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Delegation-Dependent Deference: Reinforcing Federal Separation of Powers and Avoiding *Loper* Limbo by Adopting Delegation-Dependent Deference

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Delegation-Dependent Deference:
Reinforcing Federal Separation of Powers and Avoiding *Loper* Limbo by Adopting Delegation-Dependent Deference

Jonathan Wolfson and Tanner Jones

Abstract:

In this paper, we argue that federal lawmakers should take proactive steps to restore the separation of powers and preempt potential chaos following the elimination of *Chevron* deference in *Loper Bright* by adopting a delegation-dependent deference amendment to the Administrative Procedures Act. Drawing on state experiences and recent Supreme Court jurisprudence, we examine how different approaches to delegation and deference can restore constitutional balance while maintaining effective governance. By instituting a balanced, delegation-dependent system—focused not on substantive ambiguities but instead on clear delegation of regulatory authority—lawmakers can require courts to strike down rules that lack clear legislative delegation, defer to agencies when delegation is explicit, and require legislative approval when delegation is ambiguous, ensuring more accountable and transparent rulemaking processes. This approach will not only bolster judicial review but also can nurture economic outcomes by reducing regulatory uncertainty and fostering a more dynamic market environment. Finally, our paper examines the implications of the Supreme Court's recent decision to overturn *Chevron* deference to agency legal interpretation and emphasizes the need for legislative oversight of and even participation in executive rulemaking.

"WHEN once the principles of government are corrupted, the very best laws become bad, and turn against the state: but, when the principles are sound, even bad laws have the same effect as good; the force of the principle draws every thing to it."

Montesquieu, *The Spirit of Laws*, 1748, p. 154

INTRODUCTION

The framers of the American republic borrowed heavily from Montesquieu, adopting a system of co-equal, but separate powers to ensure that no single branch would overstep its bounds, preserving individual liberties and preventing tyranny. James Madison, John Jay, and Alexander Hamilton penned *The Federalist Papers*, which integrated Montesquieu's principles that powers ought to be separated into different departments to ensure justice, preserve individual liberty, and

stave off tyranny[1] into the fledgling American context.[2] And on March 4, 1789, with the Constitution's ratification, thirteen former British colonies established a national government with independent branches (Article I legislative, Article II executive, and Article III judicial) designed to function interdependently, each checking the other.[3] This separation of powers provided stability that would allow factions to rise and fall, but never to amass sufficient power to undermine the entire system that protects the liberties of all citizens.

In America today, Montesquieu's Enlightenment vision of separated powers bound by checks and balances is increasingly under siege.[4] Congress often abdicates constitutional lawmaking responsibilities to executive bureaucracies by writing broad and ambiguous bills. The President frequently signs these bills fully cognizant of the vague language that will necessitate regulation, expanding the bounds and powers of the administrative state he commands.[5] And courts fail to meaningfully intervene, affording high deference to agency interpretations of statutes even when pertinent legal questions lie beyond the realm of appropriate agency expertise.[6]

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that courts must defer to agency expertise when laws are ambiguous, arguing that statutory ambiguities represent implicit delegations from Congress so long as agency interpretations are reasonable.[7] In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled *Chevron*, emphasizing that courts, not agencies, must exercise independent judgment to interpret ambiguous statutes, thus setting the stage to restore the federal judiciary's role in maintaining checks and balances. [8] However, many federal court precedents and statutes still uphold *Chevron* or similar deference doctrines. And since *Chevron* was not the only deference principle enshrined in caselaw, many lawyers and judges continue to apply its principles (or at least could if they so desire). Notably, the *Loper* decision expressly does not apply to regulations that have already been upheld under *Chevron*, meaning that prior holdings and judicial deference to agency

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[1] M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 187-98 (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748).
[2] James Madison, *The Avalon Project: Federalist No. 47*, Yale L. Sch. (Feb. 1, 1788), https://avalon.law.yale.edu/18th_century/fed47.asp
Jean-Claude Lamberti, Montesquieu in America, 32 Eur. J. Soc. 197, 197–210 (1991), https://doi.org/10.1017/S0003975600006226.
[3] U.S. CONST. arts. I–III.
[4] *See* Mathew D. McCubbins, *Abdication or Delegation? Congress, the Bureaucracy, and the Delegation Dilemma*, 22 REGULATION 30 (1999); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 106–29 (1967).
[5] *See generally* JONATHAN LEWALLEN, COMMITTEES AND THE DECLINE OF LAWMAKING IN CONGRESS (2020).
[6] Paul J. Ray, *Lover, Mystic, Bureaucrat, Judge: The Communication of Expertise and the Deference Doctrines* (Gray Center Working Paper 23-32, 2020), https://administrativestate.gmu.edu/wp-content/uploads/2023/10/23-32_Ray.pdf.
[7] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984); Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620 (2018).
[8] *Loper Bright Enters. v. Raimondo*, 603 U.S. ___, 144 S.Ct. 2244 (2024).

interpretations remain intact.[9] Absent a new scheme, Congress and executive agencies may well maintain the status quo, albeit with a bit more risk that courts *could* overturn a regulation that lacks adequate justification. Thus, the continued reliance on deference of some stripe at the federal level encourages vague bill-writing, fails to hold legislators accountable for poor legislation, and outsources to agency expertise even when agencies lack clear delegations.

