

Attacking *Auer* and *Chevron* Deference: A Literature Review

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ABSTRACT

In recent years, there has been a growing call to eliminate—or at least narrow—administrative law’s judicial deference doctrines regarding agency interpretations of law. As part of the Challenging Administrative Power Symposium sponsored by the Georgetown Center for the Constitution and the Institute for Justice, this Article surveys the key arguments against Auer and Chevron deference that have emerged in recent years. In so doing, the Article seeks to help judges, legislators, litigants, and scholars focus their calls for reforming how courts review agency interpretations of law.

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INTRODUCTION

In recent years, we have seen a growing call from the federal bench, on the Hill, and within the legal academy to rethink administrative law’s deference doctrines to federal agency interpretations of law. The reform efforts have also been front and center at the Supreme Court. In 2015, Justices Scalia, Thomas, and Alito all questioned the wisdom and constitutionality of judicial deference to agency interpretations of their own regulations (*Auer* or *Seminole Rock* deference).¹ Justice Thomas also doubted the constitutionality of deference to agency statutory interpretations (*Chevron* deference).²

In 2016, Republicans in Congress followed suit by introducing the Separation of Powers Restoration Act, which would amend the Administrative Procedure Act (APA) to require agencies to review de novo all agency statutory and regulatory interpretations.³ Some circuit judges have subsequently expressed concerns about these deference doctrines,⁴ culminating in an extensive discus-

1. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212–13 (2015) (Scalia, J., concurring in the judgment); *id.* at 1225 (Thomas, J., concurring in the judgment); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment). *See also* *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (instructing courts to defer to an agency’s interpretation of its own regulation “unless ‘plainly erroneous or inconsistent with the regulation’” (quoting *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989))); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (same).

2. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). *See generally* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (instructing courts to defer to an agency’s reasonable interpretation of an ambiguous statute that the agency administers).

3. Separation of Powers Restoration Act, H.R. 4768, 114th Cong. § 2 (2016); Separation of Powers Restoration Act, S. 2724, 114th Cong. § 2 (2016); *see also* Christopher J. Walker, *Courts Regulating the Regulators*, REG. REV. (Apr. 25, 2016), <https://www.theregreview.org/2016/04/25/walker-courts-regulating-the-regulators/> [<https://perma.cc/QP7N-SMG8>] (explaining how this legislation is an outgrowth of recent judicial and scholarly criticism of *Chevron* deference).

4. *See* *Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring in the judgment) (“An Article III renaissance is emerging against the judicial abdication performed in *Chevron’s* name.”); *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (criticizing both *Chevron* and *Auer*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (announcing that “[m]aybe the time has come to face the behemoth” that is *Chevron* deference); Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–54 (2016) (expressing concerns with *Chevron* deference); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 324 (2017) (“There is no getting around the fact that *Chevron* deference has created a palpable sense of entitlement among executive agencies, particularly when they show up in court.”); *see also* *Glob. Tel*Link v. FCC*, 866 F.3d 397, 418–19 (D.C. Cir. 2017) (Silberman, J., concurring) (arguing for a more searching inquiry at *Chevron* step two).

sion concerning now-Justice Gorsuch's skepticism of *Chevron* deference at the Senate Judiciary Committee hearing on his nomination to the Supreme Court.⁵

In this Article, I do not endeavor to break major new ground in these debates concerning *Auer* and *Chevron* deference. Nor do I attempt to analyze both sides of the debate, much less provide a definitive take on the constitutionality or wisdom of either doctrine. Instead, I provide a literature review of sorts concerning the arguments that have been advanced in recent years to eliminate or narrow these two deference doctrines. Concisely outlining the various arguments here should, I hope, help judges, legislators, litigants, and scholars better focus arguments for reforming how federal courts review agency interpretations of law. The Article concludes with a brief note dispensing with the argument that administrative law's deference doctrines do not matter.

I. AUER DEFERENCE

A. Case for Eliminating

Auer deference, also known as *Seminole Rock* deference, instructs courts that an agency's interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."⁶ The case against *Auer*-like deference has remained largely the same as the one John Manning advanced two decades ago.⁷ Manning's foundational critique focused on separation of powers. He drew on legal principles set forth long ago by Blackstone, Locke, and Montesquieu concerning the dangerous consolidation of law-making and law-executing powers in the same government actor.⁸ As Blackstone put it, "where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of it's [sic] own independence, and therewith of the liberty of the subject."⁹

5. See Office of U.S. Senator Orrin Hatch, Press Release, *Hatch Questions Gorsuch on Holding Federal Bureaucracy Accountable to the Law* (Mar. 23, 2017), <http://www.hatch.senate.gov/public/index.cfm?p=releases&id=4A30B354-85E8-4726-A5D2-61D282AF10EB> [<https://perma.cc/E8H8-A5X2>].

6. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); accord *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

7. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996) (criticizing, prior to the Court's decision in *Auer*, the deference doctrine first established in *Seminole Rock*).

8. See *id.* at 645–48.

9. 1 WILLIAM BLACKSTONE, COMMENTARIES *142; accord JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 143, at 76 (C.B. MacPherson ed., 1980) (1690) (arguing that it is "too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they exempt themselves from obedience to the laws they make"); MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6, at 157 (Anne Cohler et al. eds. & trans., 1989) (1768) ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.").

