TESTIMONY OF NEOMI RAO
ASSOCIATE PROFESSOR
DIRECTOR, CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
GEORGE MASON SCHOOL OF LAW

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EXAMINING AGENCY USE OF DEFERENCE, PART II

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Testimony of Neomi Rao
Associate Professor
Director, Center for the Study of the Administrative State
George Mason School of Law

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Chairman Lankford, Ranking Member Heitkamp, and members of the Committee, thank you for the opportunity to testify on this important issue. My focus today will be on the relationship between judicial deference to agency decisionmaking and the extensive delegation of lawmaking authority from Congress to agencies.

In recent opinions, Chief Justice Roberts and Justices Thomas and Alito have each drawn a connection between delegation and deference.[1] A reconsideration of judicial deference naturally implicates the scope of delegations, in part because deference is one consequence of Congress leaving a significant interpretive space for administrative agencies. Moreover, both judicial deference and the Court's refusal to limit delegations are a kind of judicial restraint that has allowed for the expansion of the administrative state outside the checks and balances of the Constitution.

This short statement borrows from my academic work on delegation and administrative collusion[2] and first explains the connection between permissive

[1] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) ("When it applies, *Chevron* is a powerful weapon in an agency's arsenal. Congressional delegations to agencies are often ambiguous—expressing 'a mood rather than a message.'"); Perez v. Mortgage Bankers Assoc., 135 S. Ct. 1199, 1219 n. 4 (2015) (Thomas, J., concurring in the judgment) (explaining why courts should not defer to agency interpretations of their own regulations and also suggesting that such deference raises concerns that the executive will be allowed to impose binding obligations on regulated parties that "suggests something much closer to the legislative power, which our Constitution does not permit the Executive to exercise in this manner."); *id*. at 1210 (Alito, J., concurring in part and concurring in the judgment) (explaining that the creation of the *Paralyzed Veterans*' doctrine "may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations….At least one of the three factors … concerns a matter that can be addressed by this Court.").
[2] *See* Neomi Rao, *Administrative Collusion, How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015).

delegations and the judicial deference doctrines, highlighting how some of the confusion related to judicial review of agency action stems from the reality of open-ended statutory grants. Second, I consider how deference and the Court's limited non-delegation doctrine share a foundational assumption about separation of powers that Congress and the President compete for control over lawmaking and so Congress will not delegate too much. In this understanding, courts can leave enforcement of the non-delegation principle to the institutional competition between the political branches. Allowing open-ended delegation and then deferring to agency decisionmaking are judicial approaches that assume the political rivalry between Congress and the Executive will adequately protect constitutional limits. Third, I argue that in the modern administrative state, this assumption is mistaken or at least significantly incomplete. Rather than compete over the exercise of administrative power, members of Congress and agencies may often collude to enact specific policies.

The topic of judicial deference has occupied many court decisions and been the subject of extensive academic commentary. Here I address one aspect of this debate and explain why a proper understanding of the delegation dynamic between members of Congress and agencies suggests additional reasons for revisiting judicial deference doctrines. The structural balance has failed to limit delegations. The result has been a significant expansion of executive branch authority and the undermining of Congress as an institution. Deference has allowed the collusion to continue. When the political process and structural checks and balances fail, judicial review provides a necessary remedy to keep the federal government within its constitutional limits.

I DELEGATION AND DEFERENCE

The modern administrative state depends on a significant transfer of the lawmaking function from Congress to the administrative agencies in statutes that leave discretion to agencies to formulate policy. While maintaining the principle that Congress

cannot delegate its lawmaking power,[3] the Supreme Court has allowed capacious delegations of authority to agencies, asking only whether a statute provides an "intelligible principle."[4] In practice, this provides virtually no judicial limit to the scope of discretion Congress may give to an agency.[5]

Confronted with the reality of agencies possessed with authority to make rules with the force of law,[6] the Supreme Court has articulated various doctrines of deference to agency decisionmaking. The Supreme Court first held that it would defer to an agency's interpretation of its own ambiguous regulations,[7] an understanding reaffirmed in *Auer v. Robbins*.[8] Perhaps the most significant of deference case, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[9] articulated a two-step inquiry in which the Court would consider first whether "Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."[10] Second, when a statute is "silent or ambiguous…the question for the court is whether the agency's answer is based on a permissible construction of the statute."[11] The Court has modified the *Chevron* inquiry over the years, adding a *Chevron* step zero,[12] or perhaps collapsing the inquiry into one step.[13] A few terms ago in *City of Arlington v. FCC*,[14] the Court held that *Chevron* deference applied to an agency's interpretation of its own jurisdiction.

