

Ambition to Counteract Ambition: How Can the Hollowed Legislatures Rival Impetuous Agencies Post-Deference?

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Introduction

Judicial deference and legislative delegations of power have become commonplace in our political system. The result is that the role of the legislature is not entirely clear with a view only to our written constitutions. In order to accommodate the modern role of the legislature which embraces and relies on administrative power, the processes of enacting policy and the behavior of individual legislators have evolved. One problem for those who seek to end the delegation of legislative power and judicial deference to agencies is that legislators across the country have come to understand delegation as an essential aspect of policy writing. Because reliance on administrative delegation has become a crutch for the legislatures, it is unclear whether ending deference in practice will reduce agency power. If the legislatures are ill equipped to pass statutes that are clear and intelligible, then a state court must either construe the statute itself or rely upon agency testimony regarding the case in question. Furthermore, if legislatures do not exercise proper oversight and properly rewrite the law once a court has struck down an agency rule, deference does little to restore faith in the legislative branch. Although many states have waged a revolution against deference, the revolution may be short lived lest the legislature become equipped to assume its proper role as leader in the legislative process.

In this paper I will show that curbing deference necessitates reviving the lost role of the legislature, I will show how and why progressive reformers hollowed out the state legislatures to create a vacuum for administrative governance, I will detail the way in which some states have exercised oversight in attempts to tame agencies during the rule-making process, and I will suggest some possible remedies to restore the lost power of the state legislatures so that they might proactively begin to hem in agency power as opposed to only doing so reactively through oversight. Ultimately, I contend that restoring the lost role of the legislature entails the embrace of proper modes of oversight, but more importantly restoring an understanding that the legislative branch is responsible for writing laws rather than leaving that important task to bureaucrats. In order that the legislature reassume its role as legislative leader, to steal a phrase from Publius, it needs to be made ambitious to counteract the ambition of

agencies; this entails the proper constitutional or institutional means to check agency abuse as well as the will, or the incentives, to exercise those means.

I: The sometimes quiet revolution

In most states, there are few statutory bulwarks to defend people from being tried in administrative law courts, fined according to the rules written by unelected administrators, and denied a jury of their peers throughout the process. What is worse is that he who violates administrative regulations has little recourse to the courts due to an obligation called “Chevron Deference.” Chevron deference is so named for the United States Supreme Court decision in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.* This doctrine dictates that courts are obliged to favor an agency’s interpretation of law. What often results is no substantive oversight of the administrative law court’s verdict as the state court justices have their hands tied by the agency’s interpretation of the statute, as well as the evidence and testimony which was approved by and admitted into the administrative law proceeding by the agency itself. Such an arrangement prohibits the state courts from substantial deliberation on the given case and often indisposes the state courts from considering the constitutionality of agency power itself.

In some sense, the deference question is inextricably linked with the question of nondelegation; once a legislative body has become habituated to delegate its power, a court cannot but rely most heavily on agencies because the legislature becomes less capable drafting statutes coherent enough to form the basis for a court’s judgment. In short, if the legislature does not legislate, then the courts must either rely upon agency interpretation or impose their own interpretation upon the statute in question. Neither of these properly reinforce the separation of powers as envisioned by the framers of the constitution because both neglect the very important role of the legislature as paramount in the construction of policy.

In his paper entitled *The End of Deference: How States (and Territories) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference*, Daniel Ortner demonstrates that several

states have taken measures to curb judicial deference.¹ Throughout this paper I will focus on five of those states: Utah, Arizona, Florida, Wisconsin, and Mississippi. In 2008 the Utah Supreme Court ruled that the judiciary should determine the “trajectory of law” without deference to agencies. In 2018 three states (Arizona, Florida, and Wisconsin) took statutory measures to eliminate deference. In 2021 The Mississippi Supreme Court ruled 8-1 to end the state practice of deferring to agency interpretations of regulations in *Mississippi Methodist Hospital and Rehabilitation Center Inc. v. Mississippi Division of Medicaid*.²

The Utah Supreme Court has issued several opinions ruling that it will not defer to agency interpretations. In 2013 the Utah Supreme Court reevaluated its approach in a unanimous opinion (*Murray v. Utah Labor Comm'm*). According to Ortner, In *Murray v. Utah Labor Comm'm*

distinguished between the distinct concepts of “discretion” and “deference,” and noted that while an agency may be given discretion in matters of policy, it could not be delegated deference in matters of law since the correct interpretation of a statute “has a single ‘right’ answer in terms of the trajectory of the law” and is best resolved by the judiciary without deference.³

In a 2014 case *Ellis-Hall Consultants v. Public Service Commission of Utah* Justice Lee ruled that it “makes little sense for [the court] to defer to the agency’s interpretation of law of its own making... (because doing so) would place the power to write the law and the power to authoritatively interpret it into the same hands.”⁴ Thus, the Utah Supreme Court has not only determined that Chevron Deference is incompatible with the separation of powers, but also is Seminole Rock/Auer-style deference.

In 2018 Arizona altered its deference process when its assembly passed [House Bill 2238](#) which directs state courts to treat administrative law cases the same as any other case.⁵ House Bill 2238 not only entailed a more robust role for the state courts, but also implied a larger role in the future for the state

¹ 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> or <http://dx.doi.org/10.2139/ssrn.3552321>

² [https://ballotpedia.org/Deference_\(administrative_state\)](https://ballotpedia.org/Deference_(administrative_state))

³ Ibid, p 13

⁴ <https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/>, accessed 7/30/2021

⁵ <https://legiscan.com/AZ/text/HB2238/id/1782086>

legislatures: point E of the bill states that “The court shall decide all questions of law, including the interpretation of a Constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency.” In other words, the bill obliged the state courts not only to interpret statutes for themselves, but implied that the court must consider the relationship between the state constitution and agency rule-making power *de novo*.

In 2018, Florida voters passed a ballot measure amending the constitution which eliminated deference to agency interpretation. The Constitutional Revision Commission put forth Amendment 6, part of which reads:

In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule *de novo*.⁶

Amendment 6 passed with 61.6% of the vote; however, the revision of deference, a retirement age for state supreme court justices, and the adoption of Marsy’s Law were proposed as one ballot measure, so it is unclear whether or not the people of Florida were motivated by the referendum on deference or the other aspects of the amendment.⁷ Nevertheless, Florida is the only state in which the people have voted and ratified an amendment abolishing deference.⁸

In 2018, the Wisconsin Supreme Court heard a case called *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue* wherein the court found judicial deference in abrogation of the state constitution’s division of powers. However, Justice Ann Walsh Bradley cast skepticism on the constitutional import of Justice Kelly’s majority opinion. She wrote,

I agree with the concurrences of Justices Ziegler and Gableman that, consistent with our doctrine of constitutional avoidance, the court need not reach the issue of whether our deference

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[https://ballotpedia.org/Florida_Amendment_6_Marsy%27s_Law_Crime_Victims_Rights_Judicial_Retirement_Age_and_Judicial_Interpretation_of_Laws_and_Rules_Amendment_\(2018\)](https://ballotpedia.org/Florida_Amendment_6_Marsy%27s_Law_Crime_Victims_Rights_Judicial_Retirement_Age_and_Judicial_Interpretation_of_Laws_and_Rules_Amendment_(2018)), *Ballotpedia*, Florida Amendment 6 (2018), accessed January 12, 2020.

⁷ https://ballotpedia.org/Marsy%27s_Law_crime_victim_rights, *Ballotpedia*, Marsy’s Law, accessed January 12, 2020.