Federal agencies armed with quasi-legislative powers become attractive targets for powerful industry participants. These connected businesses seek to capture agencies and weaponize expansive and legally uncontested rulemaking to distort price signals and fortify market failures such as monopoly and the tragedy of the commons. [10] If successful, these businesses will loudly oppose any change to the regulations. Congress often attempts to solve these problems by further empowering agencies, exacerbating a negative feedback loop that yields economic deadweight losses.[11]

Federal deference standards will continue to evolve as the courts navigate the post-*Chevron* judicial landscape, the agencies attempt to better justify their rulemaking, and the legislature decides whether to more clearly articulate its intent or continue to write less than clear statutes. But regardless of how these branches deal with the new reality, one thing is certain: courts cannot and should not be expected to do the job of legislators. The *Loper* decision signifies the Court's realization that forty years of deference have been less than ideal for citizens, judicial authority, and the principles of separate and co-equal powers. However, the Supreme Court cannot solve the deeper problems confronting the separation of powers within the federal government. Rather, the legislature too must take proactive steps to address these issues.

In the absence of *Chevron*, federal agencies and courts will need to navigate a new deference landscape. And because *Loper* did not provide a clear replacement approach, the new contours of federal deference may remain unclear for years as lower courts fill in the gaps and create new processes to address agency action in the face of unclear statutes. [12] Since any change resulting from *Loper* is based on statutory law—the Administrative Procedure Act—and not constitutional issues, the federal legislature now can and ought to play an important role to provide clarity of its intent when writing statutes.[13]

Several states have already pioneered alternatives to *Chevron*-style deference, providing valuable lessons for federal reform. However, key differences in state governance structures—including independently elected department heads and judges—mean federal solutions must be carefully

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[9] It is beyond the scope of this paper to flesh out the potential pathways litigants could use to have the courts re-open previously decided cases that relied on *Chevron* deference.
[10] Richard Posner, *Theories of Economic Regulation* (Nat'l Bureau of Econ. Rsch. Working Paper No. 41, 1974), https://doi.org/10.3386/w0041.
[11] Maria Rosa Borges, *Regulation and Regulatory Capture*, UNIV. DE LISBOA REPOS. (2017), https://www.repository.utl.pt/handle/10400.5/26245.
[12] Lisa Schultz Bressman, *Lower Courts After Loper Bright*, 31 GEO. MASON L. REV. 499 (2024).
[13] Transcript of Oral Argument, *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024) (No. 22-451), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-451_o7jp.pdf.

tailored. Our analysis draws on these state experiences while acknowledging the unique challenges of federal administrative law.

In this paper, we argue that Congress should prevent agency overreach and legal ambiguity, reasserting their constitutional lawmaking responsibilities by codifying a statutory delegation-dependent deference scheme. This balanced tripartite system gives legislators flexibility to decide when to retain and when to delegate power, acknowledging the administrative demands of the modern world while thoughtfully confronting regulatory inertia and empowering judicial review.

1. No delegation: Agencies cannot promulgate, and courts cannot defer no matter how reasonable the regulation might be.
2. Clear delegation: Agencies must promulgate, and courts must defer to reasonable agency interpretations of statute.
3. Ambiguous delegation: Lawmakers must approve or reject proposed regulations before they become effective.

Recent work by Hickman and Wildermuth categorizes delegations into specific, general, hybrid, and implicit forms based on analysis of statutory language.[14] This taxonomy provides a useful lens to understand our three-bucket model. Using their phraseology and our deference schema, agencies must regulate and courts must defer when delegations are specific, agencies should not regulate and courts must strike down regulations when statutory delegations are implicit, and agencies must obtain legislative approval for regulations derived from general and hybrid delegations. By following this arrangement, Congress and statehouses can restore the separation of powers and nurture economic outcomes.

This paper first defines the problem, contending that deference to non-delegated rulemakers erodes the separation of powers and yields economic inefficiencies; second, we contextualize our approach with recent moves to reject deference and implement legislative review in the states, analyzing how states can office proof-of-concept for the federal government that could combine best practices; third, we defend our solution, arguing that lawmakers should strengthen checks and balances by adopting delegation-dependent deference statutes.