While the Court continues to invoke *Chevron*, it nonetheless has carved out some important exceptions to the framework for deference. In particular, in *King v. Burwell*,[15] Chief Justice Roberts declined to apply *Chevron* because the framework

> is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In

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[3] Field v. Clark, 143 U.S. 649, 692 (1892) (explaining that nondelegation is "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").
[4] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).
[5] *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1255 (Thomas, J., concurring in the judgment).
[6] *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).
[7] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
[8] 519 U.S. 452 (1992).
[9] 467 U.S. 837, 842-43 (1984).
[10] *Id*. at 842.
[11] *Id*. at 843.
[12] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).
[13] *See* Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).
[14] 133 S. Ct. 1863 (2013).
[15] 135 S. Ct. 2480, 2488-89 (2015).

> extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. … Whether [tax] credits are available on Federal Exchanges is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.[16]

This decision builds on an earlier line of cases in which the Supreme Court declined to defer on certain "major questions" unless the agency had explicit authority to decide the matter.[17] Of course it may be difficult to predict when a case is extraordinary or raises a major question of economic and political significance.

A robust and ongoing debate continues both in the courts and in the academic commentary about the scope, meaning, and desirability of judicial deference. In particular the Supreme Court has seriously cast doubt on the continuing viability of *Seminole Rock* and *Auer* deference.[18] Unable to delve into all the ongoing debates here, I think it is fair to say that the actual judicial practice is in flux and academics are reconsidering the meaning and application of judicial deference.[19]

Such confusion stems, at least in part, from the persistent tension between deference and *Marbury*'s command to "say what the law is."[20] Because deference leaves important interpretive decisionmaking with the agency, it can conflict with the Article III judicial power.[21] On the other hand, when statutes leave open significant discretion, courts have determined that the formulation of regulatory policy is better left to the agencies that at least have a measure of political accountability as part of the executive branch. When statutes give authority in capacious and open-ended terms, there is simply

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[16] *Id*. at 2488-89 (internal quotation marks omitted).
[17] *See, e.g.,* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").
[18] *See* Perez v. Mortgage Bankers Assoc., 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment) (arguing for the abandonment of *Auer* deference and "restoring the balance originally struck by the APA").
[19] *See, e.g*, Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294 (2015); Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015); Jack M. Beermann, Chevron *at the Roberts Courts: Still Failing After All These Years*, 83 FORDHAM L. REV. 731 (2014).
[20] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[21] *Compare* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000), *with* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

less *law* and more discretion. There has been an understandable reluctance by the judiciary to second-guess the exercise of policymaking discretion by executive agencies.

Nonetheless, judicial review remains an essential check for preserving the constitutional and statutory limits on administrative agencies. The net result of extensive delegations combined with judicial deference is a massive transfer of authority to the executive branch. In a number of Supreme Court decisions justices have sought to make the administrative state more accountable to the President,[22] the Congress,[23] and the courts.[24] Recent opinions by Chief Justice Roberts and Justices Thomas and Alito have emphasized the importance of the judicial role in checking agency interpretation, particularly because congressional delegations often leave significant authority with the Executive Branch.[25]

Deference compounds the problems of delegation, allowing Congress and agencies to set policy outside the checks and balances of the Constitution. So long as agencies must sometimes regulate with little guidance from Congress, the judiciary will have difficulty balancing its proper role in reviewing agency action. Reconsidering the delegation principle and deference together might promote a more coherent reappraisal of the judicial review of agency action.

II DELEGATION AND DEFERENCE: A SHARED AND FLAWED FOUNDATION

The modern administrative state depends on courts practicing a kind of restraint—refusing to scrutinize delegations and deferring to agency decisionmaking. The most common reasons offered for such restraint pertain to the inability to assess when

[22] *See* Free Enterprise Fund v. PCAOB, 561 U.S. 477, 499 (2010) (holding two layers of removal restrictions were an unconstitutional limitation on the President's power and noting that "[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."). *See also* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014) (arguing that that President must have the power to remove at will all officers that execute the law, including the heads of the so-called independent agencies).