Before his passing, Justice Scalia—*Auer*'s author—joined the call to revisit *Auer* deference, observing that “[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean.”¹⁰ In his concurrence in *Talk America, Inc. v. Michigan Bell Telephone Co.*, Justice Scalia explained his basic concerns with *Auer*, distinguishing those concerns from *Chevron*'s foundation:

On the surface, [*Auer* deference] seems to be a natural corollary—indeed, an *a fortiori* application—of the [*Chevron* deference] rule that we will defer to an agency's interpretation of the statute it is charged with implementing. But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.¹¹

Justice Scalia then outlined the perverse agency incentives created by *Auer* deference, incentives he believed *Chevron* deference does not implicate. In particular, he explained that “[d]eferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive.”¹² On the other hand, he argued, “deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.”¹³

In other words, the main case for eliminating *Auer* deference is two-fold: First, it is unconstitutional (or otherwise contrary to the proper separation of governmental powers in a Blackstone-Locke-Montesquieu sense) for an agency official to both make and execute the same law. Second, such combination of law-making and law-executing authority creates inappropriate incentives for agencies to draft vague regulations and interpret those regulations through less-formal means after the fact.¹⁴ Despite litigants' sustained attacks of *Auer*

10. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part).

11. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) (citations omitted).

12. *Id.* at 2266.

13. *Id.*

14. For instance, in my survey of 128 agency rule drafters at seven executive departments and two independent agencies, half (53%) knew *Auer* deference by name and two in five (39%) indicated they

deference in recent years, these two arguments remain the predominant ones.¹⁵

B. Case for Narrowing

The case for narrowing *Auer* deference, by contrast, has evolved in form and scope in recent years. There are at least four separate arguments.

1. No Deference When Unfair Surprise

The Supreme Court has significantly narrowed *Auer*'s domain to refuse deference when the interpretation causes unfair surprise. In *Christopher v. SmithKline Beecham Corp.*, the Court held that *Auer* deference does not apply to an agency's "interpretation of ambiguous regulations [that would] impose potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced."¹⁶ The *Christopher* Court had little trouble in rejecting *Auer* deference because to apply *Auer* in such circumstances "would result in precisely the kind of 'unfair surprise' against which our cases have long warned."¹⁷ Put differently, "[t]o defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"¹⁸ In light of *Christopher*'s holding, two empirical studies indicate that circuit courts have begun to narrow *Auer* deference, with an accompanying decline in agency-win rates.¹⁹

use *Auer* deference when drafting rules, compared to 94% and 90%, respectively, for *Chevron* deference, 81% and 63% for *Skidmore* deference, and 61% and 49% for the *Mead* doctrine. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1061–63, 1061 fig.11 (2015). Cf. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 309 (2017) (observing that these figures suggest that "[i]t is most unclear that even the half [of agency rule drafters] that know *Auer* think seriously about it when they are writing regulations").

15. The *Yale Journal on Regulation* hosted an online symposium in 2016, which collected two-dozen wide-ranging perspectives on *Auer*. See Symposium, *Reflections on Seminole Rock: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, YALE J. ON REG.: NOTICE & COMMENT (2016), <https://ssrn.com/abstract=2847668> [<https://perma.cc/KZ7P-PMW3>].

16. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

17. *Id.* (citing cases).

18. *Id.* (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)). See also Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1481 (2011) ("[C]ourts ought to retain, or even strengthen, . . . the limitation on retroactive application of nonobvious regulatory interpretations. This limitation not only addresses the fair notice concern but also mitigates the incentive that [*Auer* deference] tends to create for agencies to promulgate vague regulations.").

19. See Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 827 (2015) ("Between the Court's decisions in *Talk America* and *Christopher*, courts of appeals granted *Auer* deference at a rate of 82.3%. That rate dropped to 74.4% during the period between *Christopher* and *Decker*, and fell further to 70.6% since *Decker*."); William Yeatman, *An Empirical Defense of Auer Step Zero*, 106 GEO. L.J. 515, 518, 545, tbl.1 (2018) (reviewing 1,047 circuit court decisions from 1993 through 2013 and finding that the agency-win rate under *Auer* before 2006 was 78% but dropped to 71% after that).

2. A Return to a *Skidmore*-Like Standard

Some scholars have argued that *Auer* deference should resemble the less-deferential *Skidmore* standard than its current formulation as a rule-based *Chevron* doctrine.²⁰ For example, Sanne Knudsen and Amy Wildermuth have carefully traced *Auer* deference's origins back to *Seminole Rock* and have demonstrated *Auer*'s evolution to a much more deferential rule that is unmoored from any theoretical (much less statutory) foundation.²¹ In this symposium issue, Jeff Pojanowski advances a similar argument for returning *Auer* deference to the more standard-like, less-deferential approach articulated in *Seminole Rock*.²² As Pojanowski argues, “the move from the [*Skidmore*-influenced] *Seminole Rock* case to ‘*Auer* deference’—understanding *Auer* as a *Chevron*-like deference rule presupposing delegated authority to make policy in the gaps—creates an entirely different doctrine than envisioned in 1945.”²³ Moreover, the Senate version of the Regulatory Accountability Act would amend the APA to replace *Auer* deference with *Skidmore* deference (while leaving *Chevron* deference unchanged).²⁴