[14] Kristin E. Hickman & Amy J. Wildermuth, Delegation and Deference in a Post-Loper Bright World, N.Y.U. L. Rev. (forthcoming 2025)

I. PROBLEM: DEFERENCE TO NON-DELEGATED RULEMAKING ERODES THE SEPARATION OF POWERS AND YIELDS ECONOMIC INEFFICIENCY

"The same body of magistrates are possessed, as executors of the laws, of the whole power they have given themselves in quality of legislators. They may plunder the state by their general determinations; and, as they have likewise the judiciary power in their hands, every private citizen may be ruined by their particular decisions. The whole power is here united in one body; and, though there is no external pomp that indicates a despotic sway, yet the people feel the effects of it every moment."

—*The Spirit of Laws*, p. 188

The federal administrative state faces several interrelated challenges in balancing effective governance with constitutional principles. Executive Orders can create regulatory whiplash as agencies flip-flop between administrations. Meanwhile, Congress's power over executive agencies through appropriations remains largely untested. Hickman and Wildermuth's taxonomy offers useful distinctions between specific, general, and hybrid delegations, highlighting how courts often conflate these categories, resulting in overreach.[15]

The result is a proliferation of restrictive and ever-changing rules typically written not by the elected President or even the President's most senior political appointees, but by career staff of the agencies under the putative supervision of the President's team. The Federal Register, America's index of federal regulations, exceeds 63,000 pages; between 3,000 and 4,500 new rules are published each year and, for twenty-five of the last twenty-six years, federal agencies have added at least fifty new regulations with at least a $100 million impact on the economy. [16] The American Action Forum estimates that new federal regulations have imposed more than $1 trillion in economic costs over the last 3.5 years. [17] Every one of the 438 federal agencies and sub-agencies is ultimately a creature of congressional statute. But those agencies now frequently

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[15] Hickman & Wildermuth, *supra* 17.

[16] *Federal Register Weekly Update: 1,548 Pages Added – Ballotpedia News*, BALLOTPEDIA (Sept. 15, 2023), https://news.ballotpedia.org/2023/09/15/federal-registerweekly-update-1548-pages-added/; MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER (n.d.); GEO. WASH. U. REG. STUD. CTR., NUMBER OF FINAL MAJOR RULES BY PRESIDENTIAL YEAR (n.d.), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2023-04/major_rules_presidential_year_03172023.pdf (accessed Apr. 29, 2024); CONG. RSCH. SERV., RL32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2011).

[17] Dan Goldbeck, *The Biggest Week on Record*, AM. ACTION F. (Apr. 22, 2024), https://www.americanactionforum.org/week-in-regulation/the-biggest-week-on-record/ (accessed Apr. 29, 2024).

act on a broad mission despite a more narrow original purpose. At the federal level, Article I lawmaking increasingly resides in Article II agencies because Congress fails to write clear statutes or even intentionally delegates the tough decisions to the regulators.

Expansive deference also intrinsically weakens the judicial check against regulatory inertia by conflating substantive ambiguities with delegation ambiguities. *Marbury v. Madison* established the judiciary's role to test the constitutionality of statutes, measuring laws against the constitution.[18] So, while courts can adjudicate constitutional questions, broad deference under *Chevron* meant that courts often could not measure promulgated rules against the law.[19] One 2017 Michigan Law Review study of more than 1,500 appeals found that agencies won 77.4 percent of their cases when *Chevron* deference was applied, almost forty percent more than when cases were reviewed *de novo*. When cases invoked *Chevron*'s "reasonableness" standard: "Of the 70.0% of the interpretations that moved to *Chevron* step two (the step at which the courts defer to reasonable agency interpretations when Congress's intent was not clear at step one), the agency prevailed 93.8% of the time."[20] The same study found that the Environmental Protection Agency, Food and Drug Administration, Federal Communications Commission, Department of Energy, and Department of Commerce each win over eighty percent of their cases that invoke *Chevron*. And when deferring to agencies, over half of appeals decisions cited "agency procedure," "agency expertise," and "longstanding interpretation," while less than twenty percent of cases justified deference on grounds such as "rulemaking authority" and "accountability." Wide deference to agency expertise may conflate substantive ambiguities (technical questions) with delegation ambiguities (questions of authority), weakening crucial judicial review.

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[18] *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803).
[19] Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057 (2016).
[20] Kent Barnett & Christopher Walker, Chevron *in the Circuit Courts: The Codebook Appendix*, 116 MICH. L. REV. ONLINE 1 (2017).

Expansive deference thus also erodes the check between the judiciary and legislature, failing to hold Congress accountable for poor legislative drafting. Knowing that agency interpretations legally define the contours of statute, Congress is emboldened to craft not just vague but also unclear and even incoherent statutes.

In the recent *Loper* decision, Chief Justice Roberts acknowledged this issue, writing:

> By overruling *Chevron*, though, the Court does not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite the Court's change in interpretive methodology.