[23] Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1242 (Thomas, J., concurring in the judgment) ("The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power.").

[24] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015).

[25] *See supra* note 1.

delegations have gone too far, a line-drawing problem.[26] Yet the line-drawing problem occurs in many constitutional questions and the judicial duty often requires courts to step in even when they would prefer to stay out of a dispute between the political branches.[27] As Justice Alito recently suggested about judicial review of delegations, "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."[28]

The Court frequently answers difficult constitutional questions, which suggests there might be alternative reasons for restraint in this area, particularly for formalist judges.[29] Let me suggest just one: the formal legal defense of *Chevron* and the flaccid non-delegation doctrine both depend on a view that the political process and the Constitution's structural checks and balances will be sufficient to protect constitutional limits.[30] The judicial retreat depends, at least in part, on a key assumption that Congress gives up power when it delegates and then no longer controls what occurs in administration.

The Supreme Court has generally refrained from active enforcement of the non-delegation doctrine because it views Congress as abdicating power to the Executive when it delegates.[31] Judicial intervention is unnecessary because delegations minimize congressional power and transfer power to the Executive. Thus, the reasoning goes, separation of powers and the competition between the two political branches should limit excessive delegation of legislative power. As Justice Scalia explained:

> Congress could delegate lawmaking authority only at the expense of increasing the power of either the President or the courts. Most often, as a practical matter, it would be the President. …Thus, the need for delegation would have to be

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[26] *See* Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 474-75 (2001) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law" (internal quotation marks omitted)).

[27] *See* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) (declining to apply the political question doctrine and noting that "[i]n general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid'").

[28] Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (Alito, J., concurring).

[29] This testimony does not address the various functional and practical reasons offered for deference doctrines, as I am concerned with the legal and constitutional grounds for judicial review.

[30] *See* Rao, *supra* note 2.

[31] *See, e.g.,* Loving v. United States, 517 U.S. 748, 758 (1996) ("Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties."); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch.").

> important enough to induce Congress to aggrandize its primary competitor for political power.[32]

The Court has concluded that delegations will be self-policing and has assumed, to use the language of James Madison, that Congress possesses both the "personal motives" and constitutional means to limit excessive delegations with new legislation.[33] This structural competition should be sufficient to enforce the non-delegation principle. Scholars writing from different perspectives have similarly supported judicial non-enforcement of the delegation principle on precisely these grounds—that political rivalry will adequately constrain delegations.[34]

Somewhat less apparent, the deference framework relies on similar assumptions about congressional behavior and separation of powers. *Chevron* reinforces the idea that ambiguities and silences in a statute should be left to reasonable agency interpretation—this serves as "the quintessential prodelegation canon."[35] *Chevron* holds Congress to its choice to delegate authority to an agency. From a formal perspective, deference makes Congress bear the cost of delegation—when Congress fails to resolve an issue, the policymaking choices go to the executive, Congress's political rival. As Justice Scalia explained:

> Congress cannot enlarge its own power through *Chevron*—whatever it leaves vague in the statute will be worked out by someone else. *Chevron* represents a presumption about who, as between the executive and the judiciary, that someone else will be. (The executive, by the way—the competing political branch—is the less congenial repository of the power as far as Congress is concerned.) So Congress's incentive is to speak as clearly as possible on the matters it regards as important.[36]

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[32] Mistretta v. United States, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting).
[33] THE FEDERALIST NO. 51 (James Madison).
[34] *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2148 (2004) ("[I]t is implausible that Congress—the historical rival of the Executive—would give away all or even most of its powers. … [S]trict nondelegation is unnecessary to achieve lively checks and balances among the branches of government."); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 222 (arguing that the assumption of congressional aggrandizement is inconsistent with the decision 'to delegate broadly to agencies in the first instance, to lodge most of this power with executive rather than with independent agencies, and to accede to ever greater assertions of presidential control over the entire sphere of administrative activity.").
[35] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000). *See also* Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 511-26 (1989) (criticizing *Chevron* on nondelegation grounds).
[36] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013).

As in the non-delegation context, Justice Scalia assumed that Congress actively competes with the executive and therefore *Chevron* deference should create an incentive for Congress to legislate with more specificity.

