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### Chevron, Cooperative Federalism, and Telecommunications Reform

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## ***Chevron*, Cooperative Federalism, and Telecommunications Reform**

*Philip J. Weiser\**

I.	INTRODUCTION .....	2
II.	FEDERAL SUPREMACY, <i>CHEVRON</i> , AND SKEPTICISM TOWARD STATE AGENCIES .....	5
A.	<i>Federal Supremacy and State Interpretive Authority</i> .....	6
B.	<i>Chevron</i> .....	7
C.	<i>Hostility Toward State Agency Interpretation of Federal Law</i> .....	10
III.	THE TELECOMMUNICATIONS LANDSCAPE AND THE TELECOM ACT.....	13
A.	<i>Telecommunications Law Before the 1996 Telecom Act</i> .....	14
B.	<i>The Telecommunications Act of 1996</i> .....	16
C.	<i>Federal-State Relations Under the Telecom Act</i> .....	17
D.	<i>Federal Court Review of State Agency Decisions Under the Telecom Act</i> .....	20
IV.	THE RATIONALES FOR DEFERENCE .....	22
A.	<i>Applying Chevron to Cooperative Federalism Schemes</i> .....	23
1.	<i>Delegation</i> .....	24
2.	<i>Institutional Competence</i> .....	27

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3.	Gap-Filling .....	30
B.	<i>Interstate Competition</i> .....	31
C.	<i>The Competence of State Agencies</i> .....	36
D.	<i>Historical Support for Deferential Review:</i> <i>The Ratemaking Cases</i> .....	38
V.	THE UNIFORMITY ISSUE .....	39
A.	<i>The Value of Diversity</i> .....	40
B.	<i>The Inability to Generate Uniformity Through</i> <i>Judicial Review: The Case of the Telecom Act</i> .....	44
1.	The "Cost"-Based Pricing Standard.....	46
2.	A Telecom Act Without Deference to State Agencies .....	50
VI.	CONCLUSION .....	53

## I. INTRODUCTION

It remains a long-held principle of federal-state relations that federal courts are supreme over the states in interpreting federal law. Over 180 years ago in *Martin v. Hunter's Lessee*, Justice Story decried the suggestion that state court decisions concerning federal law could evade federal review, emphasizing that, "[t]he public mischiefs that would attend such a state of things would be truly deplorable."<sup>1</sup> In the spirit of this dictum, federal courts have routinely rejected the suggestion that they should defer to state agency interpretations of federal law.<sup>2</sup> Such deference, the argument goes, would destroy the uniform interpretation and application of federal law.<sup>3</sup>

In this Article, I challenge this conventional view. The classic dictum in *Marbury v. Madison* calls for federal courts to have the final say on "what the law is,"<sup>4</sup> yet they already defer to federal agencies under the *Chevron* doctrine.<sup>5</sup> In our contemporary age of coopera-

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1. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

2. See *infra* notes 37-47 and accompanying text.

3. See, e.g., *AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989) ("The state agency's determination of procedural and substantive compliance with federal law is not entitled to the deference afforded to a federal agency."); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (*per curiam*) (emphasizing "the need for coherent and uniform construction of federal law nationwide").

4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

5. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (stating that "if the statute is silent or ambiguous . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute").

tive federalism statutory schemes,<sup>6</sup> the basic principles that animate the *Chevron* doctrine similarly call for deference by federal courts to state agencies. Moreover, such deference serves an important goal of cooperative federalism: it allows for and encourages state experimentation and interstate competition. In short, *Chevron* calls for an exception not only to the *Marbury* dictum, but to the *Hunter's Lessee* dictum as well.

To illustrate my argument, I examine the implementation of the Telecommunications Act of 1996 ("the Act" or "the Telecom Act"),<sup>7</sup> a recently enacted federal regulatory program that relies heavily on state agencies by inviting them to superintend—under federal statutory standards and subject to federal court review—the development of "interconnection agreements" between incumbent monopolists and new entrants into the local telephone market.<sup>8</sup> This examination demonstrates that the federal courts are not well served by an intrusive standard of review of state agency decisions, and that, if not instructed to defer to state agency decisions in principle, they will nonetheless endeavor to do so in practice. To be sure, my argument anticipates that federal laws such as the Telecom Act will not be applied uniformly across all fifty states. But complete uniformity in the implementation of cooperative federalism statutes is

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6. By "cooperative federalism," I mean federal programs that charge state agencies—as well as federal ones—with the responsibility of interpreting and implementing federal law. The Supreme Court sanctioned such programs in *FERC v. Mississippi*, 456 U.S. 742, 759 (1982). As one commentator put it, "Congress is not limited to a choice between allocating all power to regulate an area of conduct to state or federal agencies. It can combine federal and state regulatory power through any form of cooperative or creative federalism it finds appropriate to a particular field of regulation." Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 643 (1985); see also *New York v. United States*, 505 U.S. 144, 167 (1992) (applying the term "cooperative federalism" to a statutory scheme that provides for state regulation, with federal bureaucratic backup, to implement federal objectives).

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

8. A number of other federal statutes, such as the Medicaid Act and a number of environmental laws—including the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act—similarly rely on state agencies. See Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (1994); Medicaid Act, 42 U.S.C. §§ 1396-1396v (1994); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1994); Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994). In the environmental area, states are allowed to assume responsibility for administering and enforcing an environmental program once the EPA determines that the state's program meets minimum federal standards. By setting a federal floor with room for state experimentation, these laws: (1) call for state implementation; (2) set clear minimum standards; (3) respect state autonomy; and (4) provide mechanisms to police the process. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1198 (1995); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174-75 (1995).

both an undesirable and unattainable goal, as the costs of intrusive judicial review are considerable, and there are important benefits that come from experimentation and interstate competition.<sup>9</sup> Accordingly, if federal courts overseeing state agency decisions employ an intrusive standard of review, they will undermine both the sensible presumption set out in *Chevron* about how to allocate responsibility between agencies and courts as well as the goals of cooperative federalism regulatory programs.<sup>10</sup>

Part II of this Article outlines the long-standing admonition in favor of federal judicial supremacy, the counter-admonition in favor of federal agencies set out in *Chevron*, and the approach that courts have taken on whether this counter-admonition applies to state agencies—i.e., whether they deserve deference in interpreting federal law. Part III focuses on how this issue is raised by the Telecom Act, explaining the background to the Act and its basic structure. Part IV explains why the reasons for deference given in *Chevron*—delegation, institutional competence, and gap filling—counsel in favor of according deference to state agencies charged with interpreting federal law. Moreover, Part IV explains that judicial deference to state agencies is also justified by the important role for state experimentation and interstate competition within cooperative federalism statutory schemes. And to underscore the failings of intrusive federal court review of state agency action, Part IV reviews the history of the Supreme Court's ratemaking decisions of the early part of this century, highlighting how it provides strong evidence that an intrusive standard of judicial review of state agency decisions implementing the Telecom Act (or similar statutory schemes) is unlikely to be successful. Finally, Part V addresses the issue of uniformity, arguing both that diversity within federal law is a familiar practice that has distinct advantages and that, in any event, federal courts are unlikely to succeed in ensuring the uniform interpretation and application of cooperative federalism statutes like the Telecom Act even if they attempt to do so.

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9. Unfortunately, commentators have tended not to appreciate this point. See Peter Schuck, *Some Reflections on the Federalism Debate*, 14 YALE L. & POL'Y REV. 1, 4 (1996) ("Federalism now serves both as an instrument of the modern administrative state and as a rather flexible institutional accommodation to the extraordinary diversity of American society and to the challenges that this diversity poses for national unity. This diversity-accommodating aspect of federalism receives too little attention from commentators.").

10. The stakes involved in whether *Chevron* applies to judicial review of state agency decisions would, of course, be lower if *Chevron* failed to deter judges from interpreting ambiguous statutes. A recent study, however, suggests that *Chevron* has had its intended effect. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 59-60 (1998).

## II. FEDERAL SUPREMACY, *CHEVRON*, AND SKEPTICISM TOWARD STATE AGENCIES

Throughout the history of "Our Federalism,"<sup>11</sup> states have been assigned an uneasy role to play with respect to the interpretation of federal law. Although state courts are charged (and entrusted) with hearing most types of federal claims,<sup>12</sup> the Supreme Court has underscored the importance of federal court review of those decisions to ensure that federal law is interpreted correctly and consistently across the land.<sup>13</sup> As we approach a new century, the tension between the principle of federal judicial supremacy and the important (and often unreviewed) role played by the states in interpreting federal law is becoming increasingly apparent. For example: the Supreme Court's limited docket means that it cannot effectively oversee the large number of state decisions involving matters of federal law;<sup>14</sup> Congress has specifically called for a deferential review of state court decisions on federal law in the context of habeas corpus review;<sup>15</sup> and cooperative federalism statutes have increasingly required state agencies to interpret federal law in the first instance. Nonetheless, the rhetoric championing federal judicial supremacy and uniformity in the interpretation and application of federal law continues to obscure the increasingly important role played by the states in developing federal law. Before examining the relationship between *Chevron* and judicial review of state agency decisions, this Part first

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11. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) ("It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.").

12. See *Testa v. Katt*, 330 U.S. 386, 391-92 (1947) (asserting that state policy against enforcing federal "penal" statutes was not a "valid excuse" for refusing to adjudicate a case involving such a statute).

13. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (stating that without supervision, federal law would be interpreted differently in each state).

14. As Justice Brennan has explained, the large number of state court decisions on matters of federal law means that the Supreme Court "cannot even come close to 'doing the whole job' of ensuring the uniform and correct application of federal law by state courts. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (citation omitted). Paul Bator put this issue in more numeric terms:

We have a pool of some 55,000 appellate cases involving issues of federal law that have been decided on a regional basis. No effective system exists to harmonize and stabilize this enormous body of cases except recourse to the discretionary jurisdiction of one Supreme Court of nine judges sitting always en banc. Thus, the pool of 55,000 cases generates over 4,000 requests for review by the Supreme Court. Out of this number, the Supreme Court selects for review and decides the 150 to 175 cases that have a uniform and nationwide authority.

Paul M. Bator, *What is Wrong With the Supreme Court?*, 51 U. PITT. L. REV. 673, 679 (1990).

15. See 28 U.S.C.A. § 2254(d)(1) (West 1994 & Supp. 1998) (stating that habeas relief is available only where a state court "unreasonably appl[ie]d" clearly established law).

reviews the traditional justification for federal judicial supremacy over state interpretive authority.

*A. Federal Supremacy and State Interpretive Authority*

In *Martin v. Hunter's Lessee*,<sup>16</sup> Justice Story offered the path-marking tribute to federal supremacy. In that case, a Virginia state court had refused to follow a ruling issued by the Supreme Court on a matter involving federal law, concluding that it was not subject to federal court review.<sup>17</sup> In making clear that the Constitution grants the Supreme Court appellate jurisdiction to review state court interpretations of federal law, Justice Story stressed the importance of the uniform interpretation and application of federal law. Specifically, he explained that:

Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable. . . .<sup>18</sup>

The principle that federal courts must superintend state court interpretations of federal law often goes hand in hand with the admonition that federal courts must always exercise the full extent of the jurisdiction conferred upon them. Put simply, if federal courts could yield jurisdiction to state courts in certain cases, there would be nothing sacrosanct about the need to oversee all state court rulings on matters of federal law. That is, admitting that there are exceptions to the admonition that federal courts must exercise the full extent of their jurisdiction suggests that there may be exceptions to the necessity of reviewing all state court interpretations of federal law. Of lato, the Supreme Court has acknowledged that there are exceptions to the rule that federal courts must exercise the full extent of their jurisdiction, but has made plain that such exceptions are rare, remarking that "federal courts have 'a virtually unflagging obligation . . . to exercise the jurisdiction given them.'"<sup>19</sup> At the dawn of the republic,

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16. *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 304.

17. *See id.* at 305.

18. *Id.* at 348.

19. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 15 (1983) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).



Chief Justice Marshall put the point even more strongly in *Cohens v. Virginia*: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."<sup>20</sup> Not coincidentally, this warning from Chief Justice Marshall came in defense of the Supreme Court's authority to review state court decisions.

Despite *Hunter's Lessee's* rhetoric urging federal judicial supremacy, the reality of federal judicial practice has been much more restrained. In fact,

[i]n the early days of our Republic, Congress was content to leave the task of interpreting and applying federal laws in the first instance to the state courts; with one short-lived exception, Congress did not grant the inferior federal courts original jurisdiction over cases arising under federal law until 1875.<sup>21</sup>

This is not to say that the *Hunter's Lessee* dictum is without force, but rather that it overstates the role of the Supreme Court in the federal system. Thus, notwithstanding the strong rhetoric of *Hunter's Lessee* and *Cohens*, Chief Justice Marshall did appreciate that the argument for (or against) federal jurisdiction was not an absolute command, but rather could be accommodated to different circumstances.<sup>22</sup> Unfortunately, even in the face of the Supreme Court's recognition that different circumstances justify the yielding of federal jurisdiction and that absolute uniformity in federal law is more fiction than fact,<sup>23</sup> the lower courts' attitude toward state agencies has far more often reflected the rhetorical concerns about a lack of uniformity than the reality that federal courts are not the supreme unifying force suggested by *Hunter's Lessee*.

### B. Chevron

Notwithstanding *Marbury's* vision of judicial supremacy, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* instructed federal courts to abstain from second-guessing a federal agency's reasonable interpretation of ambiguous statutory terms

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20. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

21. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting) (footnote omitted).

22. See *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804) (concluding that a case "entirely between foreigners" should be heard based upon "considerations drawn from public convenience" and the fact that the parties did not object).

23. See *Merrell Dow*, 478 U.S. at 827 (Brennan, J., dissenting) ("Concededly, because federal jurisdiction is not always exclusive and because federal courts may disagree with one another, absolute uniformity has not been obtained . . .").

where the statutory scheme assigned the implementation of its provisions to an expert agency.<sup>24</sup> Indeed, *Chevron's* holding is one of the cornerstone principles of modern administrative law. Because it admonishes courts to respect agency interpretations despite *Marbury's* call for judicial supremacy, "*Chevron* is widely regarded as a kind of 'counter-*Marbury*' for the administrative state."<sup>25</sup> For the many courts who previously refused to accord respect to the interpretations of ambiguous statutes rendered by administrative agencies, this admonition called for a fundamental paradigm shift.<sup>26</sup>

In *Chevron*, the Supreme Court set out a two step analysis for courts to employ in reviewing agency decisions. First, they must ask whether the statute speaks directly to the issue at hand, using "the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue."<sup>27</sup> Where Congress' intention is evident from such a search, deference is not appropriate.<sup>28</sup> If the statute is ambiguous or does not express Congress' intention on the matter, the court must ask whether the interpretation adopted by the agency is reasonable, not whether the interpretation is the one that the court would have selected were it to make the determination in the first instance.<sup>29</sup> Put simply, under the first step, a court must consider whether the statutory text, history, and purpose *require* a certain interpretation; under the second step, a

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24. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

25. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969 (1992). Professor Sunstein similarly described the effect of *Chevron* as a "kind of *Marbury*, or counter-*Marbury*, for the administrative state." Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990).

26. For an example of how courts viewed administrative agencies in the pre-*Chevron* era, see *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979) ("[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation.").

27. *National Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9). The traditional tools include examination of the statute's text, legislative history, and structure, see *Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 515 (D.C. Cir. 1997), as well as its purpose, see *First Nat'l Bank & Trust v. National Credit Union*, 90 F.3d 525, 529-30 (D.C. Cir. 1996). One commentator has explained that this inquiry seeks to determine whether Congress meant "to express something, but did it ambiguously, or [was] ambiguous because it meant to express nothing." Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. 187, 207 (1992).