This application of *stare decisis* to previous cases means that while *Chevron* is overruled, its legacy remains embedded in a multitude of existing rulings. As a result, there is a legal limbo at the federal level where old precedents based on *Chevron* still stand, creating uncertainty in how courts will handle agency interpretations moving forward, especially when future litigants challenge the application of previously-affirmed regulations to more current enforcement scenarios.[21]

More troublesome, economic theory suggests that many regulations are not oriented by the public interest and instead impede market efficiency by design. The so-called University of Chicago School of Economics featuring Stigler, Friedland, Peltzman, and others famously challenged idealistic public interest theories with the so-called "economic theory of regulation." Stigler contended, "Regulation is acquired by the industry and is designed and operated primarily for its benefit." [22]

In other words, rather than sound the alarm about new regulatory burdens, rent-seeking interest groups and the largest market actors push for favorable regulations (or at least regulations that they believe will be more costly for their competitors), yielding higher compliance costs for their competitors and deadweight losses for society. Peltzman pointed out that this regulatory capture means the regulated price of goods and services will always be suboptimal. Profits of the regulatory cartel—rent-seeking interest groups and career- or political-minded regulators—catalyze higher prices for consumers. The same is true of unreasonable advocacy groups that view regulatory levers as weapons in ideological warfare, lobbying powerful agencies to interpret statutes through an ideological lens. Montesquieu, ever relevant, anticipated this exact outcome: "in a republic, where a private citizen has obtained an exorbitant power, the abuse of this power is much greater, because the laws foresaw it not, and consequently made no provision against it." [23]

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[21] *See, e.g., Corner Post, Inc. v. Board of Governors of the Federal Reserve System,* 603 U.S. 799 (2024).
[22] George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).
[23] MONTESQUIEU, *supra* note **Error! Bookmark not defined.**, at 57.

Regulatory inertia comes from expansive deference that erodes separation of powers. This inertia crushes economic growth and entrepreneurship. Empirical analysis corroborates Chicago School arguments, demonstrating the economic burden of overregulation. The National Association of Manufacturers found "the total cost of complying with federal regulations in 2022 is an estimated $3.079 trillion (in 2023 dollars), an amount equal to 12 percent of U.S. GDP."[24] The same study estimates the average cost of regulations to be $277,000 per firm and $29,100 per employee in manufacturing. In February 2023, a National Bureau for Economic Research article found that regulatory compliance costs grow by a full one percent each year.[25]

Beyond direct compliance costs, regulatory inertia also deters positive economic activity by discouraging business growth and formation. George Mason University's Mercatus Center analyzed twenty-two industries over thirty-five years to predict a counterfactual scenario where the Reagan-era regulatory environment had persisted to 2012. [26] The authors concluded that tedious regulations were responsible for a 0.8 percent annual reduction in GDP, resulting in an approximately twenty-five percent smaller economy in 2012 than if 1980 conditions had prevailed. Assuming these calculations are accurate, U.S. GDP is $4 trillion smaller today due to regulations. While the precise cost of business deterrence is unknown, overregulation stunts economic growth by discouraging investment and innovation.

While these problems with federal deference are significant, they are not intractable. Several states have already pioneered innovative solutions that could inform federal reform efforts. Their experiences provide valuable insights into how Congress might restore appropriate checks and balances while maintaining effective governance

II. VIABILITY: STATES ARE ALREADY LEADING THE WAY—CONGRESS CAN COMBINE THEIR BEST PRACTICES

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." [27]

—*The Spirit of Laws*, p. 187

Congress can learn from the experiences of states that have proactively taken steps to restore the separation of powers. While there is some support for the Regulations from the Executive in Need of Scrutiny (REINS) Act at the federal level—which requires Congressional approval of major regulations—we offer a better model for Congress focused not on the cost of the

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[24] NICOLE V. CRAIN & W. MARK CRAIN, NAT'L ASS'N MFRS, THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING AND SMALL BUSINESS (Oct. 2023), https://nam.org/wp-content/uploads/2023/10/Regulations-Exec-Summary.pdf.
[25] Linda Gorman, *Tracking the Cost of Complying with Government Regulation*, NAT'L BUREAU OF ECON. RSCH. DIGEST (Feb. 2023), https://live-nber.pantheonsite.io/sites/default/files/2023-01/feb23_0.pdf.
[26] Bentley Coffey, Patrick McLaughlin & Pietro Peretto, *The Cumulative Cost of Regulations* (Geo. Mason Univ. Mercatus Ctr. Working Paper, 2016), https://www.mercatus.org/research/working-papers/cumulative-cost-regulations.
[27] MONTESQUIEU, *supra* note 1, at 187.

regulation, but on whether Congress intends to be involved in the rulemaking process. [28] States are already leading the way to implement more effective oversight mechanisms, and our model combines the best elements of these state-level pioneers.

Several states have already taken significant steps to limit judicial deference to administrative agencies and enhance legislative oversight of rulemaking. These efforts provide valuable insights into how a delegation-dependent deference model can function effectively.

