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Judicial Deference to Municipal Interpretation

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JUDICIAL DEFERENCE TO MUNICIPAL INTERPRETATION

Joseph S. Diedrich*

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INTRODUCTION

Municipal governments exercise great power over the lives of their constituents. In “a number of policy areas,” municipalities “have long exercised significant regulatory authority.”¹ They are, for example, “the most important and powerful regulator of land uses and thus of housing supply.”² As the COVID-19 pandemic has highlighted, they have broad authority over matters of public health.³ And to name just a few more examples, municipalities extensively regulate the local economy, provide public services, and distribute public benefits.⁴ Municipalities regulate all

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1. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 588 (2017). See generally WIS. STAT. §§ 59.01–66.1341 (2022).

2. David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1352; accord Davidson, *supra* note 1, at 588 (“A prime example is land use control and the regulation of the built environment.”); see, e.g., WIS. STAT. §§ 59.69, 62.231 (2022).

3. See Nikki C. Day, Jennifer R. Cowan & Noah M. Daiker, *Governing Through the “New Normal”: Covid-19 Lessons Learned on Local Government Law, the Constitution, and Balancing Rights in Times of Crises*, 50 STETSON L. REV. 547, 549–50 (2021); see also WIS. STAT. § 252.03 (2022); Davidson, *supra* note 1, at 589–90.

4. See Davidson, *supra* note 1, at 590–92.

these areas primarily by enacting and enforcing ordinances. How ordinances are interpreted thus matters a lot, both for municipal governments and regulated parties.

Even so, scant attention has been paid to how courts interpret municipal ordinances. That is especially true compared to the constant focus on how courts interpret federal and state administrative rules, statutes, and constitutional provisions. In particular, jurists and scholars have spilled much ink about judicial deference to administrative agency interpretation of law. Arguments about *Chevron* deference, *Auer* deference, and their state analogues are all the rage.⁵

Wisconsin presents an ideal case study on the relationship between agency-deference principles and municipal-ordinance interpretation. As recounted below, Wisconsin courts once deferred to agency interpretations of statutes and rules under certain circumstances. But, in 2018, in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*,⁶ the Wisconsin Supreme Court ended that practice. For several years, Wisconsin courts have also deferred to municipalities' interpretations of their ordinances under certain circumstances. In many ways, this practice resembles pre-*Tetra Tech* agency deference. Indeed, both deference doctrines instruct courts to defer to a non-judicial actor's interpretation of ambiguous law so long as it is reasonable.

This Essay explores judicial deference to municipal interpretation of ordinances and *Tetra Tech's* effect on that deference. Part I briefly describes Wisconsin's pre-*Tetra Tech* agency deference doctrine. It then reviews the multiple grounds on which the *Tetra Tech* court relied to end that deference. Part II details Wisconsin's doctrine of deference to municipal interpretations of ordinances. Part III considers whether *Tetra Tech's* reasoning and holding extend to municipal deference. Finally, Part IV briefly remarks on states other than Wisconsin, noting that Wisconsin's experience is shared elsewhere and has potentially broad application. This Essay ultimately concludes that all of *Tetra Tech's* bases for assailing agency deference — constitutional structure, due process, and prudential concerns — also apply to municipal deference. Based on *Tetra Tech*, then, municipal deference must fall — or already has fallen.

I. JUDICIAL DEFERENCE TO AGENCY INTERPRETATION

Before June 2018, Wisconsin courts adhered to a framework of binding deference to administrative agency interpretations of law. While

5. See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018).

6. 914 N.W.2d 21 (Wis. 2018).

acknowledging that “statutory interpretation is a question of law which courts decide *de novo*,” courts simultaneously declared they would “defer to an administrative agency’s interpretation of a statute in certain situations.”⁷ Starting with roots in the late 1800s,⁸ Wisconsin’s deference framework evolved over time to eventually become a “three-level test.”⁹ The three levels were “great weight” deference, “due weight” deference, and no deference.¹⁰

Great weight deference was triggered when statutory language was ambiguous and four additional factors were satisfied: (1) the legislature had “charged” the agency “with the duty of administering the statute;” (2) the agency’s interpretation was “one of long-standing;” (3) the agency “employed its expertise or specialized knowledge in forming [its] interpretation;” and (4) “the agency’s interpretation will provide uniformity and consistency in the application of the statute.”¹¹ When these preconditions were met, a reviewing court had to adopt the agency’s interpretation “so long as it [was] reasonable.”¹² A “reasonable” interpretation was one that did not “directly contravene[] the words of the statute” and was not “clearly contrary to legislative intent” or “without rational basis.”¹³ The court had to defer even if, in its own view, “another interpretation was *more* reasonable” than the agency’s interpretation.¹⁴

Due weight deference was triggered when (1) statutory language was ambiguous; (2) the legislature had charged the agency with the duty of administering the statute; and (3) “the agency [had] some experience in an area, but [had] not developed the expertise which necessarily places it in a

7. *Harnischfeger Corp. v. Lab. & Indus. Rev. Comm’n*, 539 N.W.2d 98, 102 (Wis. 1995).

8. See *Tetra Tech*, 914 N.W.2d at 33–38; see also Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in This Court of Last Resort?*, 89 MARQ. L. REV. 541, 548–60 (2006).

9. Daniel R. Suhr, *Interpreting Wisconsin Administrative Law 4* (Aug. 23, 2017) (unpublished manuscript), <https://deliverypdf.ssrn.com/delivery.php?ID=263005086004126074118075017083069105003034008042017092107004079077095000102119113091028050096020029036111011086004094098122001018007044086045085002116103121121090029025026014020004122094119101021004109093106085104083099071121022091109074086092110026106&EXT=pdf&INDEX=TRUE> [https://perma.cc/GJ88-ZU63]; see also Salvatore Massa, *The Standards of Review for Agency Interpretation in Wisconsin*, 83 MARQ. L. REV. 597, 607 (2000).

10. See *Harnischfeger*, 539 N.W.2d at 102.

11. *Tetra Tech*, 914 N.W.2d at 31 (quoting *Harnischfeger*, 539 N.W.2d at 102); see also *UFE, Inc. v. Lab. & Indus. Rev. Comm’n*, 548 N.W.2d 57, 61 (Wis. 1996); Massa, *supra* note 9, at 602–03.

