Rejecting Judicial Deference: Restoring the Judicial and Legislative Departments to Their Proper Role

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Background

Although the phrase "constitutional crisis" was frequently used during the Trump administration, it became less common after Joe Biden rose to power and replaced Trump as the public face of the administrative state.[1] During the Trump years, the phrase was often invoked in discussions of abuses of power, specifically to determine whether the president had abused his powers. Although the debate regarding the merits of Trump's avid critics remains in dispute, the emergence of widespread public discussion of executive abuse of power presents an opportunity.

The ability of any individual, including the president, to abuse power is mitigated in our constitutional system by the separation of powers, a doctrine designed to prevent the concentration of power and stave off tyranny. The decades long growth of administrative powers and the corresponding erosion of the power and responsibilities of Congress has gone unnoticed for years as all sectors of American society have served as the frogs who are slowly boiling in the waters of the increasingly powerful administrative state.

As the administrative state grows, it increasingly distorts the political process of self-governance by increasing the distance between the public at large and those who make high level policy decisions. Unelected bureaucrats, unaccountable to the people, have control over policies that can drastically impact the opportunities afforded to everyday Americans.

The history and importance of some of the most crucial principles undergirding the Constitution's creation and implementation are drastically distorted, misunderstood, or unknown. The separation of powers is one of the many widely misunderstood principles of the Constitutional era. Because of the newfound common, even if misguided, understanding of the Founders' views on constitutional crises, there is an opportunity to further an honest discussion and analysis of the principles espoused by the founding generation and the liberating nature of careful adherence to the principles of the Constitution.

To further the discussion of the principles of the founding generation and their application in today's political climate it is necessary to understand the administrative state and the quiet backlash against administrative power currently led by state legislative and judicial chambers.

[1] Based on data pulled from TV News Archive. Search limited from 2016 to the present. Spikes in the use of the phrases constitutional crisis and America spiked in 2017 and 2019.

The Administrative State Defined

For decades now, the expansion of regulatory laws passed at the federal and state level has led to the steady, and substantial, growth of administrative agencies.[2] These agencies promulgate rules and ensure compliance with the codes they are legislatively directed to enforce. Increasingly, important legal decisions are rendered through quasi-judicial administrative proceedings.[3] Parties involved in disputes in administrative venues are not universally held to the same procedural and evidentiary rules as formal courts. This leads to the inconsistent application of law because the fact-finding process is not consistent across cases. Furthermore, because legal decisions are handed down by administrative law judges who serve at the pleasure of the executive branch, problems surrounding possible violations of the separation of powers are inherent.

Beginning in 1984, the United States Supreme Court ruled that, when reviewing an administrative agency's interpretation and application of a statute, the court would not "impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." Instead, the court stated that in circumstances where the statute is either silent or ambiguous with respect to the specific issue on which the agency ruled, the court would only overturn the agency's legal findings if the agency based its decision on impermissible grounds of statutory interpretation.[4] The judicial doctrine of deference established in *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.* was adopted by the supreme courts of many states in relation to the standard of review state courts should apply when adopted for state administrative proceedings.[5]

In the decades following the *Chevron* ruling, the administrative state has expanded astronomically, creating circumstances in which power is increasingly concentrated in the executive branch of government. The categorization, and separation, of the powers of government into equally powerful branches of executive, legislative, and judicial is a cornerstone of the republican form of government championed by America's founding fathers and remains structurally embedded within the federal and state governments. The expansion of the role and power of the administrative state threatens to subvert one of the cornerstone principles of American governance. This subversion has led to the concentration of power in the executive branch of government, resulting in a government that is less transparent, and consequently less accountable to, the people.

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[2] Approximately 3,000-4,500 rules are promulgated each year. https://sgp.fas.org/crs/misc/R43056.pdf

[3] https://www.law.cornell.edu/wex/quasi-judicial

[4] *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*

[5] https://ballotpedia.org/State_responses_to_judicial_deference

It goes without saying that the public is largely unaware of the extent of power housed in administrative agencies, nor are they aware of the legal differences between the operation of administrative "courts" and state district courts. However, regular people interface with these systems every day. Workers' compensation commissions hear disputes between employers and injured employees and are governed under administrative proceedings. Administrative agencies also oversee the adjudication of traffic related issues, such as the suspension of an individual's license. A host of other regulatory codes established by the ever-growing executive branch of government are first adjudicated in administrative bodies.

Until recently, the doctrine of deference towards the findings of law rendered by administrative agencies went largely unchallenged. However, in recent years state supreme courts have begun issuing opinions either limiting or overturning standards of review deferential to the statutory interpretation of administrative agencies.[6] Indeed, following the recent OSHA rule requiring businesses to comply with federal vaccination policy, the issue of deference has the potential to break into the mainstream of political commentary.[7] However, to appropriately contextualize the rulings and trends emerging from state supreme courts, a brief discussion of the separation of powers and the role of judiciary within American government is important.

The Role of the Judiciary

Although Federalists and Anti-Federalists sparred over the nuances of the judiciary's role within the constitutional order, there was no dispute regarding the need for judicial review.[8] Since the days of *Marbury*, the primary role of courts has been to decide disputes of law. The legislature writes the law, the executive enforces law, and judges serve as referees who judge what the law is in the event of a dispute between the executive and legislative branches. Under this system, neither branch becomes all powerful, each is "checked" by the other.

For the judicial function to operate with integrity, it must be separate from the legislative and executive governmental functions. The code of judicial ethics shows deep respect for the independence of the judiciary setting in place a complex set of rules which govern the conduct of judges. Even the "appearance of impropriety" is a violation of judicial ethics.[9] The appearance of impropriety is broadly construed and occurred when a "reasonable mind" could conclude a judge's integrity, impartiality, temperament, or honesty is compromised.[10]

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[6] Ortner, Daniel, The End of Deference: How States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines (March 11, 2020). Available at SSRN: https://ssrn.com/abstract=3552321.
[7] https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf
[8] The Debate Over the Judicial Branch – Center for the Study of the American Constitution – UW–Madison (wisc.edu)
See also: https://csac.history.wisc.edu/document-collections/constitutional-debates/judiciary/
[9] Code of Conduct for United States Judges | United States Courts (uscourts.gov)
[10] *Id.*

Such an onerous standard is understandable given the power judges wield. Judges are tasked with the responsibility of declaring the law. Their rulings not only impact the litigants before them, but also other, similarly situated litigants. Judicial rulings shape the future of law. The extent the constitution is upheld or weakened is largely dependent on the actions of judges.

Of course, the Supreme Court can issue unconstitutional rulings which negatively impact constitutional rights. Indeed, unconstitutional rulings have negative consequences because they open the door for tyranny and abuses of power. This is especially true when courts fail to rein in the subversion of the separation of powers. The administrative state is a quintessential example of the judiciary sitting idly by and watching as the executive branch of government amassed excessive power in a manner running counter to the underpinnings of American constitutional law and the principles on which the constitution rests.

Part I: Judicial Reforms

Judicial Rejection of Administrative Deference

States across the nation have begun to push back against administrative powers, specifically undermining the *Chevron* doctrine. This analysis covers judicial rulings from eight states: Kansas, Delaware, Wyoming, Utah, Michigan, Mississippi, Wisconsin, and Arkansas. Among the states examined, three categories are relevant. Each category of states will be analyzed based on the following: (1) states that reject administrative deference while making no mention of *Chevron;* (2) states that explicitly reject *Chevron*, and (3) states which explicitly reject *Chevron* through a separations of powers analysis.

This analysis deepens a current understanding of the state judicial landscape in relation to judicial deference to administrative statutory interpretation. Although the facts and rulings of the cases vary, the common thread within these rulings is a skepticism of administrative power and a resurgence of an appropriate understanding of judicial powers.