First, states like Delaware, Florida, Arkansas, Nebraska, and Idaho have already rejected *Chevron*-style judicial deference to agency interpretations. For instance, Florida passed a constitutional amendment in 2018 that prohibits courts from deferring to administrative agencies in interpreting statutes or rules. This ensures that courts independently interpret laws without automatically deferring to agency interpretations, reinforcing the separation of powers. Similarly, Idaho, through a 2024 statute, requires *de novo* judicial review of agency actions, eliminating deference and compelling courts to interpret statutes independently. [29]

Second, states such as Kansas, Utah, Arizona, Mississippi, and Wisconsin have adopted statutes or their courts have held that the reviewing courts must employ de novo review without any deference to the agency's prior interpretation of the statute. Wisconsin's 2018 state supreme court decision and subsequent statute mandate that courts review agency interpretations of law without deference, strengthening judicial oversight. Arizona's 2018 statute explicitly prohibits judicial deference to agency interpretations, ensuring that courts take an active role in interpreting laws.[30]

Third, Michigan, Ohio, and Indiana have taken steps to remove previous mandates that required courts to defer to agencies. Ohio's 2022 state supreme court ruling held that "it is the role of the judiciary, not the executive branch, to interpret the law," thereby rejecting the practice of judicial deference to agency interpretations. [31] Indiana's 2024 statute eliminated prior deference requirements, signaling a shift toward greater judicial independence in statutory interpretation.[32]

While the REINS Act represents a positive effort to increase legislative oversight by requiring Congressional approval for major regulations, it has shortcomings. The Act relies on cost thresholds to determine which regulations require approval. These estimates can be unreliable and subject to manipulation, as they are often conducted by entities with vested interests. For example, Wisconsin's REINS Act requires legislative authorization for any rule with implementation or compliance costs over $10 million over two years, but determining these costs

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[28] *REINS-Style State Laws*, BALLOTPEDIA, https://ballotpedia.org/REINS-style_state_laws (accessed June 10, 2024).
[29] *See* Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines*, (Gray Center Working Paper 21-23, 2020), https://administrativestate.gmu.edu/wp-content/uploads/2021/04/Ortner-the-End-of-Deference.pdf;
[30] Ortner, *supra* note 30; *State Responses to Judicial Deference*, supra note 30.
[31] Ortner, *supra* note 30; *State Responses to Judicial Deference*, supra note 30.
[32] *State Responses to Judicial Deference*, BALLOTPEDIA, https://ballotpedia.org/State_responses_to_judicial_deference (accessed June 6, 2024).

can be contentious and imprecise. [33] Additionally, cost thresholds may overlook significant regulatory impacts that are not easily quantifiable in monetary terms, such as environmental protection or public health considerations. Florida's REINS Act, which sets a much lower threshold of $1 million over five years, still risks neglecting regulations with substantial qualitative impacts, especially because Florida does not require robust quantification of costs and benefits for final rules, only for proposed regulations. [34] By focusing only on "major" regulations, REINS may allow significant but less costly regulations to bypass legislative scrutiny, leading to unchecked regulatory expansion in areas that profoundly affect citizens' lives.

Our delegation-dependent deference model offers a more comprehensive solution by combining the best elements of state-level approaches while addressing the shortcomings of REINS. By eliminating judicial deference to agencies, following the lead of states like Florida and Wisconsin, our model proposes that courts should not defer to agency interpretations when there is no clear legislative delegation. This ensures that courts fulfill their constitutional role in independently interpreting laws, thereby reinforcing the separation of powers at the federal level.

Furthermore, by requiring legislative approval for regulations arising from ambiguous delegations—mirroring Idaho's approach—our model ensures that agencies cannot exploit ambiguities to expand their authority unchecked. This comprehensive oversight aligns with the principle that any regulation stemming from ambiguous statutory authority must receive explicit Congressional approval before taking effect.

By emphasizing the necessity for clear statutory delegations, our model encourages Congress to define agency authority precisely. This mirrors the proactive steps taken by states like Arizona and Mississippi, which have prohibited deference to agency interpretations, thereby compelling legislators to be explicit in their directives. Our model recognizes, as demonstrated by states like Utah and Kansas, that while eliminating unwarranted deference is essential, it is equally important to allow agencies to function effectively within their areas of expertise when operating under clear legislative mandates. This balanced approach ensures that the administrative state remains competent without overstepping its boundaries.

Loper has created uncertainty at the federal level, similar to the legal limbo faced by states that adhered to *Chevron* deference. Without clear guidance, agencies, courts, and regulated entities may face confusion regarding the interpretation and implementation of regulations. Our delegation-dependent deference model offers a superior alternative to REINS by addressing its downsides and integrating successful state strategies. By requiring legislative approval for regulations stemming from ambiguous statutes—regardless of their estimated cost—we avoid the pitfalls associated with arbitrary thresholds and unreliable cost estimations.