Thus, one of the most ardent defenders of *Chevron* as a stable background rule for judicial review[37] thought that deference might encourage Congress not to yield its lawmaking powers. By favoring executive branch lawmaking over judicial lawmaking, the Court could maintain separation of powers by leaving corrections of excessive delegations to the political, not judicial, process. Institutional rivalry would spur Congress not to delegate too much.

Both the deference doctrines and the non-enforcement of the delegation principle depend on the assumption that structural political rivalry will keep Congress and the Executive within their constitutional powers, in particular because Congress will guard its lawmaking power from the Executive. These assumptions, however, rely on an incomplete understanding of how members of Congress can benefit from delegation, as discussed in the next Part. A more realistic understanding of how power operates in administration suggests further reasons for a more robust role for courts in reviewing agency authority and agency decisionmaking.

III ADMINISTRATIVE COLLUSION

The conventional view of delegations and deference suggest that judicial review should occur rarely in part because the competitive separation of powers dynamic will be sufficient to protect constitutional values and individual liberty. Yet the modern administrative state has unraveled this assumption. Delegation has a more complex incentive structure than the conventional view assumes. If structural checks and balances

[37] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) (explaining that "*Chevron* thus provides a stable background rule against which Congress can legislate: …Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion"). Yet there are some indications that Justice Scalia was rethinking judicial deference doctrines. *See, e.g.,* Perez v. Mortgage Bankers Assoc., 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment) (arguing for a reconsideration of *Seminole Rock/Auer* deference and noting that the Supreme Court's "elaborate law of deference to agencies' interpretations of statutes and regulations" was "[h]eedless of the original design of the APA" and that the problem of deference to agency interpretations was "bad enough, and perhaps insoluble if *Chevron* is not to be uprooted").

cannot keep the political branches within constitutional limits, this provides a reason to reconsider the scope of judicial review of agency authority and action.

The conventional view correctly states that delegation weakens Congress as an institution. Nonetheless, delegation can benefit individual members of Congress. These benefits include reducing the costs of legislating[38] and allowing members to avoid responsibility for difficult choices by pushing them off to the agency.[39] In addition, delegation can provide a source of influence outside the legislative process. When authority is delegated to an agency, members have an opportunity to intervene in the regulatory process to satisfy special interests, serve constituents, or pursue particular political goals.[40] Leaving statutory requirements vague can allow members to work out the details, or seek particular exemptions and modifications, in the regulatory process rather than the legislative process. Delegation helps legislators to satisfy a variety of interests.[41]

As John Hart Ely noted, "it is simply easier, and it pays more visible political dividends, to play errand-boy-cum-ombudsman than to play one's part in a genuinely legislative process."[42] Especially in an era of entrenched party polarization, legislators may prefer to take a smaller part of administration because they cannot accomplish their goals through the legislative process.[43] The possibility of this type of "particularized

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[38] *See* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267 (1967) (explaining that legislatures face higher transaction costs than agencies and therefore legislatures will delegate to agencies particularly when a proposed rule is controversial).

[39] *See, e.g.,* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 92-93 (1993) (arguing that "delegation enhances legislators' opportunities simultaneously to support the benefits of an action and oppose its costs, which is political heaven").

[40] *See* Rao, *supra* note 2, at 1481-84 (detailing the opportunities of individual members to benefit from delegated authority).

[41] *See* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 51 (1982) (noting that agencies with delegated discretion "can beneficially or adversely affect the fortunes of each legislator's constituents, and they can grant particularized favors to constituents through the congressman's good offices. … Thus, agencies reinforce the legislative tendency toward the public production of private goods, or the collective satisfaction of high demanders' preferences for public goods.").

[42] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131 (1980) (explaining why legislators often delegate authority to executive agencies).

[43] *See* Rao, *supra* note 2, at 1484-88 (explaining how party polarization increases the tendency to delegate); DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 129-35 (1999) (data showing that Congress delegates more discretion to the executive under unified government).

control"[44] for legislators further reduces the competitive tension between Congress and the Executive over how much of the legislative function is delegated.