States Rejecting Via Statutory Interpretation

Wyoming focused its analysis on a review of applicable state statutes, including state APA statues. Wyoming's standard of review when administrative agency decisions are at issue is laid out in the state's Administrative Procedures Act. After administrative remedies have been exhausted, parties injured by administrative decisions are free to appeal to district court. In accordance with the state's applicable statutory guidance, Wyoming courts exercise plenary authority upon review of administrative proceedings and grant "no special deference" to district court decisions arising from administrative disputes.[11]

States Explicitly Rejecting *Chevron*

[11] *Bowen v. State, Dept. of Transp*., 245 P.3d 827 829 (2011).

Kansas and Delaware have both explicitly rejected e *Chevron*-type deference. In years past, Kansas took the approach of applying a deferential "doctrine of operative construction" when reviewing an administrative agency's statutory interpretation. In a 2007 ruling, the court articulated a rational basis standard stating a Worker's Compensation Board's decision was entitled to judicial deference "if there is a rational basis for the Board's interpretation" of a statute.[12]

However, within two years, the court signaled a departure from their prior rational basis standard. In September 2009, the court issued an opinion in the case of *Higgins v Abilene,* ruling that "no significant deference is due to an agency's interpretation or construction of a statute."[13] Then, in 2013, the court put the issue to rest, citing *Higgins* yet again when making the point that neither Administrative Law Judges (ALJ) nor Administrative Boards are entitled to deferential interpretations of their statutory findings. In this ruling, the court went out of its way to ensure there was no ambiguity regarding how the court views judicial deference. Here the court declared "that the doctrine of operative construction….has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal."[14]

Delaware has also rejected the *Chevron* doctrine. In the 1999 ruling, *Public Water Supply Co. v. DiPasqual,* the Court ruled that an agency's interpretation of technical terms discussed, but not defined, in statutes should receive a deferential standard of review. For instance, in the event a statute broadly defines a term, such as "hazardous waste" is further defined through rules promulgated by an agency in accordance with the laws and regulations of the Delaware Administrative Procedures Act, the agency's interpretation of those rules should be granted "substantial weight."[15]Additionally, the Court noted that, pursuant to statute, issues involving findings of fact should be afforded greater deference than findings of law.[16] When addressing an issue involving the validity of an agency's finding of fact, higher courts are limited "to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency."[17]

The question the Court answered in the *DiPasquale* decision was whether higher courts should review administrative appeals under a *de novo* standard rather than upholding agency decisions unless deference leads to interpretations of law shown to be clearly erroneous.[18] The Court upheld the idea that administrative agencies deserve a degree of judicial deference. This is

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[12] *Casco v. Armour Swift-Eckrich,* 283 Kan. 508 (2007).
[13] *Fort Hays State University v. Fort Hays State University*, 290 Kan. 446 457 (2009).
[14] *Douglas v. Ad Astra Information Systems, L.L.C*, 296 Kan. 552 559 (2013).
[15] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 382 (1999).
[16] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 383 (1999).
[17] *Id.*
[18] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 380 (1999).

made clear by the Court's statement that, "[a]bsent an abuse of discretion", agency decisions should be "affirmed."[19] However, when the issue before a higher court is "one of construction of statutory law and the application of the law to undisputed facts," the Court determined the correct standard of review is *de novo.*[20]

In *DiPasquale*, the Court rejected the authoritative case law cited by lower courts in support of the deferential approach taken to agency interpretation of law found in *Eastern Shore Natural Gas Co. v. Delaware Public Service Comm.*[21] The Court noted the deficiencies of the *Eastern Shore* opinion, specifically that the case relied on the application of a federal statute written prior to the state's adoption of the state's Administrative Procedures Act.[22] Additionally, the Court determined the standard of review articulated in *Eastern Shore* to be fatally flawed. The case called for a *de novo* standard when reviewing an agency's interpretation of statutory law, yet also Court creating deferential standard when reviewing an agency's interpretation "of a statute [the agency] is empowered to enforce." Simply put, these standards of review cannot both be applied simultaneously.[23]

It is also of note that, although the Court was clear regarding the plenary standard of review as the appropriate standard in situations where a court is assessing the decision of an administrative agency's interpretation of statutory law, *DiPasquale* did not directly inform courts of the appropriate standard of review in circumstances where an agency is interpreting the rules and regulations created by the agency itself.

States Rejecting *Chevron* Citing the Separation of Powers Doctrine

Five of the eight states analyzed addressed judicial deference to administrative agency statutory interpretation through a separation of powers framework. However, although the courts were united in their desire to maintain the separation of powers, there were differences in the nature and extent of their rulings. Thus, although all states analyzed are currently wary of judicial deference, the standards of review are not mirror images of one another.

For example, Arkansas handed down a decision with a ruling citing incoherent case law and the separation of powers when explaining the applicable standard of review.[24] Although the analysis of standard of review was brief, the court was clear the appropriate standard of review should be de novo because "it is for this Court to determine what a constitutional or statutory provision means."[25]

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[19] *Id.*
[20] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 381 (1999).
[21] *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 382 (1999).
[22] *Id.*
[23] *Id.*
[24] *Myers v. Yamato Kogyo Company, Ltd.*, Ark. 135 617 (2020).
[25] *Myers v. Yamato Kogyo Company, Ltd.*, Ark 135 616 (2020).

Unlike Arkansas, Utah's standard of review depends on type of issue before the court. In this way, Utah's approach mirrors Delaware, treating issues of law and fact differently. In *Murry v Utah Labor Com'n* the court addressed a mixed question of law and fact, i.e. an issue requiring the legal application of factual findings. The court recognized deference to agency factual findings as appropriate, particularly given the impracticability of reviewing factual findings de novo.[26] However, when the legal effect of facts, rather than facts themselves, are at issue, administrative decisions should not receive a deferential standard of review.[27]

One year after the *Murray* holding, the court reviewed a case involving the viability of a multi-employer worksite doctrine under Utah's Occupational Safety and Health Act (OSHA). The court rejected the ruling of a lower court that erroneously described Utah's OSHA law as a mirror image of its federal counterpart.[28] In doing so, the court addressed applicable standard of review for administrative cases, holding the court's role is to interpret statutes without regard to policy outcomes.[29] Finally, in a case involving wind power projects in the Southeastern region of the state, Utah's high court left no ambiguity regarding the *Chevron* doctrine. The court expressly repudiated the deferential standard articulated in *Chevron,* reasoning that, free from the possibility of circuit splits, the state has no compelling reason to apply a deferential standard of review to agency decision.[30] Instead, courts should retain the "de novo prerogative of interpreting the law, unencumbered by any standard of agency deference."[31]

In addition to practical concerns, the Utah court addressed constitutional issues with judicial deference. A court granting deference to administrative agencies regarding matters of statutory interpretation would threaten the integrity of Utah's constitution. Rules promulgated by the Commission are laws. The Commission has the legal authority to promulgate rules because the state legislature delegated rule making authority to the Commission. However, deferring to an agency's interpretation of its own rules would grant the agency the power to not only create laws, but also to interpret them, a clear violation of Utah's constitution which forbids any branch of government from "exercise[ing] functions appertaining to either of the other" governmental branches.[32]

Michigan also analyzed the issue of judicial deference through a constitutional lens. The Michigan Supreme Court turned to the separation of powers doctrine for assistance in analyzing the issue. Like many states, the Michigan constitution divides government by function into three branches: judicial, legislative, and executive.[33] Article 3, section 2 of the state constitution