3. A Cabined *Auer* Deference

By contrast, Kevin Leske argues that the Supreme Court should preserve *Auer*'s rule-based approach and conduct a more searching review of the agency's interpretation. In particular, he proposes that courts should embrace a two-step test similar to *Chevron* deference. If the statute is ambiguous, and thus the reviewing court proceeds to step two, the court then should assess: “(1) the agency's stated intent when the regulation was promulgated; (2) whether the interpretation had been consistently held by the agency; (3) in what format the interpretation appears; and (4) whether the regulation being interpreted ‘parrots’ or otherwise restates the statutory text”²⁵ In a similar vein, Kevin Stack argues for “regulatory purposivism,” in which an agency's interpretation of its own regulation is cabined by the regulation's preamble.²⁶ Stack argues that guidance included in preambles should receive greater deference than other

20. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (commanding courts to give “weight” to an agency's statutory interpretation based on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all the factors which give it power to persuade, if lacking power to control”).

21. Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47 (2015); Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of Seminole Rock*, 22 GEO. MASON L. REV. 647 (2015).

22. Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J. L. & PUB. POL'Y 87 (2018).

23. *Id.* at 97.

24. Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017); see also Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 665–69 (2017) (discussing the legislation's judicial review provisions in greater detail).

25. Kevin O. Leske, *Between a Rock and Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 237 (2013).

26. Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 672 (2015); see also Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH.

forms of guidance and that reliance on preambles will necessarily result in a narrower range of acceptable readings of the regulation and greater notice of the regulation's potential applications.²⁷

4. *Mead*-Like Constraints for *Auer*

Some scholars argue that *Auer* should be limited—much like the Supreme Court limited *Chevron* in *Mead*²⁸—to focus on procedural formality and congressional delegation. In *Mead*, the Court clarified that *Chevron* deference does not apply to every agency interpretation of an ambiguous statute. Instead, it only applies when there are indications of congressional intent to commit discretion to an agency—or, more accurately, on factors that seem consistent with such an intent, even if determinate group intent is fictional. These factors include legislative authorization for an agency to make decisions with the force of law, use of relatively formal procedures in agency decisionmaking, and public accessibility of determinations.²⁹

Last October, the Supreme Court's decision to grant review in *Gloucester County School Board v. G.G.* provided an opportunity for scholars and others to suggest additional ways to narrow *Auer* deference.³⁰ *Auer* deference was front and center in *Gloucester County*, because the Fourth Circuit deferred to the U.S. Department of Education's interpretation of its own regulation implementing Title IX.³¹ Title IX provides that “[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³² The agency's longstanding regulation interpreted Title IX to permit “separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex.”³³ In an opinion letter from January 2015, the Department interpreted Title IX so that public schools “generally must treat transgender students consistent with their gender identity.”³⁴

The Court refused to grant review of the question of whether *Auer* should be overruled and, instead, limited the questions to whether *Auer* deference should

L. REV. FIRST IMPRESSIONS 61 (2015) (exploring empirically Stack's theory of regulatory interpretation first set forth in Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012)).

27. Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1257 (2016).

28. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“[A]dministrative implementation of a particular statutory provisions qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).

29. *See id.* at 229–31.

30. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239 (2017).

31. *Id.* at 718, 721.

32. 20 U.S.C. § 1681(a) (2012).

33. 34 C.F.R. § 106.33 (2017).

34. *G.G. ex rel. Grimm*, 822 F.3d at 718, 721 n.5 (quoting opinion letter from the Department of Education's Office of Civil Rights).

be accorded in this case and whether the agency's interpretation should be given effect.³⁵ The Court ultimately vacated and remanded the case in light of the new administration's withdrawal of the agency guidance, but not before the briefing on the merits was completed.

Several amicus briefs advanced various arguments for narrowing *Auer* deference. For instance, Ron Cass, Chris DeMuth, and I argued that *Auer*'s domain should be reconciled with *Chevron*'s domain, such that congressional intent to delegate lawmaking authority and the agency's use of formalized procedures to promulgate regulatory interpretations should limit *Auer*'s application.³⁶ In assessing implicit congressional intent, "the Court should give special weight to use of procedures consistent with decisions having the force of law, with notice to affected parties, and with input and analysis that provide special reasons for deference."³⁷ While some forms of agency actions that fall short of rulemaking or formal adjudication may still qualify for *Auer* deference, we argued that the Court should not accord any deference to agency interpretations advanced for the first time in private opinion letters or other similarly informal agency actions.

II. *CHEVRON* DEFERENCE

A. *Case for Eliminating*

Chevron deference instructs courts to defer to an agency's interpretation of a statute the agency administers if, at step one, the statutory provision at issue is ambiguous and then, at step two, the agency's interpretation of the statutory ambiguity is reasonable.³⁸ In addition to the statutory argument that *Chevron* deference is not consistent with the text of Section 706 of the APA,³⁹ the predominant arguments against *Chevron* deference fall into two main categories: Article III and Article I concerns.