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[33] Wis. Act 57 (2017).
[34] Fla. H.R., *CS/CS/HB 1565 (2010) - Rulemaking*, https://www.myfloridahouse.gov (accessed June 10, 2024); Fla. H.R., *Veto Message Bill Analysis - CS/CS/HB 1565*, https://www.myfloridahouse.gov (accessed June 10, 2024).

Congress can learn from the states in several ways. Emulating Idaho's requirement for legislative approval of all regulations arising from ambiguous authority ensures no regulation slips through without proper scrutiny. Adopting statutes similar to those in Florida and Wisconsin that eliminate judicial deference to agency interpretations compels courts to interpret laws independently. Following the example of Ohio and Indiana, where legislatures have reclaimed their constitutional role by removing mandates that required courts to defer to agencies, Congress can enhance legislative accountability. Recognizing the limitations of cost thresholds used in REINS-like acts at the state level, such as in Wisconsin and Florida, and instead focusing on the clarity of statutory delegation, Congress can avoid the shortcomings of a cost-based approach.

By integrating these best practices, our model combines the effective elements of state-level pioneers into a cohesive federal framework that strengthens the separation of powers, enhances accountability, and maintains regulatory efficiency. States have demonstrated that it is possible to enhance legislative oversight and reduce judicial deference without undermining the effectiveness of the administrative state. By learning from these state-level innovations, Congress can adopt a model that restores constitutional balance and promotes a more accountable and transparent regulatory process.

These state experiments demonstrate both the feasibility and complexities of reforming deference doctrines. Drawing on these lessons while acknowledging the unique challenges of the federal system, we propose a comprehensive framework for delegation-dependent deference that builds on states' successes while avoiding their pitfalls

III. SOLUTION: LAWMAKERS SHOULD RESTORE CHECKS AND BALANCES THROUGH DELEGATION-DEPENDENT DEFERENCE STATUTES

"To prevent this abuse, it is necessary, from the very nature of things, power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits."

—*The Spirit of Laws*, p. 188

Our delegation-dependent deference model offers a comprehensive solution that addresses the challenges posed by regulatory overreach and judicial deference. It combines the best elements of state-level approaches—eliminating unwarranted judicial deference, requiring legislative approval for regulations from ambiguous delegations, and encouraging clear statutory mandates—while avoiding the pitfalls associated with the REINS Act.

In the face of the legal uncertainty created by *Loper*, Congress can implement a model that not only resolves the current limbo but also establishes a durable framework for the future. By embracing the successful strategies employed by states, Congress can effectively restore checks and balances, uphold the principles of representative government, and foster an environment conducive to both regulatory efficiency and economic growth.

Federal lawmakers should capitalize upon the *Loper* momentum and reorient rulemaking around representative government by introducing a balanced deference approach that neither stifles

governmental efficiency nor grants excessive leeway to regulatory bodies. By adopting a system of deference that distinguishes between statutory and delegation ambiguities, Congress can ensure that only those agency statutory interpretations explicitly authorized by the legislature receive deference, while ambiguous delegations prompt legislative review rather than bureaucratic overreach.

Those calling for the complete abolition of deference miss a crucial point: the modern republic sometimes requires a competent administrative state. Unlike simpler times when the U.S. economy was among the West's least formidable and our population numbered only in the single millions, today's complex socio-economic environment necessitates nuanced and timely rulemaking. Citizens vote for lawmakers to enact laws that reflect their interests, and executive agencies implement and enforce those laws, including by promulgating interpretations of unclear statutes to provide guidance. Eliminating deference entirely would impede statutory implementation and could overwhelm the courts, which would have to adjudicate the legality of each promulgated rule. Expecting lawmakers to meet every regulatory or deregulatory need is not just unrealistic; it is impractical in an era where legislative gridlock often hinders crafting comprehensive answers to the demands of constituents.

Moreover, some opponents of *Chevron* deference neglect the reality that deregulatory regimes also exploit deference. President Trump, for example, exercised broad rulemaking authority to dismantle many regulatory barriers during his first administration. *Chevron* itself involved less restrictive regulatory action by the Reagan administration, which cited ambiguities in the Clean Air Act to pursue less burdensome, industry-friendly rules. Indeed, weakening deference toward regulators also weakens deference toward deregulators.

Some have advocated for reviving the non-delegation doctrine to further curtail the administrative state's power. Justice Thomas, in his concurrence in *Loper*, and even Chief Justice Roberts acknowledged that while Congress can delegate, it must do so "constitutionally." However, practically speaking, the Court does not yet appear ready to strike down regulations that spring from an express delegation merely on the basis that Congress lacks the power to delegate rulemaking authority. Given that practical reality, our proposed path gives Congress the ability to decide when to delegate power and avoids a situation where the legislature's intent is thwarted by the judiciary.