28. See *Hammontree v. NLRB*, 894 F.2d 438, 441 (D.C. Cir. 1990).

29. See *Chevron*, 467 U.S. at 842-43; see also *Troy Corp. v. Browner*, 120 F.3d 277, 285 (D.C. Cir. 1997) (holding that agency interpretation must be "reasonable and consistent with the statutory purpose"); *City of Cleveland v. United States Nuclear Regulatory Comm'n*, 68 F.3d 1361, 1367 (D.C. Cir. 1995) (holding that agency interpretation must be "reasonable and consistent with the statutory scheme and legislative history").

court must consider whether these factors *permit* the interpretation chosen by the agency.<sup>30</sup>

After setting out this two step analysis, the *Chevron* Court stressed the two basic rationales for its approach. First, it emphasized that delegation to an agency can be implicit as well as explicit, and that "[i]n such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."<sup>31</sup> Second, the Court stressed that the expert agency merits deference because an agency charged with implementing a statute has a superior understanding of the "statutory policy in the given situation [and] has depended upon more than ordinary knowledge" in reaching its conclusion.<sup>32</sup> In addition to these two reasons, *Chevron's* progeny have highlighted two other justifications for deferring to *federal* agencies: their ability to generate a uniform construction of federal law,<sup>33</sup> and their responsiveness to Congress.<sup>34</sup>

Because the *Chevron* principle is sufficiently flexible to be interpreted differently by courts and commentators, it is important that I define what I mean by *Chevron* deference. In essence, I view *Chevron* as admonishing courts to superintend regulatory schemes by ensuring that articulable legal principles—the definition of a statutory concept through the traditional tools of statutory interpretation or the delineation of the bounds of agency discretion—are judicially

30. See *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

31. *Chevron*, 467 U.S. at 844; see also *id.* at 842-43 (stating that if congressional silence "left a gap for the agency to fill," courts must defer to the agency's interpretation so long as it is a "permissible construction of the statute"); *Schwartz v. Gordon*, 761 F.2d 864, 868 (2d Cir. 1985) (holding that agency vested with policy-making power is authorized to fill in gaps that may have been left by Congress in a statute, so long as the agency's interpretation is "reasonably defensible"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (stating that when Congress leaves ambiguity in a statute it confers discretion on the appropriate agency to clarify the ambiguity, and the only question for the court is whether the agency did so in a constitutional manner).

32. *Chevron*, 467 U.S. at 844; see also *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (acknowledging judicial deference to administrative interpretation of statute); *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446, 449 (2d Cir. 1985) (affording considerable deference to any reasonable interpretation of a statute by the agency charged with administering it, "especially where specialized agency understanding is involved").

33. See *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997), *cert. denied*, *Belshe v. Orthopaedic Hosp.*, 118 S. Ct. 684 (1998); *AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 796 (10th Cir. 1989); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (*per curiam*).

34. See *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988) ("Federal agencies are also entitled to deference because their activities are subject to continuous congressional supervision by virtue of Congress' powers of advice and consent, appropriation, and oversight. Such direct and continuous congressional supervision is absent when state authorities are doing the regulating.").

enforced, whereas intricate technical and policy judgments are left to agencies.<sup>35</sup> At the macro level, this principle of deference calls for agencies to defer to reasonable interpretations of statutory gaps or ambiguities; but on a more micro level, this principle also counsels respect for agencies in reviewing the exercise of their discretion in the implementation of certain tasks assigned to them. To be sure, defining the range of reasonable interpretations of an ambiguous statutory term may sometimes resemble the determination of exactly how a statute limits an agency's discretion, but the two tasks are analytically distinct and separable in theory, even if not in practice.<sup>36</sup>

### C. Hostility Toward State Agency Interpretation of Federal Law

Although the Supreme Court has regularly revisited the application of the *Chevron* doctrine, it has yet to address the role of state

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35. Some courts have distinguished between the level of deference called for by *Chevron*—where the agency enjoys a statutory mandate to address a legal question—and that called for by *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)—where the agency's authority stems from its familiarity with an area. Compare *First Chicago NBD Corp. v. Commissioner*, 135 F.3d 457, 459 (7th Cir. 1998) (leaving open whether interpretive rules issued after notice and comment deserve *Chevron* deference), *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994) (en banc) (stating that interpretive rules deserve some deference, but not the "substantial deference" called for by *Chevron*), *aff'd* *Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152 (1996), and *Griffon v. United States Dep't of Health & Human Servs.*, 802 F.2d 146, 148 n.3 (5th Cir. 1986) (leaving unresolved whether *Chevron* applies to interpretive rules), *with* *Health Ins. Ass'n of America v. Shalala*, 23 F.3d 412, 424 n.8 (D.C. Cir. 1994) (stating that interpretive rules merit *Chevron* deference).

For simplicity purposes, this Article refers to *Chevron* as reflecting the principle that agencies authorized to implement statutes merit deference. That is, this Article does not address whether there are different levels of deference, and if so, what type of deference state agencies merit in implementing cooperative federalism statutes like the Telecom Act. See *Ritter v. Cocil County Office of Hous. and Community Dev.*, 33 F.3d 323, 328 (4th Cir. 1994) (noting that state agency implementation of federal law deserves *Skidmore* deference when approved by a federal agency). Indeed, it may well make little or no practical difference whether an agency enjoys *Chevron* or *Skidmore* deference. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) (arguing that reviewing courts often defer to informal agency interpretations that are not technically covered by the *Chevron* doctrine).

36. A court might employ this distinction, for example, by imposing certain constraints based upon its definition of an ambiguous statutory term, such as the "cost"-based pricing standard for network elements set out in the Telecom Act, see *infra* notes 173-75 and accompanying text, but leave it to state agencies to implement the court's interpretation of that term. In practice, however, I suspect that a de novo review of an agency's interpretation of a statute's ambiguities or gaps would not necessarily be separable from an intrusive oversight over the implementation of that interpretation. That is, courts may need to police the exercise of agency discretion with considerable care if they wish to enforce the statutory constraints over which they claim sole interpretive authority. Some courts have attempted to make this distinction, but, as discussed *infra* Part V.B.2, it is questionable whether their decisions will ensure that their vision of the statute is actually implemented.

agencies charged with implementing federal law—i.e., whether the *Hunter's Lessee* dictum, as well as the *Marbury* dictum, should yield to the realities of the modern administrative state. Increasingly, courts are being forced to confront this issue, as Congress has enacted a number of statutes that invite state agencies to implement federal regulatory schemes. To determine whether state agencies merit deference in implementing such schemes, the federal courts must reconcile their traditional bias against leaving federal law in the hands of the states with the fundamental underpinnings of the *Chevron* doctrine and the purpose of cooperative federalism regulatory schemes.

The federal courts of appeals that have thus far considered whether the *Chevron* doctrine applies to cooperative federalism schemes have declined to examine critically the *Hunter's Lessee* dictum. Instead, they have reconciled this dictum with *Chevron* by concluding that *Chevron* cannot demand deference to state agencies implementing federal law because a central purpose of the *Chevron* doctrine is to ensure the uniform application of federal law. After all, it is well settled that "federal statutes are generally intended to have uniform nationwide application."<sup>37</sup>

A 1989 Second Circuit case, *Turner v. Perales*, exemplifies the analysis followed by many federal courts.<sup>38</sup> In *Turner*, the Second Circuit explained that there are two types of regulatory schemes—(1) "cooperative federalism [schemes], in which state agencies are given broad responsibility and latitude in administering [federal] programs;" and (2) purely federal schemes that "envision unitary or uniform application from state to state"—with *Chevron* deference applicable to federal agencies in the latter, but not to state agencies in the former.<sup>39</sup> To justify this holding, *Turner* explained that because state agency decisions implementing federal law cannot contribute to the "coherent and uniform construction of federal law nationwide," they do not deserve deference in federal court.<sup>40</sup> Relying on *Turner*, both the Ninth and Tenth Circuits subsequently refused to defer to state agencies in the Medicaid context, even though in these cases a federal agency had guided and approved the decision of the state agency.<sup>41</sup>

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37. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

38. *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989) (per curiam) (holding that a New York State Department of Social Services interpretation of federal housing law did not deserve deference).

39. *Id.*

40. *Id.*

41. *See Orthopaedic Hosp. v. Belshe*, 103 F.2d 1491, 1495-96 (9th Cir. 1997) (reviewing state Medicare agency decision de novo because state agencies are not due the same deference

Unfortunately, these three cases—*Turner* and its Ninth and Tenth Circuit counterparts—dealt with the deference issue in summary fashion and declined to entertain the possibility that a federal statutory provision could be interpreted differently by different state agencies and still merit deference—even if the interpretation fell within a reasonable range cabined by either a federal agency's supervision or the statutory term itself.

The Second Circuit later reconsidered its *Turner* opinion in the Medicaid context in *Perry v. Dowling*, holding that where a decision of a state agency is approved by its federal counterpart, that decision is entitled to *Chevron* deference.<sup>42</sup> In *Perry*, the Second Circuit reasoned that the Medicaid Act's unique regulatory scheme—under which the federal Health Care Financing Administration ("HCFA") sets forth guidelines for the states to follow and approves their decisions implementing federal law—justified giving *Chevron* deference to the state agency decisions.<sup>43</sup> Although their treatment of the issue has not specifically referenced *Chevron*, the Third, Fifth and Seventh Circuits all appear to concur with the approach taken in *Perry*.<sup>44</sup> The Fourth and Sixth Circuits have shown even greater respect for the decisions of state agencies than the other circuits, but their holdings that state agency decisions may be given deference have also emphasized the role of the federal agency in the statutory scheme.<sup>45</sup> In essence, although no court has squarely held that *Chevron* applies to state agencies implementing cooperative federalism statutes, a number of courts

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as federal agencies), *cert. denied*, *Belshe v. Orthopaedic Hosp.*, 118 S. Ct. 684 (1998); *AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 796 (10th Cir. 1989) (same).

42. *Perry v. Dowling*, 95 F.3d 231, 237 (2d Cir. 1996) ("In these circumstances, in which the state has received prior federal-agency approval to implement its plan, the federal agency expressly concurs in the state's interpretation of the statute, and the interpretation is a permissible construction of the statute, that interpretation warrants deference."); *see also* *DeSario v. Thomas*, 139 F.3d 80, 96 (2d Cir. 1998) (holding that where a federal agency approves a state agency's plan, that plan deserves judicial deference).

43. *Perry*, 95 F.3d at 237.

44. *See* *Abbeville Gen. Hosp. v. Ramsey*, 3 F.3d 797, 804 (5th Cir. 1993) (noting that "a presumption of regularity and deferential standard attaches to [a state agency] exercise of discretion" under the Medicaid Act where there has been federal agency guidance and review of the state agency); *Illinois Health Care Ass'n v. Bradley*, 983 F.2d 1460, 1462-63 (7th Cir. 1993) (stating that because of federal agency approval, a federal court "must review [a state] plan with the deference accorded federal agency actions"); *West Virginia Univ. Hosps., Inc. v. Casey*, 885 F.2d 11, 23 (3d Cir. 1989) (stating that the Medicaid Act "contemplates a deferential standard of review by the courts in assessing compliance with the 'reasonable and adequate' reimbursement standard").

45. *Sce* *Clark v. Alexander*, 85 F.3d 146, 152 (4th Cir. 1996) (setting forth a two-step process of first assessing whether a state agency acted in a manner consistent with the federal scheme, and then upholding the state action if not arbitrary or capricious); *Ritter v. Cecil County Office of Hous. and Community Dev.*, 33 F.3d 323, 327 (4th Cir. 1994) (same); *Day v. Shalala*, 23 F.3d 1052, 1060 (6th Cir. 1994) (same).

have concluded that a state agency decision that was approved by a federal agency merits deference on the ground that the court is essentially deferring to the federal agency's review of the state agency's decision.<sup>46</sup>

Despite the Supreme Court's inattention to whether the *Chevron* doctrine ever applies to state agency interpretations of federal law, it has explicitly declined to rule out this possibility. In a footnote in *Wilder v. Virginia Hospital Ass'n*, for example, the Court implied that a deferential review standard might be appropriate in the Medicaid context, noting that:

the Courts of Appeals generally agree that when the State has complied with the procedural requirements imposed by the amendment and regulations [for instance, the development of a plan through certain procedures and the approval of that plan by HCFA], a federal court employs a deferential standard of review to evaluate whether the rates comply with the substantive [legal] requirements [of the Medicaid Act].<sup>47</sup>

Although the split of authority among the courts of appeals concerning the standard of review of state agency implementation of the Medicaid Act has not yet triggered Supreme Court review, the enactment of the Telecom Act—which is sure to generate considerable litigation on the standard of review for cooperative federalism schemes—makes it only a matter of time before the Court considers the relationship of *Chevron* and cooperative federalism regulatory schemes.

### III. THE TELECOMMUNICATIONS LANDSCAPE AND THE TELECOM ACT

In passing the Telecommunications Act of 1996, Congress fundamentally changed our nation's telecommunications laws and assigned state agencies another important area of federal law to implement. The Act's central goal is to open up the nation's historically monopolized local telephone markets to competition through a cooperative federalism regulatory program that involves the Federal Communications Commission ("FCC"), state agencies, and the federal courts.<sup>48</sup> To help accomplish this objective, the Act specifically

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46. Cf. *Illinois Health Care Ass'n*, 983 F.2d at 1462-63 ("[T]he Illinois reimbursement plan was approved by the Secretary and thus is a product of state and federal agency action. . . . [It] must be reviewed with the deference accorded federal agency actions.").

47. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 520 n.18 (1990).

48. See *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2337-38 (1997) (describing the 1996 Telecom Act as "an unusually important legislative enactment" whose "major components . . .

charges federal district courts with overseeing decisions made by state administrative agencies regarding the terms and conditions of the interconnection agreements that govern—pursuant to federal statutory standards—the relations between incumbent providers and new entrants into the local telephone market. It does not, however, set forth the appropriate standard of review for such cases. To explain the importance and the practical effect of the standard of review, this Part first outlines the relevant history of telecommunications regulation and then explains the relationship between state agencies and the federal courts in implementing the Telecom Act.

### *A. Telecommunications Law Before the 1996 Telecom Act*

Throughout most of this century, the FCC and state agencies coexisted according to a system of shared responsibility where the FCC generally oversaw interstate service and the state agencies (usually Public Utility Commissions, or "PUCs") oversaw intrastate service. The Communications Act of 1934 clearly set forth this division of responsibility in section 2(b), which precluded the FCC from adopting any regulations governing intrastate telephone services.<sup>49</sup> Because calls across state, or even national, boundaries all begin with the local network, this division of responsibility required the FCC and the states to ascertain which jurisdiction would regulate the rates of which service. This "jurisdictional separations process," as it is often called, was spawned by *Smith v. Illinois Bell Telephone Co.*, where the Supreme Court ruled that the separation of interstate from intra-

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were designed to promote competition in the local telephone service market."); U.S. W. Communications, Inc. v. Hix, 986 F. Supp. 13, 14 (D. Colo. 1997) ("The Act, at its core, is designed, among other things, to end monopolies in the local telephone market and open the market to competition."); Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 304 (1996) ("[N]ext to [the telephony provisions,] all other parts of the Act pale in importance."); Gregory L. Rosston, *The 1996 Telecommunications Act Trilogy*, 5 MEDIA L. & POLY, Winter 1996, at 1, 3 (summarizing provisions of the Telecom Act that encourage competition).

49. Section 2(b) provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." Communications Act of 1934, ch. 652, title I, § 2, 48 Stat. 1064. Under this proviso, the FCC may not regulate intrastate matters unless they are impossible to divide from interstate ones and where the state rule, absent preemption, would negate the federal policy. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) [hereinafter *Louisiana PSC*]. For a succinct review of the law before and after *Louisiana PSC*, see Michael J. Zepvak, *The Current Law of FCC Preemption*, 6 ALB. L.J. SCI & TECH. 105 (1996). In short, the basic approach called for under *Louisiana PSC* and its progeny is that if there is any method to separate the subject matter being regulated, it must be done and thus preemption is not appropriate. See *id.* at 110-11.



state telephone revenue was necessary to recognize the competent governmental authority in each sphere.<sup>50</sup>

In 1974, modern telecommunications law began to take shape with the filing of an antitrust action against AT&T, alleging that its control over its local Bell Operating Companies ("BOCs") had impeded competition in the related long distance, equipment manufacturing, information services, and other adjacent markets.<sup>51</sup> In 1982, AT&T agreed to settle the case, entering into a consent decree that required it to divest the local BOCs into seven newly created operating companies.<sup>52</sup> In approving the divestiture, Judge Harold Greene made clear that he considered the local telephone exchange a "natural monopoly" because the local network infrastructure—especially the wires connecting end users to local wire centers, often referred to as "the local loop"—was far too expensive to be replaced by a competitive local exchange carrier.<sup>53</sup> In addition, by contemplating future waivers of the decree's restrictions,<sup>54</sup> Judge Greene installed himself as a third overseer of the telecommunications industry.<sup>55</sup> Moreover, the institution of a waiver process recognized that changes in technology and innovations in regulation could change the telecommunications industry from a regulated monopoly industry to a competitive marketplace.