⁸ Ortner, Daniel, *The End of Deference: How States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* (March 11, 2020). Page 13. Available at SSRN: <https://ssrn.com/abstract=3552321> or <http://dx.doi.org/10.2139/ssrn.3552321>

framework violates the Wisconsin Constitution... I write separately, however, for two reasons. First, the majority/lead opinion ignores controlling precedent to reach a result that upends decades of administrative law jurisprudence. Similarly, the concurrences of Justices Ziegler and Gableman, while not reaching the constitutional issue, would toss away a framework that has served courts well for decades. Second, the court's misguided wholesale changes create possible unintended consequences and a great deal of uncertainty.⁹

In short, Justice Bradley's opinion aimed at destroying the implications of Justice Kelly's majority opinion for deference, and she hoped to show that the majority of the court agreed with her skepticism. Furthermore, Justice Bradley cast doubt upon whether a return to the old constitutional framework entailing a separation of powers—praised in Justice Kelly's majority opinion—was (a) useful and (b) possible. In her opinion, Justice Bradley echoed the criticism of many who fear a referendum on agency power in the states. She and others believe that the state legislature cannot govern without delegating their power to experts in administrative agencies. The disagreement on the court incentivized the Republican controlled legislature to bolster Kelly's position in state statute. In December 2018 the Wisconsin State Legislature included a rule in its Administrative Rules and Guidance Proceedings which states "No agency may seek deference in any proceeding based on the agency's interpretation of any law."¹⁰

And finally, just this year Mississippi Supreme Court Justice Leslie King ruled that the practice of "[d]eferred to agency interpretations of rules and regulations is inconsistent with the standard of review for statutory interpretation, causes confusion, causes inconsistencies in application and within our own caselaw, and violates article 1, section 2, of Mississippi's Constitution."¹¹ Unlike the case before the Wisconsin Supreme Court, the Mississippi Supreme Court ruled unanimously in this case to end the practice of deference.

⁹ <https://cases.justia.com/wisconsin/supreme-court/2018-2015ap002019.pdf?ts=1530018830>, *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, accessed January 13, 2020.

¹⁰ Wis. Stat. Ann. § 227.10. 2g.

¹¹ JUSTIA, "Mississippi Methodist Hospital & Rehabilitation Center, Inc. v. Mississippi Division of Medicaid et al.," June 10, 2021

Including these states, 40 states have taken some measures to curb deference, or at least exhibit some growing skepticism.¹² But the growing skepticism of judicial deference to agencies may only solve part of the puzzle of unrestrained agency power at the state level. Ortner observes that the states have curbed deference “with significant fanfare and a vocal rejection,” but that there has been “incremental reform rather than a more dramatic rejection of deference” at the federal level.¹³ The way that the legislature and judiciary exercise power in the states after deference has been curtailed may serve as a pilot for federal reform, or it may prove disastrous and disincentivize curtailing deference and agency power at the federal level; all of this depends on the legislature becoming capable of and willing to responsibly exercise its power as the state courts reclaim theirs. It is possible that once the courts no longer defer to agencies an increasing number of rules will be struck down and the legislatures will have to revisit the language of statutes that have given agencies rule-making power. Thus, it is possible that the legislatures will be given an increasing opportunity to embrace a role that minimizes the power of agencies in the policy writing process. Therefore, it is essential that the legislature embrace new means to reclaim its lost role as leader of the legislative process.

II: The Hollowing of the Legislature

The most basic problem with evaluating the revolution of deference and its effect on state assemblies is that the reforms are relatively new: two years is hardly enough time to determine the effects. But perhaps a greater difficulty with evaluating the effects of the revolution against deference on legislation is that the organization of legislatures and courts vary somewhat drastically across state lines, and state constitutions have developed over time in different ways. In order to properly understand the effects of deference policy in the states, and in order to restore the separation of powers, it is necessary to understand the institutional incentives at work on justices and representatives. What makes a study of the legislative process in the states most difficult is that the different dynamics of the state legislatures make

¹² Daniel Ortner, *The End of Deference: The States That Have REjected Deference*, Yale JReg, March 24, 2020. <https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/>

¹³ Ibid.

it difficult to discern what set of incentives work best to create a responsible legislature. Legislative sessions look very different across the states simply due to the dynamics produced by the state constitutions: some states have term limits and others do not, some states have short sessions and others have longer sessions, and state legislatures have varying numbers of members representing different interests which create different circumstances for the negotiation of policies. These difficulties can be expressed by a cursory look at the term dynamics and composition of each of the five states analyzed in this paper:

Legislative Dynamics							
State	House term length	House term limit	House Size	Senate term length	Senate term limit	Senate Size	Legislative session
Arizona	Two years	4 terms, 8 years	60	Two years	4 terms, 8 years	30	100 calendar days ¹⁴
Florida	Two years	4 terms, 8 years	120	Two and Four year terms	2 terms, 8 years	40	60 calendar days
Mississippi	Four years	None	122	Four years	None	52	90 calendar days, or 125 following a gubernatorial election
Utah	Two years	None	75	Four years	None	29	45 calendar days
Wisconsin	Two years	None	99	Four years	None	33	No limit

But the composition of the state legislatures only describes half of the story. Aside from the different legislative arrangements in the states, there have also been reforms that have made coalition building more difficult, have weakened the legislative process, and have prepared state governments to lean on the crutch of administrative agencies.

¹⁴ <https://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx>

Throughout the 20th century the legislative process has been upended in several ways to ensure that American institutions were replaced by administrative governance. Progressive reformers were clear that such was their intention and they were also clear that the states would be the laboratories for more wide scale reform. But they were not the only ones who have contributed to the hollowing of the legislature over the past 100 years, they merely set the process in motion. Reform came in three waves: first, progressives attacked the party structure at the turn of the century to make institutions like the legislatures less organized and therefore less capable of governing, second, and shortly thereafter, states began urging reforms in the name of direct democracy in order to circumvent the role of the legislatures as a policy-making institution, and finally the state legislatures rendered themselves less organized and reduced their own level of expertise by instituting reforms that made the committee system and individual representatives less capable of checking agency power.

The Wisconsin Idea

As mentioned earlier, Justice Ann Bradley of Wisconsin cast skepticism on the state supreme court's decision in *Tetra* because she believed that the court, led by Justice Kelly, “upend(ed) decades of administrative law jurisprudence... toss(ed) away a framework that has served courts well for decades (and) create(ed) possible unintended consequences and a great deal of uncertainty.”¹⁵ Justice Bradley's remarks may smack of the bitterness of defeat, but her fears prove valid when one looks closely at the development of Wisconsin's political institutions. Bradley's warnings to the court, and to the people of the state leading a not-so-quiet revolution against deference, are cast in the shadow of the hundred year reform of the state's political institutions that have rendered it reliant on agency governance to function. If those leading the revolution against deference in the state of Wisconsin— and the several states that followed Wisconsin's progressive model— do not replace the administrative framework with one that represents the will of the people through their elected legislators, then the state legislature will continue to

¹⁵ *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*

empower agency officials in their statutes and there will be little that the state court may do on the back-end to restrain agency power.¹⁶

In order to properly understand how and why agencies have gained so much power, and why dissenting voices like Justice Bradley bemoan the renegotiation of judicial deference to agencies, it is necessary to understand the historical development of state institutions throughout the progressive era as agencies began to accrue more power and the legislature was crippled. Wisconsin was at the forefront of progressive innovations at the state level.

In 1912, Frederic Howe wrote that “Wisconsin is doing for America what Germany is doing for the world.”¹⁷ Robert LaFollette was arguably the greatest driver of this change in Wisconsin during the progressive era (Howe’s book is dedicated to LaFollette’s father, and the very first chapter is on LaFollette Jr.). Robert Maxwell writes that during the years between 1900 and 1914 “the Progressives developed a powerful political machine, dominated state elections for a dozen years, and enacted a series of sweeping political, economic, and social reforms which attracted the attention of the entire nation and were widely copied.”¹⁸ During that period, LaFollette was the most personally successful Wisconsin politician. From 1900 until 1925, he won every office that he sought including three terms as governor, four terms as a United States Senator, and on two occasions received the state’s vote for president.

“The Wisconsin Idea,” or the new organization of the state, which entailed an active political role for academics at the University of Wisconsin-Madison, brought sweeping changes both in terms of policy and constitutionalism in the state. The progressive reformers, led by LaFollette, championed systems of direct legislation, non-partisan elections, the open primary system, and direct election of U.S. senators before the 17th amendment was passed. In addition to their institutional changes, the Wisconsin progressives championed workers’ compensation and agricultural policies that would serve as a blueprint for the new deal (the centerpiece for these programs was the creation of agencies to regulate industry),

¹⁶ It is also worth noting that Justice Daniel Kelly, who wrote the opinion in *Tetra*, lost retention election to Jill Karofsky.