12. *Tetra Tech*, 914 N.W.2d at 31.

13. *Id.* at 31–32 (quoting *Harnischfeger*, 539 N.W.2d at 662).

14. *Id.* at 32 (emphasis added) (quoting *Crystal Lake Cheese Factory v. Lab. & Indus. Rev. Comm’n*, 664 N.W.2d 651, 659 (Wis. 2003)).

better position to make judgments regarding the interpretation of the statute than a court.”¹⁵ When these preconditions were met, a reviewing court had to defer to an agency’s reasonable interpretation — except “[i]f [the] court [found] an alternative interpretation more reasonable.”¹⁶ Faced with a tie between two equally reasonable interpretations, a court had to favor the agency’s interpretation.¹⁷

No deference was applied when statutory language was unambiguous or “when the issue [was] one of first impression for the agency and the agency lack[ed] special expertise or experience in determining the question presented.”¹⁸ Under those circumstances, courts simply undertook their traditional role of interpreting and applying the law.

In addition to statutes, courts also deferred to agency interpretations of their own administrative rules.¹⁹ Only two levels of deference were applied: great weight and no deference. Great weight deference for rules was “similar to the great weight standard applied to statutory interpretations” and “turn[ed] on whether the agency’s interpretation [was] reasonable and consistent with the meaning or purpose of the regulation or statute.”²⁰ In other words, when an agency offered a reasonable interpretation of its own administrative rule, a court had to accept that interpretation.

In *Tetra Tech*, the Wisconsin Supreme Court “end[ed] [the] practice of deferring to administrative agencies’ conclusions of law.”²¹ Although five of seven justices agreed with that outcome, the reasoning was fractured. The lead opinion, which announced the court’s judgment, was authored by Justice Daniel Kelly and joined by Justice Rebecca Grassl Bradley.²² Multiple concurring opinions were also filed.²³

The lead opinion reasoned that agency deference violated state constitutional structure and due process. Starting with the former, the

15. *Id.* (quoting *UFE*, 548 N.W.2d at 57).

16. *UFE*, 548 N.W.2d at 62–63.

17. *See* *ABKA Ltd. P’ship v. Wis. Dep’t of Nat. Res.*, 648 N.W.2d 854, 877 (Wis. 2002) (Sykes, J., dissenting) (“[T]he agency’s legal interpretation will be upheld even if there is a different, equally reasonable interpretation — in other words, a tie goes to the agency.”); *see also* Suhr, *supra* note 9, at 7.

18. *Kitten v. State Dep’t of Workforce Dev.*, 644 N.W.2d 649, 656 (Wis. 2002); *see also* Massa, *supra* note 9, at 603–04.

19. *See* Suhr, *supra* note 9, at 7.

20. *Id.* (quoting *Marder v. Univ. of Wis.*, 687 N.W.2d 832, 839 n.3 (Wis. Ct. App. 2004)).

21. 914 N.W.2d 21, 45 (Wis. 2018). *Tetra Tech* has since been codified. *See* WIS. STAT. § 227.57(11) (2022) (“Upon review of an agency action or decision, the court shall accord no deference to the agency’s interpretation of law.”).

22. *See Tetra Tech*, 914 N.W.2d at 28–29 n.4.

23. *See infra* notes 40–47 and accompanying text.

Wisconsin Constitution creates three separate branches of state government and vests each with a distinct power.²⁴ This structural separation bars any branch from encroaching onto another's core power or from abdicating its own core and transferring it elsewhere.²⁵

Specifically, the Wisconsin Constitution provides that “[t]he judicial power of this state shall be vested in [the courts].”²⁶ At its core, “judicial power” means the power and duty (1) to apply law to adjudicate disputes;²⁷ (2) in the course of adjudicating disputes, to interpret the law and ascertain its meaning; and (3) to decide in accord with higher-order law when multiple sources of law conflict.²⁸ Given the separation of powers and the vesting of “judicial power” in the courts, the lead opinion reasoned that “only the judiciary may authoritatively interpret and apply the law in cases before our courts.”²⁹ “[B]ecause that power belongs to the judiciary — and the judiciary alone — [courts] may not allow an administrative agency to exercise it.”³⁰ Yet when they apply deference, courts “cede to the agency” the “core judicial power” to “authoritatively interpret the law . . . and apply the law to the case.”³¹ Constitutional structure, therefore, forbids courts from deferring to agency interpretations of law.

The *Tetra Tech* lead opinion also concluded that agency deference was incompatible with the due-process right to a “fair trial in a fair tribunal.”³² Deference was often, if not always, applied in cases where “[the] agency appear[ed] in . . . court[] as a party.”³³ Once deference was triggered, courts effectively “receive[d] instruction from the [agency] on how to interpret and apply the rule of decision.”³⁴ “This systematic favor,” in the lead opinion’s view, “deprive[d] the non-governmental party of an

24. *Tetra Tech*, 914 N.W.2d at 41 n.28.

25. *See id.* at 41–43. Although “[t]he constitution does not . . . hermetically seal the branches from each other[,]” each branch’s “[c]ore powers” cannot be “shar[ed].” *Id.* at 42. To that end, “[t]he separation of powers prevents [courts] from abdicating core power just as much as it protects the judiciary from encroachment by other branches.” *Id.*

26. WIS. CONST. art. VII, § 2.

27. *See Tetra Tech*, 914 N.W.2d at 42–43, 45. In the words of the *Tetra Tech* lead opinion, “exercising judgment in the interpretation and application of the law in a particular case is the very thing that distinguishes the judiciary from the other branches.” *Id.* at 42.

28. *See id.*; *see also* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437–40 (2019) (Gorsuch, J., concurring); *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803); Joseph S. Diedrich, *Separation, Supremacy, and the Unconstitutional Rational Basis Test*, 66 VILL. L. REV. 249, 264–70 (2021) (discussing the judicial power and citing several sources).

29. *Tetra Tech*, 914 N.W.2d at 45.