The ability of lawmakers to influence administration poses a number of constitutional problems. First, allowing individual members to influence administration is inconsistent with the "collective Congress."[45] Quite simply, Article I vests all federal legislative power in Congress.[46] Collective decisionmaking serves as the cornerstone of representative government—it provides the mechanism by which representatives serving different interests come together and enact laws for the general good. As James Madison explained, "In the extended republic of the United States, and among the great variety of interests, parties and sects, which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles, than those of justice and the general good."[47] Lawmaking could not be trusted to a single person or even to a small group of representatives, but instead was given to a sufficiently large bicameral Congress. Legislators must represent their constituents, but can serve their particular interests only by enacting laws, which requires negotiating with other lawmakers.[48] When members have a way to exercise power individually, their interests are no longer directly aligned with the institution of Congress or the public as a whole.

Second, the Constitution gives no lawmaking power to individual members of Congress and specifically restricts them from participating in the execution of the laws. The Incompatibility Clause prohibits a person from simultaneously serving in Congress and as an executive officer.[49] Moreover, the Appointments Clause does not give

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[44] Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 10 (1994).
[45] *See* Rao, *supra* note 2, at 1492-93 (introducing the idea of the "collective Congress" as a fundamental principle of separation of powers).
[46] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States….").
[47] The Federalist No. 51 (James Madison).
[48] *See, e.g.*, H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1033 (1975) (explaining that the framers' envisioned that "representational interests would be expressed only through the institutional filter of bicameralism and by placing limitations on the powers of individual legislators").
[49] U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

Congress the power to appoint officers[50] and the Supreme Court has prohibited congressional attempts to control or to supervise executive officers through the removal power.[51] Yet through the creation of administrative discretion, members can influence execution and administration outside of the ordinary legislative channels. Delegation to the executive simultaneously can serve as a kind of self-delegation to committees, subcommittees, and members of Congress, contrary to the principles articulated in *INS v. Chadha*.[52]

Finally, delegation allows for a kind of administrative collusion between the political branches.[53] As an institution, Congress cannot control administration except through the enactment of legislation. Yet members can pursue their individual interests through the regulatory process. Senators and Representatives thus will sometimes share the interest in expanding the discretion of executive agencies, because this creates an opportunity for them to act as "solo practitioners,"[54] representing their particular interests.

Collusion between the political branches, rather than competition, undermines individual liberty. It allows administrators to function as lawmakers and lawmakers to influence administrators. This dynamic turns separation of powers on its head and violates the venerable principle "that the power to write a law and the power to interpret it cannot rest in the same hands."[55]

Delegation thus raises serious constitutional problems that often will not be checked by structural competition between the branches. Similarly, judicial deference can undermine separation of powers by removing the judicial check and allowing both

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[50] U.S. CONST. art. II, § 2, cl. 2 (vesting the President with appointment power over principal officers and allowing Congress to vest the appointment of inferior officers "as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").
[51] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charge with the execution of the laws it enacts.").
[52] 462 U.S. 919 (1983) (holding the one-house legislative veto unconstitutional and requiring that all legislative actions follow the requirements of bicameralism and presentment). Admittedly, legislator influence over administration is not a formal mechanism like the one-house veto, but similar concerns arise when individual lawmakers can act outside of bicameralism and presentment to influence particular administrative matters.
[53] *See* Rao, *supra* note 2, at 1504.
[54] *See* Christopher DeMuth, *The Decline and Fall of Congress*, WALL STREET JOURNAL, Oct. 18, 2015 (discussing congressmen as "solo practitioners" and noting that "[s]ingle-member activism has replaced the committee hierarchies and autocratic chairmen of times past").
[55] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013).

agencies and members of Congress to expand their powers. A background rule of deference may promote ambiguous lawmaking and increase the level of discretion given to agencies. This shifts lawmaking away from Congress, but allows legislators to shape discretion in the regulatory process. Instead of prompting Congress to jealously guard its lawmaking power from the Executive, deference can encourage Congress to delegate and shape administration outside of the scrutiny of the courts. Since Congress often does not compete in the way the conventional view assumes, deference can merely ratify collusion between the political branches. The fact that the structural checks and balances have not limited delegations suggests one reason for less deferential judicial review.

IV LESS DELEGATION, LESS DEFERENCE

Judicial restraint in enforcing the non-delegation principle and judicial deference to agency interpretations depend in part on an assumption that the structural checks and balances will keep the political branches within their constitutional powers. Yet delegation in the modern administrative state has unraveled structural competition as explained above. This has led to an expansion of executive power and the increase of lawmaking outside of constitutional procedures. Here I offer a few, necessarily brief, observations for reconsidering judicial review in the administrative state.