¹⁷ Howe, F. C. (1912). *Wisconsin: An Experiment in Democracy*. C. Scribner's Sons. Preface, vii.

¹⁸ Robert Maxwell, *La Follette and the Progressive Machine in Wisconsin*. (1852) Pg 1.

state regulation of railroads, and progressive taxation rates. LaFollette defended the former reforms in a 1987 speech in which he argued, “The official obeys whom he serves. Nominated independently of the people, elected because there is no choice between candidates so nominated, the official feels responsibility to his master alone, and his master is the political machine of his party.”¹⁹ To LaFollette, the party was an unnecessary intermediary that insulated politicians from the people and created the circumstances for corruption.

However, to Herbert Croly and John Dewey (both editors of *The New Republic*, the latter of whom taught at the University of Wisconsin-Madison, and who LaFollette called “the only philosopher of our age”), the destruction of the old arrangement of electing candidates was not only necessary to empower voters; it was necessary to create a vacuum for a new political system. Though early on LaFollette described the move as a decidedly democratic one, the progressive founders of *The New Republic* and the professors at the University of Wisconsin-Madison sought higher aims when they attempted to weaken the party system. For example, in his book *Progressive Democracy* (1914), Croly argued that the two-party system undermines the will of the people because it “proposes to accomplish for the people a fundamental political task which they ought to accomplish for themselves. It seeks to interpose two authoritative partisan organizations between the people and their government.”²⁰ But if the old system of parties, with all of its mechanisms for organization, was too slow moving and did not result in the organization of society that the progressives desired, how could it be that the people could spontaneously organize and push society forward through direct democracy? Croly’s solution was an increased role for administrative agencies. He writes,

The success of the new instruments [of direct democracy] will be commensurate with their success as agencies for the realization of positive popular political purposes. Their serviceability as agencies for the realization of popular political purposes will depend upon the ability of democratic law-givers to associate with them an efficient method of delegating popular political authority. Direct democracy, that is, has little meaning except in a community which is resolutely pursuing a vigorous social program.²¹

¹⁹ Robert LaFollette (1987)

²⁰ Herbert Croly, *Progressive Democracy* (New York: Macmillan Co., 1914), p. 341.

²¹ *Ibid*, p. 270.

Joel Silbey summarizes, “for the Progressives, political reform, especially the concerted attack on the parties, was a prerequisite to everything else they wished to accomplish.”²² Joseph Postell concludes, “Once the parties were out of the way, Progressives reasoned, it would be much easier to restructure the political system to deal with the abuses of the day.”²³ Wisconsin, animated by the “Wisconsin Idea” and propelled into administrative governance by the intellectuals at the University of Wisconsin-Madison were the first to begin hollowing out the party system and the legislative process to create a vacuum for the administrative state.

Progressives at the national level were just as clear about their aims: they wanted to weaken the parties in order to weaken the legislature; and they wanted to weaken the legislatures so experts could play a central role in planning and governing. For example, Woodrow Wilson remarked “Self-government does not consist in having a hand in everything, any more than housekeeping consists necessarily in cooking dinner with one's own hands. The cook must be trusted with a large discretion as to the management of the fires and the ovens... The problem is to make public opinion efficient without suffering it to be meddlesome.”²⁴ Additionally, Rexford Tugwell wrote, “It is, in other words, a logical impossibility to have a planned economy and to have businesses operating its industries, just as it is also impossible to have one within our present constitutional and statutory structure. Modifications in both, so serious as to mean a destruction and rebeginning, are required.”²⁵ In short, the Progressives who advocated an increased role for agency planning and governance did so because they wanted to destroy the constitutional structure and begin anew. Therefore, if one wants to decrease the power of administrative agencies one must think seriously about the mechanisms that allowed representatives of the people to govern before agencies started playing the central role in policy. It is necessary to consider what factors empowered the legislative process and rendered representatives capable of governing, and

²² Joel H. Silbey, “The Rise and Fall of American Political Parties, 1790–2000,” in *The Parties Respond: Changes in American Parties and Campaigns*, ed. L. Sandy Maisel (Boulder, CO: Westview Press, 1998), 13.

²³ Joseph Postell, “The ‘Controlling Power of Organization’: Constitutional Conservatism and the Defense of Party Government” in *American Citizenship*. (University of Oklahoma Press, 2022), 241.

²⁴ Woodrow Wilson, *The Study of Administration*. 1887. Pp 214-5

²⁵ Rexford Tugwell, *The Principle of Planning and the Institution of Laissez Faire*. 1832. P 92.

the factors that might incentivize them to serve those who elected them rather than shirking responsibility by delegating broad power to the unelected bureaucrats, or as Wilson called them, “the cooks” in the kitchen.

Florida, the Initiative and Referendum

In 1966 the post-reapportionment Florida legislature was described by Richard Pettigrew in the following language: “[T]hese were new faces thrust into an old institution, without ties—no ties to the leadership, no ties to the lobbyists, no ties to the old cabinet officers who had been there from time immemorial. They were brand new on the scene and they felt they were taking a fresh look at the institutions [of government].”²⁶ The change was the result of the recognition of the “one person, one vote” principle in Florida. In 1968 Florida voters adopted a near complete revision of the Florida constitution. The most prolific change was a line mandating a Constitutional Revision Commission to occur every twenty years.²⁷ Florida is the only state in the country to establish such a process. In addition to the Constitutional Revision Provision, the 1968 Constitution provides for citizens initiatives and referenda. Of the 1968 constitutional revision, Mary Adkins writes, “The new Constitution was responsive to the people... Never again would Florida’s citizens be beholden to the legislature for constitutional reform. The constitution provided for citizens’ initiatives and contained a provision unique in America: a periodic automatic Constitution Revision Commission.”²⁸ Such reforms in the name of direct democracy, alongside election and institutional reforms like those in Wisconsin, function to weaken the legislative process.

The initiative is a process that allows citizens to bypass their state legislatures by collecting signatures to put statutes or constitutional amendments on the ballot; the referendum is a process that allows citizens to refer a law passed by the legislature to the ballot for voters to decide to uphold or repeal

²⁶ Remarks of Richard A. Pettigrew, Florida Senate Seminar, Legislative Reform in Historic Context, in West Palm Beach, Fla. (Jan. 11, 1985) (unedited transcript) (on file with Senate President's office).

²⁷ https://ballotpedia.org/Florida_Constitution_Revision_Commission

²⁸ <https://www.floridatoday.com/story/news/2017/10/05/florida-frontiers-revising-1968-florida-constitution/735630001/>

the law. Florida was one of the last states to embrace the initiative but it has not acknowledged the referendum process in its constitution. At the turn of the 20th century progressives weaved these reforms into various state constitutions in the name of direct democracy. In 1987 Nebraska allowed cities to place initiative and referendum in their charters.²⁹ South Dakota was the first state to adopt a statewide initiative and referendum process in 1898. By 1918, 19 states adopted some form of initiative and referendum. To this day, 26 states have embraced some form of the initiative or referendum process.³⁰

Florida's initiative process, on its face, seems different from that of other states. As was previously mentioned, Florida has never embraced the referendum to work alongside the initiative process. Additionally, Florida is only one of three states which allows only initiated constitutional amendments rather than both initiated statutes and amendments to the constitution.³¹ The legislature in Florida may also place legislatively referred constitutional amendments on the ballot. And finally, Florida has a single subject rule for its proposed measures. The Florida Supreme Court hears cases to approve ballot measures and routinely uses the single subject requirement as a test. All of these requirements surrounding the initiative process would seem to discourage the initiative process, or at least make initiative amendments less common in the state. However, the result is that Florida ballot measures produce amendments to the constitution that are, in their nature, policy measures. For example, in 2020 initiatives resulted in new citizen voting requirements, a constitutional amendment to raise the minimum wage in 2026, the establishment of a top-two primary system, and homestead property tax changes. The result is that the Florida Constitution is not merely a document which lays out governmental powers, but also contains policy on fishing requirements, tobacco, the Everglades Trust Fund, limitations on the confinement of pigs during pregnancy, slot machines, marijuana, and greyhound racing.³² Perhaps all of these are good policy measures, but including them in the constitution entails more difficulty for a

²⁹ https://ballotpedia.org/History_of_initiative_and_referendum_in_the_U.S.