50. *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930). In the wake of *Smith*, Congress codified this principle in the Communications Act. Communications Act of 1934, ch. 652, title I, § 2, 48 Stat. 1064; see also 47 C.F.R. § 36 (1997) (setting forth regulations for cost allocation between the two jurisdictions); MICHAEL K. KELLOGG ET AL., *FEDERAL TELECOMMUNICATIONS LAW* 88-89 (1992) (noting the Telecom Act's inadequate treatment of federal/state jurisdictional issues). In essence, this process of identifying the services to be regulated by each jurisdiction ensures that interstate service providers are charged (a regulated rate) for their use of the local network to provide originating and terminating access to the end user. For a basic explanation of the division of costs between the two jurisdictions, see *National Ass'n of Regulatory Utility Commissions v. FCC*, 737 F.2d 1095, 1103-05 (D.C. Cir. 1984) (*per curiam*).

51. See *United States v. AT&T Communications, Inc.*, 524 F. Supp. 1336, 1352, 1357, 1374-75, 1379-81 (D.D.C. 1981).

52. See *United States v. AT&T Communications, Inc.*, 552 F. Supp. 131, 140-42 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

53. See *id.* at 223. As one commentator has noted, in a natural monopoly, competition cannot thrive because a bigger firm is more efficient and will therefore grow at the expense of a smaller rival [and] competition would be inefficient, because one way or another it involves splitting the market, with the result that no firm is as big (that is, efficient) as it could be.

Joseph Farrell, *Creating Local Competition*, 49 FED. COMM. L.J. 201, 201-02 (1996).

54. See *AT&T Communications*, 552 F. Supp. at 195 (holding that waiver of line-of-business restriction is warranted "upon a showing that there is no substantial possibility that an Operating Company could use its monopoly power to impede competition in the relevant market").

55. See Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 852 (1997) (noting that once Judge Greene entered the AT&T consent decree, it became "the nation's leading source of telecommunications law").

### B. *The Telecommunications Act of 1996*

In the wake of the changes that Judge Greene had anticipated might occur in telecommunications technology and in the marketplace, Congress enacted the Telecommunications Act of 1996 to, as the Conference Report put it, "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>56</sup> Instituting a new legal framework to facilitate competition in the local telephone market required a massive overhaul in our nation's telecommunications laws. Over the years, the FCC was able to address many important telecommunications issues—such as the development of a regulatory regime for cable television—based on the general public interest mandate set out in the Communications Act of 1934.<sup>57</sup> In crafting the Telecom Act, however, Congress did not choose to authorize the FCC (or the state PUCs) to formulate the primary details of how local telephone markets would be opened, but instead chartered many of the basic principles itself, specifically outlining the essential market opening requirements in sections 251 and 252 of the Act.<sup>58</sup> Thus, for example, Congress envisioned and provided for three paths of entry into the local telephone market—the building of facilities-based networks (which would be interconnected to the incumbent provider's facilities),<sup>59</sup> the use of network elements "unbundled" from the incumbent provider's local network,<sup>60</sup> and the

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56. H.R. CONF. REP. NO. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124 (Joint Explanatory Statement of the Committee of Conference).

57. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (quoting 47 U.S.C. § 303(r) in holding that the FCC may regulate cable television by issuing "such rules and regulations and prescrib[ing] such restrictions and conditions, not inconsistent with law," as 'public convenience, interest, or necessity requires'").

58. Although not addressed here, the Telecom Act also includes a number of other important provisions related to the emergence of competition in all telecommunications markets. Notably, the Act: (1) provides for preemption of state (and local) legal barriers to entry, *see* 47 U.S.C.A. § 253 (West Supp. 1998); *AT&T Communications, Inc. v. City of Austin*, 975 F. Supp. 928, 942 (W.D. Tex. 1997) (applying section 253 of the Act); (2) mandates a transition from the present system of cross-subsidies between different services (and users) to an explicit, competitively neutral system of universal service support that is compatible with competitive markets, *see* 47 U.S.C.A. § 254 (West Supp. 1998); and (3) institutes a process for Bell Company entry into long distance markets in their region, *see id.* § 271; *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 418-19 (D.C. Cir. 1998) (discussing provision).

59. *See* 47 U.S.C.A. § 251(c)(2) (West Supp. 1998) (establishing a duty to interconnect).

60. *See id.* § 251(c)(3) (establishing a duty to sell individual elements unbundled from the incumbent's network). The Act defines the term "network element" as:

reselling of the services offered by the incumbent local provider<sup>61</sup>—and specified the pricing regime for each of these entry vehicles. In arbitrating the agreements between the incumbent providers and the new entrants, the state agencies implementing the Act must respect this scheme, and the federal courts who oversee their decisions are charged with ensuring that they do so.

### C. Federal-State Relations Under the Telecom Act

In setting out the congressionally mandated local competition rules, the FCC recognized the difficult position that the state agencies and federal district courts would be in without some important guidance on certain of the ambiguous statutory terms and gaps in the Telecom Act and thus issued regulations on a number of topics. In so doing, the FCC sought to limit the occasions in which the state agencies and federal courts would have no federal guidance on gaps or ambiguities in the statute; even with these regulations in force, however, the state agencies would still have been required to answer interpretive questions not addressed by the FCC regulations or the Act itself.<sup>62</sup> Moreover, after the Eighth Circuit invalidated—on jurisdictional grounds—a number of the regulations contained in the FCC's *Local Competition Order*,<sup>63</sup> the scope of such questions grew markedly, leaving both the state agencies and the federal courts with less guidance as they each proceeded to interpret the Telecom Act's statutory commands.

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a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

*Id.* § 153(29).

61. *See id.* § 251(c)(4).

62. In this respect, the Telecom Act parallels numerous other statutory schemes where Congress sets out general principles and the courts—or in the administrative state, agencies—are charged with “fill[ing] up the details.” *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *see also Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 441-42 (7th Cir. 1994) (en banc) (stating that in the administrative state, “the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details”), *aff’d sub nom. Brotherhood of Locomotive Eng’rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152 (1996) (not discussing the point).

63. *In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, 11 F.C.C.R. 15,499 (1996) (1st Report & Order) [hereinafter *Local Competition Order*], *rev’d in part & aff’d in part sub nom. Iowa Util. Bd. v. FCC*, 120 F.3d 753, 819-20 (8th Cir. 1997), and *rev’d in part and aff’d in part sub nom. AT&T Corp. v. Iowa Util. Bd.*, No. 97-826, 1999 WL 24568 (U.S. Jan. 25, 1999).

In the wake of the Eighth Circuit's decision to invalidate a number of the FCC's regulations in *Iowa Utilities Board v. FCC*, much of the burden of interpreting the Act's requirements rested, at least in the first instance, with the state regulatory authorities. In the *Iowa Utilities Board* case, the FCC argued to the Eighth Circuit that the Act's call for nationwide rulemaking on the rules for local competition authorized it to define all aspects of these rules.<sup>64</sup> Thus, on the FCC's view, it was authorized not simply to determine what elements of the incumbent's network needed to be "unbundled," but also to devise the pricing methodology that the States would follow.<sup>65</sup> After initially ordering a stay of the FCC's pricing rules,<sup>66</sup> the Eighth Circuit later invalidated those and several other regulations set forth in the FCC's *Local Competition Order*.<sup>67</sup> In so doing, the court relied heavily on Section 2(b) of the Communications Act, which, as the Eighth Circuit put it, "fenced off" intrastate telephone services from FCC regulation.<sup>68</sup> Although the Supreme Court reversed the Eighth Circuit's decision on the jurisdictional issue (as well as a number of others),<sup>69</sup> the reinstatement of the FCC's regulations still leaves the state agencies with considerable discretion in implementing federal law.<sup>70</sup>

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64. *Iowa Util. Bd.*, 120 F.3d at 794-95; see also 47 U.S.C.A. § 251(d)(1) (West Supp. 1998).

65. See *Local Competition Order*, 11 F.C.C.R. at 15,508. For a good description of the FCC's *Local Competition Order*, see INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION: THE LAST TEN MILES 227-50 (1997).

66. See *Iowa Util. Bd. v. FCC*, 109 F.3d 418, 421 (8th Cir. 1996), *motion to vacate stay denied*, 520 U.S. 83 (1996), *and rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Util. Bd.*, No. 97-826, 1999 WL 24568 (U.S. Jan. 25, 1999)..

67. See *Iowa Util. Bd.*, 120 F.3d at 819 n.39.

68. *Id.* at 796 (quoting *Louisiana PSC*, 476 U.S. 355, 370 (1986)). For criticism of this ruling, see Jim Chen, *Telric in Turmoil, Telecommunications In Transition: A Note on the Iowa Utilities Board Litigation*, 33 WAKE FOREST L. REV. 51, 78 (1998) (arguing that nothing in the legislative history supports the Eighth Circuit's reading of the Telecom Act); Duane McLaughlin, Note, *FCC Jurisdiction Over Local Telephone Under the 1996 Act: Fenced Off?*, 97 COLUM. L. REV. 2210, 2240-42 (1997) (arguing that the Eighth Circuit's approach denies that the Telecom Act changed the FCC's jurisdiction). Because the issue of whether the state agencies implementing the Act deserve deference remains an important question even after the Supreme Court's decision in *Iowa Utilities Board*, this Article does not address the merits—or lack thereof—of the Eighth Circuit's decision in that case. See Chen, *supra*, at 78 (noting that even if *Iowa Utilities Board* were reversed, the state agencies would still be the ones charged with "interstitial legislative authority" on setting the terms and conditions of physical collocation).

69. See *AT&T Corp. v. Iowa Util. Bd.*, No. 97-826, 1999 WL 24568 at \*15 (U.S. Jan. 25, 1999).

70. See *infra* notes 85-87 and accompanying text. Indeed, the majority opinion in *Iowa Utilities Board* noted explicitly that the Court will eventually have to resolve the novel issue examined by this Article. 1999 WL 24568, at \*9 n.10 (scheme put in place by Telecom Act "is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well").

The FCC's role in implementing the Telecom Act will vary not only depending on how it chooses to exercise its authority (i.e., whether it chooses to leave certain decisions to state agencies), but also on whether the state agencies decline to assume the role of implementing the Telecom Act. If a state agency declines the opportunity to oversee the development of interconnection agreements, that role is to be assumed by the FCC.<sup>71</sup> Where a state agency accepts the role of implementing the Telecom Act,<sup>72</sup> all incumbent providers are obligated to negotiate in good faith with new entrants to determine the terms and conditions for the necessary arrangements between them<sup>73</sup> and to submit any interconnection agreement reached between them for approval to the state agency.<sup>74</sup> If the parties are unable to reach an agreement, either may petition the state agency to arbitrate any disputed issues and to order the parties to comply with certain terms and conditions.<sup>75</sup> If a party believes that the arbitrated agreement fails to meet the standards set out in the Act or in binding FCC regulations, it may challenge those aspects of the agreement in federal district court.<sup>76</sup>

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71. See 47 U.S.C.A. § 252(e)(5) (West Supp. 1998). Thus far, no state agency has refused to assume the role provided to it in the Telecom Act.

72. By offering the state agencies the option not to participate in the federal regulatory scheme, the Telecom Act does not commandeer state agencies as condemned in *Printz v. United States*, 521 U.S. 28, 117 S. Ct. 2365, 2380 (1997). See *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 9 F. Supp. 2d 766, 772 (E.D. Ky. 1998) ("Because the Act allows the State to either participate in the regulation of the telecommunications systems or to be preempted in that field of regulation, the Act is a permissible exercise of Congress' power."). Indeed, this model of inviting state agencies to implement federal telecommunications law has been employed previously in the Pole Attachment Act, which authorized the FCC to regulate pole attachments only if a state agency had declined to do so pursuant to certain federal requirements. See 47 U.S.C.A. § 224(c) (West Supp. 1998) (providing that FCC may regulate rates, terms, and conditions of pole attachments, but only in the absence of state regulation or state compliance with specified procedural requirements).

73. See 47 U.S.C.A. §§ 251(c)(1), 252(a)(1) (West Supp. 1998).

74. See *id.* § 252(e)(1).

75. See *id.* § 252(b).

76. See *id.* § 252(e)(6). This procedure, providing for suit against state agencies in federal district court, has been challenged repeatedly on Eleventh Amendment grounds under *Seminole Tribe v. Florida*, 517 U.S. 44, 53-54 (1996). Almost (if not entirely) uniformly, the federal district courts that have addressed the constitutionality of this procedure have upheld it on the ground that such suits are authorized by *Ex parte Young*, 209 U.S. 123 (1908), or that the state agency waived its immunity by choosing to take part in the federal statutory scheme. See, e.g., *U.S. W. Communications, Inc. v. Public Serv. Comm'n*, 991 F. Supp. 1299, 1300 (D. Utah 1998) (upholding suit against commissioners based on *Ex parte Young*); *U.S. W. Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997) (upholding suit based on theory that state waived its sovereign immunity).

*D. Federal Court Review of State Agency Decisions  
Under the Telecom Act*

In enacting the Telecom Act, Congress specified an important role for the federal courts in bringing competition to local telephony, but did not instruct them on what standard to use in reviewing the decisions of the state agencies.<sup>77</sup> On issues of fact gathering, the federal courts that have addressed the issue have generally agreed that the state agency administrative process must not be replicated in federal district court and that the court is to limit its review to the administrative record.<sup>78</sup> In so holding, the federal courts have concluded that Supreme Court precedent governing judicial review of federal agency proceedings also applies to judicial review of state agency proceedings when it comes to development of a factual record.<sup>79</sup>

In contrast to their review of factual disputes, the federal courts have declined to accord state agencies the same respect accorded to federal agencies when it comes to construing ambiguous statutory terms or filling gaps in the Telecom Act.<sup>80</sup> In line with the cases discussed in Part II.C, the federal district courts have usually

77. The Act, in relevant part, provides that where a state agency carries out the role of approving or arbitrating interconnection agreements under federal law, "any party aggrieved by such determination may bring an action in an appropriate federal district court to determine whether the agreement or statement [of terms made available to all entrants] meets the requirements of section 251 and this section." 47 U.S.C.A. § 251(e)(6) (West Supp. 1998); see also *U.S. W. Communications v. Hix*, 986 F. Supp. 13, 15 (D. Colo. 1997) (noting that "[t]he Act does not elucidate either the scope of review or the standard of review" of state agency determinations); *id.* at 17 ("Because of the unique framework of the Act, it does not appear that there is an analogous statutory scheme that assists me with the standard of review determination.").

78. See, e.g., *Hix*, 986 F. Supp. at 15 (holding that scope of review is to be limited to the administrative record).

79. See, e.g., *id.* (holding that when no standard is specified in the statute, review of administrative proceedings is "to be confined to the administrative record" and no *de novo* proceeding may be held).

80. See *AT&T Communications Corp. v. BellSouth Telecomm., Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998) (stating that every court to address the issue has held that "it is not appropriate to defer to [a] state agency's interpretations of federal law"); *AT&T Communications Corp. v. Pacific Bell*, No. C97-0080SI, 1998 WL 246652, at \*3-4 (N.D. Cal. May 11, 1998) (adopting *de novo* standard for federal law questions and arbitrary and capricious standard for all other questions); *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 7 F. Supp. 2d 674 (E.D.N.C. 1998) (adopting the *Hix* standard of review); *U.S. W. Communications, Inc. v. TCG Seattle*, No. C97-354WD, slip op. at 3 (W.D. Wash. Jan. 22, 1998) (stating that state agency's interpretation receives *de novo* review); *U.S. W. Communications, Inc. v. MFS Intolnet, Inc.*, No. C97-222WD, 1998 WL 350588, at \*2 (W.D. Wash. Jan. 7, 1998) (adopting *de novo* standard of review); *GTE South, Inc. v. Morrison*, 6 F. Supp. 2d 517, 524 (E.D. Va. 1998) (stating that if an agency is not federal its decisions receive less deference); *Hix*, 986 F. Supp. at 13 (stating that state agency determinations are not granted the same deference as federal agency determinations).

distinguished between deference to state agencies and to federal agencies on the ground that deference to state agencies cannot assist in the development of a uniform interpretation of federal law.<sup>81</sup> Accordingly, these decisions have concluded that the presumption established in *Chevron*—that Congress intended for an administering federal agency to define ambiguous statutory concepts—should not be extended to state agencies.