To be sure, these arguments are not new. Indeed, Cynthia Farina sketched out both Article III and Article I concerns just five years after *Chevron*'s birth:

35. 137 S. Ct. at 369.

36. Brief of Professors—Dean Ronald A. Cass, Christopher C. DeMuth, Sr., and Christopher J. Walker—as Amicus Curiae In Support of Petitioner at 6–8, Gloucester Cty. Sch. Bd. v. G.G., No. 16–273 (filed Jan. 10, 2017), http://www.scotusblog.com/wp-content/uploads/2017/01/16-273_amicus_pet_professors_dean_ronald_a_cass_christopher_c_demuth_sr_and_christopher_j_walker.pdf [<https://perma.cc/9HWZ-ZL8U>].

37. *Id.* at 5–6.

38. *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

39. See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–94 (2016); *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Reg. Reform, Commercial & Antitrust Law of H. Comm. on Judiciary*, 115th Cong. (2016) (statement of John F. Duffy, Professor of Law, Univ. of Va.), <http://docs.house.gov/meetings/JU/JU05/20160315/104665/HHRG-114-JU05-Wstate-DuffyJ-20160315.pdf> [<https://perma.cc/Q6ZG-8PA3>].

[W]e cannot embrace *Chevron*'s vision of deference as the handmaiden to separation of powers and legitimacy principles without substantially recasting those principles—a recasting in which some aspects of existing theory would have to be abandoned and others radically reformulated. The danger of *Chevron*'s [siren] song lies in its apparent obliviousness to the fundamental alterations it makes in our constitutional conception of the administrative state.⁴⁰

These Article III and Article I concerns are outlined in turn, followed by an extended discussion of what I will coin potential Article II concerns. For most, it is likely that none of these concerns, standing alone, is sufficient to justify abandoning *Chevron* deference. Viewing these concerns together as a systemic attack on the rule of law, however, may well be sufficient for some.⁴¹ Even then, one must address whether these concerns, coupled with other factors,⁴² justify abandoning *Chevron* deference in light of the doctrine of *stare decisis*. This Article does not tackle that more ambitious project—a project that, to date, has not been done in any systematic fashion.

1. Article III Concerns

Article III arguments against *Chevron* deference concern the federal judiciary's role to exercise independent judgment to “say what the law is.”⁴³ In his concurring opinion in *Michigan v. EPA*, Justice Thomas perhaps captured the argument best:

As I have explained elsewhere, “[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.” Interpreting federal statutes—including ambiguous ones administered by an agency—“calls for that exercise of independent judgment.” *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is “the best reading of an ambiguous statute” in favor of an agency's construction. It thus wrests

40. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989). Jack Beermann, among others, has long criticized *Chevron* deference based on administrability and related grounds. See, e.g., Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731 (2014); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

41. See, e.g., Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1329 (2015) (arguing that *Chevron*'s deference principles “form a web of discretionary exercises of power that threaten, over time, to undermine the restraining structure that has constrained power, supported liberty, and provided stability more than tolerably well for over two centuries”); accord Ronald A. Cass, *Is Chevron's Game Worth the Candle? Burning Interpretation at Both Ends*, in *LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE* 57 (Dean Reuter & John Yoo eds., 2016).

42. For more on other factors considered in favor and against *stare decisis*, see, e.g., Pearson v. Callahan, 555 U.S. 223, 233–35 (2009).

43. *Marbury v. Madison*, 5 (1 Cranch) 137, 177 (1803).

from Courts the ultimate interpretative authority to “say what the law is,” and hands it over to the Executive. Such a transfer is in tension with Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.⁴⁴

Philip Hamburger framed these Article III concerns through the lens of due process, as opposed to the structural separation of powers. For Hamburger, *Chevron* deference imbues the federal judiciary with institutional bias in favor of the most powerful parties (the federal bureaucracy), which violates parties’ due process rights when their life, liberty, or property is at issue.⁴⁵ Then-Judge Gorsuch took this argument one step further by saying that “[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions.”⁴⁶

2. Article I Concerns

“The deference required by *Chevron* not only erodes the role of the judiciary,” Judge Jordan has argued, “it also diminishes the role of Congress.”⁴⁷ In particular, Article I vests Congress with “All legislative Powers,” yet *Chevron* deference encourages members of Congress to delegate broad lawmaking power to federal agencies. In doing so, Congress further frustrates the values of the nondelegation doctrine.⁴⁸

To be sure, the nondelegation doctrine could still be used to block unconstitutional delegations.⁴⁹ But *Chevron* deference provides perverse incentives for

44. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (citations omitted); *accord Egan v. Del. River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (“The checking function of the courts is in our power of judicial review, it being ‘emphatically the province and duty of the judicial department to say what the law is.’ Yet, the Supreme Court has created a doctrine that requires judges to ignore their own best judgment on how to construe a statute, if the executive branch shows up in court with any ‘reasonable interpretation made by the administrator of an agency.’” (citations omitted)). *But see Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (“The Court avoids those constitutional concerns [regarding *Chevron* deference] today because the provision of the America Invents Act at issue contains an express and clear conferral of authority to the Patent Office to promulgate rules governing its own proceedings.”).

45. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016).

46. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); *see also id.* (“And the founders were wary of those costs, knowing that, when unchecked by independent courts exercising the job of declaring the law’s meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative.” (citing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 287–91 (2014))).

47. *Egan*, 851 F.3d at 279 (Jordan, J., concurring).

48. *See, e.g., Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (describing the nondelegation doctrine as a principle which prevents Congress from delegating its legislative powers to agencies unless Congress provides an “intelligible principle” to which the agency must conform).

49. Another contributor to this symposium has a unique take on how to narrow *Chevron* deference to enforce the nondelegation values. *See* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV.

what Neomi Rao has coined “administrative collusion”: “By fracturing the collective Congress and empowering individual members, delegation also promotes collusion between members of Congress and administrative agencies.”⁵⁰ Put differently, as Judge Jordan has, “The consequent aggrandizement of federal executive power at the expense of the legislature leads to perverse incentives, as Congress is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues.”⁵¹

3. Article II Concerns

To date, the arguments against *Chevron* deference have focused primarily on impermissibly supplanting the judiciary’s constitutional duty to independently say what the law is (Article III concerns) and encouraging members of Congress to over-delegate broad lawmaking authority to federal agencies in tension with nondelegation values (Article I concerns). The third set of potential arguments—which I label Article II concerns—return to Justice Scalia’s misplaced comfort with *Chevron* compared to his attacks on *Auer*.

In his concurrence in *Perez v. Mortgage Bankers*, Justice Scalia reiterated the historical justification for *Chevron* deference (first articulated in his *Mead* dissent): “[T]he rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where ‘[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.’”⁵² Federal-court review of executive-branch actions in the 1800s, Justice Scalia further explained in his *Mead* dissent, “was principally exercised through the prerogative writ of mandamus,” and such “writ generally would not issue unless the executive officer was acting plainly beyond the scope of his authority.”⁵³

Moreover, as discussed in Part I, Justice Scalia believed that concerns about self-delegation—the same government actor both making and executing the law—applied to *Auer* but not *Chevron*. In other words, we should be more willing to embrace *Chevron* deference because of Article II’s historical role in

(forthcoming 2018), <https://ssrn.com/abstract=2917275> [<https://perma.cc/5Z2E-B3AL>] (“[I]f *Chevron*’s core assumption is that statutory ambiguities in broad statutes are implicit delegations of authority to agencies to resolve those ambiguities, then there is no reason why these implicit delegations cannot be assessed for nondelegation violations.” (footnote omitted)).

50. Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1504 (2015); see also *id.* at 1505–06 (footnote omitted) (“Delegations thus erode one of the primary mechanisms for controlling the government by undermining the structural rivalry between members of Congress and the executive. Instead of competing over delegation, they will often agree on open-ended delegations of authority to agencies in order to expand the discretionary power of the legislators and administrators.”).

51. *Egan*, 851 F.3d at 279 (Jordan, J., concurring) (footnote omitted).

52. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)).

53. *Mead*, 533 U.S. at 243 (2001) (Scalia, J., dissenting) (citing LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 166, 176–177 (1965)).

interpreting statutes and the lack of Article II's involvement in the legislative process that results in lawmaking delegation by statutory ambiguity. Recent developments suggest that perhaps neither of these assumptions stands on firm ground.

As to the historical argument, Aditya Bamzai has cast serious doubt on Justice Scalia's understanding of *Chevron's* origin story.⁵⁴ Bamzai exhaustively rebuts the argument that the case law and doctrine before the twentieth century support the type of deference now applied to agency statutory interpretations under *Chevron*. Instead, the interpretive approach was to defer to executive interpretations of law that are longstanding and contemporaneous.⁵⁵ Such "respect" had nothing to do with agency expertise, congressional delegation, national uniformity in the law, or political accountability, which are the primary rationales invoked today to support *Chevron* deference.⁵⁶ Instead, courts respected longstanding and contemporaneous executive interpretations because, under the traditional canons of statutory interpretation, courts respected longstanding and contemporaneous interpretations in general.⁵⁷

Similarly, Bamzai concludes that *Chevron* deference finds no historical support from nineteenth-century mandamus doctrine and practice: "Those cases distinguished between, on the one hand, the standard for obtaining the writ and, on the other, the appropriate interpretive methodology that would be applied in cases not brought using the writ."⁵⁸ This finding is significant because it suggests that Justice Scalia may have been mistaken in relying on those cases as historical justification for *Chevron* deference in his *Mead* dissent and *Mortgage Bankers* concurrence.

As for the Article II self-delegation concerns, I have spent the last several years interviewing and surveying agency officials about their role in the legislative process.⁵⁹ My findings suggest that the legislative drafting story is more complex than Justice Scalia appreciated when distinguishing his concerns about *Auer* deference from the propriety of *Chevron* deference. It turns out that federal agencies are deeply involved in legislative drafting—both in the forefront by drafting the substantive legislation the Administration desires to submit to Congress and in the shadows by providing confidential "technical drafting assistance" on legislation that originates from congressional staffers.