30. *Id.*

31. *Id.*

32. *Id.* at 48–50 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *see also* *State v. Herrmann*, 867 N.W.2d 772, 778 (Wis. 2015) (applying the principle in Wisconsin).

33. *Tetra Tech*, 914 N.W.2d at 48–49.

34. *Id.* at 49.

independent and impartial tribunal.”³⁵ In no small way, the agency “interpret[ed] and applie[d] the law in a case to which it [was] a party,” thereby unlawfully “acting as judge of its own cause.”³⁶

For the lead opinion, great weight and due weight deference both raised the same constitutional concerns; any difference was a matter of degree.³⁷ Systematic, binding deference in any form could not stand. At the same time, the lead opinion noted that an agency’s views on interpretation deserved respect “as matter of persuasion, not deference.”³⁸ The agency, to that end, must “explain how its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties, and why that background should make [its] view of the law more persuasive than others.”³⁹ An agency that regularly administers a statute might indeed have persuasive points to offer. But just like any other party, the agency must demonstrate that to the court by explanation and persuasion. No longer does an agency get a benefit simply because it is an agency.

Justice Annette Ziegler, joined in part by Chief Justice Patience Roggensack, filed a concurring opinion. She favored ending deference on non-constitutional grounds: “Deference to administrative agencies was a court-created doctrine and, thus, is one that can be court eliminated.”⁴⁰ Ruling on constitutional grounds, Ziegler reasoned, was unnecessary and raised thorny questions about the validity of past decisions in which courts had deferred to agency interpretation.⁴¹

Justice Michael Gableman, joined by Chief Justice Roggensack, also filed a concurring opinion. “Deference is simply unsound in principle,” he wrote, because it “leads to the perverse outcome of courts often affirming inferior interpretations of statutes.”⁴² Rather, “erroneous-but-reasonable legal conclusions,” which deference had allowed to pass, should be

35. *Id.* at 50.

36. *Id.*; *see also id.* at 49 (quoting Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016) (“[W]hen judges defer to the executive’s view of the law, they display systematic bias toward one of the parties.”)); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (“Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due-process (fair notice) and equal-protection concerns the framers knew would arise if the political branches intruded on judicial functions.”). Due process, in some ways, can be understood as a structural guarantee. *See generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

37. *See Tetra Tech*, 914 N.W.2d at 51–52.

38. *Id.* at 53.

39. *Id.*

40. *Id.* at 67 (Ziegler, J., concurring).

41. *See id.* at 67–69.

42. *Id.* at 75 (Gableman, J., concurring).

“corrected.”⁴³ In addition, Gableman noted that “[d]eference is based on the theory that administrative agencies develop expertise in their realm.”⁴⁴ He argued that this theory had been proven doubtful and therefore could not support a coherent deference doctrine.⁴⁵

Invoking *stare decisis*, Justices Ann Walsh Bradley and Shirley Abrahamson would have kept the pre-*Tetra Tech* deference framework in place.⁴⁶ They also disagreed with the lead opinion’s constitutional-structure conclusions on the grounds that even with deference, “[t]he court itself must always interpret the statute to determine the reasonableness of the agency interpretation.”⁴⁷ So long as a court at least participated in the interpretive endeavor, no separation-of-powers concerns arose.

Although *Tetra Tech* was a statutory-interpretation case, nothing about its holding appears limited to agency interpretations of *statutes*. The court jettisoned the entire existing agency-deference framework, which had included agency interpretations of both statutes and administrative rules.⁴⁸ It comes as no surprise, then, that a Wisconsin Court of Appeals panel recently invoked *Tetra Tech* to reject an administrative agency’s request for deference to that agency’s interpretation of its own rule.⁴⁹

43. *Id.* Although not expressly invoking the Constitution, Justice Gableman’s reasoning in this regard arguably “depends on the separation of powers.” *Id.* at 55 (lead opinion).

44. *Id.* at 76 (Gableman, J., concurring) (“[A]n . . . important principle of administrative law is that, in recognition of the expertise and experience possessed by agencies, courts will defer to their interpretation of statutes in certain situations.” (quoting *Barron Elec. Coop. v. PSC*, 569 N.W.2d 726 (Wis. Ct. App. 1997))).

45. *See id.* For instance, “some agency decisions are made by a single hearing examiner — of unknown expertise or experience.” *Id.* (citing Roggensack, *supra* note 8, at 557). So too, “it is possible for multi-member agency review boards to lack substantial experience or expertise.” *Id.* (citing Roggensack, *supra* note 8, at 558).

46. *See id.* at 64–65 (Bradley, J., concurring) (quoting *Racine-Harley Davidson, Inc. v. State*, 717 N.W.2d 184 (Wis. 2006)).

47. *Id.* at 65. Indeed, some have argued that agency deference is supported — or even required — by the separation of powers, because such deference helps keep courts from substituting their judgment for that of the political branches. *See* Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 667–78 (2020); *see also* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277–78, 283, 285 (1988).

48. *See supra* text accompanying notes 19–20.

49. *See* *Green Bay Sportservice, Inc. v. Dep’t of Workforce Dev.*, 921 N.W.2d 518, 519 (Wis. Ct. App. 2018) (reasoning that, because *Tetra Tech* “‘end[ed] [the] practice of deferring to administrative agencies’ conclusions of law,’” the court would “give no deference to [the Department of Workforce Development’s] interpretation of [the Department’s own administrative rule]” (quoting *Tetra Tech*, 914 N.W.2d at 63)).

II. JUDICIAL DEFERENCE TO MUNICIPAL INTERPRETATION

Tetra Tech “end[ed] [the] practice of deferring to administrative agencies” interpretations of statutes and agency rules.⁵⁰ But agency deference is not the only deference doctrine Wisconsin courts have embraced. At least up until *Tetra Tech*, Wisconsin courts also applied a framework of binding deference to municipal interpretations of law under certain circumstances.⁵¹

The Wisconsin Supreme Court’s most recent extended discussion of municipal deference appears in *Ottman v. Town of Primrose*.⁵² Just like pre-*Tetra Tech* agency deference cases, *Ottman* recites that a court’s review of questions of law — including both statutes and municipal ordinances — is *de novo*.⁵³ On the one hand, *Ottman* does not envision deference to a municipality’s interpretation of a statute.⁵⁴ On the other hand, it does require courts to defer to “a municipality’s interpretation and application of its own ordinance.”⁵⁵

Ottman, like pre-*Tetra Tech* agency deference cases, sets a trigger for deference. Start with what does not receive deference: ordinances that are either unambiguous or not “unique.” Some ordinances, the *Ottman* court observed, “parrot” a state statute or statewide standard and are not unique.⁵⁶ For this category of ordinance, courts do not defer to a municipality’s

50. *Tetra Tech*, 914 N.W.2d at 63.