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[26] *Murray v. Utah Labor Com'n,* 308 P.3d 461 464 (2013).
[27] *Murray v. Utah Labor Com'n,* 308 P.3d 461 465-469 (2013).
[28] *Hughes General Contractors, Inc. v. Utah Labor Com'n,* 322 P.3d 712 715 (2014).
[29] *Id* at 718
[30] *Ellis-Hall Consultants v. Public Service Commission,* 379 P.3d 1270 1274 (2016).
[31] *Id.*
[32] *Ellis-Hall Consultants v. Public Service Commission,* 379 P.3d 1270 1275 (2016).
[33] *In re Complaint of Rovas Against SBC Michigan,* 482 Mich. 90 97 (2008).

plainly states no "person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."[34] The court addresses the applicability of the *Chevron* doctrine, expressly declining to adopt the standard in the state of Michigan. In so doing, the court pointed to the ambiguous and vague nature of subsequent decisions based upon the doctrine, its incompatibility with the state's case law, and the threat such a doctrine poses to the separation of powers.[35]

The Court recognized the need to bifurcate the standard of review granted to findings of fact versus findings of law. Administrative agencies act outside the constitutional exercise of judicial power and operate utilizing a hybrid of quasi-legislative and quasi-judicial authority. The decisions of administrative agencies related to findings of fact receive a level of deference "akin to an appellate court's review of a trial court's findings of fact."[36] However, issues involving statutory interpretation, are reviewed with no deference granted to administrative decisions.[37] Therefore, although agencies are capable of promulgating rules, they are not empowered to craft laws, and although they can, and should, engage in important fact findings investigations, they are not empowered to construe the meaning of statutes.[38]

Unlike Michigan, which never adopted a deferential standard to administrative statutory interpretation, Mississippi courts once viewed deference with favor. But the standard of review constructed by the courts was confusing and inherently contradictory.[39] This haphazard standard was designed to grant agencies considerable leeway when seeking to resolve fact intensive problems routinely brought before administrative bodies. However, the court recognized the flaws inherent in the current standard of review and, in so doing, rejected granting administrative agencies deference in matters involving an agency's interpretation of law.[40] Although *King* does not address the *Chevron* doctrine by name, it asserts the supremacy of the Court in determinations of law, stating courts exercise "the ultimate authority and responsibility to interpret the law, including statutes."[41]

By overturning the defective standard of review in place prior to *King,* the Court refused to continue abdicating its constitutional responsibilities and once again stepped into its proper role as the supreme authority in the realm of statutory interpretation. The ruling makes clear that the separation of powers was a persuasive motivating factor for the court when determining the appropriate standard of review in cases involving interpretations of law coming from administrative bodies. Because administrative agencies are under the authority of the executive

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[34] *Id.*
[35] *Id* at 109
[36] *Id.*
[37] *Id.*
[38] *Id* at 101
[39] *King v. Mississippi Military Department*, 245 So.3d 404 407 (2018).
[40] *Id* at 408
[41] *Id* at 407

branch their actions must not usurp the role of a separate branch of government. Pursuant to Article 1, Sections 1 & 2 of the Mississippi Constitution, "No person or collection of persons" operating within one branch of government "shall exercise any power" belonging to a separate branch of government.[42]

In *King,* the Court makes clear that, although in years past, it failed to exercise its full constitutional powers, such days are over. Prompted by a renewed respect for constitutional theory and persuaded by then-Judge Gorsuch's opinion in *Gurierrez-Brizuela v Lynch,* the court saw a deferential standard towards the legal findings of administrative agencies as a failure to fulfill the duties of the judiciary to exercise independent judgment regarding what the law is.[43] The prior standard, one in which the court claims de novo standard, while simultaneously articulating the intent to defer to agency interpretations of law, is untenable given the constitutional responsibility granted to the judiciary alone. Thus, moving forward, the court makes clear that administrative interpretations of the law are offered no deference when subject to judicial review.

Wisconsin's stance on judicial deference shows the limitations of judicial reforms. The court's recent decision in *Tetra Tech EC, Inc. v Wisconsin Department of Revenue* overturned the state's existing paradigm for the standard of review utilized by courts when hearing cases involving decisions rendered from administrative agencies. Wisconsin statutes instruct the judiciary to "set aside or modify" agency action if it finds the agency "erroneously interpreted" a provision of law.[44] The same statute requires the court to give "due weight" to the "experience, technical competence, and specialized knowledge" of the agency involved.[45] However, over time, the court developed a methodology of reviewing administrative agencies that extended far beyond statutory requirements. Prior to the *Tetra Tech* ruling, the framework used when applying a standard of review to agency action was inherently contradictory. On the one hand, it provided for the de novo review of agency action involving statutory interpretation. But then, de novo review is thwarted by a requirement for courts too "defer" to an administrative agency's interpretation of statutes "in certain situations."[46]

This confusing standard of review led to the adoption of a three-tied treatment of administrative findings regarding the interpretation and application of statutes. When courts review agency findings, such findings were either granted (1) great weight deference, (2) due weight deference, or (3) no deference at all.[47] Great weight deference is applied to situations in which the agency is legislatively charged with the duty of administering a statute, the interpretation of the agency is longstanding, the agency utilized its expertise in formulating its

[42] *Id* at 407
[43] *Id* at 408
[44] *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 382 Wis.2d 496 556 (2018).
[45] *Id* at 551
[46] *Id* at 605
[47] *Id* at 517

statutory interpretation, and the agency's interpretation provides uniformity and consistency to the application of the statute.[48] When applying great weight deference as a standard of review, courts were required to uphold an agency's findings so long as the agency's interpretation of the statute was reasonable.[49] Therefore, even in circumstances in which the court believes a different interpretation of the statute was *more* reasonable, an agency's findings remain in effect provided they pass a "reasonableness" test.[50]

Due weight deference, the second tier of review, was applied in circumstance in which the statute was on the agency was charged with administering, and the agency has some experience in the area involved in determining the interpretation of the statute.[51] Under this standard of review, an agency's reasonable interpretation of a statute is not automatically upheld. Instead, if a court "finds an alternative interpretation more reasonable" it may adopt this interpretation rather than the agency's interpretation.[52]

Functionally speaking, due weight deference granted greater merit to an agency as a litigant because courts upheld agency interpretation of statutes unless they found another interpretation to be clearly more reasonable.[53] Lastly, the standard of no deference was reserved only for situations in which neither great weight nor due weight deference was appropriate.[54]

The court concluded that the three-tiered approach to agency interpretation of statues is an abdication of the judiciary's constitutional responsibility. Allowing an administrative agency to "authoritatively interpret the law" raises concerns that the doctrine of deference has allowed the state's judicial power to "take up residence" in the executive branch of government.[55] The separation of powers informs the court's understanding of how the constitution allocates governmental power between the executive, legislative, and judicial functions. Courts must be "assiduous in patrolling the borders between the branches" to ensure the structure of the government does not deprive the people of their liberties.[56]

Of course, the separation of powers does not mean the branches of government are sealed off from one another. Many powers are shared between the three branches. However, each branch possesses core powers which other branches of government must not exercise. A core power of the judiciary is the responsibility "to proclaim the law."[57] This responsibility cannot be passed to the executive branch of government through legislative decree.

