drives the Court to maintain this doctrine, then it would certainly apply the same doctrine to agency interpretations of the statutes they enforce. Without a clear justification, the only remaining possible justification is stare decisis. Ultimately, the Court undercuts the doctrine by failing to defer to reasonable agency interpretations of statutes.

146. *See generally* Dep't of Banking & Fin. of State of Neb. v. Wilken, 217 Neb. 796, 352 N.W.2d 145 (1984).

147. City of Omaha v. Kum & Go, 263 Neb. 724, 732–33, 642 N.W.2d 154, 161 (2002) (stating that although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction).

148. *See* Ash Grove Cement Co. v. Neb. Dep't of Revenue, 306 Neb. 947, 969, 947 N.W.2d 731, 746 (2020).

149. Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019).

150. *See* NEB. CONST. art. II, § 1.

E. Judicial Deference to Agency Interpretations of Regulations Violates Nebraska's Constitutional Guarantee of the Separation of Powers

Perhaps the most common criticism of judicial deference to agency interpretations of regulations is that such deference violates the separation of powers doctrine. This criticism is applicable to deference's existence in Nebraska. Nebraska's Constitution contains an explicit separation of powers provision.[151] In practice, the Nebraska Supreme Court interprets this provision to prohibit "one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives."[152]

Under this interpretation, judicial deference to agency interpretations of regulations violates Nebraska's Constitution. While deference can be seen to permit the executive to "encroach on the duties and prerogatives" of multiple branches of government, it most certainly interferes with the powers of the judicial branch.[153] Nebraska Supreme Court precedent makes clear that the judicial branch has an "imperative duty . . . to protect its jurisdiction at the boundaries of power fixed by the Constitution."[154] Deference requires the judiciary to violate its own precedent. By deferring to the executive branch, the judiciary is essentially ceding its most sacred power, the power to say what the law is, to the executive.[155]

In cases dealing with alleged interference by other branches, the Nebraska Supreme Court appears more than willing to enforce the bounds of Nebraska's separation of powers doctrine. For example, in *Shepherd*, the Nebraska Supreme Court held unconstitutional a statute that it felt permitted the legislative branch to dictate to the execu-

151. *Id*.

152. State *ex rel*. Shepherd v. Neb. Equal Opportunity Comm'n, 251 Neb. 517, 524, 557 N.W.2d 684, 690 (1997).

153. *Id*.

154. State *ex rel*. Sorensen v. State Bank of Minatare, 123 Neb. 109, 114, 242 N.W. 278, 281 (1932).

155. Scholars and judges argue that this creates serious due process concerns. In his seminal work on the topic, Professor John Manning argues that judicial deference to agency interpretations of regulations violates the separation of powers by permitting the executive branch to both write and interpret the law. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 639 (1996). Justice Gorsuch describes this blending of powers as leaving weak, unpopular parties "a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge." Kisor v. Wilkie, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring). Justice Thomas argues that history tells us that the Founders explicitly sought to avoid having political actors, like agencies, be the final say on the meaning of a question of law. *See* Perez v. Mortg. Brokers Ass'n, 575 U.S. 92, 112–33 (2015) (Thomas, J., concurring).

tive branch how it was to treat certain executive branch employees.[156] The Court reasoned that the statute contravened the executive's constitutional powers regarding removal of its own employees.[157]

Judicial deference to agency interpretations of regulations contradicts Nebraska Supreme Court precedent elaborating on the proper judicial function. Nebraska case law makes clear that the construction and interpretation of Nebraska's Constitution is a judicial function.[158] Given this, it seems quite clear that the interpretation of statutes or regulations are also judicial functions.[159] Older case law seems to confirm this conclusion. In *Dawson County*, the Nebraska Supreme Court stated that if an administrative body was to actually exceed its statutorily granted powers, the resulting harm could be remedied in a court.[160] This necessarily implies that a court must be the final say on the meaning of a question of law because the administrative agency would have had to violate the statute in order to exceed its powers. The end result of all of this is that in order for administrative agencies to legitimately engage in quasi-judicial action, such actions must be reviewable by courts. Accordingly, the interpretation of law (either statutes or regulations) must be within the judicial power.

Deference breaks this arrangement. By deferring to the agency's interpretation, the judicial branch is essentially making the executive branch the ultimate interpreter of the regulation at issue. The limited scope of review further supports this assertion. By deferring to the agency unless its interpretation is plainly erroneous or inconsistent, the judicial branch is handing the executive a judicial function, even if the interpretation proposed by the agency's opposing party is actually better than the one put forth by the agency. This violates the separation of powers because the agency then has the power to write laws, enforce laws, and interpret laws.

VI. CONCLUSION

Deference to agency interpretations of regulations is inconsistent with Nebraska's APA. The doctrine is inconsistent with the de novo

156. *Shepherd*, 251 Neb. at 525, 557 N.W.2d at 691,

157. *Id.*; *see also* State *ex rel*. Beck v. Young, 154 Neb. 588, 594, 48 N.W.2d 677, 681 (1951) (holding that the supreme executive power vested in the governor by NEB. CONST. art. IV, § 6 includes the power of removal).

158. Calabro v. City of Omaha, 247 Neb. 955, 972, 531 N.W.2d 541, 553 (1995).

159. Nebraska case law is somewhat thin on the full scope of judicial power. *Calabro* makes clear that constitutional interpretation and the entering of a declaratory judgment are judicial functions. *Id*. at 971, 531 N.W.2d at 553. Older Nebraska case law makes clear that agencies may act in a quasi-judicial capacity, but that such quasi-judicial powers are only legitimate if litigants have recourse in the courts. *See generally* Dawson Cnty. Irr. Co. v. McMullen, 120 Neb. 245, 231 N.W. 840 (1930).

160. *Dawson Cnty.*, 120 Neb. at 251, 231 N.W. at 843.

review standard required by Nebraska's APA and with Nebraska Supreme Court precedent stating that the meaning of a regulation is a question of law that appellate courts make regardless of a trial court's decision. Such deference also violates Nebraska Supreme Court precedent requiring courts to give meaning to all words of a statute because deference ignores the de novo review requirement. The doctrine's most prominent defense, as expressed by the Supreme Court of the United States, is undercut by the fact that the Nebraska Supreme Court has refused to give mandatory deference to agency interpretations of statutes. Finally, deference violates Nebraska's Constitution by distorting the delicate separation of powers Nebraska's Constitution created.