54. Bamzai, *supra* note 39; see also Christopher Walker, *Chevron's Origin Story*, JOTWELL (Oct. 5, 2016) (reviewing Bamzai, *supra* note 39), <https://adlaw.jotwell.com/chevrans-origin-story/> [<https://perma.cc/DJ69-WQRZ>].

55. See Bamzai, *supra* note 39, at 930–46.

56. See Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1273–75 (2008).

57. See Bamzai, *supra* note 39, at 916.

58. *Id.* at 947.

59. See Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting* (Final Report to the Admin. Conference of the U.S. 303, 2015), <https://ssrn.com/abstract=2655901> [<https://perma.cc/5NHY-FLHA>]; see also Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,161–63 (Dec. 16, 2015) (summarizing findings and adopting recommendations from ACUS report).

This role of federal agencies in legislative drafting may cast some doubt on the foundations for *Chevron* deference, in that agencies often are substantially involved in drafting the legislation that ultimately delegates to the agencies the primary authority to interpret that legislation. Agency technical drafting assistance, which I term “legislating in the shadows,”⁶⁰ may be particularly problematic.⁶¹ As I have noted elsewhere:

[T]he relationship between individual members of Congress (and congressional committees) and federal agencies may elevate the risk that legislating in the shadows leads to excessive delegation of interpretive and policymaking authority in ways that contravene the will of the collective Congress. In so doing, both individual members of Congress and federal agencies are able to exercise law-making and law-interpreting authority in ways similar to those that concerned Scalia and Manning as to *Auer* deference.⁶²

Eliminating, or at least narrowing, *Chevron* deference would be one way to help address those Article II self-dealing incentives.

B. Case for Narrowing

To be sure, the likelihood that the Supreme Court will abandon *Chevron* deference is quite low. But it is quite possible the Court will attempt to narrow *Chevron*'s domain at what has been coined *Chevron* Step Zero.⁶³ *Chevron* deference could likewise be further constrained at Steps One and Two. Each will be addressed in turn.

1. At Step Zero

Chief Justice Roberts, writing for the Court in *King v. Burwell*, introduced a new variant of the major questions doctrine, which eliminated *Chevron* deference for “question[s] of deep ‘economic and political significance’” and perhaps when the implementing agency “has no expertise in crafting [] policy of this sort.”⁶⁴ As I have argued elsewhere,⁶⁵ however, the Chief Justice’s opinion for the Court in *King v. Burwell* may be an attempt to advance his more systemic, context-specific narrowing of *Chevron* deference set forth in his dissent in *City*

60. Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1407–19 (2017).

61. *But see* James J. Brudney, *Contextualizing Shadow Conversations*, 166 U. PA. L. REV. ONLINE 37, 38–45 (2017) (disputing the extent of agency involvement in technical drafting assistance—and thus the potential implications of agency legislating in the shadows for *Chevron* deference—based on his personal involvement in the legislative process).

62. Walker, *supra* note 60, at 1416.

63. *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining *Chevron* Step Zero as “the initial inquiry into whether the *Chevron* framework applies at all”).

64. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

65. *See* Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1098–1104 (2016).

of *Arlington v. FCC*.⁶⁶

In *City of Arlington*, the Chief Justice, joined by Justices Kennedy and Alito, argued that *Chevron* deference should not always apply when Congress delegates rulemaking or formal adjudicatory authority to the agency and the agency uses that authority to advance a statutory interpretation. Instead, quoting the *Chevron* decision itself, the Chief Justice argued that the court should evaluate “whether Congress had ‘delegat[ed] authority to the agency to elucidate a *specific provision* of the statute by regulation.’”⁶⁷ In other words, “[a]n agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner.”⁶⁸ As I have detailed elsewhere, the Chief Justice’s context-specific *Chevron* deference finds some support in the empirical realities of how Congress drafts statutes and how agencies interpret them.⁶⁹

So what type of evidence would suggest that Congress did not intend to delegate by statutory ambiguity primary interpretive authority to a federal agency? In *King v. Burwell*, Chief Justice Roberts suggested that such evidence could include the importance of the question and an agency’s expertise concerning the issue in question.⁷⁰

Justice Breyer’s concurrence in *City of Arlington* suggests some other indicia of congressional intent to delegate. Drawing on his opinion for the Court in *Barnhart v. Walton*, Justice Breyer noted that the Court had previously “assessed ‘the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.’”⁷¹ He further noted the relevance of the statutory provision’s subject matter—“its distance from the agency’s ordinary statutory duties or its falling within the scope of another agency’s authority.”⁷² “Although seemingly complex in abstract description,” Justice

66. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1881 (2013) (Roberts, C.J., dissenting). Jonathan Adler has advanced a similar argument for narrowing *Chevron*’s domain based on a more searching inquiry into whether Congress intended to delegate by statutory ambiguity authoritative interpretive authority to a federal agency. See Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 Mo. L. Rev. 983 (2016).

67. *City of Arlington*, 133 S. Ct. at 1881 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–84 (1984)).

68. *Id.* at 1883.

69. See Walker, *supra* note 14, at 1004–13 (discussing findings from Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013)).

70. *King*, 135 S. Ct. at 2489. Admittedly, *King v. Burwell* provides little guidance, which is why Kent Barnett and I have argued that lower courts should play an important role in developing the new major questions doctrine. See Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147 (2017) (responding to Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017)).