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[48] *Id* at 517-18
[49] *Id* at 518
[50] *Id*
[51] *Id* at 519
[52] *Id*
[53] *Id*
[54] *Id* at 520
[55] *Id* at 536
[56] *Id* at 537
[57] *Id* at 541

The court further argues a further violation of the separation of powers involves the possible violation of due process. It is for an agency to appear in court as a party to a case because, in such a situation, it is reasonable for the non-agency party to question whether the doctrine of deference "will deprive him of an impartial decisionmaker's exercise of independent judgment."[58] The court determined that, because it views the doctrine of deference as a violation of the separation of powers, it naturally follows that an agency appearing before the court as a party in a case controls some part of the litigation giving rise to questions of the appearance of bias within the litigation process. Judges deferring to the "executive's view of the law" would show a "systemic bias" towards one of the parties in litigation, depriving the non-governmental party of an independent and impartial trial.[59]

Despite the longevity of the three-tiered system, the court overturns the system to "restore" the correct standard of review by "removing the patina of 'deference'" from cases heard by the court.[60] The doctrine of deference, the court argues is unsound in principle, fails to reselect the separation of power, and gives "insufficient consideration" to the due process rights of those who stand in opposition to the agency in litigation. Rather than turning a blind eye to such an injustice, the court "returns to its constitutionally-assigned residence" by reclaiming the core judicial power ceded under the doctrine of deference.[61]

Judicial Remedies Insufficient

Although it is an encouraging sign to see state supreme courts push back against the power of administrative bodies, judicial decisions alone will be unlikely to curb the power of the administrative state because most cases reach settlement before trial, let alone before review from a state's supreme court. Such settlements are shrouded in mystery and are governed primarily by the settlement negotiations of counsel. Even in the absence of settlement, parties dissatisfied with an administrative law judge's decision are often unlikely to appeal due to the costs associated with further litigation.

Unfortunately, the cost of appealing an unsound decision, even a decision that cuts against precedent, is steep for most parties involved in litigation. Parties, particularly corporate entities, often prefer the predictability of the resolution of a matter over the cost of litigating cases that could be won. Ideally, it would be difficult for overreaching administrative decisions to be rendered. Reforms that focus exclusively on judicial decisions are limited because they allow for overreaching decisions to stand in scenarios where parties are unwilling to go through the process of bringing their case to a higher court.

Another problem with relying on courts to curb administrative powers is that, among the small percentage of cases that reach the court, an even smaller number will be decided based

[58] *Id* at 552
[59] *Id* at 552-54
[60] *Id* at 557
[61] *Id* at 564

upon an agency's interpretation of law. Furthermore, the ideological make up of state supreme courts is constantly in flux leading to changing precedent. For example, despite Wisconsin's rejection of the *Chevron* doctrine in relation to standard of review, the Wisconsin Supreme Court recently thwarted the intent of legislative reforms passed by the Walker administration by interpreting agency power broadly in disputes involving the scope of Department of Natural Resources' regulatory power.[62]

Well drafted statutes codifying a de novo standard of review and providing canons of construction in cases involving administrative agency regulatory power would place much needed guardrails against the perversion of the separation of powers advanced under the current administrative system.

Part II: Legislative Responses

Judicial handling of agency authority is only one part of the puzzle. As recognized by several state supreme courts, deferring to agencies can aggrandize the executive at the expense of the judiciary, by delegating its authority to interpret the law. By the same token, deference can aggrandize the administrative arm of the executive branch at the expense of the legislature, by allowing it to shape the law in unintended ways. While Part I explored the judiciary's attempt to regain its proper power, Part II looks at legislative responses. Every time the legislature creates rulemaking authority, it cedes a certain amount of control to executive agencies. When done carefully this can allow agencies to pursue the legislature's policy by handling details the for which the legislature has no time, and responding quickly to changes in circumstance, of which the legislature may be completely ignorant, or to which they may be too slow to respond. However, when broad rulemaking power is given to an agency, it allows the agency to execute its own policy, rather than faithfully administering the policy of the legislature.

This section seeks to answer the question of how responsive legislators are to changes in judicial deference doctrines. In addition to the aforementioned states which reformed their deference standards via court of last resort opinions, two more states were reviewed: both Arizona and Florida recently amended their laws concerning agency deference. In 2018 Arizona passed a constitutional amendment abrogating judicial deference to agencies. The same year Arizona's legislature passed a law to similar effect. Finally Wisconsin, which rejected deference through judicial decision (recently overturned) also passed a statutory reform, also in 2018. It is analyzed as both a judicial and popular reform.

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[62] Corydon James Fish & Andrew C Cook, STATE COURT DOCKET WATCH: CLEAN WISCONSIN V. WISCONSIN DEPARTMENT OF NATURAL RESOURCES THE FEDERALIST SOCIETY, https://fedsoc.org/commentary/publications/state-court-docket-watch-clean-wisconsin-v-wisconsin-department-of-natural-resources?fbclid=IwAR0VoDONT3sd_5ILm-Xek_ykQRBtheJ8ChqjgCyCyeBrczIoBG3S4zOI2f4 (last visited Dec 7, 2021).

Are legislatures in states with reforms more cautious when doling out rulemaking authority to agencies? Are they creating policy and simply authorizing agencies, boards and commissions to carry out their instructions? Are they creating agencies with no more direction than "go forth and do good things"? Are they somewhere in between? Is one type of reform - judicial or popular - more effective in reducing improper delegations? Part II reviews the most recent legislative sessions of each state where reforms have occurred, and evaluates any new grants of rulemaking or regulatory authority to agencies, boards, and commissions.

Methodology

Approximately 3,600 bills were reviewed, all from 2021 legislative sessions. Most did not address administrative rulemaking power, and were not further analyzed. Of those that did address rulemaking, a great many more did not add new rulemaking power, and instead amended some portion of a law unrelated to the rulemaking power. These too were discarded. Only laws which substantially changed or created new agency rulemaking power were given a rating.

Why were these laws the ones analyzed? Because they are the best indicators the state of legislative delegation *today*. Due to the wide range in the timing of reforms, choosing a fixed year allows us to see how effective the various reforms are over time. Additionally, the COVID-19 crisis gives an unexpected view as to how well the reforms hold up under crisis.

Vetoed bills were reviewed and, if they met all other criteria, rated. Even a vetoed bill represents the collective will of the legislature. These bills give worthwhile insight into how the legislative branch views its relationship with administrative agencies. Failed, stalled, or otherwise unpassed bills were not reviewed. These bills do not yet represent the collective will of the legislative body.

Only new or substantially modified rulemaking power was given a rating. The legislative process often leaves even undesirable existing language in place if it does not go to the heart of a legislator's proposed amendment. Unless a legislator or a legislative council is particularly passionate about reducing legislative delegation to agencies, it is unlikely that existing language not directly related to the substance of an amendment will be modified. In order to gauge the current state of legislative delegation, we must look to new language. After all the extraneous laws were discarded, each of the remaining laws was given a rating.

Ratings

Each law that granted an agency new or substantially modified rulemaking authority was given a rating, as follows: new limits, appropriate, acceptable, unacceptable, excessive.

New limits included specific language that gave agencies less leeway to interpret or abuse their power. This could include language narrowing an important definition, listing new exclusions on permissible rules, or the complete elimination of some rulemaking.

Appropriate rulemaking is found when the legislature sets out a clear policy, and delegates the fine details to an agency. This is the kind of rulemaking the authors of the Administrative Procedures Act likely thought they were creating. Laws which create appropriate rulemaking either have plenty of statutory guidance, making it almost impossible for a court to side with an agency going beyond its duty, or one in which there a combination of statutory language and incentive alignment to keep the agency in line.

If the legislature creates a program and allows the agency to use rules to create an application process, this would be appropriate, provided the legislature codifies the kinds of applicants it wants in statute. Appropriate rulemaking might also take the form of a particularly well-articulated policy in statute, with the agency left to implement it with rules. If there is too much room for an unscrupulous agency head to abuse the system, whether to dole out favors to friends or to limit competition, the statute would not receive an "appropriate" score unless the incentives in the program are so aligned that abuse is extraordinarily unlikely.