51. Just as agency deference most often arose in judicial review of agency decisions in which the agency was a party to litigation, municipal deference most often arises in judicial review of municipal decisions (known as certiorari) in which the municipality is a party. *See, e.g.*, WIS. STAT. §§ 59.694(10), 62.23(7) (2022); *Ottman v. Town of Primrose*, 796 N.W.2d 411, 420 (Wis. 2011) (“Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal.”). Direct attacks on municipal ordinances — brought as declaratory-judgment actions or under 42 U.S.C. § 1983 — also feature the municipality (or a municipal official) as a party and sometimes implicate deference doctrines. *See, e.g.*, *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1232 (11th Cir. 2006) (“[W]e consider the City’s own authoritative construction of the ordinance, including its implementation and interpretation and defer to that construction so long as its interpretation is based on a permissible construction.” (quoting *Southlake Prop. Assocs., Ltd. v. City of Morrow*, 112 F.3d 1114, 1119 (11th Cir. 1997))).

52. 796 N.W.2d 411. Although it may not have the historical pedigree of pre-*Tetra Tech* administrative deference, municipal deference existed well before *Ottman*. *See, e.g.*, *Weber v. Town of Saukville*, 562 N.W.2d 412, 416 (Wis. 1997); *Marris v. City of Cedarburg*, 498 N.W.2d 842, 850 (Wis. 1993); *State ex rel. B’nai B’rith Found. v. Walworth Cnty. Bd. of Adjustment*, 208 N.W.2d 113, 118–20 (Wis. 1973).

53. *See Ottman*, 796 N.W.2d at 424; *see also Tetra Tech*, 914 N.W.2d at 31.

54. *See Park 6 LLC v. City of Racine*, 824 N.W.2d 903, 906 (Wis. Ct. App. 2012).

55. *Ottman*, 796 N.W.2d at 424.

56. *Id.* at 425.

interpretation: “Doing so would give one locality disproportionate authority to influence state standards established by the legislature.”⁵⁷

By contrast, other ordinances contain language that “appears to be unique.”⁵⁸ When language is “drafted by the municipality in an effort to address a local concern,” the court reasoned, the “municipality may be uniquely poised to determine what that ordinance means.”⁵⁹ Courts faced with ambiguous, unique ordinance language must defer to a municipality’s reasonable interpretation. An interpretation is “unreasonable” if it “directly contravenes the words of the ordinance” or is “contrary to law,” “clearly contrary to . . . intent, history, or purpose of the ordinance,” or “without a rational basis.”⁶⁰

At issue in *Ottman* was the Town of Primrose’s driveway ordinance:

No driveway shall be approved in the Town of Primrose if the Town Board finds that the driveway will adversely impact productive agricultural land, unless . . . the person requesting the permit can show that the parcel to be served by the driveway is capable of producing at least \$6000.00 of gross income per year.⁶¹

The Town and the Ottmans advanced opposing interpretations of the “capable of producing” language. The former argued the language required evidence of *actual income* produced by the parcel in the past; the latter argued that it required only evidence of *potential income*.⁶² The court, for its part, determined that the ordinance was ambiguous; and, because it did not “parrot the language of a state statute,” the ordinance was “unique.”⁶³ It then applied deference, concluding that “[t]he Ottmans have not met their burden of showing that the [Town’s] interpretation is unreasonable.”⁶⁴

It takes no special glasses to immediately see many similarities between *Ottman*-style municipal deference and pre-*Tetra Tech* agency deference — particularly great weight deference to agency interpretations of agency rules. *Ottman* and its predecessors, in fact, expressly “borrowed from [now-abrogated] cases setting forth the framework for reviewing administrative agency determinations.”⁶⁵ Both deference doctrines are

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 416 (quoting Town of Primrose Driveway Ordinance 1.10).

62. *See id.* at 426.

63. *Id.*

64. *Id.* at 427.

65. *See id.* at 425; *see also* *Marris v. City of Cedarburg*, 498 N.W.2d 842, 850 (Wis. 1993); *Schroeder v. Dane Cnty. Bd. of Adjustment*, 596 N.W.2d 472, 478 (Wis. Ct. App. 1999). *But see infra* text accompanying notes 84–88.

deployed when the law’s language is ambiguous and an additional trigger — uniqueness or the agency-deference factors — is met. Both instruct courts to defer to a non-judicial actor’s interpretation of law unless it is “unreasonable,” with unreasonable defined to mean directly contrary to text, clearly contrary to intent, or without rational basis.⁶⁶ Both require courts to defer even when they identify a more reasonable interpretation.⁶⁷ And, as *Ottman* aptly demonstrates, both can be effectively outcome-determinative.⁶⁸ These immediate similarities prompt the question: what, if anything, did *Tetra Tech* do to Wisconsin’s municipal-deference doctrine?

III. *TETRA TECH’S* EFFECT ON MUNICIPAL DEFERENCE

This Part discusses *Tetra Tech’s* effect on municipal deference. It considers whether *Tetra Tech’s* underlying grounds — constitutional structure, due process, and prudential concerns — call municipal deference into doubt like they did agency deference. And it concludes they all do. Although *Tetra Tech* dealt with agency interpretations of law, its central guiding principle — that *courts* must independently interpret law when exercising their judicial power — applies equally to municipal interpretations.⁶⁹ Any honest reading of *Tetra Tech* spells the end of municipal deference, too.