³⁰ https://ballotpedia.org/States_with_initiative_or_referendum

³¹ https://ballotpedia.org/Laws_governing_ballot_measures

³² https://ballotpedia.org/Article_X,_Florida_Constitution

legislature who believes that it is important to make a change in policy, especially if the policy regulating gambling, marijuana, or the confinement of pigs overlaps with rules written by agencies.

When the National Economic League suggested the initiative and referendum to the states, much like LaFollette and the progressives in Wisconsin, their fundamental aim was to weaken the state legislatures because they believed that institution had been captured by parties and special interests. The National Economic League argued that the legislative process was “out of date” and that “the output is not even nominally under public control.”³³ Ultimately, they envisioned a system wherein “The electorate, while returning the man to office, can overrule the measures with no more reflection on his honor or usefulness than is involved in the overruling of a lower court by a higher.”³⁴ Although for some the aim was to render the legislature more accountable to the people, the unintended consequence has been that the people circumvent the legislature and therefore pay less attention to the legislative process in their states. A 2018 survey found that, although 70 percent of citizens believed that state government did a better job than the federal government, yet almost 50 percent didn’t know if their state had a two-house legislature.³⁵ The initiative process, aimed at creating direct democracy, is one of many alterations to our system of representative self government which discourages the people from communicating with legislators, volunteering for their legislatures, and generally staying informed about the laws passed by the representatives of their choosing. All of this serves to create a citizenry that less actively strives to understand the state legislative process; the result is that the people do not actively attempt to keep the legislature accountable as they do not see the legislature as paramount in the policies that govern them.

Arizona and Term Limits

Although progressive reforms can be credited with creating the circumstances to hollow the legislature, more recent history shows that weakening the legislature has been a bipartisan effort. In 1990,

³³ <https://archive.org/details/initiativerefer00nati/page/8/mode/2up>. p15.

³⁴ *Ibid*, p 8.

³⁵ <https://releases.jhu.edu/2018/12/11/jhu-survey-americans-dont-know-much-about-state-government/>

John Fund wrote for the Cato Institute, “Polls show that over 70 percent of Americans back a limit on terms for elected officials, and by next month voters in states where one of every seven Americans live may have voted some form of term limits into law. Elected officials from city council members to President Bush are scrambling to get to the front of the term-limit parade.”³⁶ Term limits on state legislators were adopted in 21 states in the early 1990s.³⁷ In 1992 Arizona passed a constitutional amendment limiting legislators to four consecutive two year terms.

The adoption of state legislative term limits came in the wake of the 1990 Republican controlled congress’s “big lobotomy.” Although congressional term limits had been a talking point since the 1940’s the 1988 GOP platform was the first time that congressional term limits were advanced by a party.³⁸ In addition to the more rhetorical admonition of establishment politicians and the promise of restoring a “citizen-legislature” the GOP cut professional staff in Congress by a third.³⁹ Although the Supreme Court nixed term limits for federal legislators in *U.S. Term Limits, Inc. v. Thornton (1995)*, the states adopted them out of a belief in the promise of restoring accountability to their representatives.

The idea of limiting the terms of representatives is not a new one, but the aims– or lack thereof– put forth in the 1990s were altogether new. Many argue that term limits for the federal legislature were seriously considered by the framers. In his piece, John Fund argues that they were omitted from the Constitution because they were thought of as “entering too much into detail.”⁴⁰ While that may have been part of the explanation, such a simple defense of the omission does not capture the institutional theory of the leading framers. What was most important to the authors of the Federalist, and what term limits at the state level effectively nullifies, is institutional expertise and stability in the administration of justice. In

³⁶ John H. Fund, *Term Limitations, an Idea Whose Time Has Come*.

<https://www.cato.org/sites/cato.org/files/pubs/pdf/pa141.pdf>

³⁷ Wisconsin never adopted term limits for state legislators. Florida adopted them in 1992 by referendum. The measure passed with almost 77% of the vote.

³⁸

https://www.wtamu.edu/webres/File/Academics/College%20of%20Education%20and%20Social%20Sciences/Department%20of%20Political%20Science%20and%20Criminal%20Justice/PBJ/2009/1n1/1n1_06Rausch.pdf, pp 40.

³⁹ <https://www.rstreet.org/wp-content/uploads/2016/01/RSTREET50.pdf>

⁴⁰ Ibid

Federalist 62, Publius writes “a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.” A straight line can be traced from Madison’s Vices of the Political System to *Federalist 62*: in his Vices piece, Madison argued that multiplicity and mutability of laws in the states resulted in the “injustice of the laws” of the states. In *Federalist 62*, Publius makes the most pointed argument for stability in the public councils and against required turnover:

The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed? Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people... In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed?⁴¹

Term limits create new waves of representatives who necessarily— by motive of appointment and the incentives of election— pursue a different vision of state policy. These conflicting visions often promote the same instability that Madison saw, and sought to avoid, when he helped frame the federal legislature at the convention. As Congress has been hollowed and administrators have begun to play the central role in policy-making, it is evident that the three vices identified by Madison— mutability of the laws, multiplicity of the laws, instability of government, and want of confidence—characterize the legislative arrangement in many of the states.

Furthermore, as new members constantly rotate into office, institutional memory suffers. In the case that a state court rejects an agency rule, how is a new legislator to understand the rule’s congruence with the bill that was passed years before he began campaigning? Various surveys on term limits in the states have shown that they do not fulfill their intended aims and have adverse consequences: legislators

⁴¹ Publius, Fed 62

are not, on the whole, more beholden to those whom they represent, yet they are less adept at achieving the policy aims they promise throughout the election cycle because they have little institutional expertise and memory. John M. Carey, Richard Niemi, Lynda Powell, and Gary Moncrief nicely summarize the findings across a number of studies in their paper *The Effects of Term Limits on State Legislatures: A New Survey of the 50 States*:

Moncrief and Thompson (2001) found that lobbyists in states with term limits believe that the governor, executive agencies, interest groups, and legislative staff all have become more influential relative to the legislature. Peery and Little (2002) found that legislative leaders in such states also believe that the legislature has lost power relative to other actors. And, in the most rigorous study to date, Kousser (2005) found that term-limited legislatures— and less professionalized ones— are substantially weaker than those without limits when bargaining with governors over state budgets.⁴²

The commonality between all three observations is that the vacuum created by legislature hollowed through term limits leads to a rise in executive and administrative power.

A survey of Arizona legislators bears out the institutional consequences in the state: power is still concentrated in leaders yet those leaders have a diminished understanding of what it means to lead, good leaders rise quickly but are forced out when they begin to learn the ropes of institutional leadership, leaders therefore quickly become lame ducks, there is less expertise to create informed committees because there is less experience among members, when leaders are produced they have little institutional memory and little knowledge of the policies passed in previous sessions as well as their relative costs and benefits, committee chairs and members have less knowledge of subject matter, bills are passed with less vetting and debate, yet the bills that are often the focus of debate are “dumb or frivolous bills,” and members have been prompted to introduce legislation they know little about to appease the voters back home.⁴³ Here are some excerpts from the survey, organized topically:

Topic	Survey Response
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⁴² https://www.jstor.org/stable/40263375?read-now=1&refreqid=excelsior%3A8d8333c87d92dc43e2dbb10c6ea3b28b&seq=2#page_scan_tab_contents, pg 108.