For instance consider a Wyoming statute allows an agency to set an application fee for one of their programs, with no cap in statute. This would normally receive at best an "acceptable" rating, however, the application was for volunteers to help the agency carry out its primary mission. The odds of the agency setting the application fee too high are extraordinarily low, so the law was given an "appropriate" rating.

Acceptable rulemaking is that which gives the agency undue latitude in creating rules, but has some safeguards, either through the incentives given to the agency, or the statutory language, that make abuse unlikely.

Inappropriate rulemaking authority includes laws where an inference as to the legislature's intent can easily be made, but the language lacks sufficient guidance and limits. Courts would likely be able to differ with an agency interpretation that goes beyond the legislature's intent, but the potential for gray areas is present.

Excessive is reserved for those bills which either grant nearly-unrestrained rulemaking power, or for which the legislature failed to provide sufficient statutory safeguards and the agency's incentives do nothing to prevent abuse. While these laws do no necessarily lead to an agency run amok, only the good will of the agency heads is preventing such abuse.

The statutes were scored without regard for the quality of the policy, whether it increased or decreased the liberty of the citizens of the state. Some terrible laws were given "appropriate" scores, while some laws with laudable aims were given "inappropriate" scores. The scoring was based solely on how much potential for abuse or agency overreach a law created. If a bill gave detailed instructions or significant indications legislative intent, it was scored as appropriate. If it left too much discretion to an agency, it was rated as "acceptable," "inappropriate," or "excessive" depending on the degree of discretion.

State Scoring

After analyzing and rating the bills, each state was given an overall score. Bills that were rated as new limits were counted as a negative one, so that one can quickly see where legislatures are attempting to rein in agencies. Bills that were scored as appropriate were a zero. Bills that were scored as acceptable were a one, those which were inappropriate a two, and bills with no guidance or limiting principle were scored a three. These scores were added to give each state its total score. The total for each state was divided by the number of bills scored for the average score.

The total and average scoring do offer a shorthand way of comparing states, but they are significantly less instructive than an analysis of the laws. Appendix 1 lists each statute scored, by state. Appendix 2 contains charts comparing the scores among states, sorting them by method of reform.

Judicial Rejection

The states which rejected judicial deference to agency decisions via judicial opinion have varied greatly in their attempts to increase the amount of policymaking done at the legislative level.

Arkansas

Arkansas is the state which most recently reformed its judicial deference to agency rulemaking doctrine. The state had a total score of -2, and an average score of -0.105, with 18 new bills effecting agency rulemaking. More than half (11 of 18) of these bills granted appropriate rulemaking authority. Five of the bills reined in agency rulemaking. One bill gave an agency a little too much leeway with creating policy. And one bill was wildly inappropriate, giving almost

no guidance, and, in essence, telling the agency to go forth and do good things regarding the eligibility requirements for long term care placements.

Overall Arkansas seems to be making a concerted effort to put policymaking back in its proper place, though it seems legislators still wanted to pass the book on long term care facilities.

Delaware

Delaware never accepted a Chevron-equivalent doctrine. The state had a total score of 6, and an average score of 0.5, across 10 scored bills. Only one bill served to rein in agencies, by tightening definitions under which the cosmetology board operates. Four bills granted appropriate rulemaking authority. Four bills gave slightly too much policymaking power to agencies, while one, regulating bail bondsmen gave far too much, for a rating of unacceptable.

While Delaware did not pass much legislation modifying agency rulemaking powers, in those instances where it acted, it tended to enlarge the power of the administrative state.

Kansas

Kansas passed 27 bills modifying agency rulemaking powers. It had a total score of 9, and an average score of 0.346. Eighteen of the 27 bills granted appropriate rulemaking power to agencies. Two bills reined in agencies, and four were acceptable. Two new laws were inappropriate, and one was excessive.

Kansas was an early adopter of Chevron reform, changing its jurisprudence in 2013. Unfortunately the legislature has strayed from the path of making policy for the state. The Kansas legislature left far too much leeway to agencies.

Michigan

Michigan had a total score of -2, and the lowest average score, with only 8 bills modifying agency rulemaking power, for an average of -.25. Michigan had a perfect record, with no acceptable, inappropriate or excessive new laws. Twice the legislature reined in agencies, and six times it granted appropriate lawmaking power.

Michigan was the first state to change directions on Chevron-type deference, reforming its jurisprudence in 2008.

Mississippi

Mississippi passed 9 laws modifying agency rulemaking powers. It had a total score of 3, for an average of 0.333. Only one time did the legislature rein in an agency. It granted inappropriate

rulemaking power once, and acceptable rulemaking power two times. The other five scored laws were all appropriate delegations.

Mississippi, like several other states, passed relatively few laws in 2021.

Utah

Utah had a total score of 10, across 31 laws. Its average score was 0.581. The Utah legislature reined in agencies once. It issued appropriate rulemaking 24 times. Three times the legislature passed acceptable bills, it passed one unacceptably delagative law, and it twice gave agencies nearly carte blanche.

Wyoming

Wyoming passed 22 scored laws, with a total score of 16. That works out to an average score of 0.696. Twelve of the 22 laws were appropriate delegations, but the remainder were all acceptable or worse. Five new grants of rulemaking power were acceptable. Four more were unacceptable. The final law was excessive; the legislature essentially allowed the state gaming commission to create an online gaming policy without input from the legislature.

Popular Reform

Arizona

Arizona is an interesting case. For the vast majority of the bills reviewed, there was a clear effort to rein in agencies, to extend only the most minimal and technical of powers, and to maintain the legislature as the sole source of statewide policymaking. Then there were a handful of new laws that threw out all that restraint and instead allowed the director of an agency almost unlimited rulemaking authority within his sphere of influence. In one instance, the director was empowered to prescribe by rule penalties for violation of relevant statutes or rules created under those statutes. Arizona had 26 scored bills. Three were excessive, while seven served to rein in agencies. The remainder were appropriate or acceptable.

Florida

Florida had 43 scored bills. With a total score of only 8, its average score was 0.190. While only two bills reined in agencies, 37 bills were appropriate uses of agency rulemaking power. Unfortunately four bills raised the state's score significantly, with two scoring inappropriate and two scoring excessive.

Both Judicial and Popular Reform

Wisconsin

Wisconsin was one bill away from a negative score, but one excessive law negated three negative scores for a total score of 0 and an average of 0.000. Out of nine bills scored, only one had a positive value; unfortunately that one was excessive, indicating the legislature was fully delegating policymaking to an agency. On the other hand, in three instances the legislature rei ned in agencies. The remaining five bills were appropriate delegations to agencies.

Analysis

The legislative portion of this paper tells only part of the story. While a legislature may leave the laws governing agencies open-ended, courts may step in and narrow the permissible uses of rulemaking power. While courts are not an ideal place for second-guessing state policies, a robust jurisprudence or statutory scheme disfavoring agency overreach could help alleviate the problems. On the other hand, a state legislature that narrowly defines policies and asks agencies only to implement them won't run into these problems in the first place. A statutory or jurisprudential scheme disfavoring agency overreach would, in these circumstances, serve as an extra safeguard, rather then the primary means of ensuring some modicum of liberty.

The states that reformed via judicial decision ran the gamut, with some working hard to ensure that policymaking occurs at the legislative level. Michigan and Arkansas were outstanding, lending the agencies in their state almost no unwarranted powers. On the other hand Wyoming and Utah didn't hesitate to expand administrative authority. In Wyoming, all five bills that were scored "inappropriate" or "excessive" passed by wide majorities, with only two bills falling below 2-1 yay to nay ratio in either chamber, and those just barely so. In Utah, none of the three "inappropriate" or "excessive" bills were anywhere as close as 2-1. It seems these two neighboring western states share a tolerance for delegating broad powers to agencies, in spite of the

The states with popular reforms were a mixed bag. Florida modified more rulemaking powers than any of the judicial reform states. It did rein in agencies several times, but its low average score is due primarily to the sheer number of scored bills it passed. Four bills were responsible for all the positive scoring value. Arizona exhibited an all or nothing pattern, with three excessive bills, but an otherwise clear commitment to limit the scope of agency power. In both instances, the overall impression of the legislative review is one of a general intent to reduce delegation, with a few bills that slipped through the cracks. This is in stark contrast with states like Utah and Wyoming, which both seemed quite comfortable with agency rulemaking shaping state policy.