Because the state agencies are assigned the critical role of arbitrating disputes over the terms and conditions on which the new entrants and the incumbent provider will do business, their decisions will materially affect the nature and pace of competitive entry into the local telephone market. An issue that perhaps best exemplifies the role that the state agencies may play in implementing the Act is how to define the pricing standard for unbundled access to elements of the incumbent's network. The Act explains that unbundled network elements are to be priced at "just, reasonable, and non-discriminatory rates,"<sup>82</sup> and that such rates must be "based on . . . cost (determined without reference to a rate-of-return or other rate-based proceeding),"<sup>83</sup> but it fails to provide a precise definition of what constitutes "cost"-based rates for unbundled elements. Even though federal courts will, under the Supreme Court's ruling in *Iowa Utilities Board*, be able to rely on FCC regulations regarding the pricing of unbundled elements, it is still worth examining this issue because some of the challenges involved in implementing the Act's standards will persist even with the FCC regulations in place and, more importantly, because this issue exemplifies the importance of judicial forbearance in superintending intricate regulatory matters.<sup>84</sup>

Although the FCC's jurisdiction to define the "cost"-based pricing standard has been upheld by the Supreme Court in *Iowa Utilities Board*, there are likely to be a variety of other issues where (1) the FCC left issues to be decided by state agencies; and (2) the Act assigned decisions to be made by the state agencies in the first instance. In terms of the first set of issues, it is worth noting that the FCC left it to the state agencies to decide whether network elements other than the ones denoted in its *Local Competition Order* should be "unbundled" by the local incumbent provider.<sup>85</sup> As for the second set

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81. See, e.g., *Hix*, 986 F. Supp. at 17-18.

82. 47 U.S.C.A. § 251(c)(2)(D) (West Supp. 1998).

83. *Id.* § 252(d)(1)(A).

84. See *infra* Part V.B.2.

85. The FCC identified a number of network elements that, at a minimum, must be "unbundled," see Specific Unbundling Requirements, 47 C.F.R. § 51.319 (1997); *Local*

of issues, the Telecom Act itself may be interpreted as delegating to the state agencies the responsibility of resolving many of the issues related to the development of appropriate arrangements for the collocation of competitors' facilities in the offices of the incumbent providers (for purposes of either interconnection or obtaining unbundled access).<sup>86</sup> Thus, even though the Supreme Court determined that the Act assigns a broad role to the FCC to resolve statutory ambiguities and gaps that might otherwise be addressed by state agencies (such as the definition of the "cost"-based pricing standard for unbundled elements), the state agencies will still be forced to interpret many ambiguities or gaps in the Telecom Act without guidance from the FCC. Indeed, even if the Act is ultimately read to grant residual lawmaking authority to the FCC on all matters (and to delegate no issues exclusively to state agencies), the state agencies will still confront some statutory interpretation issues in the first instance, for no other reason than that the FCC cannot—and should not—be expected to anticipate and address every interstitial gap or ambiguity in the Act.<sup>87</sup>

#### IV. THE RATIONALES FOR DEFERENCE

Given the increasing number of federal statutes that charge state agencies with the responsibility of interpreting federal law in the absence of federal agency precedent or discernible statutory guidance, courts and commentators must grapple with whether reviewing courts should defer to state agency decisions on how to address statutory ambiguities or gaps. As outlined in this Part, an examination of three important rationales for the *Chevron* doctrine—the fact that Congress delegates to an agency the responsibility of making certain decisions in the first instance, the comparative institutional competence of agencies over courts in

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*Competition Order*, 11 F.C.C.R. 15,499, 15,624, 15,683 (1996), but state commissions are free to require additional elements to be made available (either as a matter of federal or, in some cases, state law). Indeed, one court has already noted this fact and concluded that "dark fiber"—the unlit fiber optic conduits in the local network—constitutes a network element despite the fact that the FCC did not so determine in its *Local Competition Order*. See *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 7 F. Supp. 2d 674, 679-80 (E.D.N.C. 1998).

86. See Chen, *supra* note 68, at 78 ("Congress needed to choose between federal and state regulatory expertise in a variety of circumstances demanding delegation of interstitial legislative authority. In most of those circumstances, Congress chose the FCC; in collocation, Congress preferred the state commissions.").

87. Moreover, the FCC might well choose to leave some matters to the state agencies under such a scenario.



making certain types of decisions, and the superior ability of agencies to fill gaps in complex statutory schemes—suggests that such deference is appropriate. Moreover, by according deference to state agencies charged with implementing cooperative federalism statutes, federal courts can help effectuate the underlying purposes of such schemes: to encourage individual tailoring by and competition between different states in implementing a federal statute, provided that they do so in a manner that is compatible with federal statutory precepts.<sup>88</sup> Quite understandably, federal courts have been reluctant to give effect to such a model of federal regulation, for, among other reasons, it departs markedly from the New Deal vision of and the long-standing rhetorical support for uniformity above all and little or no role for state agencies in implementing federal law.<sup>89</sup>

Although deferring to state agency decisions challenges the notion of federal judicial supremacy embodied in the *Hunter's Lessee* dictum, it is hardly an untested approach in our jurisprudence. Indeed, the failure of the aggressive review of state ratemaking decisions that was abandoned in the mid-part of this century can be seen as important evidence in favor of deferring to state agencies who implement federal law. Accordingly, after this Part outlines how three important rationales for *Chevron* deference and the values of cooperative federalism suggest that deference to state agencies makes good sense (especially with respect to the Telecom Act), it then reviews the history of the ratemaking cases to illustrate why intrusive judicial review of complex regulatory decisions does not.

#### A. Applying *Chevron* to Cooperative Federalism Schemes

Whether *Chevron's* presumption—that gaps, ambiguities, or silences in federal statutes are to be decided by agencies, not courts<sup>90</sup>—applies to cooperative federalism schemes, like the Telecom

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88. See Lisa B. Deutsch, *Medicaid Payment for Organ Transplants: The Extent of Mandated Coverage*, 30 COLUM. J.L. & SOC. PROBS. 185, 207-08 (1997) ("The cooperative federalism relationship that the Medicaid Act sought to encourage between the federal government and the individual state governments was designed to accommodate change and to provide flexibility.").

89. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 315 (1998) ("A central lesson of the limitations of New Deal institutions is that effective government services and regulations must be continuously adapted and recombined to respond to diverse and changing local conditions.").

90. As Chief Judge Posner has noted, *Chevron's* "domain consists of statutory gaps (fissures, puzzles, anomalies, etc.) that Congress has left for the agency administering the statute in question to fill; the court is not to second-guess the agency's gap-filling unless the agency is being unreasonable." *First Chicago NBD Corp. v. Commissioner*, 135 F.3d 457, 459 (7th Cir. 1998).

Act, raises the question of how to conceptualize the role played by a state agency in such schemes. In *Chevron*, the Supreme Court examined this question as to federal agencies implementing regulatory statutes and concluded that Congress should be presumed to intend that agencies, and not the federal courts, are the bodies charged with developing statutory policies left implicit in a regulatory statute.<sup>91</sup> For the same reasons that it gave with respect to federal agencies, the Supreme Court should also defer to state agency interpretations of cooperative federalism statutes. First, such schemes delegate to state agencies the responsibility of interpreting and applying federal law. Second, state agencies enjoy superior institutional competence over reviewing courts in addressing matters that are often inextricably linked to their substantive expertise. Third, gap-filling in complex regulatory statutes can be effectuated better by agencies—who are focused on the entire statute and not simply on the particular provision at issue in a given case—than by courts. This section addresses each point in turn, using the Telecom Act to illustrate the strength of these arguments.

### 1. Delegation

In enacting the Telecom Act, Congress could have written a law without state agency involvement by delegating the entire array of interpretive responsibilities to the FCC. It chose not to do so, however. Thus, although the FCC enjoys important responsibilities under the Act, it is quite clear that there will be numerous situations where no FCC regulation addresses a question of statutory interpretation that is presented to a state agency. In these situations, Congress will have charged the state agencies with implementing the Act and developing, at least in the first instance, an appropriate definition of the ambiguity or gap in the statutory scheme. In a recent discussion of *Chevron*, the Supreme Court made clear that in such cases it presumes that "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the

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91. It is worth noting that the exact reason for the shift taken in *Chevron* has never been clearly established. Commentators have explained that *Chevron* represents either a sensible default rule against which Congress can legislate, a presumption that reflects congressional intent, or an application of separation of powers principles that keeps courts out of the lawmaking business. Although I refer to *Chevron* as approximating congressional intent, the other two conceptions of the *Chevron* doctrine also comfortably support the application of *Chevron* to state agencies. For a concise review of all three conceptions, see Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957, 959-60 (1994).

ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."<sup>92</sup>

In enacting the Telecom Act, Congress did not expect that either the statute or the FCC would be able to ensure that the state agencies confronted no gaps or ambiguities in implementing the Act. To be sure, Congress did clearly address a number of points in the Telecom Act and plainly contemplated that the FCC would be able to address a number of other issues.<sup>93</sup> But Congress also envisioned that the state agencies would have an independent role in implementing a number of the Act's provisions.<sup>94</sup> Because the Telecom Act charges state agencies (if they choose to accept the task) with the responsibility of interpreting some of its ambiguous terms and gaps in the first instance, the federal courts should defer to them on those matters rather than take on the job of interpreting the statutory gaps and ambiguities.<sup>95</sup> To do otherwise would have the effect of "dump[ing] the problem [of making sense of the Telecom Act] in the lap of the courts, taking advantage of the fact that the courts are a kind of political lightning rod. . . . [with] a mandate, though no specific directions."<sup>96</sup> Such an approach would both disserve those courts that

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92. *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996); *see also Stinson v. United States*, 508 U.S. 36, 44 (1993) (stating that when Congress leaves gaps in statutes, it means for agencies to fill the gaps); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("When Congress, through express delegation or the introduction of an interpretative gap in the statutory structure, has delegated policy making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.").

93. *See, e.g.*, 47 U.S.C.A. § 251(b)(2) (West Supp. 1998) (charging the FCC with developing nationwide rules for number portability).

94. A number of other cooperative federalism schemes, such as the pre-Welfare Reform Act Aid to Families with Dependent Children ("AFDC"), have worked similarly. *See, e.g.*, *Deel v. Jackson*, 862 F.2d 1079, 1083 (4th Cir. 1988) (en banc) ("Congress cannot prescribe every detail of a program as complex as AFDC. If it could, state agencies would serve no independent purpose.").

95. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (stating that a "precondition to deference under *Chevron* is a congressional delegation of administrative authority"); *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) ("[T]he first question in determining the deference appropriate to the agency's construction is whether Congress has transferred discretion [to interpret the statute] to the agency."); Anthony, *supra* note 35, at 42 ("[T]he key question in each case is whether Congress delegated the authority to issue interpretations with the force of law in this format.").

96. RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 290 (1985). The federal courts assume a "political lightning rod" role when they must make sense out of ambiguous statutes not superintended by regulatory agencies. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 261 (1994) ("It is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue . . . Congress viewed the matter as an open issue to be resolved by the courts."). This role differs from the more venerable tradition of developing judge-made rules based upon a common law statute such as the Sherman Act or the NLRA. *See, e.g.*, *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (stating that Sherman Act invites "courts to give shape to the statute's broad mandate by drawing on

attempt to undertake this responsibility as well as the cooperative federalism schemes that the state agencies are charged with implementing.

Respecting a congressional delegation to state agencies under a cooperative federalism scheme does raise the question of whether Congress should be permitted to delegate interpretive authority to an agency that is not directly accountable to it. Some have criticized such an approach on the ground that Congress should not be allowed to devise a federal scheme that does not allow it to influence regulatory policy; correlatively, these critics have suggested that such schemes may also allow Congress to disclaim responsibility for the ensuing policy decisions.<sup>97</sup> As an initial matter, it is worth noting that Congress wields considerable sway over policy in cooperative federalism schemes, as states must attend to Congress' wishes lest they jeopardize the significant sums of money that it sends to them every year or face possible preemption of their decisions.<sup>98</sup> Second, the presence of congressional oversight does not appear to be the touchstone of *Chevron* deference in any event, as other non-accountable actors, such as the Federal Reserve and the Federal Sentencing Commission, appear to enjoy *Chevron* deference.<sup>99</sup> Finally, in the case of state agencies, delegations of interpretive authority also advance federalism interests and allow Congress to pursue a policy of diversity and experimentation within a federal scheme.<sup>100</sup> Indeed, the threat of assigning interpretive authority to

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common-law tradition"); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (noting that "courts must fashion [operative rules] from the policy of our national labor laws" in applying section 301 of the NLRA); see also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 40-46 (1985) (stating that the Labor Act and Sherman Act are paradigmatic examples of implied delegations of lawmaking authority to the federal courts). In the latter case, Congress leaves a field open to federal common law based upon a broad instruction; in the former, Congress leaves specific issues undefined because it could not reach agreement on how to do so.

97. See Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 243-55, 270-80 (1997) (criticizing such statutory regimes).

98. See Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 286 (1990) (noting the effects that congressional control of spending and the threat of preemption have on states).

99. The question of whether the Federal Sentencing Commission merits *Chevron* deference is hardly settled, but the Supreme Court has intimated as much. See *Stinson v. United States*, 508 U.S. 36, 44-45 (1993). Moreover, three Justices have already reached this conclusion. See *United States v. LaBonte*, 520 U.S. 751, 117 S. Ct. 1673, 1687 (1997) (Breyer, J., dissenting). But see *id.* at 1679 n.6 (leaving this question open).

100. Some have suggested that the absence of executive branch oversight raises separation of powers problems with such delegations. See *Printz v. United States*, 521 U.S. 28, 117 S. Ct. 2365, 2378 (1997) (suggesting possible separation of powers concerns, but noting that they are significantly reduced if the state agency's role in a federal scheme is voluntary); Evan

state—as well as federal—agencies may well enable Congress to ensure that both sets of actors are more responsive to its wishes, as the agencies of the two jurisdictions will be forced to compete with one another to maintain any grip on delegated authority. After all,

[t]he history of cooperative federalism is, in part, a history of struggles between elected policy generalists—mayors, governors, state legislatures, and city councils—and federal agency specialists for greater control over federal programs with Congress favoring one or another type of organization depending on the political climate and perceived regulatory needs.<sup>101</sup>

## 2. Institutional Competence

As a modification to *Marbury's* mandate that courts must remain the final arbiter on questions of law, *Chevron* instructs courts to acknowledge the important role played by expert agencies in the modern administrative state. In essence, *Chevron* recognizes that the judiciary's limited ability to gather and process information, its commitment to precedent and reasoning by analogy, and its insulation from the political process weaken its ability to define ambiguous terms in regulatory statutes. Regulatory agencies, on the other hand, have access to the necessary information (in other words, the ability to gather and process information through methods unavailable to the judiciary), are versed in the intricacies of what often are complex, technical, and interrelated statutory schemes, and are able to respond to the concerns of democratically elected officials.<sup>102</sup> As *Chevron* ex-

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Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1111-12 (1997) (calling for more attention to the issue and concluding that separation of powers concerns demand either "weak" executive supervision or invalidation of the statutory regime). These concerns, however, like those relating to the need for congressional oversight, also argue against delegations of interpretive authority to independent federal agencies, such as the Federal Reserve, and would require the overruling of long-standing Supreme Court decisions. See Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 382-83 (1998) ("Congress has made, and the Court has upheld, assignments of administrative functions to nonfederal actors in a remarkable number of cases spanning the Constitution's existence."). Moreover, even some advocates of a "unitary executive" theory—that calls for executive oversight of any executive function—justify delegations to state agencies without such oversight on federalism grounds. See, e.g., Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72-73, 102 (1990).

101. Rederick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and Dual Sovereignty Doesn't*, 96 MICH. L. REV. 813, 883 (1998).

102. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); *Mayburg v. Secretary of Health and Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984) ("The fact that a question is closely related to an agency's area of expertise may give an agency greater power to

plained, courts historically have deferred to agency decisions wherever "a full understanding of the force of the statutory policy" depends "upon more than ordinary knowledge respecting the matters subjected to agency regulation."<sup>103</sup> More recently, the Supreme Court put this point in even more forceful terms: "[H]istorical familiarity and policy-making expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court."<sup>104</sup> Thus, the *Chevron* principle acknowledges that judicial forbearance on certain statutory questions will yield a better result than de novo review.<sup>105</sup>

If the federal courts resist *Chevron*'s admonition and step into a policymaking function by insisting on de novo review of complex regulatory issues decided by state agencies, they will take policy decisions away from state policymakers and risk incurring an institutional cost.<sup>106</sup> By declining to defer to state agencies, courts risk suffering three distinct types of institutional harm: (1) causing bad results through their involvement in policy decisions for which they are ill-suited; (2) damaging their perceived legitimacy if they are seen as making pure policy decisions; and (3) acting undemocratically by depriving accountable policymakers of the opportunity to make such decisions. A cautionary tale in this regard is the federal courts' review of state ratemaking decisions over the first half of this century.

persuade.'"); *Perine v. William Norton & Co.*, 509 F.2d 114, 120 (2d Cir. 1974) (noting that deference is to be given to agencies "on the basis of the agency's superior expertise in the area of its authority"); Marshall J. Berger, *Administrative Law and Labor Law: The Supreme Court's 1991-92 Docket*, 7 ADMIN. L.J. 257, 261 (1993) ("Judicial deference is rooted in the concept that the administrative agency assigned lawmaking power by Congress has greater 'historical familiarity and policymaking expertise' than the reviewing court."). As the Eighth Circuit has observed in the Medicaid Act context, the Health Care Financing Administration has more expertise in the area than the courts. See *Nebraska Health Care Ass'n v. Dunning*, 778 F.2d 1291, 1295 (8th Cir. 1987); cf. *First Chicago NBD Corp. v. Commissioner*, 135 F.3d 457, 459 (7th Cir. 1998) ("The Internal Revenue Service knows more about the tax laws than the judges of the federal appellate courts do, and so it is natural for us to give some weight to its views about the meaning and application of those laws.").

103. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (internal quotation marks omitted).

104. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 153 (1991).

105. See Crawford, *supra* note 91, at 980 ("If agencies do not have an institutional advantage over courts in interpreting statutes, little purpose would be served by the *Chevron* doctrine."); Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990) ("*Chevron* rests on the sound premise that agencies enjoy a comparative institutional advantage as a matter of legitimacy in resolving ambiguities in legislation they are charged with interpreting.").

106. This would be no small irony, as the Telecom Act aspired to end the judicial policymaking of Judge Greene's oversight of the AT&T consent decree. See H.R. CONF. REP. NO. 104-230, at 201 (1996), reprinted in 1996 U.S.C.A.N. 10, 215 (stating that purpose of Act was to end "government by consent decree"); 141 CONG. REC. H8451 (daily ed. Aug. 4, 1995) (remarks of Rep. Bliley) ("[I]t is time for Congress to retake the field.").

Initially, the federal courts viewed themselves as competent to make intricate judgments about whether a particular approach to ratemaking was acceptable under takings principles because they believed that there was a single "right" answer on how to compensate utilities for the use of their assets. But once the Supreme Court realized that its oversight of this area was equivalent to the sort of policymaking decisions made by a legislature, it adopted a more deferential attitude toward the regulatory bodies that handled ratemaking decisions.<sup>107</sup> Thus, before the federal courts embark on an intrusive judicial review of the intricate issues involved in implementing the Telecom Act—such as the setting of terms and conditions for the prices of network elements—they should consider the fact that they are displacing the actions of politically accountable actors and may suffer an institutional cost as a result.

The heart of the *Chevron* doctrine is a judicial recognition that in matters of policy, administrative agencies are presumptively more suited to the task than courts.<sup>108</sup> Indeed, as the Supreme Court recently noted, the dispute at issue in *Chevron* itself—the meaning of the Clean Air Act's concept of a "stationary source"—indicates that "the resolution of ambiguity in a statutory text is often more a question of policy than of law" and thus properly resolved by policymakers, not courts.<sup>109</sup> To ignore this recognition and undertake an intrusive judicial review of the implementation of regulatory statutes by state agencies would be a mistake, as "courts really have little to contribute

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107. See Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1392 (1997) ("Once the matter is viewed as a matter of policy, it follows quite quickly that the matter is for legislatures, not courts.").

108. See *id.* at 1410 (noting that in the administrative state, "[i]nterpretation seemed less law finding than law making, and this law making by courts raised an illegitimacy cost. In *Chevron*, the Court acknowledged this cost, at least in the context of ambiguous statutes."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *COLUM. L. REV.* 612, 625 (1996) ("*Chevron* embraces the assumption that if a silent or ambiguous statute leaves an interpreter room to choose among reasonable alternative understandings, the interpretive choice entails the exercise of substantial policymaking discretion."); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 *GEO. L.J.* 2225, 2228 (1997) (stating that *Chevron* "recognized that any time Congress enacts a statute that does not resolve an interpretive question that arises in the process of administering the statute, Congress has created the need for some other institution to resolve a policy dispute" and assigned that task to administrative agencies).

109. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (citing Sunstein, *supra* note 25, at 2085-88); see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."); Silberman, *supra* note 105, at 823 ("[W]hoever interprets the statute will often have room to choose between two or more plausible interpretations. That sort of choice implicates and sometimes squarely involves policy making. The agencies—even the independent ones—have superior political standing to the life-tenured federal judiciary in performing that policy making function.").

in defining the specific details of . . . policy when pressed to do so by financially disappointed litigants.”<sup>110</sup> In the Medicaid context, courts have generally appreciated this point, refusing to “engage in an independent assessment of what rates [they] believe would be reasonable and adequate,” but instead applying an arbitrary and capricious—in other words, a deferential—standard.<sup>111</sup>

### 3. Gap-Filling

*Chevron*’s admonition that the courts must respect agency interpretations in filling “any gap left, implicitly or explicitly, by Congress”<sup>112</sup> reflects not only an assessment of the expertise of the agency, but also its breadth of vision in administering a complex statutory program. Although courts can and do adhere to the principle that a statutory provision must be interpreted in light of the entire statute,<sup>113</sup> an expert agency—even a state one—is better situated to address the interstices and gaps in a statutory scheme with which it is charged with administering. For this reason, courts have explained that *Chevron* deference is “even more appropriate” where “a small corner of a labyrinthine statute” is at issue.<sup>114</sup> For cooperative federalism statutes like the Telecom Act, leaving these gaps for state agencies to fill is appropriate for an additional rationale. As discussed in Part IV.B below, the very purpose of delegating decision-making authority to state agencies is to allow states to tailor approaches to suit their needs and conditions as well as to compete with other states by experimenting with alternative methods that are not inconsistent with the federal statutory scheme.

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110. Eleanor D. Kinney, *The Role of Judicial Review Regarding Medicare and Medicaid Program Policy: Past Experience and Future Expectations*, 35 ST. LOUIS U. L.J. 759, 791-92 (1991).

111. *West Va. Univ. Hosps., Inc v. Casey*, 885 F.2d 11, 24 (3d Cir. 1989). Other courts have explained that with respect to the Medicaid Act’s “reasonable and adequate” standard, “[r]easonableness has been characterized as a zone, not a pinpoint.” *Colorado Health Care Ass’n v. Colorado Dep’t of Soc. Servs.*, 842 F.2d 1158, 1167 (10th Cir. 1988). In relevant part, the statutory standard provided by the Medicaid Act called for states to find that a reimbursement plan is “reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services.” 42 U.S.C. § 1396a(a)(13)(A) (1994), amended by Pub. L. 105-33, § 4732(a)(2), 111 Stat. 251 (1997).

112. *Chevron*, 467 U.S. at 843.

113. See, e.g., *Aircraft Mechanics Fraternal Ass’n v. Atlantic Coast Airlines, Inc.*, 55 F.3d 90, 94 (2d Cir. 1995) (“An individual section of a statute should not be interpreted in isolation but as part of the entire statutory scheme.”).

114. *Skandalis v. Rowe*, 14 F.3d 173, 178 (2d Cir. 1994).



### B. Interstate Competition

Traditionally, cooperative federalism programs have served four basic purposes.<sup>115</sup> First, they respect long-standing state interests and autonomy.<sup>116</sup> Second, they facilitate local participation and greater accountability.<sup>117</sup> Third, they allow for local experimentation and interstate competition where appropriate.<sup>118</sup> Finally, they rely on the economy of local agencies (rather than creating or expanding a new national bureaucracy).<sup>119</sup>

Cooperative federalism programs—like the Telecom Act—allow for state involvement while guarding against deviation from basic federal standards. Such schemes institute national rules that are necessary to give rise to substantial efficiencies,<sup>120</sup> protect critical equity concerns,<sup>121</sup> safeguard against interjurisdictional externalities

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115. Although I view the four criteria listed above as the essential characteristics of a cooperative federalism program, other commentators have highlighted different ones. See, e.g., Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995) (stating that criteria include providing for state implementation, setting clear standards, respecting state autonomy, providing mechanisms to police the democratic process, and applying the same rules to government and private parties); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 10 (1988) (emphasizing the characteristics of checking abuse of power, encouraging citizen participation, creating diverse cultural and political environments, and encouraging innovation).

116. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1006, 1014-15 (1995) (arguing that states generally remain "autonomous decisionmaking units with self-elected officials and thus enjoy a political existence separate from the central authority"); Dwyer, *supra* note 8, at 1197-1208 (describing how environmental laws are structured to allow some measure of state autonomous decision making).

117. See Dwyer, *supra* note 8, at 1185 n.10, 1198 (explaining that the structure of the environmental regulatory regime facilitates state participation); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1069, 1067-74 (1980) (arguing that local governance facilitates greater opportunities for political participation). For a thorough and recent review of the literature hailing the possibilities for civic participation in decentralized regulatory regimes, see Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1232 (1997) (stating that "political participation is likely to increase as policy responsibilities are decentralized to state and local governments").

118. See Dwyer, *supra* note 8, at 1218 (noting that in the environmental context, federal legislation has proved to be "a springboard for innovative regulation that goes beyond the federal minimum, thereby giving life to Brandeis' description of the states as laboratories of experimentation in public policy" and creating a system of cooperative federalism).

119. See Caminker, *supra* note 116, at 1014.

120. Such efficiencies might include, for example, the value of a national standard that would be clearly superior to other alternatives or would create overwhelming economies of scale, such as the ability of nationwide companies to plan on a national scale. Such efficiencies must be both substantial and real, however, for there is also a substantial and real cost (e.g., loss of experimentation and creativity in structuring regulatory schemes) in removing issues from the purview of state agencies.

121. See PAUL E. PETERSON, *CITY LIMITS* 83 (1981) (arguing that equity issues cannot be effectively addressed through a competitive federalism model); cf. Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1252-53 (1997) (noting

(for example, spillovers, such as pollution that crosses state lines),<sup>122</sup> or prevent a "race to the bottom" between states.<sup>123</sup> At the same time, cooperative federalism regimes allow individual states to tailor solutions to their particular needs and desires where it is appropriate to do so. These features make cooperative federalism programs akin to a model of limited competitive federalism. As articulated in the Tiebout hypothesis, the pure model of competitive federalism calls for each state to provide the best services that it can so as to lure businesses and residents.<sup>124</sup> Under the cooperative federalism model,

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that equity concerns, such as ensuring the protection of poorer citizens, can warrant the institution of a uniform federal standard, though the guaranteed levels of public rights, goods, and services can still be implemented in a flexible manner).

122. See Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1389-96 (1993) (using economic analysis to model this argument); see also Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 153 (1992) ("The problem of environmental spillovers across states is therefore one that the exit right cannot address."); Pierce, *supra* note 6, at 670 ("It is in the national interest to permit each state to adopt its own regulatory policy to the extent that such decisions affect only, or predominantly, the interests of state residents. States should not be permitted, however, to make regulatory decisions that create substantial interstate spillovers.").

123. See Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1440 (1992) (arguing that certain areas of corporate law produce a "race to the bottom" between states who would benefit from uniform federal rules); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212-16 (1977); Alan N. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1047-48 (1988) (arguing that use of federal police power is appropriate when competition among the states forces them to the lowest common denominator of regulation, and to neglect "the welfare, safety, or morality" of their citizens). Some commentators have linked the interjurisdictional spillover issue with the race to the bottom phenomenon, but others have identified them as distinct justifications. Compare Inman & Rubinfeld, *supra* note 117, at 1244-45 (stating that when interjurisdictional spillovers or externalities "are present, state and local governments underprovide regulations with valuable, positive spillovers (for example, air quality control) and overprovide regulations with harmful, negative spillovers (for example, anticompetitive business regulations). . . . [In such instances] economic competition no longer guarantees efficiency; more likely, competition becomes a 'race to the bottom.'"), with Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-To-The-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1212 (1992) (noting that jurisdictional spillovers provide a valid warrant for federal limits on state action, but questioning the race to the bottom justification).

124. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). A more recent general articulation of these principles can be found in ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (2d ed. 1978); see also Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 509 (1991) ("[T]he community must compete with other jurisdictions if it wants to encourage development because a developer dissatisfied with a community's exactions policy can take the project to another jurisdiction that offers better terms."). Of more recent vintage, law and economics scholars have celebrated the importance of competition between states and localities as a means for producing better public policies. See Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 33-35 (1983).

certain choices are removed from the state level to ensure that the state does not compromise—for whatever reason—on issues of national importance.<sup>125</sup> Thus, cooperative federalism schemes define the terms of competition between states so that they do not deviate from basic federal policy goals, underinvest in goods and services that would benefit neighboring states, or engage in a “race to the bottom.”

The underlying vision of cooperative federalism is that state agencies will compete with each other by implementing statutes like the Telecom Act in a manner that each believes will best facilitate economic development in its respective state.<sup>126</sup> In so doing, they will continue to serve as “laboratories of democracy.”<sup>127</sup> When it passed

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125. See THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* 189 (1990) (“Just as various ‘market failures’—externalities, monopolies, immobilities, and imperfect information—reduce the efficiency of the competitive market model, so also do various imperfections limit the utility of the competitive federalism model.”); Dwyer, *supra* note 8, at 1193 (“Congress reserved an important role for the states in implementing and enforcing the federal program, [but] excluded the states from certain policy decisions and programs where it suspected that the states would undermine federal goals.”); Daphne A. Kenyon & John Kincaid, *Introduction to COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 1, 4 (Daphne A. Kenyon & John Kincaid eds., 1991) (“[F]ederal policies form a framework within which state and local governments compete.”); Daniel L. Rubinfeld, *On Federalism and Economic Development*, 83 VA. L. REV. 1581, 1589 (1997) (“[C]ooperative federalism [views] the primary function of the central government [as] encourag[ing] and enforc[ing] interjurisdictional contracts, which provide pure public goods and . . . correct[ing] the failings of lower-tier fiscal competition.”).

126. See Paul Teske & Mallika Bhattacharya, *State Government Actors Beyond the Regulators*, in *AMERICAN REGULATORY FEDERALISM & TELECOMMUNICATIONS INFRASTRUCTURE* 47, 50 (Paul Teske ed., 1995) [hereinafter *AMERICAN REGULATORY FEDERALISM*] (“[I]n the multistate competition for jobs, each state faces prisoner’s dilemma incentives that can force them to compete even if they do not see a link, because competitor states are taking such actions.”); see also Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 448-49 (1997) (noting that the quality of infrastructure (e.g., telecommunications) is one of the resources states rely on in competing with each other for firms); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1498 (1987) (“A consolidated national government has all the drawbacks of a monopoly: it stifles choice and lacks the goad of competition.”); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 132 (1997) (“In short, competitive federalism forces governments to be more efficient by improving services, reducing costs, and better assessing citizen preferences for public goods.”).

127. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Dwyer, *supra* note 8, at 1185 n.10. Kathleen Wallman, a former Chief of the Common Carrier Bureau at the Federal Communications Commission, made this very point more recently: “The states have been marvelous laboratories; we [in Washington] have a lot to learn from the states.” Kathleen M.H. Wallman, *Keynote Address: The State Role in Telecommunications Regulation*, 6 ALB. L.J. SCI. & TECH. 7, 18 (1996) (footnote omitted); see also Barry Cole, *State Policy Laboratories*, in *AMERICAN REGULATORY FEDERALISM*, *supra* note 126, at 44-45 (“States have acted as policy laboratories in the decade since the breakup of AT&T. . . . [S]ome [states] have already acted as models not only for other states, but for the federal government.”); Paul Teske, *Conclusions*, in *AMERICAN REGULATORY FEDERALISM*, *supra* note 126, at 141 (There is “much evidence that states are playing an experimental, laboratory role in a period of substantial technological economic and financial uncertainty in this dynamic industry.”). There is also good reason to believe that experimentation in environmental policy has had the desired

the Telecom Act, Congress recognized that a number of states had experimented with different forms of telecommunications regulation, and it preserved state flexibility to continue to do so in ways that are not inconsistent with the terms of the Act.<sup>128</sup> To best serve Congress' appreciation for the value of state experimentation and innovation, courts should defer to the decisions of state agencies so that the nation can benefit from the hallmark flexibility of cooperative federalism programs.<sup>129</sup>

Although a uniform approach to telecommunications regulation makes sense where there is a clearly superior policy approach, Congress or the FCC, and not the courts, should decide when a particular approach is the optimal one. Where there is an optimal policy, but Congress or the FCC does not mandate it, it is reasonable to expect that the vast majority of states—through the process of regulatory competition—will eventually adopt such an approach.<sup>130</sup> Conversely, where no policy is clearly superior, it will be beneficial to allow different states to experiment by testing different approaches.<sup>131</sup>

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effect. See, e.g., David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 353-55 (1994) (explaining that actors from both sides of the environmental debate believe states, not the federal government, are creating the most innovative regulatory regimes).