In light of these considerations, we recommend that Congress proactively address deference questions: codify clear deference guidelines to give legislators options, strengthen the separation of powers, create regulatory and market certainty, and ensure accountability to citizens. The solution to the deference debate lies not in total deference or none at all, but in a calibrated approach that both recognizes the value of administrative expertise and respects the constitutional mandate of clear legislative delegation, as well as the social contract principles of republican representation.

Congress should amend the Administrative Procedures Act to adopt delegation-dependent deference: high deference for regulatory powers explicitly delegated by the legislature and

minimal or no deference for actions based on ambiguous statutes without clear legislative approval. Such a framework would encourage agencies to derive their authority from clear legislative mandates, thereby reinforcing accountability and transparency in the regulatory process. We propose a tripartite scheme for delegation-dependent deference:

1. No delegation or legislative silence: Agencies cannot promulgate regulations, and courts cannot defer. In cases where Congress fails to delegate authority (e.g., when statutes are silent), courts must not defer to agencies and ought to strike down rules.
2. Clear delegation of rulemaking authority: Agencies may promulgate regulations, and courts should defer. When Congress clearly delegates authority to agencies to issue regulations, agencies can promulgate rules that enforce the laws, and courts should defer to agency expertise by permitting rulemaking so long as agency interpretations are reasonable.
3. Broad or ambiguous delegation of authority: The legislature must approve any regulation proposed by an agency before courts will uphold it. When Congress fails to explicitly delegate authority, but the agency believes regulations are needed to ensure compliance with the law, the agency is permitted to initiate rulemaking. However, before that regulation is finalized and becomes enforceable, Congress must approve the regulation. Absent such explicit approval or "post-hoc delegation," courts ought to strike down the regulation as beyond the agency's authority.

To implement the third tier of our arrangement, Congress could require that agencies seek legislative approval for broadly delegated regulation before it becomes enforceable. One method is for Congress to vote directly on proposed regulations, ensuring a clear approval process. Alternatively, agencies could present a case to Congress for the need for a regulation before drafting begins. Once the necessity of the regulation is established, Congress would then approve or reject a delegation to the agency to promulgate the proposed rule. This process of securing legislative approval could occur either during the regulatory agenda stage or prior to finalizing the proposed rule. Oversight mechanisms should be tailored to fit the legislative schedule and processes of Congress, ensuring consistent legislative control over significant regulatory actions.

This model would fundamentally shift incentives for agency regulators by making legislative delegation the touchstone of agency rulemaking authority. Agencies would be deterred from regulating absent clear delegation and incentivized to seek legislative approval, knowing that rules without clear delegation will be rejected by the courts. This approval process would deter agencies from overreaching their mandate and promote accountability.

Courts, in turn, would have a more focused role: for regulations clearly backed by legislative approval, judicial review would be limited to ensuring that the agency’s interpretation is reasonable and that administrative procedures were followed. For regulations without explicit legislative approval, courts would assess both the validity of the agency's claimed authority and whether Congress explicitly sanctioned the regulation post-drafting. By narrowing the scope of

judicial review, courts can prioritize procedural compliance while reinforcing Congress's role as the ultimate source of regulatory authority.

In principle, the legislative approval process also more firmly grounds rulemaking in the principles of representative government. If stakeholders and small businesses view rules as onerous misinterpretations of statute, they are no longer confined to costly and lengthy legal challenges but have an opportunity to vote and lobby their elected representatives to reject or narrow the scope of delegations. While Congress may often rubber-stamp delegations of rulemaking authority, the delegation-dependent deference model creates an opportunity for lawmakers to reclaim their constitutional role. More importantly, the legislature will no longer be able to abdicate responsibility for problematic rules since Congress held the final vote to accept or reject a rule.

Under this tiered deference system, it is crucial to differentiate between areas where agency insights are appropriate and areas where legislative clarity is needed first. Clearly, many statutory ambiguities—all previously afforded deference on the basis of agency expertise under Chevron—deal with legal and definitional questions that far eclipse agency expertise. If a statute's legal and delegation language is unclear, unelected rulemakers lack special expertise to provide interpretations, and Congress should resolve these ambiguities to ensure that enforced rules adhere more closely to the democratic process and legislative intent. While narrow technical definitions may more clearly fall within the purview of agency wisdom, broader outsourcing under the auspices of "expertise" significantly expands the regulatory scope and requires extreme caution.[35] Lawmakers should be empowered to offer clarity about the contours of appropriate delegation.

In addition, courts must take an active role in scrutinizing the use of guidance documents by agencies. Guidance documents, while non-binding, often create a de facto regulatory framework that can feel just as mandatory to the regulated community. This practice allows agencies to bypass the formal rulemaking process, especially when statutory language is silent or ambiguous.[36] Such reliance on guidance documents undermines the principle of separation of powers and creates confusion for citizens and businesses trying to comply with the law. Furthermore, guidance lacks the accountability and transparency of formal regulations, as it is not subject to the same level of public scrutiny or legislative oversight.