Wisconsin, as the only state to both judicially and legislatively reject Chevon-style deference, is something of an outlier. It had a fairly low score, indicating that its legislature takes seriously its

responsibility to make policy for the state, and delegate only the day-to-day administration. Whether this is the result of having dual reforms, or whether some other state-specific factor created a culture of legislative policymaking is beyond the scope of this paper. But the state's overall score suggests that a combination of judicial and legislative reforms might well be worth pursuing, especially in light of the mixed success from either reform on its own.

It appears that while reforms to judicial deference doctrines are necessary to restoring the legislature to its rightful place, they are not sufficient. State and statehouse culture doubtless play some role in the success of that program. While judicial-led reforms can improve the administrative landscape, it may be more effective to pursue legislative or constitutional remedies. While reform advocates push legislators to reduce the level of deference courts accord to agencies, they can simultaneously educate legislators on the importance of their role as the primary policymaking body in the state. If agencies are going to be brought to heel, legislatures must be the ones giving the commands.

Conclusion

Judicial deference has a long way to go. Restoring state powers to their proper branch of government is well begun in only a small minority of states. It is not yet finished anywhere. Even in a state with outstanding judicial deference reform and concerted legislative effort like Michigan, agencies impose tens of thousands of commands through regulation.[63] These regulations often undermine the separation of powers by aggrandizing executive administrative agencies at the expense of the other two branches. Reforms both legislative and judicial show promise, but have yet to fully realize the original vision of the separation of powers. Those interested in reform may find legislative changes more appealing, as these efforts, if successful, may simultaneously direct the judiciary to reject deference, and educate legislators on the importance of legislative primacy in shaping state policy. Though neither method of deference reform is foolproof, legislative reform is usually faster, more appropriate (as judges should not be chosen on the basis of a single-litmus test) and furthers the collateral goal of reducing delegation of legislative powers.

[63] https://www.mercatus.org/publications/regulation/quantifying-regulation-us-states-state-regdata-20

State Legislation Scores

ARKANSAS Bill Number	Link	Rating	Score
SB599	https://legiscan.com/AR/text/SB599/id/2387760	Appropriate	0
SB535	https://legiscan.com/AR/text/SB535/id/2387663	New Limits	-1
SB576	https://legiscan.com/AR/text/SB576/2021	Appropriate	0
HB1665	https://legiscan.com/AR/text/HB1665/2021	Appropriate	0
HB1881	https://legiscan.com/AR/text/HB1881/2021	Appropriate	0
SB599	https://legiscan.com/AR/text/SB599/2021	Appropriate	0
HB1848	https://legiscan.com/AR/text/HB1848/2021	Appropriate	0
HB1920	https://legiscan.com/AR/text/HB1920/2021	New Limits	-1
HB1712	https://legiscan.com/AR/text/HB1712/2021	Appropriate	0
HB1828	https://legiscan.com/AR/text/HB1828/2021	Unacceptable	2
SB394	https://legiscan.com/AR/text/SB394/2021	Appropriate	0
SB491	https://legiscan.com/AR/text/SB491/2021	Appropriate	0
SB163	https://legiscan.com/AR/text/SB163/2021	Inappropriate	1
SB694	https://legiscan.com/AR/text/SB694/id/2388310	Appropriate	0
HB1910	https://legiscan.com/AR/text/HB1910/id/2387864	New Limits	-1
HB1907	https://legiscan.com/AR/text/HB1907/id/2389947	Appropriate	0
HB1180	https://legiscan.com/AR/text/HB1180/id/2385443	New Limits	-1
SB379	https://legiscan.com/AR/text/SB379/id/2347729	New Limits	-1
		Total	-2

ARKANSAS Bill Number	Link	Rating	Score
		Average	-0.10526315789473
DELAWARE Bill Number	**Link**	**Rating**	**Score**
HB 174	https://legiscan.com/DE/text/HB174/2021	Shrinks agency power	-1
HB65	https://legiscan.com/DE/text/HB65/2021	N/a	0
HB141	https://legiscan.com/DE/text/HB141/2021	Acceptable	1
HB8	https://legiscan.com/DE/text/HB8/2021	Appropriate	0
SB96	https://legiscan.com/DE/text/SB96/2021	Acceptable	1
SB102	https://legiscan.com/DE/text/SB102/2021	Excessive	2
SB56	https://legiscan.com/DE/text/SB56/2021	Appropriate	0
HB160	https://legiscan.com/DE/text/HB160/2021	Acceptable	1
HB163	https://legiscan.com/DE/text/HB163/2021	Appropriate	0
SB22	https://legiscan.com/DE/text/SB22/2021	Acceptable	1
		Total	5
		Average	0.5
KANSAS Bill Number	**Link**	**Rating**	**Score**
SB55	https://legiscan.com/KS/text/SB55/2021	Appropriate	0
HB2039	https://legiscan.com/KS/text/HB2039/2021	Appropriate	0
SB237	https://legiscan.com/KS/text/SB273/2021	Acceptable	1
SB238	https://legiscan.com/KS/text/SB238/2021	Appropriate	0
SB47	https://legiscan.com/KS/text/SB47/2021	Appropriate	0

ARKANSAS Bill Number	Link	Rating	Score
HB2187	https://legiscan.com/KS/text/HB2187/2021	Appropriate	0
SB78	https://legiscan.com/KS/text/SB78/2021	Appropriate	0
HB2114	https://legiscan.com/KS/text/HB2114/2021	Appropriate	0
HB2104	https://legiscan.com/KS/text/HB2104/2021	Appropriate	0
HB2066	https://legiscan.com/KS/text/HB2066/2021	Appropriate	0
SB38	https://legiscan.com/KS/text/SB38/2021	Excessive	3
HB2064	https://legiscan.com/KS/text/HB2064/2021	Appropriate	0
HB2183	https://legiscan.com/KS/text/HB2183/2021	New Limits	-1
HB2244	https://legiscan.com/KS/text/HB2244/2021	Acceptable	1
HB2332	https://legiscan.com/KS/text/HB2332/2021	Appropriate	0
SB50	https://legiscan.com/KS/text/SB50/2021	Appropriate	0
HB2391	https://legiscan.com/KS/text/HB2391/2021	Appropriate	0
HB2058	https://legiscan.com/KS/text/HB2058/2021	Appropriate	0
HB2208	https://legiscan.com/KS/text/HB2208/2021	Inappropriate	2
HB2196	https://legiscan.com/KS/text/HB2196/2021	Appropriate	0
HB2203	https://legiscan.com/KS/text/HB2203/2021	Inappropriate	2
SB106	https://legiscan.com/KS/text/SB106/2021	Appropriate	0
SB86	https://legiscan.com/KS/text/SB86/2021	Acceptable	1
HB2072	https://legiscan.com/KS/text/HB2072/2021	Appropriate	0