Constitutional Structure. First, consider *Tetra Tech’s* constitutional-structure argument. To be sure, *Tetra Tech* was dealing with an agency deference framework that involved *state* courts deferring to *state* executive-agency interpretations. For the lead opinion, at least, agency deference contravened horizontal separation-of-powers principles; one branch cannot exercise another branch’s core power.⁷⁰ But such horizontal principles themselves derive from (or at least exist alongside) a more fundamental source — the Wisconsin Constitution’s vesting clauses. In particular, the judicial vesting clause provides that “[t]he judicial power of this state shall be vested in [the courts].”⁷¹ The lead opinion begins its structural analysis by quoting the judicial vesting clause,⁷² nods to its implications multiple

66. *Ottman*, 796 N.W.2d at 424; see also *Tetra Tech*, 914 N.W.2d at 30–32.

67. See *Ottman*, 796 N.W.2d at 425–27; see also *Tetra Tech*, 914 N.W.2d at 32.

68. See Roggensack, *supra* note 8, at 559 (“The court’s decision often is driven by the level of deference that is applied.”).

69. To date, the Wisconsin Supreme Court has not explicitly considered whether *Tetra Tech* extends to municipal deference. One court of appeals panel noted that the argument was presented, but it declined to decide one way or another. See *Watkins v. Pension Bd. of Emps. Ret. Sys. of Cnty. of Milwaukee*, 943 N.W.2d 349, 349 (Wis. Ct. App.) (per curiam) (unpublished).

70. See *supra* notes 24–31 and accompanying text.

71. WIS. CONST. art. VII, § 2.

72. See *Tetra Tech*, 914 N.W.2d at 40.

times,⁷³ and ultimately concludes that “only the judiciary may authoritatively interpret and apply the law in cases before our courts.”⁷⁴ In other words, *Tetra Tech*’s constitutional-structure argument does not depend on the horizontal relationship between the non-judicial interpreter and the judicial interpreter. It rather depends on the judiciary being the only branch vested with constitutional authority to exercise core judicial power.

With this in mind, *Tetra Tech* stands for the proposition that courts may not divest or “cede” their core judicial power and “shar[e]” it with an executive agency or *any other actor*.⁷⁵ Less than two weeks after *Tetra Tech*, in fact, the Wisconsin Supreme Court invoked that case’s holding beyond state-agency interpretations to reject an argument for deference to a private university’s interpretation of law.⁷⁶ This shows the Supreme Court does not understand *Tetra Tech*’s holding to be limited to agency interpretations. The lead opinion can quite comfortably be altered to embrace the notion that “only the judiciary may authoritatively interpret and apply [ordinances] in cases before our courts.”⁷⁷

What’s more, any structural differences between state agencies and municipalities do not appear to matter for purposes of deference.⁷⁸ State agencies are “creatures of the legislature” and derive their power entirely from statutes.⁷⁹ Although not state-level bodies, municipalities are likewise “creatures of the state legislature that have no inherent right of self-

73. See *id.* at 42–45; accord *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Gabler v. Crime Victims Rts. Bd.*, 897 N.W.2d 384, 397–98 (Wis. 2017).

74. *Tetra Tech*, 914 N.W.2d at 45.

75. *Id.* at 42, 45; cf. Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 108–10 (2020) (relying on constitutional vesting clauses to argue that “Congress cannot divest itself of the powers that the Constitution vests in it”); Philip Hamburger, *Nondelegation Blues* 64–70 (Mar. 7, 2022) (unpublished manuscript), <https://deliverypdf.ssrn.com/delivery.php?ID=047093101091071106064125092102086067010037073076067052094080121127029027113085011126099054038127042010098066082124106005070088098048031000085082002099003072110076051016084127080030081090066072000087025123096008080019004099065110079011072127000103004&EXT=pdf&INDEX=TRUE> [<https://perma.cc/F9NR-2QPG>].

76. See *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 727–29 (Wis. 2018).

77. *Tetra Tech*, 914 N.W.2d at 45.

78. Nestor Davidson has suggested that varying municipal organizational structures support varying approaches to deference: “[A] framework of judicial deference sensitive to local context on grounds such as structure and expertise might play out differently.” Davidson, *supra* note 1, at 621. Davidson’s argument, however, presumes the constitutionality and wisdom of an agency deference doctrine. Because Wisconsin has abandoned agency deference, Davidson’s arguments do not apply.

79. *Myers v. Wis. Dep’t of Nat. Res.*, 922 N.W.2d 47, 52 (Wis. 2019) (“[A]dministrative agencies are creatures of the legislature. An administrative agency has only those powers expressly conferred or necessarily implied by the statutory provisions under which it operates.”).

government beyond the powers expressly granted to them.”⁸⁰ True enough, cities and villages — unlike agencies — have “home rule” authority, which affords them a certain degree of constitutional authority to govern local affairs.⁸¹ But that home-rule authority is expressly “subject . . . to [this] constitution” and has never been interpreted to alter the constitution’s judicial vesting clause or otherwise divest any core judicial power from courts.⁸² Municipalities have no more core judicial power under the constitution than do state agencies.⁸³

As mentioned, *Ottman* and similar cases “borrowed from [now-abrogated] cases setting forth the framework for reviewing administrative agency determinations” to build Wisconsin’s municipal-deference doctrine.⁸⁴ The *Ottman* court also stated, however, that it was “declin[ing] to graft [the pre-*Tetra Tech* agency-deference] framework wholesale onto [the] framework for reviewing municipal decisions.”⁸⁵ Why? Because agency deference, but not municipal deference, presents horizontal separation issues; and because agencies, but not municipalities, are “charged by the legislature with the administration of a state statute.”⁸⁶ Although these observations may explain why pre-*Tetra Tech* and *Ottman* deference do not look exactly alike, neither reduces how forcefully *Tetra Tech*’s constitutional-structure argument applies to municipal deference. As already explained, the essence of that argument is not about *horizontal* separation but rather divestment of core judicial power. Moreover, while municipalities may not “administer” statutes in the same way agencies do,

80. *Wis. Carry, Inc. v. City of Madison*, 892 N.W.2d 233, 240 (Wis. 2017) (quoting *Black v. City of Milwaukee*, 882 N.W.2d 333, 343 (Wis. 2016)) (discussing cities); *see also* *Jackson Cnty. v. State Dep’t of Nat. Res.*, 717 N.W.2d 713, 720 (Wis. 2006) (“A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided.”); *Silver Lake Sanitary Dist. v. Wis. Dep’t of Nat. Res.*, 607 N.W.2d 50, 52 (Wis. Ct. App. 1999) (“Agencies, municipal corporations and quasi-municipal corporations are all creatures of the state and their powers are only those ascribed to them by the state.”).