⁴³ <https://www.ncsl.org/Portals/1/documents/jptl/casestudies/Arizonav2.pdf>

Committees	“Committee chairs are less likely than in the past to understand the subject matter of their committees.” (pg 7)
	“Constant turnover among leaders has meant less continuity in policy, lots of wasted time and efforts, and makes it difficult to concentrate on long-range projects.” (pg 14)
	“Legislative sessions have become less productive, as the legislature goes from crisis to crises without solving much of anything.” (pg 14)
Leadership	“Power in the Arizona legislature continues to be concentrated in its leaders. These individuals are chosen out of party caucuses. The Senate President and House Speaker appoint committee chairs and members, decided which bills go to which committees, and generally control the fate of proposed measures. Still, interviewees suggested, term limits have made life far more difficult for legislative leaders to control members. Indeed, some suggested that the effect of term limits on leadership has been devastating. Under term limits, leaders can be expected to generally rise to the top more quickly but also to stay there for a briefer period and with reduced influence.” (pg 4)
	“We are now producing leaders with little institutional memory and little knowledge of the issues they have to deal with.” (pg 7)
	“Many of those in leadership positions have little legislative experience.” (pg 7)
	“Members have no choice but to move up fast, and the legislature has to turn to inexperienced leaders, including less experienced committee chairs.” (pg 7)
	“Term limits change your incentives. You have more independence from leadership because leadership is always relatively new.” (pg 6)
Discipline	“...constant turnover in members and leaders, were linked by observers with more general chaos, more emotional decision making and more unpredictability as to results. The departure of several old-timers has been accompanied by a loss of institutional memory regarding legislative norms, procedures, and protocol. Conversely, the increase in the number of inexperienced legislators has produced a body where more legislators are uncertain about how to do their jobs and are relatively uninformed about the issues facing the state” (pg 11)
	“Term limits encourage members to go their own way, making it difficult to hold the caucus together.” (pg 7)
	“New members don’t appreciate the art of compromise.” (pg 11)
Expertise	“With a few exceptions it has taken time for legislators to learn the system. Without term limits you could take time grooming leaders, now freshmen are chairing committees and are unprepared to do so, they really don’t know how to run committees.” (pg 8)
	“Some observers suggested, however, that term limits have led to an increase in the number of dumb or frivolous bills being introduced and have prompted more people to introduce legislation they know nothing about just to make some sort of record and/or to please some interest group. With a weakening of leadership and the committee system, some observers saw also bills being passed with less vetting.” (pg 10)
	“Term limits had driven talented people and subject matter specialists (e.g., in budgeting and

	health issues) out of legislative office.” (pg 11)
	“In the good old days experts could be found in the legislature, in part, because they had time to develop the expertise.” (pg 11)
	“Legislators lack the experience to deal with complex issues like the budget.” (pg 14)
Administrative Power	“Under term limits administrators can lie to legislators, saying that they are going to do a certain thing, for example, reduce the time it takes to get a drivers license, if they are given the money and get by without reaching the objective or even trying to do so because they know the legislators they are talking to will be gone by next year.” (pg 15)

In short, term limits for Arizona legislators are one factor that has contributed to the weakening of the legislative process. Although term limits cannot be wholly to blame, they certainly do not create the circumstances for effective legislating and producing wisened statesmen with an understanding of and appreciation for the legislative process. As the legislators themselves admit, term limits have led to hollowed committees that can’t produce coherent bills, weak leadership and chaotic sessions, lack of discipline among both majority and minority parties, less cooperation and compromise, and little expertise about the subject matter of legislation. All this has tended in the direction of a reliance on agency power and expertise.

At the federal level, the circumstances for legislative statesmanship have disappeared. Where the federal government has gone, the states have followed. Arguably, the states have done an even better job of hollowing their own legislatures than the federal government has done at hollowing the federal legislature. The result is that it can scarce be said that the people are governed by representatives of their own choosing, yet those who are elected continue to reap the benefits that come with holding office. In order to once again ensure that people are governed by representatives of their choosing, there must be methods of holding those representatives accountable as opposed to encouraging them to punt policy-making power to administrators to shirk the responsibility of elected office. In order to attain the proper incentives, it is necessary to look at the dynamics of agency and legislative power, but also reflect on what circumstances have created an empowered legislature throughout our country’s history.

III: Oversight as a check on agency power

All of the historical means of changing the legislative process have led state legislatures to rely on agencies for the most important aspects of policy writing. The old modes whereby legislatures had organized themselves and exercised power have been stripped away and instead of asserting their role as policy leaders by seriously considering the written word of the law, legislatures have embraced oversight processes for holding agencies accountable after they have given them the power to write rules. This is because legislators no longer take themselves to be the experts when it comes to writing the laws; instead, they consider those in the agencies to be the experts and they allow them to lead the legislative process using their expertise to fill in the blanks of statutes.

At the outset of this project I intended to survey legislators from Arizona, Florida, and Wisconsin but due to a scant number of survey responses and few responses to requests for interviews I decided to take a different approach. Yet the responses that I received, the lack of responses, and the few interviews conducted do shed some—albeit anecdotal—light on the way in which state assemblies understand deference and what we can expect from state assemblies after curtailing deference. In short, the state assemblies— even in the states where the legislatures have taken the steps to curtail deference— do not seem very interested in speaking about deference, do not understand what curbing deference means for the future role of the legislature, nor do they understand what this means for the judiciary.

The survey submitted to Arizona legislators contained ten questions.⁴⁴ I received seven responses after submitting the survey to every member of the state assembly in Arizona and giving two follow up calls and one follow up email to each member's staffer. The first question of the survey was "Which of the following are you familiar with? (select all that apply) A. Auer deference B. Chevron Deference C. Skidmore Deference C. None."⁴⁵ Of the seven legislators surveyed, five chose only Chevron Deference,

⁴⁴ I focus on the results from the Arizona survey here because it was the most comprehensive. I received one survey response from Florida legislators following the same protocol.

⁴⁵ For each of these survey responses and the interview with the state representative I choose to keep their identities private. I asked the interviewee if he would prefer to remain anonymous and he said that would be preferable to him, so I would like to respect his wishes. Nevertheless, I read the questions back to him at the close of the interview and he confirmed his responses and said they could be published in this piece.

one chose all of the above, and one chose none. More shocking were the responses to another question: “Has HB2238 (2018) changed the way that legislators write laws?” Two chose “Not at all,” one chose “Yes, but little,” and four chose “I am not sure.” None of the legislators who responded “I am not sure” explained why they were not sure in a blank left for extended response. Of the seven legislators who responded to survey questions, one was willing to meet in order to talk further about deference in Arizona. When I asked him “How many of your colleagues consider judicial deference to agencies to be a problem?” he responded “This is not something that comes up when drafting policy.” When I asked “Do you think that judicial deference to agencies results in statutory language being misconstrued or properly construed in court cases?” he responded “I am not really sure about that because I haven’t looked at those cases.” When I asked “have you seen any discernible change in the way that the assembly conducts business since HB2238 (2018) was passed?” He said “It is not clear that it has changed.”

Although these survey responses are piecemeal and should serve only as anecdotal evidence, they paint an interesting picture of, at least some, legislators’ understanding and awareness of the role of agencies in writing statutes. What seems to be the case is that legislators at the state level are not experts in the same way that administrators are, nor are they legal experts. Rather, they are busy elected officials with many time constraints upon whom incentives work. They respond to the wishes of their constituents and seek reelection, but they are not experts in the same way that judges and agency officials are. Therefore, they do not consider agencies and their role in legislation in the same way that experts do. In order to properly understand what curbing deference at the state level entails, therefore, we have to understand the way that legislators think and the incentives that work upon them.

However, the anecdotal evidence from survey responses is bolstered by other research that points to one general conclusion: state legislators, on the whole, do not primarily concern themselves with agency power when they write statutes because often they do not have the time or expertise to predict what agencies will do with statutes once they have been passed. Instead, they respond to other incentives when they enter the chamber to negotiate the passage of policy. Rather than considering agencies on the front end, when statutes are being written, legislatures have habituated themselves to deal with agencies

through oversight. This points to the fact that legislatures assume the role of agencies in the policy writing process and instead of minimizing the agency role when writing statutes they choose to exercise oversight once the agency has written rules and exercised power. In short, state legislatures embrace and make room for agency power, hoping to mitigate it when it is abused instead of rejecting the agency's interpretive power when writing policy.