At the outset, it is worth noting that the courts cannot remedy the problems of administrative overreach on their own. Judicial review plays an essential part in keeping the branches within their constitutional limits. Yet judicial review is not the exclusive mechanism for this, and often it will not be the most effective check. The political branches have far more effective means to check each other. Through more specific legislation, appropriations, and oversight, Congress possesses powerful mechanisms to counteract the expansion of executive power.

Recognizing this responsibility, a group of Senators and Representatives are seeking to revive the first branch of government. As members of the Article I Project launched by Senator Mike Lee have explained: “The stability and moral legitimacy of America’s governing institutions depend on a representative, transparent, and accountable Congress to make federal law. Today, Congress willfully shirks this

responsibility, and permits – and indeed, often encourages – the Executive Branch to do work the Constitution assigns to the legislature. Congress's refusal to use its powers – to do its duty – is the root cause of Washington's dysfunction."[56]

Congress should take greater responsibility for legislating, and the courts must also play their part. The awareness of how delegation works to fracture the collective Congress can be part of the reconsideration of the deference framework in several areas. First, *Chevron* step zero looks at whether Congress intended to delegate to an agency the authority to act with the force of law.[57] Congress may intend to give power to an agency—but Congress cannot delegate its exclusive lawmaking power. It hardly serves as a defense to a challenged statute or regulation that Congress *intended* to make an overbroad delegation to an agency. Instead, the potential for members of Congress and the executive to expand power from such delegations provides additional support for independent review of the scope of an agency's delegated authority and the particular exercise of that authority.

The likelihood of congressional influence suggests a reason for reconsidering *City of Arlington v. FCC*, in which the Supreme Court held that courts must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's jurisdiction.[58] For the reasons given by Chief Justice Roberts in dissent, the Court should make an independent judgment about whether Congress has delegated authority to the agency over a particular issue.[59] One additional argument would be that when an agency pushes at the boundaries of its jurisdiction, it might be working with key legislators, who either desire expansion of the agency's jurisdiction or are willing to tolerate it. Allowing agencies to interpret the scope of their jurisdiction may allow some members of Congress to undermine the statutory limits on an agency's authority.[60]

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[56] Article I Project, *Policy Brief: The Case for Congressional Empowerment* (Feb. 3, 2016) available at http://www.scribd.com/doc/297785392/A1P-Issue-No-1-The-Case-for-Congressional-Empowerment.
[57] *See supra* notes 6 & 12.
[58] 133 S. Ct. 1863 (2013).
[59] *See id*. at 1886 (Roberts, C.J., dissenting) (explaining that the Court must ensure "that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies.").
[60] *See* Rao, *supra* note 2, at 1518.

Second, last Term the Supreme Court strongly signaled it might overrule *Seminole Rock/Auer*, which provides for deference to an agency's interpretation of its own rules. Justices Scalia and Thomas explicitly called for overruling these cases, emphasizing the principle that lawmaking and law interpretation cannot subsist in the same hands.[61] While this combination of law making and law interpretation is especially apparent in executive agencies; the rationale could also extend to the deference given to agency interpretations of their statutory mandates. If the Court should not defer to an agency's interpretation of its own rules, perhaps it should also reconsider deferring to agency interpretations that might be strongly influenced by Congress. Which is to say that Congress should not make the laws and then interpret them in the administrative process. When Congress delegates in open-ended terms, the likelihood of congressional interference increases because there is more discretion for the agency to exercise. Keeping agencies to their statutory grants of authority would limit the ability of members of Congress to interpret the law through the back door in a way that lacks the accountability, visibility, and collective action of legislation.

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As the Supreme Court has said:

> There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.[62]

The administrative state has required the loosening and sometimes the abandonment of constitutional restraints. Yet the second-best doctrines of administrative law have not served to protect individual liberty. All three branches can work to restore the particular accountability created by the Constitution through more effective presidential oversight

[61] *See* Perez v. Mortgage Bankers Assoc., 135 S. Ct. 1199, 1212-13 (2015) (Scalia, J., concurring in the judgment); *id*. at 2225 (Thomas, J., concurring in the judgment).
[62] INS v. Chadha, 462 U.S. 919, 959 (1983).

and control of administration; greater congressional specificity in lawmaking; and independent judicial review of the actions of the political branches to ensure they stay within constitutional limits.