81. WIS. CONST. art. XI, § 3(1) (“Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.”). Counties have similar statutory home-rule authority. *See* WIS. STAT. § 59.03(1) (2022).

82. *State ex rel. Michalek v. LeGrand*, 253 N.W.2d 505, 506 (Wis. 1977). Instead, the “home rule amendment accomplishes two things, in some measure distinct: (1) It makes a direct grant of *legislative* power to municipalities; and (2) it limits the legislature in the exercise of its general grant of *legislative* power.” *Id.* (emphasis added).

83. The one exception may be municipal courts, *see* WIS. CONST. art. VII, § 2, which are rarely if ever implicated in municipal-deference cases.

84. *Ottman v. Town of Primrose*, 796 N.W.2d 411, 425 (Wis. 2011).

85. *Id.*

86. *Id.*

their authority still similarly derives from statutes.⁸⁷ To be sure, pre-*Tetra Tech* courts deferred to agency interpretations of *statutes*, whereas courts do not defer to municipal interpretations of statutes. But pre-*Tetra Tech* courts *also* deferred to agency interpretations of *their own rules* — just like *Ottman* instructs courts to defer to municipalities’ interpretations of *their own ordinances*.⁸⁸

Due Process. Second, consider *Tetra Tech*’s due-process argument. Agency deference primarily arose in cases where “that agency appears in . . . court[] as a party.”⁸⁹ So too does municipal deference usually, if not always, arise in cases where the municipality is a party.⁹⁰ And, just like with agency deference, once a court determines that deference applies, it then “receives instruction from the governmental party on how to interpret and apply the rule of decision.”⁹¹ The municipality “interprets and applies the law in a case to which it is a party,” thereby “acting as judge of its own cause.”⁹² Just like agency deference, municipal deference “systematic[ally] favor[s]” the municipality and “deprives the non-governmental party of an independent and impartial tribunal.”⁹³

Prudential Arguments. Third, consider *Tetra Tech*’s prudential arguments. Like agency deference, municipal deference is a judicially created doctrine. Echoed by all the other justices agreeing in the outcome, Justice Gableman decried agency deference as “unsound in principle”: it “[led] to the perverse outcome of courts often affirming inferior interpretations of statutes” because courts had to defer even when they identified a more reasonable interpretation.⁹⁴ This reasoning applies with equal force to municipal deference.

Justice Gableman also noted that agency deference was “based on the theory that administrative agencies develop expertise in their realm.”⁹⁵ But because this basis was not necessarily true (at least not uniformly), he reasoned it did not justify the agency-deference doctrine.⁹⁶ Similarly, municipal deference is based on the theory that municipalities and their

87. See *supra* note 80 and accompanying text.

88. See *supra* notes 19, 48–49 and accompanying text.

89. See *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 914 N.W.2d 21, 48 (Wis. 2018).

90. See *supra* note 52.

91. *Tetra Tech*, 913 N.W.2d at 49.

92. *Id.* at 50.

93. *Id.*

94. *Id.* at 75 (Gableman, J., concurring); see also *id.* at 54–55 (lead opinion); *id.* at 67 (Ziegler, J., concurring).

95. *Id.* at 75–76 (Gableman, J., concurring); see also Massa, *supra* note 9, at 598–99.

96. See *Tetra Tech*, 914 N.W.2d at 75–76 (Gableman, J., concurring).

officials develop expertise in their *locality*.⁹⁷ The doubts raised by Justice Gableman apply to the municipal realm as well. Consider, for instance, how “[q]uick turnover rates and changing political administrations mean agencies — and the people staffing them — do not always come with the presupposed experience or knowledge.”⁹⁸ This is just as true for municipalities, with frequent elections for policymaking roles.⁹⁹ To be sure, agencies and municipalities have particular expertise, and it may make good sense to defer to their evaluation of facts and circumstances to which they are close. But interpreting *law* is the domain and expertise of courts. One need not reject the general concept of comparative institutional competence to accept that courts know most about interpreting law; that is what generalist judges, trained and experienced in the law, do every day.¹⁰⁰

One more prudential critique bears mention. Pre-*Tetra Tech* agency deference was applied when a statute or rule was ambiguous and when a multi-factor test was satisfied. Among other things, the test considered whether the agency interpretation was “long-standing” and whether the agency had “employed its expertise or specialized knowledge.”¹⁰¹ This test was criticized as overly malleable, meaning deference was inconsistently and unpredictably applied.¹⁰² Municipal deference, for its part, is applied when an ordinance is ambiguous and “unique.”¹⁰³ But what constitutes uniqueness? *Ottman* only says an ordinance that “parrots” a state statute is not unique.¹⁰⁴ But what if multiple municipalities have the same or similar

97. See *Ottman*, 796 N.W.2d at 425 (“[T]he municipality may be uniquely poised to determine what that ordinance means.”).

98. Amy Buchmeyer, Note, *When Roles Collide: Deference, Due Process, and the Judicial Dilemma*, 2019 WIS. L. REV. 1589, 1616; see also Roggensack, *supra* note 8, at 557–58 (2006); Alexander D. Bolton, John M. de Figueiredo & David E. Lewis, *Elections, Ideology, and Turnover in the U.S. Federal Government* 2, 29 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22932, 2019).

99. See, e.g., MADISON, WIS. ORDINANCE §§ 3.01(1), 3.03(1) (2022) (stating that alders are elected to two-year terms and the mayor is elected to a four-year term). By contrast, Supreme Court justices are elected for ten-year terms, WIS. CONST. art. VII, § 4(1), and Court of Appeals and circuit court judges are elected for six-year terms. *Id.* § 5(2).