For example, Every legislature has some mechanisms for oversight, but each legislature varies in the means at its disposal and the way in which they exercise those means. In their paper *Checks and Balances in Action: Legislative Oversight across the States*, Lyke Thompson and Marjorie Sarbaugh-Thompson write, "our case studies reveal that several states have adopted processes and procedures designed to overcome the tendency of some legislators to minimize their attention to oversight."⁴⁶ The mechanisms used by state legislators are various. Many state legislatures rely on information provided by auditors general or an equivalent, but many of them assign different tasks to auditors whose information they will use to check agency power through budgetary means.⁴⁷ Some use state agencies to assess agency program and financial performance. As for performance audits, Thompson and Sarbaugh-Thompson write, "Producing audit reports and the evidence they contain is a necessary, but not sufficient condition to produce evidence-based oversight in state legislatures; the reports need to be used... This could be an issue of attention span. We imagine that it would take an exceedingly well-organized legislature to actually use more than 30 performance audits a year. It is conceivable that there are just too many other demands for legislators' attention."⁴⁸ Some states use audits combined with budget reports each year to detail agency performance. Most legislatures hold committee hearings to gather testimony about agency programs, use of state money, and programs. Legislatures also use rule review as a method of oversight, but results vary when considering new and old rules; however, legislatures are more actively involved

⁴⁶ For this list of oversight methods I am relying on Thompson and Sarbaugh-Thompson, *Checks and Balances in Action: Legislative Oversight*, p 9. https://law.wayne.edu/levin-center/pdfs/accessible_cus_full_report_07-08-19.pdf pp 17-29.

⁴⁷ *Ibid*, p 18.

⁴⁸ *Ibid*, pp 22-23

where sunset provisions exist.⁴⁹ Many states use oversight of gubernatorial appointments. And many states have advice and consent powers, but use them minimally.⁵⁰

State Case Studies

In their study of checks and balances at the state level, Thompson and Sarbaugh-Thompson rank each state by capacity of oversight as well as their use of those capacities. It is evident that oversight plays a very important role in curbing the power of agencies, and legislators take seriously the opportunity to constrain agencies after they have made rules. In addition to legislatures embracing a new role when writing policy, understanding the best methods of exercising oversight is one very important piece to the puzzle of the legislature reclaiming its paramount role after states have begun to curb deference. However, each state embraces different methods for oversight and different methods work better or worse given the different arrangement of the states. Nevertheless, there are some methods that work well across the state lines. Below is a list of the five states considered in this study, ranked by oversight capacity and use from Thompson and Sarbaugh-Thompson’s study:

Rank by oversight capacity and use, from <i>Checks and Balances: Legislative Oversight</i>		
State	Rank by capacity	Rank by Use
Arizona	40	35
Florida	19	41
Mississippi	23	26
Utah	43	36
Wisconsin	14	11

In the following sections I will detail some of the different mechanisms used for agency oversight in the five states which are the focus of this study.

⁴⁹ Ibid, p 39.

⁵⁰ Ibid, p 48.

Arizona

In Arizona, appropriations committees and the Joint Legislative Budget Committee (JLBC) play the largest role in the oversight process. The quarterly review through the committee is one way that the legislature exercises oversight through the power of the purse. Arizona has a sunset review process that incentivizes agencies to implement audit recommendations. Audit recommendations are made by the Joint Legislative Audit Committee (JLAC) in conjunction with the Office of the Auditor General (OAG) to whom it provides direction. Some audits are mandated but the legislature can also request special audits. After audit reports have been released the JLAC a reference committee which is a five-member committee assigned by the JLAC to participate in sunset and sunrise processes. During the hearings agencies must respond to each audit recommendation voicing whether they agree or disagree. The 10 Senate and 14 House standing committees also use the OAG reports during standing committee meetings.⁵¹ Although an agency must have statutory authority to make rules, and it must specify the costs and benefits of rules made, the Governor’s Regulatory Review Council (GRRRC) is primarily responsible for reviewing rules. The members of that committee are appointed by the governor but must be approved by the Legislative Rules Committee. A periodic review of all rules is required every five years by state statute.⁵² The Administrative Rules Oversight committee reviews rules for conformity with legislative intent. However, an interview from Thompson and Sarbaugh-Thompson states that “Knowledgeable staff report no awareness of a legislative review for rules.”⁵³ Arizona also requires agencies to undergo a sunset review on a regular schedule.⁵⁴

Florida

Like many other states, Florida establishes the Office of the Auditor General (OAG) in its constitution.⁵⁵ Florida appropriated \$36 million to the OAG in 2015 and the OAG has a staff of 328

⁵¹ Ibid, p 117.

⁵² A.R.S. 41-1056

⁵³ Checks and Balances in Action, p 120.

⁵⁴ AZ Laws, 1978, Chapter 210

⁵⁵ Florida Constitution, Article III, Sections 2 and 11.42.

employees. The auditor general is appointed by the Joint Legislative Auditing Committee (JLAC). Thompson and Sarbough-Thompson write, “the Office of the Auditor General (OAG) and the Joint Legislative Auditing Committee (JLAC) focus much of their attention on auditing local governments, school districts, special districts, boards, and commissions.”⁵⁶ Nevertheless, the OAG is responsible for determining whether agency practices are compliant with statutes. The Office of Economic and Demographic Research (EDR) is responsible for forecasting future costs and revenues generated by each agency program. In an interview conducted by Thompson and Sarbough-Thompson, one senior staff member commented that “EDR reports are vital for and frequently used by partisan staff and members of the appropriations committees when drafting new appropriations bills as these reports allow the legislature to adjust program budgets to reflect shifting needs.”⁵⁷ The Office of Program Policy Analysis and Government Accountability (OPPAGA) conducts reports, but the JLAC is responsible for the distribution and circulation of those reports. Thompson and Sarbough-Thompson write, “The OPPAGA was initially created with intention that the agency would, with the assistance of the fiscal committees, annually review and analyze performance data from all of Florida’s executive agencies in accordance with the state’s ‘Performance Based Budgeting’ (PB2) initiative... However, despite this capacity, the legislature was soon inundated with complicated data from state agencies, which legislators struggled to comprehend”⁵⁸ Florida reviews agency rules through the Joint Administrative Procedures Committee (JAPC). The JAPC performs an annual review of all legislative changes and determines what rules are thereby affected. Through that process the JAPC may reject an agency rule. If the JAPC rejects a rule the agency must modify or withdraw the rule. Thompson and Sarbough-Thompson write, “The constraints on agency rulemaking are extensive and provide JAPC with many opportunities to object to a rule. For example, agencies are required to demonstrate that their rules and proposed rules do not unduly burden small businesses, small cities, and small counties. Moreover, the cost of regulatory rules on

⁵⁶ Checks and Balances in Action, p 230.

⁵⁷ Ibid, p 234.

⁵⁸ Ibid, p 234.

business competitiveness and economic development must be assessed. If these costs are too high, the agency must modify or rescind the rule.”⁵⁹ In 1976 Florida was one of the first states to implement a comprehensive sunset law which required the legislature to review all laws after a period of time, but in 2011 the legislature repealed its sunset provisions.

Mississippi

The Mississippi Legislature exercises oversight primarily through performance evaluations issued by the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER). PEER is a joint standing committee of seven senators appointed by the lieutenant governor, seven representatives appointed by the speaker, 21 staff members, and a chair and vice chair elected annually and rotating between the chambers.⁶⁰ In 2016 the lieutenant governor did not appoint senators to the committee until October and the committee did not meet throughout the 2016 session. Mississippi also exercises oversight through the budget process and the Legislative Budget Office hears agency budget requests and gives recommendations. There is no administrative rule review process in the Mississippi legislature; the decision about implementing a new rule lies with the agency promulgating the rule.⁶¹ The legislature does not formally have review of executive orders. Mississippi does not have a sunset process because the state Sunset Act was terminated in 1984. One method that the legislature uses when penning policy is using what they call “repealers.” In an interview one legislator described repealers saying “ You can find them all over and they are used more as a device to get certain legislation back before the legislature in a set amount of time. It’s no longer used systematically but now it’s used on an individual basis and you’ll find some legislators who want to use it a lot or you’ll find situations where it is used as a compromise to get a bill passed.”⁶² Another legislator stated that repealers are used to ensure agency compliance with legislative intent.⁶³

⁵⁹ Ibid, p 241.

⁶⁰ Ibid, p 528.

⁶¹ Ibid, p 536.

⁶² Ibid, p 538-539.

⁶³ Ibid, p 539.