Courts should not view guidance documents as a solution or a permissible workaround to our proposed framework. Rather, they should treat guidance with the same skepticism as any other regulatory action that lacks clear legislative approval. Just as courts would strike down regulations issued without clear statutory authority, they should also reject attempts to use guidance in place of properly promulgated rules. Absent either clear delegation or explicit

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[35] *See* Paul Ray, *Chevron on Trial: Keynote Address*, 31 GEO. MASON L. REV. F. 96 (2024).
[36] JOEL ZINBERG, COMPETITIVE ENTER. INST., REPORT: FEDERAL REGULATORY AGENCIES ABUSE POWER WITH GUIDANCE DOCUMENTS (2024), https://cei.org/news_releases/report-federal-regulatory-agencies-abuse-power-with-guidance-documents/.

legislative approval, courts must ensure that agencies cannot govern through guidance alone, thereby upholding the Administrative Procedure Act (APA) and ensuring that agencies remain accountable to both the legislative branch and the public.

In this system, when lawmakers have clearly delegated, agencies can regulate with certainty and judicial support. However, when statutes are vague or open-ended, it is not the role of unelected bureaucrats to fill a legislative void with their own interpretations. Instead, ambiguous laws should return to the legislative arena, where elected representatives can debate and compromise, aligning regulatory actions more closely with republican principles and public accountability.

Our model gives legislators the option to clearly delegate authority when they prefer to outsource to agency expertise. However, crucially, ambiguous laws must return to the legislative arena for debate and resolution. This view does not reject the possibility that agencies have expertise but rejects the premise that agencies should have carte blanche to make law any time the legislature fails to write clear enough statutes. The key is that the default becomes no regulation absent delegation rather than regulatory authority unless and until the legislature withdraws it. In our model, legislators can approve rules or tighten the bounds of their delegations.

Moreover, to ensure that regulatory authority remains aligned with current legislative intent, we propose that delegations be time-limited—a "shot clock" for regulatory authority. By setting expiration dates on delegated powers, agencies would be required to seek reauthorization from Congress periodically. This mechanism would encourage continuous legislative engagement and oversight, preventing agencies from operating on outdated mandates and ensuring that regulations adapt to changing societal needs.

A delegation-dependent deference framework would allow Congress to restore the constitutional balance of powers, ensuring that agencies do not overstep their mandates while still allowing for effective governance. This approach respects the practical necessities of modern administration without compromising the foundational principles of democratic representation and accountability. Given the courts' general hesitation to broadly apply the non-delegation doctrine, an alternative structure, our proposed solution provides a realistic and actionable path forward. It empowers Congress to decide when and how to delegate power, thereby avoiding situations where the legislature's intent is thwarted by judicial intervention, all while ensuring that the administrative state operates within constitutionally appropriate boundaries.

In the absence of immediate legislative action, a proactive executive could initiate the implementation of delegation-dependent deference. The President can set clear expectations for rulemaking submissions within the executive branch, emphasizing the need for clear legislative authority before proceeding with significant regulatory actions. This executive initiative could set a precedent for congressional adoption of delegation-dependent deference guidelines, promoting a more balanced and accountable government.

By embracing this approach, lawmakers can effectively restore checks and balances, enhance accountability, and promote economic efficiency, all while respecting both the constitutional framework and the practical realities of modern governance.

While implementing this framework would require careful attention to procedural details and potential challenges, the experiences of state governments suggest that such reforms are both practical and beneficial. The time is right for Congress to take decisive action to clarify the bounds of administrative authority.

CONCLUSION

The overruling of *Chevron* in *Loper* presents both a challenge and an opportunity for federal lawmakers. The existing uncertainty necessitates a proactive approach to restore the separation of powers and prevent regulatory overreach. By adopting a delegation-dependent deference model that combines the best practices from pioneering states, Congress can create a balanced framework that respects constitutional principles, enhances accountability, and maintains an effective administrative state.

This approach not only addresses the immediate concerns arising from *Loper* but also provides a sustainable path forward that aligns with the foundational ideals of American governance as envisioned by Montesquieu and the Framers of the Constitution. By learning from state-level innovations and integrating them into federal policy, Congress can ensure that the administrative state operates within constitutionally appropriate boundaries, preserving liberty and promoting the general welfare.

By instituting delegation-dependent deference statutes, federal lawmakers can reassert their constitutional role, prevent agency overreach, and provide clarity in the regulatory landscape. This model balances the need for an efficient administrative state with the imperative of maintaining checks and balances among the branches of government.

Congress can adopt this framework to avoid prolonged legal uncertainty in the wake of *Loper* and foster a more dynamic and transparent market environment. The delegation-dependent deference model offers a practical and constitutionally sound solution to the challenges posed by the evolving deference standards, ensuring that the separation of powers is preserved and that the government remains accountable to the people it serves.