128. See 47 U.S.C.A. § 251(d)(3) (West Supp. 1998).

129. See *Deel v. Jackson*, 862 F.2d 1079, 1083 (4th Cir. 1988) ("[S]tate flexibility allows the development of specifically tailored solutions to specific problems, and provides fifty state proving grounds in which the efficacy of administrative innovations can be tested. This reality in turn underlies the Court's admonition that state rules are not to be lightly displaced."); cf. *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (holding that courts should not "presume . . . that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intent to do so."). Along these lines, President Clinton recently stressed that he endorsed the cooperative federalism approach in order to facilitate valuable experimentation by the states. See Gary Wills, *The War Between the States and Washington*, N.Y. TIMES, July 5, 1998, § 6 (Magazine), at 28 (quoting President Clinton: "What my Administration tried to do was, basically, to emphasize two things—No. 1, states as laboratories of democracy, principally in education, health care and welfare reform; and secondly, actually reduce the aggregate volume of regulations in areas where I thought there was too much micromanagement.").

130. See Raymond W. Lawton & Bob Burns, *Models of Cooperative Federalism for Telecommunications*, 6 ALB. L.J. SCI. & TECH. 71, 86 (1996) ("Generally, no state can afford to design or justify (based on evidence submitted in public hearings) a set of energy policies that are arbitrarily different from the policies of adjacent states, or its region. This incentive encourages an appropriate level of uniformity.").

131. Mary Loring Lyndon recently made a similar point regarding when federal courts should preempt state tort remedies:

Whether it is best to preempt [is] a matter of maximizing incentives and opportunities to research. In this approach, uniformity and singular control may be appropriate ways to manage some risks, but not others. Where we are unsure [about the merits of a particular approach], the learning model of the law suggests that values other than uniformity may be primary.

If federal courts refuse to accord state agencies deference in implementing federal law, then states may be pushed to rely on independent state authority—as preserved by many cooperative federalism schemes like the Telecom Act—to adopt different approaches than those mandated by the reviewing federal courts.<sup>132</sup> If state agencies are forced to take this approach, the federal courts would in effect have to examine the same issues in two separate contexts, first to decide what the Act *requires* in interconnection agreements and then to determine what states are *allowed* to do to supplement those requirements.<sup>133</sup> Although this outcome would involve duplicative litigation and delay, at least it would still allow the states to engage in some of the experimentation contemplated by the Act. A worse fate than this unnecessary litigation would be a situation in which the states, in the face of intrusive federal court oversight of their decisions in the interconnection agreement context, declined to rely on their own authority at all and simply accepted the decision of the reviewing courts on what approach federal law required. In this event, the states would be abdicating their responsibility to experiment in telecommunications regulation and consequently would deprive American consumers of the benefits of a competitive federalism.<sup>134</sup>

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Mary Loring Lyndon, *Tort Law, Preemption and Risk Management*, 2 WIDENER L. SYMP. J. 69, 80 (1997).

132. This effect might be particularly acute if certain state agency rulemakings were reviewed in state court where they almost certainly would be accorded deference. *See, e.g.*, *Indiana State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935, 939 (Ind. 1993) (applying deferential treatment to state agency interpretation of state Medicaid plan); *Madrid Home for the Aging v. Iowa Dep't of Human Servs.*, 557 N.W.2d 507, 511 (Iowa 1996) (explaining the broad scope of state decision-making authority within the Medicaid program); *Americare Properties, Inc. v. Whiteman*, 891 P.2d 336, 344 (Kan. 1995) (adopting an arbitrary and capricious standard for reviewing state Medicaid agency's decisions); *Home Care Ass'n v. Bane*, 643 N.Y.S.2d 231, 233 (N.Y. App. Div. 1995) (same); *St. Francis Extended Health Care v. Department of Soc. & Health Servs.*, 801 P.2d 212, 215 (Wash. 1990) (explaining that Congress granted states flexibility in administering the Medicaid program and thus review of state agency decisions should be deferential).

133. State agencies are likely to be given considerable latitude in imposing supplemental requirements, as the Supremacy Clause does not call for preemption of state regulation unless "Congress has explicitly preempted the particular form of state regulation at issue or it is literally impossible for a regulatee to comply with federal and state requirements." *Pierce*, *supra* note 6, at 644. As to the latter, supplemental requirements are by definition ones with which regulatees can comply; as to the former, the Telecom Act not only does not preempt state authority to facilitate the transition to competitive telecommunications markets, it affirmatively preserves state authority in the area. *See* 47 U.S.C.A. § 251(d)(3) (West Supp. 1998).

134. *Cf. West Va. Univ. Hosps. v. Casey*, 885 F.2d 11, 23 (3d Cir. 1989) (applying a non-deferential standard and thereby requiring all states to pursue a single approach "would run counter to the congressional intent that states be afforded considerable freedom in pursuing ways of limiting [M]edicaid costs and encouraging efficiency").

*C. The Competence of State Agencies*

Applying *Chevron* to cooperative federalism schemes also recognizes that the congressional scheme places state agencies on a level with federal ones. Consistent with the dictum from *Hunter's Lessee*, however, the federal courts have refused to accord this recognition to state agencies, explaining that they lack "the expertise in implementing federal laws and policies and the nationwide perspective of a federal agency."<sup>135</sup> Obviously, state agencies lack the nationwide perspective of a federal agency, but the relevant inquiry is why should that matter? In the case of cooperative federalism statutes like the Telecom Act, state agencies enjoy the confidence of Congress (who delegated to them the opportunity to implement federal law), possess the necessary expertise in the subject matter (which is more important than expertise in implementing federal laws per se), and are well situated to fill in the gaps in complex regulatory statutes.

Understood in a different light, the argument against state agency competence is not that they lack expertise as such, but rather that they would pursue parochial interests over the national interest. This concern, however, fails to appreciate the very nature of cooperative federalism schemes. By designing a statutory scheme that assigns important interpretive authority to state agencies, Congress recognizes the value of tailoring federal regulation to local conditions as well as the value of experimenting with different approaches. Where Congress desires a national solution in a cooperative federalism statute, it either decides for itself what course to take or delegates unconstrained authority to a federal agency to determine the areas where a national solution is appropriate. Thus, the very point of cooperative federalism schemes—and the argument for deference to state agencies—is to allow states to adopt the approach that they deem to be the optimal regulatory strategy (even if it is a "parochial" one) whenever the statutory scheme authorizes them to make that decision in the first instance.

Underlying the concerns about parochialism and the lack of a nationwide perspective appears to be a concern that state agencies are more vulnerable to capture than federal ones. Due to the competitive dynamics of cooperative federalism schemes, however, this concern should be somewhat diminished by a state's political process (which should respond to the threat that companies and citizens will

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135. *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988).

opt for those states with superior economic development strategies). More fundamentally, cooperative federalism statutes often include institutional protections against state agency capture. The Telecom Act, for example, addresses certain key issues by resolving them as a matter of statutory text or by delegating them to the FCC. In addition, even where the Act authorizes the state agencies to make certain decisions, the FCC's responsibility for evaluating the applications of the Bell Companies for in-region long distance authority provides an important check that will help ensure that the local market-opening job is completed in a satisfactory manner.<sup>136</sup> Finally, the Act's judicial review provisions provide a proceduralist check—even with a deferential review of substantive decisions—that will help to ensure that the state agencies undertake a reasoned consideration of the issues presented to them.<sup>137</sup> In the Medicaid Act context, this requirement has imposed real demands on state agencies, requiring them to “conduct an objective analysis, evaluation, or some type of fact-finding process.”<sup>138</sup>

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136. In a decision subsequent to *Iowa Utilities Board*, the Eighth Circuit ruled that the FCC could not examine pricing decisions at all in the context of reviewing a Bell Company application for section 271 authority. See *Iowa Util. Bd. v. FCC*, 135 F.3d 535, 543 (8th Cir. 1998), *petition for cert. filed*, 66 U.S.L.W. 3623 (Mar. 13, 1998) (No. 97-1519). In addition to the jurisdictional objections to this ruling (section 271 appeals are only to be heard in the D.C. Circuit), the substance of this decision limited FCC authority in an area where it faces no section 2(b) limitation—considering Bell Company entry into the interstate long distance market. Moreover, the decision also might well have precluded the FCC from giving effect—let alone the substantial weight required by the Act—to the Justice Department's competitive assessment of the merits of Bell Company entry insofar as the Department's assessment examines the pricing structure of the state at issue. See *id.* at 541 (precluding any examination of pricing under either the competitive checklist or the public interest test). Because the Supreme Court reversed the Eighth Circuit on the FCC's authority to institute pricing guidelines, the basis for the Eighth Circuit's section 271 ruling no longer exists. In any event, it is still possible that the FCC's role in implementing section 271 could serve the purpose discussed above—that is, the FCC could decline to prescribe regulations under section 251, but rely on its section 271 authority as a backstop to oversee a state agency's implementation of the Act.

137. See *Americare Properties*, 891 P.2d at 343 (citing cases holding that the weight of authority governing Medicaid Act challenges to state agency decisions calls for de novo review of compliance with the Act's procedural requirements); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 469 (1987) (asserting that the reasoned decisions requirement of the Administrative Procedure Act standard can “flush out” illegitimate decisions). For a good explanation of the value of a standard of judicial review that allows state agencies to experiment substantively, provided that they undertake a careful process of considering the various alternatives, see Dorf & Sabel, *supra* note 89, at 392 (arguing that the proper scope of judicial review of state agency action is a careful examination of its procedure that “avoids the extremes of deference and intrusion”).

138. *Americare Properties*, 891 P.2d at 345. As for the procedural requirements, a state is not required to adopt any specific approach, but “the requirement to make findings is real: ‘mere recitation of the wording of the federal statute is not sufficient for procedural compliance.’” *Kansas Health Care Ass'n v. Kansas Dep't of Soc. and Rehabilitation Servs.*, 31 F.3d 1536, 1539 (10th Cir. 1994) (quoting *AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*,

*D. Historical Support for Deferential Review: The Ratemaking Cases*

Federal judicial review of state agency action under the Telecom Act closely resembles the judicial review of utility ratemaking decisions, although the institutional actors are different in the two models.<sup>139</sup> Under the classic model, state public utility commissions were charged with regulating the retail rates charged by utilities under their jurisdiction, subject to judicial review based upon takings limitations. The new model instituted by the Telecom Act charges those same public utility commissions with developing—through arbitration—interconnection agreements between the incumbent providers and the new entrants. These agreements, which specify the terms and conditions of entry into the local telephone market, are then subject to review in federal court to ensure consistency with the terms of the Telecom Act and FCC regulations.

Although the federal courts have little experience with reviewing the interconnection agreements spurred by the Telecom Act, they have considerable experience in takings review of ratemaking orders. As the litigation over the terms specified in the interconnection agreements will focus, at least in considerable part, on the cost of transactions between incumbent providers and new entrants, there are important analogies between the “old world” and “new world” ratemaking litigation. Indeed, as noted above in Part III (and discussed below in Part V), federal courts reviewing state agency decisions implementing the Telecom Act will be asked to evaluate some basic ratemaking issues like how to determine the proper methodology for pricing unbundled network elements.

In considering whether to adopt an intrusive or a deferential review of state agency decisions, federal courts would do well to reflect upon the failed and abandoned effort to employ a more intrusive review standard of state ratemaking orders under the Takings Clause. Justice Brandeis became an early critic of the intrusive standard adopted in *Smyth v. Ames*, lamenting that it set out “the laborious and baffling task of finding the present value of the utility.”<sup>140</sup> Eventually, in the *Hope Natural Gas* decision, the Supreme

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879 F.2d 789, 797 (10th Cir. 1989)); see also *Madrid Home for the Aging v. Iowa Dep't of Human Servs.*, 557 N.W.2d 507, 512 (Iowa 1996) (procedural “requirement is not a mere formality”).

139. See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2119 (1997) (“[T]he system of forced interaction follows in the pattern of earlier common carrier regulation to place complex substantive and institutional limitations on the power of any person simply to take the property of another.”).

140. *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 292 (1923) (Brandeis, J., dissenting).



Court rejected the laborious model of judicial review called for by *Smyth* and adopted a more deferential review of state ratemaking decisions.<sup>141</sup> In essence, the new approach resembles “something akin to *Chevron* deference,”<sup>142</sup> instructing courts to leave ratemaking decisions to regulators unless the decisions deviate from a “zone of reasonableness.”<sup>143</sup> Thus, it is no accident that the D.C. Circuit’s articulation of why courts should review ratemaking decisions deferentially mirrors the exact lesson taught by *Chevron*: “Issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission. Not surprisingly, therefore, our review is deferential.”<sup>144</sup>

## V. THE UNIFORMITY ISSUE

Even if courts conclude that *Chevron* and the historical experience of ratemaking review suggest that deference to state agencies would be a sensible configuration of the “institutional roles of the different players in the administrative state,”<sup>145</sup> the resulting absence

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141. *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944). Richard Pierce describes the Court’s shift in *Hope Natural Gas* as a pragmatic one:

Prior to *Hope*, the Court’s approach to review of ratemaking was formulaic; it focused in meticulous detail on the method by which an agency calculated a rate, insisting in case after case that government agency ratemaking reflect[s] the market value of a utility’s assets through application of a prescribed formula. The *Hope* Court formally abandoned this insistence upon specific methodology in favor of what purported to be a purely pragmatic test.

Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions*, 77 GEO. L.J. 2031, 2032 (1989).

142. Chen, *supra* note 68, at 79.

143. *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968) (“[A]ny rate selected . . . from the broad zone of reasonableness . . . cannot properly be attacked as confiscatory.”); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 478-79 (1985) (“[A]gencies and courts realized that no prescribed formula produced acceptable results in all contexts and that ‘just and reasonable’ had no fixed meaning. As a result, they replaced the formulaic approach with . . . a ‘zone of reasonableness’ [approach] within which any rate . . . must be affirmed.”) (footnote omitted); see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989) (“The economic judgments required in rate proceedings . . . do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding.”).

144. *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992). State courts also tend to give expert agencies considerable deference in ratemaking. See, e.g., *U.S. W. Communications, Inc. v. Washington Util. & Transp. Comm’n*, 949 P.2d 1321, 1328 (Wash. 1997) (stating that courts should allow “regulatory agencies [to] exercise substantial discretion in selecting the appropriate rate making methodology”).

145. Herz, *supra* note 27, at 187; see also Pierce, *supra* note 108, at 2227 (noting that “*Chevron* . . . set forth, for the first time, a coherent analytical framework that anchors the modern administrative state securely within the boundaries” of the Constitution’s separation of powers principles).

of uniformity in the interpretation and application of federal law is likely to give them considerable pause. Indeed, in other areas of the law, such as preemption, "a common judicial impulse . . . has been to strive for 'uniformity.'" <sup>146</sup> Before concluding that a concern for uniformity should trump the values of *Chevron* policy and cooperative federalism, federal courts should remember that the principle that "federal statutes are generally intended to have uniform nationwide application" <sup>147</sup> is a canon of construction, not a categorical command. <sup>148</sup> By elevating this principle above *Chevron* policy and the values of experimentation and interstate competition, courts reject the possibility that there are advantages to a lack of uniformity in federal law. <sup>149</sup> Moreover, even where uniformity in the interpretation of certain statutory gaps or ambiguities may be desirable, it is not likely to be readily achievable through judicial review. Thus, for both principled and practical reasons, federal courts should accept a certain amount of diversity in cooperative federalism programs.

### A. *The Value of Diversity*

Although the ability to generate uniform interpretations and applications of federal law may be uniquely within the province of federal agencies, the very nature of cooperative federalism schemes leaves certain aspects to the respective state agencies to implement in a flexible and varied manner. <sup>150</sup> In the case of the Telecom Act, a provision that preserves state authority to facilitate the transition to competitive telecommunications markets makes it plain that the Act allows for, and indeed encourages, such experimentation. <sup>151</sup>

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146. Lyndon, *supra* note 131, at 75.

147. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

148. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 220 n.59 (1985) ("It is not at all clear that uniformity is a value inherent in the constitutional structure.").

149. Unfortunately, the argument that national uniformity in regulation is desirable is often accepted by courts as a self-evident truth, without a careful analysis of when uniformity is actually valuable and necessary. See Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption?: A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 68-69 (1996) (stating that the notion that "national uniformity equals regulatory efficiency" is both an "unexamined and perhaps erroneous" assumption).