Utah

In Thompson and Sarbaugh-Thompson's study they note that "given its short legislative sessions, Utah's legislature has little time to carry out extensive oversight of state agencies."⁶⁴ The Utah legislature lacks the ability to block administrative rules, but mandates rule review every five years. The Administrative Rules Review Committee (ARRC) can use sunset provisions to gain agency compliance with the legislature on administrative rules. The ARRC consists of ten members, five from each chamber, and there can be no more than three members from each chamber from the same party.⁶⁵ If an agency does not meet the deadlines to get a rule reauthorized by the ARRC, the rule is stricken. Although the committee is charged with oversight it cannot strike rules; it can only prepare written recommendations which may include legislative action. Utah has an Office of the Legislative Auditor General which produces yearly audit reports but "there is no evidence of audit reports being used consistently and systematically."⁶⁶ The legislature cannot check executive orders because there is no legislative review or public filing. The governor appoints 21 administrative officials, 19 of which require approval of the Senate.

Wisconsin

Primarily, three joint committees are responsible for oversight in the state of Wisconsin: the Joint Committee on Finance, the Joint Legislative Audit Committee, and the Joint Committee for Review of Administrative Rules. According to Thompson and Sarbaugh-Thompson's study, these oversight committees often have more sway than the respective substantive committees in each chamber when investigating state agencies.⁶⁷ They also say that "the way these joint committees, especially the finance and audit committees, use the primary analytic bureaucracies can provide a useful model for other states

⁶⁴ Ibid, p 890.

⁶⁵ Utah Code 63G-3-501

⁶⁶ Checks and Balances in Action, p 890-891.

⁶⁷ Ibid, p 972.

to emulate.”⁶⁸ The Legislative Audit Bureau (LAB) is one of these analytic bureaucracies. The legislative audit bureau is directed by the state auditor who is considered an “at-will” employee of the legislature who does not serve a fixed term. He is appointed by the Joint Committee on Legislative Organization. The LAB has the authority to subpoena agencies. The LAB publishes yearly financial and performance audits of agencies and their reports “lead to increased legislative oversight and action.”⁶⁹ The Joint Legislative Audit Committee (JLAC) utilizes the reports from the LAB to investigate state agencies. After investigating state agencies by conferring with the state auditor or pertinent standing committee, the JLAC may hold public hearings, relay findings to a legislative committee for statutory purposes, or even propose legislation. Another such analytic bureaucracy is the Legislative Fiscal Bureau (LFB). The LFB prepares papers to assist the Joint Committee on Finance when the committee addresses budget requests from agencies. The Joint Committee on Finance is another key player in oversight: it examines “all legislation that deals with state income and spending, including legislation that appropriates money, provides for revenue, or relates to taxation.”⁷⁰ Overall, Thompson and Sarbaugh-Thompson claim, “In the case of Wisconsin, unlike other states, oversight is more systematic and less reactive due in part to the integrated use of the LFB and LAB by the respective joint committees.”⁷¹

In addition to the “analytic bureaucracies” that help joint committees of the legislature investigate agencies, the Joint Committee for Review of Administrative Rules (JCRAR) checks executive branch agencies. State statute allows the JCRAR to prevent proposed rules from being promulgated and suspend rules that have already been promulgated. After an agency proposes a rule, the Legislative Council Administrative Rules Clearinghouse reviews the rule, then it is passed to the appropriate standing committee, and finally it must be referred to the JCRAR. The JCRAR has 30 days to review the rule, but that can be extended for an additional 30 days. The JCRAR can reject the rule or portions of the rule. If the JCRAR is at odds with the standing committee, then the JCRAR can introduce its own statute

⁶⁸ Ibid, p 972.

⁶⁹ Ibid, p 977.

⁷⁰ s. 13.09-13.11, 16.47, 16.505, 16.515, and 20.865 (4), Wis. Stats.

⁷¹ Checks and Balances in Action, p 981.

concomitant to the standing committee. If the standing committee rejects the agency's rule but the JCRAR accepts, then the JCRAR may overrule the standing committee. State legislatures primarily attempt to check administrative agencies through various mechanisms of oversight. That is to say that, after the agency has already acted, the legislatures either affirm their activity or deny them the means through which future activity is possible. This may be a good safeguard to prohibit abuses of agency power in some cases, but in order to ensure that abuses do not happen in the first place, legislatures need to act proactively as well as retroactively. Some tools used for oversight equip the state legislatures to develop expertise regarding agency rule-making and should be emulated by others who hope to empower legislatures to hold agencies accountable. Adopting proper oversight tools is a good first step; however, legislatures need to consider agency power on the front end, when writing statutes, rather than merely waiting for agency abuses to assert their power as a check upon agencies. But in order to do so, legislatures need the means that make action possible, and they need to be given incentives to use those means.

IV: Ambition to Counteract Ambition: Restoring the Lost Role of the Legislature

When the Framers set out to draft the federal Constitution, they reflected on the state governments and drew from experience. They created an arrangement which divided power and created a delicate balance between the separate branches. Madison worried that the legislature would become an "impetuous vortex" that would swallow up the powers of the other branches. He therefore declared that "ambition must be made to counteract ambition," meaning that each department must have a will of its own and vigorously defend those powers. Because Madison believed that the legislature would be more ambitious than the other branches, he thought of "auxiliary precautions" and "devices" to limit the concentration of all powers into an ambitious legislature approximating aristocracy or oligarchy. Shortly after the ratification of the constitution, Madison began to understand his misjudgment: the legislature balked at opportunities to govern and waited for the hand of Washington to move and they called Alexander Hamilton to session in order that they be advised on the treasury and national economy. The

legislature, set over a widened sphere and fragmented by a variety of conflicting interests lacked organization and they lacked expertise. Years later, Madison helped develop the Democratic Party because he understood that some organizational structure was requisite to supply the cohesion that a fragmented and extended republic prohibited. To the early Madison, it might have been strange, therefore, to see the 20th century legislatures offload their powers to administrative agencies. However, to the wisened Madison who witnessed the inner workings of the American legislature perhaps it would have been no surprise. Nevertheless, Madison's thoughts on the legislature may still prove valuable: if he prescribed ambition of the other branches to meet the impetuous vortex that was the legislature, it may be wise to consider ambition as the antidote to administrative agencies that have also tended to swallow up the powers reserved to the constitutional branches of government.

But how can one supply that ambition? In *Federalist 51*, Publius recommended "constitutional means and personal motives."⁷² Creating a legislature with the will and capacity to govern requires supplying the incentives which will make legislators want to govern and the tools that make them capable of governing. When one thinks about the personal motives of a properly constituted legislature, one should think of the incentives that will encourage individual legislators to assert their role in the legislative process; the aspects of will might be coalition building, ambition to lead committees, ability to acquire expertise, accountability to the people, and so on and so forth. When one considers constitutional means one should think of the aforementioned means of oversight. However, as Thompson and Sarbaugh-Thompson demonstrate, proper constitutional means promise little unless legislators have the incentives to use them to assert their proper role. In the following sections I will provide some methods reinstating proper motives for legislators. As Publius suggested, I suggest that the interior structure of the legislature must be constituted so as to give it the energy requisite to keep agencies in their place.

⁷² Federalist 51.

Legislative staffing

Of the many hopes of the progressive reforms to the legislative branch, primary among them was the creation of a “citizen legislature.” The parties were weakened at the turn of the 20th century so that members would not organize themselves and act in concert to pursue a policy platform, the initiative and referendum hoped to insure that representatives would be responsive to the people as opposed to parties pursuing a policy agenda, and most importantly, term limits were instituted in order that professional politicians not guide the state legislatures. As LaFollette, Tugwell, and Wilson argued, all of this was necessary so that special interests not run state politics, but more importantly so that agency experts could play a greater role in the policymaking process.

As was argued, all of these changes to the legislative process in the states have a long history and are somewhat widely accepted. In turn, much of the staff internal to state legislative offices have been cut, and much of the staff resources are now housed in what Thompson and Sarbough-Thompson call the “analytic bureaucracies.” In other words, in order to curb agency power through oversight, many state legislatures have reduced the bandwidth of individual legislators' offices and created a bureaucracy of their own. For example, although the Florida legislature is considered one of the most “professional legislatures” by the NCSL because it had 1,613 staff in 2015 when their analysis was last conducted, their calculus includes the 328 employees of the OAG and the \$36 million dollars budgeted for its work.⁷³⁷⁴ Despite Florida’s ranking as one of the most professional state legislatures, its total staff numbers have dropped from 2,173 in 1996 to 1,613 in 2015.⁷⁵ As of 2015, Utah only had 227 legislative staff, Mississippi had 173, Arizona had 618, and Wisconsin had 649.⁷⁶ In most cases, this results in one or two legislative staff per legislator’s office. In his study of state legislative development, Alan Rosenthal

⁷³ <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>, accessed 7/31/2021.