ARKANSAS Bill Number	Link	Rating	Score
HB2155	https://legiscan.com/KS/text/HB2155/2021	Acceptable	1
SB40	https://legiscan.com/KS/text/SB40/2021	Fantastic	-1
SB64	https://legiscan.com/KS/text/SB64/2021	Appropriate	0
		Total	9
		Average	0.346153846153846
MICHIGAN Bill Number	**Link**	**Rating**	**Score**
HB4434	https://legiscan.com/MI/text/HB4434/2021	Reins in	-1
HB4359	https://legiscan.com/MI/text/HB4359/id/2417803	Reins in	-1
HB4055	https://legiscan.com/MI/text/HB4055/id/2371795	Appropriate	0
SB155	https://legiscan.com/MI/text/SB0155/id/2414724	Appropriate	0
HB4517	https://legiscan.com/MI/text/HB4517/id/2422063	Appropriate	0
HB4015	https://legiscan.com/MI/text/HB4015/2021	Appropriate	0
HB4050	https://legiscan.com/MI/text/HB4050/2021	Appropriate	0
SB312	https://legiscan.com/MI/text/SB0312/2021	Appropriate	0
		Total	-2
		Average	-0.25
Mississippi Bill Number	**Link**	**Rating**	**Score**
SB2221	https://legiscan.com/MS/text/SB2221/2021	Acceptable	1
HB949	https://legiscan.com/MS/text/HB949/2021	New Limits	-1
HB196	https://legiscan.com/MS/text/HB196/2021	Appropriate	0

ARKANSAS Bill Number	Link	Rating	Score
HB886	https://legiscan.com/MS/text/HB886/2021	Appropriate	0
HB2606	https://legiscan.com/MS/text/SB2606/2021	Acceptable	1
HB352	https://legiscan.com/MS/text/HB352/2021	Appropriate	0
SB2751	https://legiscan.com/MS/text/SB2751/2021	Inapproriate	2
	https://legiscan.com/MS/text/HB382/2021	Acceptable	0
	https://legiscan.com/MS/text/HB1095/2021	Appropriate	0
		Total	3
		Average	0.333333333333333
UTAH Bill Number	**Link**	**Rating**	**Score**
HB98	https://legiscan.com/UT/text/HB0098/2021	Appropriate	0
HB295	https://legiscan.com/UT/text/HB0295/2021	Inappropriate, bordering on egregious	3
HB86	https://legiscan.com/UT/text/HB0086/2021	Appropriate	0
HB199	https://legiscan.com/UT/text/HB0199/2021	Appropriate	0
HB60	https://legiscan.com/UT/text/HB0060/2021	Acceptable	1
HB118	https://legiscan.com/UT/text/HB0118/2021	Appropriate	0
HB296	https://legiscan.com/UT/text/HB0296/2021	Appropriate	0
HB94	https://legiscan.com/UT/text/HB0094/2021	Inappropriate	2
SB194	https://legiscan.com/UT/text/SB0194/2021	Appropriate	0
SB226	https://legiscan.com/UT/text/SB0226/2021	Appropriate	0

ARKANSAS Bill Number	Link	Rating	Score
HB223	https://legiscan.com/UT/text/HB0223/2021	Appropriate	0
HB352	https://legiscan.com/UT/text/HB0352/2021	Appropriate	0
SB199	https://legiscan.com/UT/text/SB0199/2021	Appropriate	0
HB260	https://legiscan.com/UT/text/HB0260/2021	Appropriate	0
HB375	https://legiscan.com/UT/text/HB0375/2021	Acceptable	1
SB211	https://legiscan.com/UT/text/SB0211/2021	Appropriate	0
HB348	https://legiscan.com/UT/text/HB0348/2021	Appropriate	0
HB328	https://legiscan.com/UT/text/HB0328/2021	Appropriate	0
SB192	https://legiscan.com/UT/text/SB0192/2021	Appropriate	0
HB321	https://legiscan.com/UT/text/HB0321/2021	Appropriate	0
HB303	https://legiscan.com/UT/text/HB0303/2021	Unacceptable	3
HB425	https://legiscan.com/UT/text/HB0425/2021	Appropriate	0
HB381	https://legiscan.com/UT/text/HB0381/2021	Appropriate	0
HB285	https://legiscan.com/UT/text/HB0285/2021	Acceptable	1
HB195	https://legiscan.com/UT/text/HB0195/2021	Appropriate	0
HB82	https://legiscan.com/UT/text/HB0082/2021	Appropriate	0
HB135	https://legiscan.com/UT/text/HB0135/2021	Appropriate	0
HB371	https://legiscan.com/UT/text/HB0371/2021	Acceptable	0
SB38	https://legiscan.com/UT/text/SB0038/2021	Acceptable	0

ARKANSAS Bill Number	Link	Rating	Score
SB68	https://legiscan.com/UT/text/SB0068/2021	Appropriate	0
HB217	https://legiscan.com/UT/text/HB0217/2021	Reduces some regulation, new rulemaking appropriate	-1
		Total	10
		Average	0.645161290322581
WYOMING Bill Number	**Link**	**Rating**	**Score**
SB68	https://legiscan.com/WY/text/SF0068/2021	Acceptable	1
HB239	https://legiscan.com/WY/text/HB0239/2021	Appropriate	0
HB51	https://legiscan.com/WY/text/HB0051/2021	Appropriate	0
HB189	https://legiscan.com/WY/text/HB0189/2021	Appropriate	0
SB78	https://legiscan.com/WY/text/SF0078/2021	Inappropriate	2
HB49	https://legiscan.com/WY/text/HB0049/2021	Appropriate	0
HB7	https://legiscan.com/WY/text/HB0007/2021	Inappropriate	2
HB17	https://legiscan.com/WY/text/HB0017/2021	Acceptable	1
HB133	https://legiscan.com/WY/text/HB0133/2021	Terrible	3
HB197	https://legiscan.com/WY/text/HB0197/2021	Acceptable	1
SB33	https://legiscan.com/WY/text/SF0033/2021	Appropriate	0
HB10	https://legiscan.com/WY/text/HB0010/2021	Appropriate	0
HB54	https://legiscan.com/WY/text/HB0054/2021	Acceptable	0
HB13	https://legiscan.com/WY/text/HB0013/2021	Unacceptable	2

ARKANSAS Bill Number	Link	Rating	Score
SB53	https://legiscan.com/WY/text/SF0053/2021	Appropriate	0
SB54	https://legiscan.com/WY/text/SF0054/2021	Acceptable	1
HB53	https://legiscan.com/WY/text/HB0053/2021	Appropriate	0
HB34	https://legiscan.com/WY/text/HB0034/2021	Appropriate	0
HB6	https://legiscan.com/WY/bill/HB0006/2021	Acceptable	1
HB166	https://legiscan.com/WY/text/HB0166/2021	Appropriate	0
SB76	https://legiscan.com/WY/text/SF0076/2021	Inappropriate	2
SB26	https://legiscan.com/WY/text/SF0026/2021	Appropriate	0
		Total	16
		Average	0.695652173913044
Arizona Bill	**Link**	**Rating**	**Score**
SB1526	https://legiscan.com/AZ/text/SB1526/2021	Reins in	-1
HB2296	https://legiscan.com/AZ/text/HB2296/2021	Reins in	-1
HB2820	https://legiscan.com/AZ/text/HB2820/2021	Excessive	3
SB1274	https://legiscan.com/AZ/text/SB1274/2021	Acceptable	1
HB2605	https://legiscan.com/AZ/text/HB2605/2021	Appropriate	0
SB1572	https://legiscan.com/AZ/text/SB1572/2021	Appropriate	0
HB2838	https://legiscan.com/AZ/text/HB2838/2021	Appropriate	0
SB1783	https://legiscan.com/AZ/text/SB1783/2021	Appropriate	0
SB1124	https://legiscan.com/AZ/text/SB1124/2021	Appropriate	0