150. See Moulton, *supra* note 126, at 77-78 ("Not only is a lack of uniformity inevitable in a federal system, it is one of the principal goals of federalism. As a matter of history, politics, economics, and culture, the fundamental role of states in the federal system is to permit diversity of normative choices.").

151. See 47 U.S.C.A. § 251(d)(3) (West Supp. 1998). Indeed, the Act's commitment to state authority, and its intention not to preempt state regulation that is consistent with its terms, suggests that it does not place a high premium on uniform regulation across the nation. See

Despite the rhetorical force of the call for uniformity and the canon that federal law is generally to be applied uniformly, a number of federal schemes allow and indeed call for diverse results in different states. In federal maritime law, for example, the Supreme Court has often noted that the states are left with a "wide scope" to address matters as they choose, so long as they do not "make inroads on a harmonious system."<sup>152</sup> In *Yamaha Motor Corp. v. Calhoun*, the Supreme Court recently applied this principle, concluding that federal maritime law did not require a single approach to wrongful death remedies.<sup>153</sup> Citing uniformity concerns, the defendants in *Yamaha Motor* argued that the administration of maritime law demanded a single national approach to what remedies were available for federal maritime wrongful death claims.<sup>154</sup> The Supreme Court rejected this argument, making clear that maritime law—though federal in nature—is not a "solitary" scheme and did not demand "uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law."<sup>155</sup> In so doing, the Court pointed out that a relevant congressional statute expressly affirmed state authority in the area and ultimately concluded that the purposes of maritime law would best be served by leaving the states with room to experiment with different remedies, provided that they were compatible with the federal scheme.<sup>156</sup>

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*Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 815-16 (1985) (noting that preemption of state regulation, and not federal review, is the quintessential means for ensuring uniformity).

152. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 211 n.8 (1996) ("The federal cast of admiralty law, we have observed, means that 'state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope.'") (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959)); see also *Calhoun v. Yamaha Motor Corp. U.S.A.*, 40 F.3d 622, 628 (3d Cir. 1994) (State law may be applied in admiralty cases unless it conflicts with federal law by "prejudic[ing] the 'characteristic features' of federal maritime law, or interfer[ing] with the 'proper harmony and uniformity of that law.'") (quoting *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917)), *aff'd*, 516 U.S. 199 (1996).

153. *Yamaha Motor*, 516 U.S. at 200-01. A number of other federal schemes provide only a right of action and define the scope of the duty while leaving other important features up to state law. See, e.g., *Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (concluding that state law provides the statute of limitations for civil rights laws); *Tipton v. Atchison, Topeka & Santa Fe Ry. Co.*, 298 U.S. 141, 148 (1936) (finding that Federal Safety Appliance Act leaves remedy up to state law).

154. *Yamaha Motor*, 516 U.S. at 209-210.

155. *Id.* at 210.

156. See *id.* at 216. The *Yamaha Motor* Court's appreciation for experimentation and diversity diverged from what some had thought to be the core principle of maritime law: the need for national uniformity. See, e.g., Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 380-81 (1996) ("The goal of maritime law is to create an efficiently functioning set of rules that is uniform and predictable. . . . This need for uniformity was the motivating force behind the maritime grant in the Constitution."); B.J. Haeck, Note, *Yamaha Motor Corp. v. Calhoun: An Examination of Jurisdiction, Choice-of-Laws, and Federal*

The Supreme Court's decision not to preempt diverse remedial schemes in *Yamaha Motor* suggests that federal courts should be hesitant to displace differing state approaches to telecommunications deregulation under the Telecom Act based upon the mere invocation of the uniformity argument. To be sure, the form of deference in *Yamaha Motor* differs from that in the implementation of the Telecom Act. An admiralty court tolerates various state remedial schemes by forbearing from federal common lawmaking, whereas deference to the state agencies implementing the Telecom Act tolerates different approaches by accepting any reasonable interpretation of an ambiguous federal statutory term. But the end result is fundamentally similar. In both cases, federal courts refrain from ousting state decisions by recognizing the value of state experimentation that is compatible with the fundamental precepts of a federal regulatory scheme.

In charging state agencies with the implementation of federal law, Congress (or the federal agency if it enjoys residual authority) decides that the resolution of certain issues will benefit from differentiation, flexibility, and particularized knowledge.<sup>157</sup> In these situations, a state agency will often be just as capable as its federal counterpart in its ability to (1) "identify, obtain, and evaluate relevant data and analysis"; (2) "operate[] as a mechanism to register preferences for collective goods"; and (3) "coordinate regulatory decisions that courts deal with in isolation."<sup>158</sup> Thus, before federal courts displace state agency decisions and sacrifice the benefits of cooperative federalism on uniformity grounds, they should consider the words of Justice Jackson in an eloquent dissent from a Supreme Court deci-

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*Interests in Maritime Law*, 72 WASH. L. REV. 181, 202 (1997) ("Because the U.S. Supreme Court had emphasized uniformity again and again in its prior decisions in maritime tort, the lower courts understandably came to accept this as a motivating factor in their decisions."). The view that federal common law schemes necessarily demand uniformity has always been based more on rhetoric than reality, however. For example, with respect to customary international law—an area of federal common lawmaking that has continued, though under increasing criticism, in the wake of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)—"states could, and sometimes did, depart from federal court understandings of the content of [customary international law]." Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2263 (1998); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 111-15 introductory note at 41 (1987) ("State and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of the various States and by the federal courts.").

157. See Caminker, *supra* note 116, at 1006, 1013-14; Dwyer, *supra* note 8, at 1192-93.

158. Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1565 n.101 (1983).

sion that displaced state regulation of utilities through a broad construction of the Federal Power Act:

Congress may well have believed that diversity of experimentation in the field of regulation has values which centralization and uniformity destroy. . . . Long before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences. . . . It must be remembered that closer than any federal agency to those they regulate and to their customers are the state authorities, whose mechanisms are less cumbersome and whose principles can much more quickly be adjusted to the changing times. We should not utilize the centralizing powers of the federal judiciary to destroy diversities between states which Congress has been scrupulous to protect. If now and then some state does not regulate its utilities according to the federal standard, it may be a small price to pay for preserving the state initiative which gave us utilities regulation far in advance of federal initiative.<sup>159</sup>

The values behind deference to state agencies in the implementation of cooperative federalism regulatory statutes bears considerable similarity to the values underpinning the abstention doctrines that call for federal judicial deference to state judicial or administrative proceedings. Like these doctrines, applying *Chevron* to cooperative federalism schemes enables federal courts both to respect the federalism interests recognized by Congress in delegating power to state agencies, as well as to avoid addressing issues in which the state agencies admittedly enjoy superior expertise.<sup>160</sup> Although the rhetorical appeal of uniformity in federal law enjoys a legacy dating back to *Hunter's Lessee*, it is also directly contradicted by long-standing judicial practice. As David Shapiro has convincingly

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159. *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464, 488-89 (1950) (Jackson, J., dissenting).

160. Along these same lines, one commentator has argued that *Chevron* can best be understood as a protective doctrine that enables the judiciary to screen out certain disputes that it cannot satisfactorily or effectively resolve. See Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretation of Statutes? A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1299 ("*Chevron* is best understood as stating a judicially self-imposed deference requirement which is analogous to the various prudential justiciability-based limitations on federal court jurisdiction."). Indeed, judicial abstention doctrines, like the *Chevron* doctrine, instruct courts to respect specialized decision makers addressing complex regulatory matters. See *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 360-61 (1989) (noting that abstention was appropriate in both *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Alabama Public Service Commission v. Southern Railroad Co.*, 341 U.S. 341 (1951), because state court review in those cases involved specialized decision makers addressing complex regulatory matters). Alternatively, *Chevron* deference can be analogized to the doctrine of primary jurisdiction, which calls for judicial deference (in the form of a referral to an expert agency) whenever "enforcement of the claim requires the regulation of issues which, under a regulatory scheme, has been placed within the special competence of an administrative body." *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 851 (2d Cir. 1988).

explained, the common law tradition firmly authorizes courts to use their equitable discretion in deciding whether to decide matters within their jurisdiction.<sup>161</sup> In choosing how to review state agency interpretations of cooperative federalism statutes, the federal courts would do well to utilize this discretion by adopting the *Chevron* standard in order to keep themselves out of areas where they are at a relative disadvantage.<sup>162</sup>

Even if the federal courts conclude that uniformity concerns are paramount in interpreting cooperative federalism statutes, they should bear in mind that they are not well suited to develop uniform rules on intricate regulatory matters in any event. For example, the details of the Telecom Act are likely to generate considerable conflict among the courts of appeal (not to mention the district courts), and it is pure fiction to envision Supreme Court review of them all.<sup>163</sup> In short, if a certain lack of uniformity is inevitable and even tolerable—as several commentators suggest<sup>164</sup>—then courts might ask themselves what uniformity purposes are actually served by a more intrusive standard of review.

*B. The Inability to Generate Uniformity Through Judicial Review:  
The Case of the Telecom Act*

Perhaps because of the lack of clarity on how certain provisions of the Telecom Act should be interpreted (and by whom), the FCC took the position that the Act authorized it to cabin state agency decisions on all matters relating to the development of local competition,

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161. See David L. Shapiro, *Jurisdiction and Discretion*, 77 N.Y.U. L. REV. 543, 588 (1985) ("[T]he responsibility of the federal courts to adjudicate disputes does and should carry with it significant leeway for the exercise of reasoned discretion in matters relating to federal jurisdiction.").

162. As some commentators have put it, the best judicial policy in certain areas is forbearance. See, e.g., Pierce, *supra* note 141, at 2075 ("Electric utility ratemaking is only one of many arenas, however, in which judicial forbearance ultimately will yield a political solution superior to that available from the judiciary.").

163. Edward Hartnett recently emphasized this point, explaining that:

No system—short of requiring Supreme Court review of all state court judgments involving federal issues—will produce perfect uniformity. Perfect uniformity would require eliminating the choice now given to losing litigants to decline to seek review, eliminating the discretion given to the Court to decline to exercise review, and eliminating the restrictions on the Court's jurisdiction.

Edward Hartnett, *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 945 n.205 (1997).

164. See, e.g., *id.* ("[I]f an issue arises infrequently enough, some disuniformity may be permanent, but, for precisely that reason, hardly of serious concern."); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 697 (1995) (concluding that "unresolved intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system").

including the methodology used to calculate the rates at which competitors could lease individual elements unbundled from an incumbent provider's network. As discussed in Part III, the Eighth Circuit's decision in *Iowa Utilities Board* rejected the FCC's claim to interpretive authority on this issue, holding that the Telecom Act left decisions about intrastate telecommunications services not specifically assigned to the FCC solely in the hands of the state regulators.<sup>165</sup> Had the Supreme Court not overturned that ruling, the federal courts would not have been guided by any controlling authority when reviewing state agency interpretations of federal law in a multitude of situations. Even with the reinstatement of the FCC's regulations, however, there are still likely to be a number of situations where the state agencies will be left with discretion to interpret the Telecom Act subject only to judicial review or the subsequent adoption of a regulation by the FCC.<sup>166</sup>

The regulatory and judicial processes surrounding the development of interconnection agreements are designed to develop fair arrangements between incumbent providers and new entrants. As Congress rightly recognized, voluntary negotiation between the parties would not be sufficient to develop the necessary arrangements, as "the blockade position of the local monopolists is such that they would have every incentive to guard access to their networks against their would-be competitors."<sup>167</sup> Because many of these arrangements—access to unbundled network elements, porting of telephone numbers when customers switch providers, access to rights-of-way, or terms and conditions for exchanging traffic—will come at a price, considerable incentives exist for parties to contest unfavorable results by arguing that they stemmed from legal error. Under *Chevron*, however, review of these arrangements would not invite judicial policymaking, but would instead be limited to whether the expert agency adopted a reasonable interpretation of the relevant statutory provision, followed the requisite

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165. *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 794 n.10 (8th Cir. 1997) (listing areas of the FCC's enumerated authority), *rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Util. Bd.*, No. 97-826, 1999 WL 24568 (U.S. Jan. 25, 1999).

166. As noted above, the lack of controlling authority on certain questions would still be a dilemma for federal district courts even if the FCC's pricing rules remained in effect, as those pricing rules would still confer considerable discretion on the state agencies. See FCC Petition for Writ of Certiorari at 26, 39, *FCC v. Iowa Util. Bd.*, 135 F.3d 535 (8th Cir. 1998) (No. 97-831) (explaining that state agencies are able to "exercise considerable discretion" and serve the "important task of tailoring [the Act's] standards to accommodate region—or carrier—specific variables" even under the FCC's pricing regulations).

167. Epstein, *supra* note 139, at 2119.

statutory procedures,<sup>168</sup> and applied that interpretation in a reasonable manner.<sup>169</sup> Bearing these constraints in mind, Part V.B.1 below details how district courts should review state agency decisions regarding the "cost"-based pricing standard for unbundled network elements under *Chevron*, and Part V.B.2 outlines the likely outcomes if federal courts decline to follow this approach.

### 1. The "Cost"-Based Pricing Standard

In the wake of its defeat in *Iowa Utilities Board*, the FCC argued that a federal statutory term must have a single meaning nationwide and, even if that meaning cannot be determined by reference to an FCC regulation, it still must be defined by a federal court.<sup>170</sup> Many district courts appear to agree with this sentiment and have not deferred to state agency interpretations of federal telecommunications law on uniformity grounds.<sup>171</sup> Under this approach, however, federal courts reviewing state arbitrations will have the unwelcome task of engaging in de novo review of the pricing methodology of state PUCs. Moreover, even though the federal regulations on pricing are now binding and provide guidance to the federal courts, judicial battles over pricing will still ensue; the FCC's *Local Competition Order* sets forth only broad guiding principles for states to consider in establishing forward-looking costs.<sup>172</sup> That is, even with the reinstatement of the FCC regulations, federal courts will still be called upon to oversee

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168. In the Medicaid Act context, for example, the weight of authority interprets *Chevron* as calling for a de novo review of the procedural requirements (e.g., whether the agency made the necessary findings), but a deferential standard on the interpretation of the Act's substantive requirements. See, e.g., *Americare Properties, Inc. v. Whiteman*, 891 P.2d 336, 339-340 (Kan. 1995).

169. See, e.g., *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983) (stating that a court must review an agency decision to ensure "a rational connection between the facts found and the choice made"); *Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehabilitation Servs.*, 31 F.3d 1536, 1540 (10th Cir. 1994) ("While states have considerable discretion, their determination of reasonable reimbursement rates must be principled.").

170. See FCC Petition for Writ of Certiorari at 15, *Iowa Util. Bd.*, 135 F.3d 535 (8th Cir. 1998) (No. 97-831) (arguing that the Act could not have given state commissions unbounded discretion in calculating wholesale rate structure required as a matter of federal law); *id.* at 22-24 (arguing that federal court review of the Act's basic legal issues, such as the proper cost standard, will eventually yield a nationwide definition of key statutory terms).

171. See, e.g., *U.S. W. Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, 1998 WL 350588, at \*2 (W.D. Wash. Jan. 7, 1998) ("*Chevron* deference is not appropriate where as many as fifty state commissions will be applying the Telecommunications Act.").

172. See Rosston, *supra* note 48, at 8 ("It is impossible to predict actual rates in any state from the principles set forth in the *Order*. In fact, some states are suing . . . because they think the resulting rates will be too high, while others are suing because they think the . . . rates will be too low.").



state interpretations of constraining principles (imposed by either the Act itself or by FCC regulations) in order to establish the actual rates for the leasing of unbundled network elements.

The most basic question about the statutory concept of “cost”-based pricing for unbundled network elements is whether there will be a single definition that will constrain how they can be priced. In the absence of a binding FCC regulation after the Eighth Circuit’s decision, courts were forced to decide for themselves whether the prices charged for unbundled network elements must be “forward-looking” or based on “historic costs.”<sup>173</sup> Based on the Act’s purpose of fostering competition,<sup>174</sup> the FCC regulations concluded that the Act demands the former definition, but the issue is hardly free of controversy.<sup>175</sup>

With regard to the pricing of unbundled network elements, the incentive for parties to seek a better deal from the courts than they obtained from state regulators will be enormous.<sup>176</sup> It seems unlikely, however, that courts will be in a position to recalculate the prices for telecommunications facilities and services; as the Supreme Court has candidly put it, “neither law nor economics has yet devised generally

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173. A forward-looking cost methodology calls for a network to be leased at its efficient replacement cost. That is, such a methodology asks what it would cost a competitor to build the network today and not what amount was actually paid for the network when it was built.