⁷⁴ Checks and Balances in Action, p 233.

⁷⁵ <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>

⁷⁶ Ibid.

concludes that in some states, one staffer may serve three, four, or five legislators.⁷⁷ This is hardly enough bandwidth for representatives to correspond with constituents, raise funds, answer emails, man telephones, and most importantly research complex issues before speaking or voting.

If the state legislatures are expected to revisit statutes when courts declare agency rules noncompliant with statutory language, representatives need to have the expertise to reconsider the statute and the rule in a serious manner. Yet with term limits, some legislators may not have been elected when the statute was passed in the first instance and with little experience with statutes of the sort these representatives may have little knowledge of how to rewrite the statute so that it is coherent and solves the problem that gave rise to agency power in the first place. Creating a legislative staff that possesses institutional knowledge and expertise is the first step to equipping legislators to govern. The main work of legislative staff should not be playing secretary, but should be enlightening representatives so that they can govern. The staff of analytic bureaucracies should therefore be revisited and budgets in state should be revisited and reallocated to create more staff bandwidth internal to the legislature, internal to legislative committees, and internal to legislative offices. In many states the legislatures have the power to renegotiate budgets and reallocate the resources of analytic bureaucracies. They should use that power to acquire internal experts of their own so that they may rival the experts in the agencies.

Committees

In his analysis of Legislative Committee Systems, Rosenthal argues that “membership on multiple committees encourages legislators to divide their energies, hinders their acquisition of specialized knowledge, and militates against their performing ably in one or two areas of legislative activity.”⁷⁸ It might be assumed that legislatures with committees devoted to specific issues might produce more expertise and therefore serve as a greater check on agencies, but Rosenthal and others have

⁷⁷ Alan Rosenthal, “State Legislative Development: Observations from Three Perspectives” in *Legislative Studies Quarterly*, Vol. 21, No. 2. P 174.

⁷⁸ Alan Rosenthal, *Legislative Committee Systems: An Exploratory Analysis in The Western Political Quarterly*, Vol. 26, No. 2. P 255.

shown that the number of committees per legislature has an adverse effect. The number of legislative committees in some states has ballooned since Rosenthal’s study in 1973. Below is a chart listing the number of committees in each legislature investigated in this study:

State	House Committees	Senate Committees	Joint Committees	Total Number of Committees
Arizona ⁷⁹	14	11	0	25
Florida ⁸⁰	10	19	5	34
Mississippi ⁸¹	45	41	2	88
Utah ⁸²	15	12	2	29
Wisconsin ⁸³	45	23	10	78

It is true that there is no golden rule for the proper number of committees per legislature to produce expertise and effectiveness; things such as session length, number of members, and institutional mechanisms determine the extent to which legislatures can utilize a large number of committees.

However, Rosenthal argues that the greatest determinant of committee effectiveness is staffing: “probably the greatest emphasis is placed on the inadequacy of committee resources... if there is any single resource which is thought to be indispensable, it is professional staff.”⁸⁴ However, Rosenthal concludes that “There are a few legislatures in which committees have staff of their own, and for the most part committees in the states draw on the professional manpower located in central staff agencies.”⁸⁵ Expertise is essential to committees if they hope to produce statutes on complex issues that are precise enough to encourage

⁷⁹ https://ballotpedia.org/List_of_committees_in_Arizona_state_government, accessed 8/1/2021

⁸⁰ https://ballotpedia.org/List_of_committees_in_Florida_state_government, accessed 8/1/2021

⁸¹ https://ballotpedia.org/List_of_committees_in_Mississippi_state_government, accessed 8/1/2021

⁸² https://ballotpedia.org/List_of_committees_in_Utah_state_government, accessed 8/1/2021

⁸³ https://ballotpedia.org/List_of_committees_in_Wisconsin_state_government, accessed 8/1/2021

⁸⁴ Rosenthal, Legislative Committee Systems, p 256.

⁸⁵ Ibid. p 257.

agencies to follow legislative intent. Yet expertise among state legislators has been diminished as term limits have been adopted, time is split between committees, and professional staff internal to legislative offices have been slashed and devoted to campaign fund raising as opposed to the acquisition of expertise. One thing that can counteract the changes that have rendered the state legislatures less capable of expertise as policy has become more reliant on it is by revisiting the number of committees per legislature and rethinking committee dynamics. This analysis will differ according to the character of each state. Rethinking the dynamics of committees should result in a reconsideration of what makes a committee effective and will necessarily result in some committees being consolidated where states force legislators to divide too much of their time between committees. This will allow legislators to acquire some specialization and expertise. Additionally, each committee should be staffed with a number of policy analysts from both sides of the aisle.

Session Length

In hopes of creating a “citizen legislature,” some states adopted term limits and others adopted the initiative and referendum process to hold legislators accountable to the people. Other states shortened congressional sessions to ensure that legislators would not spend the majority of their time at the state house, but back in their district with constituents. The National Conference of State Legislatures describes this phenomenon:

Since the late 1980s, several session lengths were shortened. Colorado's session was cut to 120 days in 1988. In 1992, Louisiana changed its constitution to shorten and limit the scope of its even-year session. In 1998, the citizens of Nevada adopted a constitutional amendment that restricts the legislative session to 120 days. In 2002, an amendment to the Louisiana Constitution changed the timing of its general and fiscal sessions and adjusted the length of the fiscal session; the changes went into effect January 2004. In 2006, Alaska voters passed an initiative establishing a 90 day session in statute, which took effect in 2008.⁸⁶

Only 11 states do not have session length restrictions.

⁸⁶ <https://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx>, accessed 8/1/2021.

Every year, many legislatures struggle to conclude business given the short session lengths. In Florida, the state budget is usually negotiated at the end of the session and there is routinely a time-crunch to finalize the budget. This year, five states including Florida, Texas, and Utah called special legislative sessions.⁸⁷ In states with shortened session lengths, special sessions routinely occur. While special sessions serve to lengthen the time legislators can spend on special policies, often the governor calls for special session and hopes to determine the agenda of the legislature. For example, in Utah the governor called a special session which led to legislative leaders calling their own special session to discuss Critical Race Theory and Second Amendment rights because the governor specified that those were not the reason that he had convened them.⁸⁸ The frequent callings of special sessions is a tacit omission that in many states the regular session length is hardly enough time to devote to crafting policy. Special sessions are a band-aid solution that serve to accomplish certain policy aims for each given year. Yet, it is difficult for legislative leaders to consider and pursue a set policy agenda if they are not sure how long the session will last and whether or not the governor will extend their time in the states where legislature rely on the governor to call special sessions. In states like Utah and Florida with very short legislative sessions, a constitutional amendment should be considered to lengthen sessions. As Kevin Kosar writes, “A part-time, mostly amateur legislature cannot compete with a colossal, full-time executive branch.”⁸⁹

Conclusion

Overturning the hundred years of institutional change that has functioned to weaken the state legislatures is a monumental task. However, the creation of a legislature that can meet the courts’ rejection of agency rules in a post-deference world requires that we reconsider the mechanisms that allow legislatures to reassume the paramount position as leaders of policy in each state. The aforementioned methods of rendering the state legislatures more expert, more ambitious, and more energetic are the

⁸⁷ <https://www.democracydocket.com/2021/07/whats-a-special-session-anyway/>, accessed 8/1/2021.

⁸⁸ <https://www.abc4.com/news/local-news/utah-state-lawmakers-meet-for-controversial-special-session/>, accessed 8/1/2021

⁸⁹ <https://www.rstreet.org/wp-content/uploads/2016/01/RSTREET50.pdf>, p 2.

lowest hanging fruit for reinvigorating the state legislatures. Such changes are essential if the curtailment of deference in the states is to result in a more controlled and responsible administrative state; if the courts overturn agency rules, but state legislatures are incapable of following through with the courts' rebuke of agency overreach, all of the work to curtail deference at the state level will not serve to reinforce the separation of powers.