100. See Buchmeyer, *supra* note 98, at 1616; see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1249 (2018) (Thomas, J., dissenting) (arguing that at least as an original matter, “the interpretation of legal texts, even vague ones, remained an exercise of core judicial power”); Diedrich, *supra* note 28, at 266 (citing similar statements).

101. *Tetra Tech*, 914 N.W.2d at 31 (quoting *Harnischfeger Corp. v. Lab. & Indus. Rev. Comm’n*, 539 N.W.2d 98, 102 (Wis. 1995)).

102. See Massa, *supra* note 9, at 619–20; see also Suhr, *supra* note 9, at 6. Jack Beermann has raised similar administrability concerns about the comparable federal agency deference doctrine. See generally Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

103. *Ottman v. Town of Primrose*, 796 N.W.2d 411, 413 (Wis. 2011).

104. *Id.*

ordinance language? Municipalities often copy each other or borrow from sample ordinances.¹⁰⁵ Moreover, *Ottman* cryptically suggests that “uniqueness” may have something to do with “local concern.”¹⁰⁶ But is it the *concern* that must be unique, the *ordinance language* addressing it, or both? For example, two cities may have identical (not unique) land-use concerns but regulate that concern using different (unique) language. “Unique,” in short, is susceptible to the same criticisms lodged against the agency-deference standard.

In sum, all of *Tetra Tech*’s arguments assailing agency deference — constitutional structure, due process, and prudential concerns — equally assail municipal deference. *Tetra Tech* signals, or perhaps even accomplishes, the end of municipal deference, too.

Of course, none of this is to say a municipality’s interpretation might not constitutionally and prudently serve as *evidence* of an ordinance’s meaning.¹⁰⁷ Yet, just like *Tetra Tech* said about agency deference, this “is a matter of persuasion, not deference.”¹⁰⁸ A municipality must “explain how its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties, and why that background should make [its] view of the law more persuasive than others.”¹⁰⁹

IV. OTHER STATES

Its recent treatment of agency deference and municipal deference make the Wisconsin Supreme Court a prime specimen for study. That said, the deference doctrines and corresponding implications discussed above arise — to a greater or lesser extent — in nearly every state. And while a fulsome exploration of every state’s deference practices lies well beyond the scope of this Essay, a few general comments are in order.

105. See *Sample Ordinances*, LEAGUE WIS. MUNS., <https://www.lwm-info.org/328/Ordinances> [<https://perma.cc/8H2D-BT4G>] (last visited Jan. 11, 2022) (“The League receives copies of ordinances from member municipalities to use as samples for other municipalities considering similar issues.”).

106. *Ottman*, 796 N.W.2d at 424.

107. Cf. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 336 n.413 (1994) (“While an interpreter may be persuaded or influenced in the exercise of her *own* judgment by the views and reasoning of another, any theory that accords decision-altering weight to the views of another, contrary to the interpreter’s settled conviction as to the proper interpretation of the provision at issue, is fundamentally illegitimate.”).

108. *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018).

109. *Id.*

First, different states' courts vary in whether and how they defer to agency interpretations of statutes and rules.¹¹⁰ Many states apply a *Chevron*-like heavy deference framework; others apply no systematic deference at all; and others still apply unique hybrid tests.¹¹¹ Like Wisconsin in *Tetra Tech*, courts in a few other states have ended deference to agency interpretations, including by relying on constitutional principles.¹¹² Second, similar to Wisconsin in *Ottman*, many other states embrace some form of deference to municipal interpretation of ordinances.¹¹³ Regarding the interaction between agency-deference rules and municipal-deference rules, two states in particular merit brief attention.

110. See Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 557–60 (2014); see also Luke Phillips, Comment, *Chevron in the States? Not So Much*, 89 MISS. L.J. 313, 315, 321–64 (2020). Federal courts defer to agency interpretation of statutes and rules, at least under certain circumstances. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2404 (2019); see also *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864–65 (1984).

111. See Phillips, *supra* note 110, at 321–64; see also Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 984–1007, 1010–24 (2008).

112. See, e.g., *King v. Miss. Mil. Dep't*, 245 So. 3d 404, 408 (Miss. 2018); *Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 379 P.3d 1270, 1274 (Utah 2016); *In re Complaint of Rovas*, 754 N.W.2d 259, 275 (Mich. 2008); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382–83 (Del. 1999). So too have several U.S. Supreme Court justices lodged similar objections to analogous federal deference doctrines. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (“[A]s originally understood,” the judicial power requires a court “to exercise its independent judgment in interpreting and expounding upon the laws,” “including ambiguous ones administered by an agency.” (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring))); see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437–39 (2019) (Gorsuch, J., concurring); *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring); *City of Arlington v. FCC*, 569 U.S. 290, 315–16 (2013) (Roberts, C.J., dissenting). See generally Walker, *supra* note 5. Finally, some states have ended deference legislatively. E.g., ARIZ. REV. STAT. ANN. § 12-910(F) (2022) (“In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency.”); WIS. STAT. § 227.57(11) (2022) (“Upon review of an agency action or decision, the court shall accord no deference to the agency’s interpretation of law.”).

113. See, e.g., *Berkeley Hills Watershed Coal. v. City of Berkeley*, 243 Cal. Rptr. 3d 236, 248 (Dist. Ct. App. 2019) (“[A] city’s interpretation of its own ordinance is entitled to great weight unless it is clearly erroneous or unauthorized.” (quoting *Anderson First Coal. v. City of Anderson*, 130 Cal. App. 4th 1173, 1193 (Dist. Ct. App. 2005))); *Bd. of Supervisors of Fairfax Cnty. v. Bd. of Zoning Appeals of Fairfax Cnty.*, 626 S.E.2d 374, 382 (Va. 2006) (“A consistent administrative construction of an ordinance by the officials charges with its enforcement is entitled to great weight.” (quoting *Masterson v. Bd. of Zoning Appeals of City of Va. Beach*, 353 S.E.2d 727, 733 (Va. 1987))); 62 C.J.S. *Municipal Corporations* § 367 (2022); 56 AM. JUR. 2D *Municipal Corporations, Etc.* § 340 (2022). Some federal courts have likewise deferred to municipal interpretations of municipal ordinances. See, e.g., *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1232 (11th Cir. 2006) (“[W]e consider the City’s own authoritative construction of the ordinance, including its implementation and