174. The FCC’s *Local Competition Order* explained that:

In dynamic competitive markets, firms take action based not on embedded costs, but on the relationship between market-determined prices and forward-looking economic costs. If market prices exceed forward-looking economic costs, new competitors will enter the market. If their forward-looking economic costs exceed market prices, new competitors will not enter the market and existing competitors may decide to leave.

*Local Competition Order*, 11 F.C.C.R. 15,499, 15,813 (1996).

175. See Rosston, *supra* note 48, at 8 (“There was, and is, significant debate about the pricing principles set forth by the Commission.”). Compare Gregory J. Sidak & Daniel F. Spulber, *The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996*, 97 COLUM. L. REV. 1081, 1083 (1997) (arguing that incumbent providers should be forced to lease network elements at their historic cost), with William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037, 1038 (1997) (“Most economists, joined by the FCC and the majority of state PUCs, believe that rational decisions on the pricing of unbundled network elements and access to local networks must be based on forward-looking costs.”), and *id.* at 1062-63 (“For regulation to provide consumers the benefits of competition, the regulatory rules must replicate the behavior in competitive markets. . . . [C]ompetitive markets force firms to adapt their prices to forward-looking costs.”).

176. Joel I. Klein, *The Race for Local Competition: A Long Distance Run, Not a Sprint*, Address Before the American Enterprise Institute 6 (Nov. 5, 1997), in *Speeches by Senior Members of the Antitrust Division* (last modified Mar. 10, 1998) <<http://www.usdoj.gov/atr/public/speeches/1268.htm>> (stating that incumbents and new entrants are bound to fight over pricing, as it “can determine the relative success of the new entrants vis-a-vis the existing incumbent monopolist,” and “each side understandably wants a margin of error to protect itself”).

accepted standards for the evaluation of rate-making orders.”<sup>177</sup> In short, because “agency ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise,”<sup>178</sup> it would not be “the most sensible” administrative scheme to ask courts to engage in intrusive judicial review over those decisions.<sup>179</sup> Indeed, if the past history of the judicial review of ratemaking decisions is prologue, the courts would do well to accord the state agencies deference in this area (even with respect to their interpretation and implementation of the FCC regulations).<sup>180</sup>

*Chevron* deference does not mean that courts are to forsake judicial review, but rather that judicial review should be premised on modern administrative law principles as opposed to second-guessing of reasonable agency determinations.<sup>181</sup> As is always the case, the amount of guidance that can be had from a statutory term through the traditional tools of statutory interpretation is sure to be disputed,<sup>182</sup> but *Chevron* demands that courts determine what range of choices are available to the agency under the statute. As with the Medicaid Act, courts interpreting the Telecom Act may require that state agency decisions hew not only to the procedural requirements and the textual bounds of the Act, but also remain “consistent with the objectives” of the Act.<sup>183</sup> That is, rather than engaging in the details of pricing methodologies for unbundled network elements, courts can be far more effective by identifying pricing arrangements that are outside the range of what any state commission could accept

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177. *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

178. *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995), *cert denied*, 516 U.S. 1112 (1996).

179. Sunstein, *supra* note 25, at 2086.

180. *See, e.g., Mobil Oil Exploration & Prod. S.E. v. United Distrib. Cos.*, 498 U.S. 211, 224 (1991) (“Far from binding [FERC], the ‘just and reasonable’ requirement [of the Natural Gas Policy Act and the Natural Gas Act] accords it broad ratemaking authority. . . . The Court has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula in general.”).

181. As Michael Herz explained, “to the extent Congress has in fact decided something [in the statute], *Chevron*’s own political theory requires the courts to ensure that agencies act consistently with that decision.” Herz, *supra* note 27, at 190. Or, as Peter Strauss puts it, Congress sometimes enacts a statutory term with a “range of indeterminacy” that leaves it to the agency to develop a concept, provided it does not go off the deep end. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987).

182. Compare, for example, the opinion of the court in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 229-30 (1994), with the dissenting opinion, *id.* at 245 (Stevens, J., dissenting).

183. *Beal v. Poe*, 432 U.S. 438, 444 (1977); *see also Weaver v. Reagan*, 886 F.2d 194, 199-200 (8th Cir. 1989) (holding that state refusal to fund AZT when deemed a medical necessity was inconsistent with objectives of the Medicaid Act).

as “cost”-based.<sup>184</sup> Put simply, state agencies are particularly well-suited to filling in statutory interstices and defining ambiguous terms in cooperative federalism statutes, whereas courts are better at setting forth and applying broader legal principles.<sup>185</sup>

An irony of *Chevron* deference is that it not only admonishes courts to resist intrusive oversight of highly technical or policy-bound questions, but it also emphasizes that courts should maintain careful oversight of articulable legal principles. In this sense, step one of *Chevron*—determining whether the statute speaks to the issue at hand—is not an invitation to courts to throw up their hands in the face of a complex regulatory scheme, but rather to sort the legal principles from the policy judgments left implicit in the statutory scheme. Accordingly, the implementation of the Telecom Act not only would be hampered by an overintrusive judicial review, but would benefit from the proper type of judicial review—one guided by *Chevron*. Indeed, as discussed below, some of those courts refusing to apply the *Chevron* two step analysis may actually undertake a *less* careful scrutiny of the state agencies’ decisions than called for by *Chevron*, for example, by classifying certain statutory terms as factual, rather than as legal, inquiries.<sup>186</sup> If these courts adhered to the *Chevron* standard, they would instead articulate the bounds of reasonable choices allowed by the statute and oversee the application of these choices to ensure that they were faithfully applied to the facts.<sup>187</sup>

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184. With respect to the Telecom Act, courts would do well, for example, to pay particular attention to whether one-time charges associated with the provisioning of network elements actually reflect real costs (no matter how calculated) and whether state PUCs have allowed incumbent providers to levy charges on top of the price of purchasing the unbundled elements necessary to provide service. See, e.g., *AT&T Communications Corp. v. Pacific Bell*, No. 97-0080, 1998 WL 246652, at \*15-16 (N.D. Cal. May 11, 1998) (holding that levying of access charges in addition to price for unbundled elements violated Telecom Act).

185. As Justice Breyer once noted:

The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency’s (rather than the court’s) administrative or substantive expertise, the less likely it is that Congress . . . “wished” or “expected” the courts to remain indifferent to the agency’s views.

*Mayburg v. Secretary of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984).

186. See *infra* Part V.B.2.

187. The Supreme Court, in its discussion of the state agency role in implementing the Medicaid Act, hinted at such an approach. See *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 519-20 (1990) (“While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act.”).

## 2. A Telecom Act Without Deference to State Agencies

Should courts decline to accord deference to state agencies charged with implementing the Telecom Act, they are likely to look for ways to avoid many of the difficult interpretive questions called for by de novo review of state agency determinations. Specifically, there appear to be four readily available (and already used) approaches that will offer courts a way out of resolving interpretive questions presented by the Telecom Act: (1) relying on FCC rules, even if not binding, as a source of interpretive guidance; (2) declaring that open-ended statutory concepts are really fact questions on which they may permissibly defer to the state agency; (3) reviewing legal issues de novo, but applying a deferential standard when reviewing the application of that standard to the facts; or (4) determining that the open-ended statutory standards themselves allow for a zone of reasonableness, thereby stating a de novo legal standard, but applying a deferential one in fact. Many of the cases rejecting the state agencies' argument that they merit *Chevron* deference in implementing the Telecom Act have taken one of these approaches to avoiding intrusive judicial review in practice, even while giving lip service to the value of uniformity in the interpretation of federal law.

The first approach envisions that the federal courts would interpret the Telecom Act in a manner similar to how some courts have treated the Medicaid Act—deferring to the state agency when it acts in accordance with standards set by the federal agency. With this approach, courts would view non-binding FCC regulations as providing valuable guidance to courts on the validity of state agency decisions. Under such an approach, non-binding FCC regulations are treated as comparable to interpretive rules adopted by agencies without a statutory charge to do so, such as those issued by the EEOC.<sup>188</sup> Although no court has specifically relied on this model as its approach,<sup>189</sup> some courts have looked to the FCC's regulations for guidance. In *U.S. West Communications, Inc. v. TCG Seattle*, for example, Judge Dwyer upheld the Washington Utilities and Transportation Commission's price-setting for unbundled local loops<sup>190</sup>

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188. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (holding that EEOC regulations, though not authorized by statute, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

189. One court did note that such an approach would not work in the Telecom Act context because the FCC was not granted a formal oversight role, such as that enjoyed by HCFA in the Medicaid Act context. See *GTE S., Inc. v. Morrison*, 6 F. Supp. 2d 517, 524 (E.D. Va. 1998).

on the ground that it was based on a similar methodology to that recommended by the FCC, which, though not binding, "still can be informative."<sup>191</sup>

The second approach, which construes many of the difficult statutory terms as fact questions, may well become popular among courts that wish to proclaim federal judicial supremacy, but still wish to avoid the challenging task of closely analyzing pricing methodologies. With this approach, courts can have it both ways, refusing to defer to state agencies on legal questions, but avoiding the difficult work that would ensue should they take on the responsibility of interpreting open-ended statutory standards. In fact, Judge Dwyer recently took this approach (in addition to relying on the FCC's similar methodology), concluding that a state commission's determinations on pricing decisions:

Must be treated as fact findings and reviewed to test whether they are arbitrary and capricious. Under that deferential standard, a reviewing court under the Administrative Procedure Act (analogous here) is to consider whether the agency's decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. The court may not substitute its judgment for that of the agency.<sup>192</sup>

Judge Dwyer's decision on the "cost"-based standard may be an attempt to resolve the tension between two competing rationales: (1) not to defer to state agencies on legal questions (which he held was inappropriate under the Telecom Act); and (2) not to get into the business of second-guessing and recalculating highly technical policy decisions. Given this tension, Judge Dwyer's conclusion is understandable, but unfortunate in that it may compromise the "cost"-based pricing standard of its legal force even under a *Chevron* standard.<sup>193</sup> That is, by classifying all pricing decisions as fact

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190. The "local loop" is the term that refers to the wire from an incumbent's central office to an end user.

191. *U.S. W. Communications, Inc. v. TCG Seattle*, No. C97-354WD, slip op. at 5 (W.D. Wash. filed Jan. 22, 1998); see also *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 7 F. Supp. 2d 674, 678-80 (E.D.N.C. 1998) (noting that an FCC determination regarding "dark fiber" in a proceeding predating the Telecom Act "is quite persuasive in considering whether such a service is a network element under the current Act.>").

192. *U.S. W. Communications, Inc.*, No. C97-354WD, slip op. at 4 (citation omitted). Other courts have viewed the matter as a legal issue and reviewed the question de novo. See *GTE S., Inc. v. Morrison*, 6 F. Supp. 2d 517, 529 (E.D. Va. 1998) (noting that the Act is best read "as not allowing historical cost" inputs for developing the prices of unbundled network elements.).

193. In a later case, Judge Dwyer stated that the Act "does not require that a 'just and reasonable rate' be based on actual or historical costs." *MCIMetro Access Transmission Servs., Inc. v. GTE N.W., Inc.*, No. C97-742WD, slip op. at 7 (W.D. Wash. July 8, 1998). Unfortunately,

questions, courts may move away from even taking on the level of oversight called for by the two step *Chevron* analysis.

In an interesting twist on the fact question approach, it seems likely that some courts will not classify all legal determinations as fact issues, but rather will do so on a selective basis to avoid particularly laborious inquiries. In *MCI v. BellSouth*, for example, the court essentially concluded that because the FCC decided to leave to state commissions the decision of whether a subloop was an unbundled element, the decision must be regarded as an issue of fact.<sup>194</sup> If the *MCI* court appreciated the nature of the Telecom Act's cooperative federalism scheme, however, it could have recognized that the FCC's failure to fill a gap or answer a legal question does not automatically transform the issue into a fact question or force courts to address the matter de novo. Rather, according to *Chevron* deference to state agencies acknowledges that they are equipped to address such unanswered issues. Thus, even without classifying these issues as fact questions, courts can "defer to the technical expertise" of state commissions as they interpret and apply federal telecommunications law.<sup>195</sup>

A third approach addresses legal issues de novo, but uses a deferential review when legal standards are applied to facts. Unfortunately, this approach will run up against some difficult line-drawing problems and may be difficult to institute. First, courts may find it difficult to apply a strategy that neither finds its roots in traditional agency review (i.e., *Chevron*) nor in traditional appellate oversight, which requires de novo review to ensure that a legal standard is faithfully and properly applied to the facts.<sup>196</sup> Second, this new standard, though a creative means of guarding against an overintrusive judicial review, may immerse the judiciary in determinations of what constitutes a clean legal judgment as opposed to an application of a legal principle to particular factual circumstances. It may well be that courts resolve this tension by defining the Act's legal standards at a fairly high level of generality and by employing a deferential review in practice, while insisting that they scrutinize all legal determinations de novo.

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probably because the case was not argued on that ground, he did not make clear what, if any, pricing standards are imposed by the Act.

194. *MCI Telecomm.*, 7 F. Supp. 2d at 680-81.

195. *Id.* at 681.

196. See *U.S. W. Communications, Inc. v. Hix*, 986 F. Supp. 13, 19 (D. Colo. 1997) (stating that this standard "does not rely on technical distinctions between questions of law and questions of fact or mixed questions of law and fact as those terms have been defined by other cases.").

Finally, courts may avoid an intrusive judicial review of state agency decisions through a form of burden shifting that requires the plaintiff to demonstrate that the decision is inconsistent with federal law. This strategy contemplates that courts will interpret statutory terms to allow for multiple approaches, any of which would be upheld as being consistent with the Act. To be sure, this is deference by another name, but Judge Dwyer also utilized this approach in a later case addressing the issue of whether "dark fiber"<sup>197</sup> is an unbundled network element. He concluded that, "[as] [t]here is no authority exactly on point . . . [t]he WUTC's decision on this point cannot be deemed arbitrary and capricious."<sup>198</sup> Similarly, the Tenth Circuit, which has refused to defer to state agencies in the Medicaid Act context, has taken this very approach, explaining that it will review state reimbursement plans *de novo*, but only under a standard that requires that they "fall within a 'zone or range of reasonableness.'"<sup>199</sup> On this approach, courts would acknowledge that the "cost"-based pricing standard for network elements imposes a legal standard, but would avoid the hard work of defining that standard by interpreting it as a broad one that allows for a number of different approaches.<sup>200</sup>

## VI. CONCLUSION

The Telecommunications Act of 1996 launched a grand experiment in regulatory reform. Even in the best of all possible worlds, the project of facilitating competition in local telephony through the sharing of incumbent providers' facilities with new entrants was not going to be easy; that is, the technical, economic, and legal challenges inherent in readjusting an almost century old system of regulation takes time. As federal courts review decisions by the state administrative agencies charged with implementing federal law, they will increasingly be asking themselves how best to understand their role

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197. The term "dark fiber" refers to the unlit fiber optic conduits in the local network.

198. *MCIMetro Access Transmission Servs.*, No. C97-742WD, slip op. at 8. Other courts have deemed this issue a question of law and interpreted the matter for themselves. See *MCI Telecomm.*, 7 F. Supp. 2d at 679-80 (reversing the state agency's decision that "dark fiber" did not constitute a network element).

199. *Kansas Health Care Ass'n v. Kansas Dep't of Soc. and Rehabilitation Servs.*, 31 F.3d 1536, 1539 (10th Cir. 1994) (quoting *Colorado Health Care Ass'n v. Colorado*, 842 F.2d 1158, 1167 (10th Cir. 1988)).

200. One court has already taken this approach in a challenge to a state's universal service program. See *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 956 P.2d 685, 700 (Kan. 1998) ("We hold the revenue neutral concept is not prohibited by or contrary to the Federal Act.").

in this project. In answering this question, they will also be addressing a much larger one: Does *Chevron* apply to cooperative federalism schemes where Congress delegates interpretive authority to state agencies?

In adopting the *Chevron* framework, the Supreme Court concluded that the rise of the administrative state warranted a departure from the *Marbury* dictum. Similarly, the rise of the cooperative federalism state—exemplified by statutes such as the Telecom Act—suggests that the *Chevron* doctrine should also be applied to judicial review of state agency decisions, even though doing so departs from *Hunter's Lessee's* rhetorical call for absolute uniformity in the interpretation and application of federal law. But moving away from the *Hunter's Lessee* mindset and applying *Chevron* to state agency decisions will enable federal courts and state agencies to better maintain their proper institutional roles and to fulfill the promise of cooperative federalism. Conversely, if the federal courts refuse to give state agencies the deference that they deserve, they may ultimately undermine the possibilities presented by the emerging cooperative federalism state.