ARKANSAS Bill Number	Link	Rating	Score
SB1082	https://legiscan.com/AZ/text/SB1082/2021	Appropriate	0
SB1828	https://legiscan.com/AZ/text/SB1828/2021	Appropriate	0
SB1829	https://legiscan.com/AZ/text/SB1829/2021	Appropriate	0
SB1819	https://legiscan.com/AZ/text/SB1819/2021	Excessive	3
SB1842	https://legiscan.com/AZ/text/SB1842/2021	Appropriate	0
SB1457	https://trackbill.com/bill/arizona-senate-bill-1457-abortion-unborn-child-genetic-abnormality/2003015/	Appropriate	0
SB1063	https://www.azleg.gov/legtext/55leg/1R/laws/0281.htm	Reins in	-1
SB1170	https://legiscan.com/AZ/text/SB1170/2021	Reins in	-1
HB2813	https://legiscan.com/AZ/text/HB2813/2021	Reins in	-1
HB2580	https://legiscan.com/AZ/text/HB2580/2021	Reins in	-1
HB2392	https://legiscan.com/AZ/text/HB2392/2021	Appropriate	0
SB1097	https://legiscan.com/AZ/text/SB1097/2021	Acceptable	1
SB1115	https://legiscan.com/AZ/text/SB1115/2021	Appropriate	0
HB2381	https://legiscan.com/AZ/text/HB2381/2021	Reins in	-1
SB1370	https://legiscan.com/AZ/text/SB1370/2021	Appropriate	0
HB2772	https://trackbill.com/bill/arizona-house-bill-2772-fantasy-sports-betting-event-wagering/2011574/	Excessive	3

ARKANSAS Bill Number	Link	Rating	Score
SB1181	https://www.azleg.gov/legtext/55leg/1R/laws/0282.pdf	Excessive	3
			7
			0.269230769230769
FLORIDA Bill Number	**Link**	**Rating**	**Score**
SB146	https://legiscan.com/FL/text/S0146/2021	Appropriate	0
HB1631	https://legiscan.com/FL/text/H1631/2021	Inappropriate	2
HB7059	https://legiscan.com/FL/text/H7059/2021	Appropriate	0
HB1381	https://legiscan.com/FL/text/H1381/2021	Appropriate	0
SB64	https://legiscan.com/FL/text/S0064/2021	Appropriate	0
HB3	https://legiscan.com/FL/text/H0003/2021	Appropriate	0
SB96	https://legiscan.com/FL/text/S0096/2021	Appropriate	0
HB1289	https://legiscan.com/FL/text/H1289/2021	Appropriate	0
SB1944	https://legiscan.com/FL/text/S1944/2021	Appropriate	0
SB1086	https://legiscan.com/FL/text/S1086/2021	Excessive	3
SB44	https://legiscan.com/FL/text/S0044/2021	Appropriate	0
SB80	https://legiscan.com/FL/text/S0080/2021	Appropriate	0
HB673	https://legiscan.com/FL/text/H0673/2021	Appropriate	0
SB1946	https://legiscan.com/FL/text/S1946/2021	Appropriate	0
SB1134	https://legiscan.com/FL/text/S1134/2021	Appropriate	0

ARKANSAS Bill Number	Link	Rating	Score
HB1463	https://legiscan.com/FL/text/H1463/2021	Appropriate	0
HB1239	https://legiscan.com/FL/text/H1239/2021	Appropriate	0
HB131	https://legiscan.com/FL/text/H0131/2021	Appropriate	0
HB233	https://legiscan.com/FL/text/H0233/2021	Appropriate	0
SB1040	https://legiscan.com/FL/text/S1040/2021	Appropriate	0
SB1966	https://legiscan.com/FL/text/S1966/2021	Appropriate	0
HB149	https://legiscan.com/FL/text/H0149/2021	Appropriate	0
HB1231	https://legiscan.com/FL/text/H1231/2021	Excessive	3
SB252	https://legiscan.com/FL/text/S0252/2021	Acceptable	0
SB768	https://legiscan.com/FL/text/S0768/2021	Appropriate	0
SB890	https://legiscan.com/FL/text/S0890/2021	Appropriate	0
SB1954	https://legiscan.com/FL/text/S1954/2021	Appropriate	0
HB7061	https://legiscan.com/FL/text/H7061/2021	Appropriate	0
HB5601	https://legiscan.com/FL/text/H5601/2021	Appropriate	0
HB77	https://legiscan.com/FL/text/H0077/2021	Inappropriate	2
HB429	https://legiscan.com/FL/text/H0429/2021	Appropriate	0
SB312	https://legiscan.com/FL/text/S0312/2021	New Limits	-1
HB7017	https://legiscan.com/FL/text/H7017/2021	Appropriate	0
SB1018	https://legiscan.com/FL/text/S1018/2021	Appropriate	0

ARKANSAS Bill Number	Link	Rating	Score
SB184	https://legiscan.com/FL/text/S0184/2021	Appropriate	0
SB430	https://legiscan.com/FL/text/S0430/2021	New Limits	-1
SB628	https://legiscan.com/FL/text/S0628/2021	Appropriate	0
HB183	https://legiscan.com/FL/text/H0183/2021	Appropriate	0
SB1080	https://legiscan.com/FL/text/S1080/2021	Appropriate	0
SB366	https://legiscan.com/FL/text/S0366/2021	Appropriate	0
HB485	https://legiscan.com/FL/bill/H0485/2021	Appropriate	0
HB1507	https://legiscan.com/FL/text/H1507/2021	Appropriate	0
SB52	https://legiscan.com/FL/text/S0052/2021	Appropriate	0
		Total Score	8
		Average	0.19047619047619
WISCONSIN Bill Number	Link	Rating	Score
SB160	https://legiscan.com/WI/text/SB160/2021	Appropriate	0
SB15	https://legiscan.com/WI/text/SB15/2021	Appropriate	0
SB74	https://legiscan.com/WI/text/SB74/2021	Great	-1
SB168	https://legiscan.com/WI/text/SB168/2021	Appropriate	0
HB166	https://legiscan.com/WI/text/AB166/2021	Appropriate	0
HB143	https://legiscan.com/WI/text/AB143/2021	Wildly inappropriate	3
SB50	https://legiscan.com/WI/text/SB50/2021	Great	-1
HB120	https://legiscan.com/WI/text/AB120/2021	Appropriate	0

ARKANSAS Bill Number	Link	Rating	Score
SB54	https://legiscan.com/WI/text/SB54/2021	Great	-1
		Total	0
		Average	0

ARKANSAS Bill Number	Link	Rating	Score

States by method of rejecting deference, and legislative responses

State	Rejection	Rejection Tier	Total	Average	New Rulemaking Powers Created
Arkansas	Judicial	No explicit rejection of state-Chevron doctrine	-2	-0.105	18
Wyoming	Judicial	No explicit rejection of state-Chevron doctrine	16	0.695	22
Delaware	Judicial (never had it)	Explicit rejection of state-Chevron doctrine	5	0.5	10
Kansas	Judicial	Explicit rejection of state-Chevron doctrine	9	0.346	27
Michigan	Judicial	Explicit rejection of state-Chevron doctrine, with separation of powers analysis	-2	-0.25	8
Mississippi	Judicial	Explicit rejection of state-Chevron doctrine, with separation of powers analysis	3	0.333	9
Utah	Judicial	Explicit rejection of state-Chevron doctrine, with separation of powers analysis	10	0.645	32
Wisconsin	Judicial	Explicit rejection of state-Chevron doctrine, with separation of powers analysis	0	0	10
Wisconsin	Popular	Popular Rejection	0	0	10
Arizona	Popular	Popular Rejection	7	0.269	26
Florida	Popular	Popular Rejection	8	0.19	44