Similar to Wisconsin before *Tetra Tech*, Utah courts had at one time deferred to (1) agency interpretations of rules and (2) municipal interpretation of municipal ordinances.¹¹⁴ In the mid-2010s, the Utah Supreme Court ended agency deference.¹¹⁵ It invoked constitutional structure and due process, reasoning that “defer[ence] to the agency’s interpretation of law of its own making” ultimately “place[s] the power to write the law and the power to authoritatively interpret it in the same hands.”¹¹⁶ Then in 2017, the court held that its grounds for rejecting agency deference also applied to municipal deference.¹¹⁷ Indeed, the court added, “there is even less reason to defer to local agencies’ interpretations of ordinances, given that those local agencies ‘do not possess the same degree of professional and technical expertise as their state agency counterparts.’”¹¹⁸

Somewhat similarly, Mississippi courts had, until recently, deferred to (1) agency interpretation of law and (2) municipal interpretation of municipal ordinances. In the 2018 decision of *King v. Mississippi Military Department*,¹¹⁹ the Mississippi Supreme Court relied on constitutional-structure principles to end deference to agency interpretation.¹²⁰ Then in 2021, despite *King*, a plurality arguably preserved the pre-existing *municipal* deference doctrine.¹²¹ Multiple justices wrote separately, arguing that *King* “is equally applicable to the interpretation of

interpretation and defer to that construction so long as its interpretation is based on a permissible construction.” (quoting *Southlake Prop. Assocs., Ltd. v. City of Morrow*, 112 F.3d 1114, 1119 (11th Cir. 1997))).

114. See *Outfront Media, LLC v. Salt Lake City Corp.*, 416 P.3d 389, 394 (Utah 2017); see also *Ellis-Hall Consultants*, 379 P.3d at 1273.

115. See *Ellis-Hall Consultants*, 379 P.3d at 1273–74. The court had previously clarified that, with respect to statutes, courts have “the de novo prerogative of interpreting the law, unencumbered by any standard of agency deference.” *Hughes Gen. Contractors, Inc. v. Utah Lab. Comm’n*, 322 P.3d 712, 718 (Utah 2014).

116. *Ellis-Hall Consultants*, 379 P.3d at 1275.

117. See *Outfront Media*, 416 P.3d at 394 n.13.

118. *Id.* (quoting *Carrier v. Salt Lake Cnty.*, 104 P.3d 1208, 1216 (Utah 2004)). As one prominent treatise notes, “[o]rdinances frequently are drafted without the aid of skilled technicians, such as are used in the writing of statutes, and probably few ordinances would withstand too technical, hard and fast rules of construction.” 6 MCQUILLIN MUNICIPAL CORPORATIONS § 20:45 (3d ed. 2005). Although an ordinance’s comparative imprecision may warrant different interpretive treatment, it does not justify deferring to municipalities simply because they are municipalities. Quite the opposite, if anything. After all, imprecise contractual language is typically construed against its drafter. *E.g.*, *Md. Arms Ltd. P’ship v. Connell*, 786 N.W.2d 15, 25 (Wis. 2010).

119. See *generally* 245 So. 3d 404 (Miss. 2018).

120. *Id.* at 408.

121. See *Bd. of Supervisors of Hancock Cnty. v. Razz Halili Tr.*, 320 So. 3d 490, 494 (Miss. 2021) (plurality opinion).

ordinances.”¹²² Finally, in 2022, a majority of the Mississippi Supreme Court formally overturned the precedent that had created the state’s municipal-deference doctrine.¹²³ The court reasoned that *King*’s logic — and the general principle that *courts* must independently interpret law when exercising their judicial power — applied just as much to municipal ordinances and their interpretation.¹²⁴

Wisconsin’s, Utah’s, and Mississippi’s experiences may translate to other states. Whether such experiences translate to any particular state will depend on multiple factors, including the state’s existing deference practices, its constitutional structure, and its individual judges’ proclivities. For any state with substantial similarities to Wisconsin, Utah, or Mississippi, however, judicial deference to municipal interpretation should be subjected to a healthy dose of scrutiny and doubt.

CONCLUSION

Through a confluence of reasons, *Tetra Tech* “end[ed] [the] practice of deferring to administrative agencies’ conclusions of law” in Wisconsin.¹²⁵ Both before and after *Tetra Tech*, Wisconsin courts have confirmed that statutory-interpretation principles apply equally to interpreting ordinances.¹²⁶ It follows that if statutory interpretations receive no deference, then ordinance interpretations do not, either. Following Utah’s and Mississippi’s examples, Wisconsin courts — and courts in other states that follow similar legal principles — should make this clear the first chance they get.

122. *Id.* at 499–500 (Coleman, J., dissenting); *see also id.* at 499 (Kitchens, C.J., concurring in part and in result).

123. *See Wheelan v. City of Gautier*, No. 2019-CT-01062-SCT, 2022 WL 325207, at *5 (Miss. Feb. 3, 2022).

124. *See id.* The court also offered another justification for ending municipal deference. Citing cases from many jurisdictions, including a pre-*Tetra Tech* Wisconsin case, the *Wheelan* court noted that most state courts adhere to a *de novo* standard of review when interpreting ordinances. *See id.* at *4 (citing, among others, *Hambleton v. Friedmann*, 344 N.W.2d 212, 213 (Wis. Ct. App. 1984)). But as previously suggested, the nominal recitation of a *de novo* standard does not imply the absence of deference. Many states, including Wisconsin before *Tetra Tech*, purported to both apply *de novo* review and defer to reasonable interpretations of administrative rules and ordinances. *See supra* notes 7, 53, and accompanying text.

125. *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 914 N.W.2d 21, 63 (Wis. 2018).

126. *See Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 924 N.W.2d 153, 158 (Wis. 2019); *see also Bruno v. Milwaukee Cnty.*, 660 N.W.2d 656, 658 (Wis. 2003).