71. *City of Arlington*, 133 S. Ct. at 1875 (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

72. *Id.* at 1875 (citing *Gonzales v. Oregon*, 546 U.S. 243, 265–66 (2006); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1007–10 (1999)).

Breyer explained, “in practice this framework has proved a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency.”⁷³

Limiting *Chevron*'s domain at Step Zero via a context-specific inquiry into objective congressional intent, as the Chief Justice has advocated, is the most probable narrowing that could occur in the near future. But there are other avenues for limiting *Chevron*'s reach at Step Zero. Most notably, further development of the major questions doctrine is possible. And some scholars have argued that *Chevron* deference should not apply to agency interpretations that preempt state law.⁷⁴

2. At Step One

Arguments for narrowing *Chevron* at Step One focus on utilizing interpretive tools to more aggressively resolve statutory ambiguities. In one of her last opinions on the D.C. Circuit, Judge Janice Rogers Brown called for a renewed emphasis on *Chevron* Step One: “For all its potential for manipulation, it is *Chevron* Step One where ‘[t]he court’s task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria.’”⁷⁵ One way to do that is to more stringently apply the textual canons at Step One to resolve statutory ambiguities, similar to how Justice Scalia approached his *Chevron* inquiry.⁷⁶ Count Judge Kethledge among the advocates for this position. He recently observed that in nearly ten years on the Sixth Circuit he has yet to find a statute ambiguous at *Chevron* Step One, even though “there have been plenty of cases where the agency wanted us to.”⁷⁷

Another approach would be to further embrace “contextualism” in statutory interpretation by looking at the whole text of the statute to eliminate ambiguities.

73. *Id.* at 1876.

74. See Miriam Seifter, *Federalism at Step Zero*, 83 *FORDHAM L. REV.* 633, 634 & n.11 (2014) (collecting literature that argues for no deference or limited *Chevron* deference for preemption questions and citing, *inter alia*, William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 *NOTRE DAME L. REV.* 1441, 1471 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 *MICH. L. REV.* 737, 742 (2004); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 *NW. U. L. REV.* 727, 730 (2008); Cass R. Sunstein, *Nondelegation Canons*, 67 *U. CHI. L. REV.* 315, 331 (2000)). Seifter, however, argues against such an approach: “A Federalism Step Zero would thus needlessly harm the coherence and predictability of the *Chevron* framework.” Seifter, *supra*, at 636.

75. *Waterkeeper All. v. EPA*, 853 F.3d 527, 538 (D.C. Cir. 2017) (Brown, J., concurring) (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 *COLUM. L. REV.* 1, 27–28 (1983)).

76. See, e.g., Kavanaugh, *supra* note 4, at 2129 (“[A]nother critical difference between textualists and purposivists is that, for a variety of reasons, textualists tend to find language to be clear rather than ambiguous more readily than purposivists do. One need look no further than the statements of the archetypal textualist, Justice Scalia, for confirmation of this point.”); see also Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 *ADMIN. L. REV.* 725, 728–30 (2007) (arguing that the Supreme Court has moved from an intentionalist to a textualist inquiry at Step One).

77. Kethledge, *supra* note 4, at 323.

ties.⁷⁸ This contextualist approach to statutory interpretation may cut in the other direction, however. As Richard Re has noted, contextualism may be used to find ambiguity more often: “[L]egal ambiguity can spring from a mix of text, purpose, and pragmatism.”⁷⁹ A third approach would be to eliminate the use of legislative history at Step One when it is used to broaden the statutory ambiguity.⁸⁰ A final approach would be to use substantive or normative canons—such as constitutional avoidance, the rule of lenity, or the presumptions against extraterritoriality, implied right of action, preemption, waiver of sovereign immunity, etc.—to constrain ambiguity at Step One. For instance, I have explained elsewhere that the Court has applied constitutional avoidance at Step One—albeit inconsistently and confusingly—and have argued that its modern version should play no role under the *Chevron* inquiry.⁸¹

3. At Step Two

Arguments for narrowing *Chevron* at Step Two call for a more searching analysis regarding what should constitute a “reasonable” interpretation. Whereas Judge Brown has recently argued for a reinvigorated Step One, her D.C. Circuit colleague Judge Silberman has called for a more searching Step Two: “Much of the recent expressed concern about *Chevron* ignores that *Chevron*’s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion.”⁸² For Judge Silberman, this Step Two analysis seems to require a more searching, perhaps more purposivist inquiry into whether the agency’s interpretation is within the statutory ambiguity identified at Step One.

Judge Silberman’s approach seems consonant with the Supreme Court’s decision in *Utility Air Regulatory Group v. EPA*.⁸³ There, the Court provided

78. See, e.g., Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 35 (noting the rise of contextualism in statutory interpretation by which judges prioritize the statute’s substance over its form).

79. Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 421 (2015).

80. John Manning recently argued against the use of legislative history at all at Step One—whether as a tool to narrow or broaden statutory meaning. See John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1521 (2014). While embracing Manning’s call to eliminate the use of legislative history at Step One, one could also advocate for the extensive use of legislative history as a reasonableness check at Step Two. That proposal exceeds the ambitions of this Article.

81. Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of the Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 144 (2012) (“While a court must strike down an administrative interpretation that is actually unconstitutional at *Chevron* step two, modern avoidance [of constitutional questions] should play no role under *Chevron* step one or two.”); see also David Hahn, *Silent and Ambiguous: The Supreme Court Dodges Chevron and Lenity in Esquivel-Quintana v. Sessions*, MINN. L. REV. DE NOVO (Nov. 29, 2017) (arguing that *Chevron* should trump the rule of lenity for agency interpretations promulgated via rulemaking but not for agency interpretations advanced in adjudication), <http://www.minnesotalawreview.org/2017/11/silent-and-ambiguous/> [https://perma.cc/7ADJ-53UY].

82. *Glob. Tel*Link v. FCC*, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring).

83. 134 S. Ct. 2427 (2014).

some gloss on how to review for reasonableness by requiring the interpretation to “account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole.’”⁸⁴ The Court determined that the EPA’s interpretation was “inconsistent with—in fact, would overthrow—the Act’s structure and design.”⁸⁵ And the interpretation would have led to an “unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.”⁸⁶

Another approach to constrain *Chevron* deference at Step Two would be to apply the APA’s arbitrary and capricious “hard look” review. This appears to have been Judge Silberman’s position, at least back in 1990:

Chevron is not all that different analytically from the APA’s arbitrary and capricious review. In either the second step of *Chevron* or in arbitrary and capricious review, the court often asks itself whether the agency considered and weighed the factors Congress wished the agency to bring to bear on its decision. If the agency did so, that the court would have struck the balance somewhat differently cannot be grounds to overturn the agency’s action.⁸⁷

Justice Kagan, writing for the Court in *Judulang v. Holder*, apparently embraced this view of Step Two, noting that “our analysis would be the same [under Step Two or APA arbitrary and capricious review], because under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance.”⁸⁸ Justice Kennedy, writing for the Court in *Encino Motorcars v. Navarro*, also seemed to embrace this procedural limitation (without identifying at which step it should apply): “[W]here a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation.”⁸⁹ This approach to Step Two has both proponents and opponents in the legal academy.⁹⁰

84. *Id.* at 2442 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

85. *Id.*

86. *Id.* at 2436.

87. Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 827–28 (1990) (footnote omitted).

88. *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (internal quotation marks omitted).

89. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

90. Compare Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254–55 (1997) (arguing that *Chevron*’s “two steps in the review process should be deemed not just overlapping, but identical,” with the current Step Two “absorbed into arbitrariness review”); and Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2105 (1990) (“The [Step Two] reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency’s decision is ‘arbitrary’ or ‘capricious’ within the meaning of the APA.”), with Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 326–27 (1996) (rejecting a reasonableness requirement at Step Two because it is already required separately in the APA). See also Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 86

Recently Aaron Saiger has argued for a very different approach to Step Two, at least from the perspective of the agency interpreter. Saiger argues that an agency “must reject interpretations that it concludes are interpretively suboptimal, notwithstanding that an ethical, law-abiding reviewing court would acquiesce in those interpretations.”⁹¹ Saiger does not argue that courts should review agency statutory interpretations differently at Step Two, only that agencies have a nonreviewable duty to choose the “best” interpretation of an ambiguous statute. One could imagine taking this fiduciary duty argument one step further and instructing a court at Step Two to assess whether the agency fulfilled its duty to choose the interpretation the agency believed was the best interpretation (even if that interpretation is not the one the court would deem the best interpretation).

Similar to Step One, arguments could also be made for utilizing the substantive canons at Step Two to further constrain *Chevron* deference, deeming that agency interpretations are unreasonable, for instance, if they do not avoid serious constitutional questions, unreasonably upset the federal-state balance, and so forth. Kent Barnett and I have explored *Chevron* Step Two’s potential domain in greater detail elsewhere, including how the circuit courts presently approach Step Two.⁹²

CONCLUSION: DEFERENCE MATTERS

In closing, it is worth addressing “an elephant in the room”⁹³: Do administrative law’s deference doctrines actually matter?⁹⁴ The doubters typically emphasize the findings of a seminal empirical study by Bill Eskridge and Lauren Baer of deference doctrines at the Supreme Court, in which they found that the Court has applied the doctrines inconsistently over the years.⁹⁵ To answer this question, however, it is a mistake to focus myopically on the Supreme Court.

(1994) (arguing that at Step Two, courts should “scrutinize more carefully the reasonableness of agencies’ statutory interpretation”).

91. Aaron Saiger, *Agencies’ Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231, 1233 (2016); accord Evan J. Criddle, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325, 327 (2016) (“[A]n agency’s obligation to set aside its own independent policy preferences in favor of legislative policy judgments rests primarily on a different legal foundation: the constitutional requirement that Congress must supply an authoritative ‘intelligible principle’ to guide agency discretion whenever it entrusts lawmaking authority to an agency.”).

92. See Kent Barnett & Christopher J. Walker, *Chevron Step Two’s Domain*, 93 NOTRE DAME L. REV. (forthcoming 2018), <https://ssrn.com/abstract=3082641>.

93. Cf. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (stating, in criticizing *Chevron* and its progeny, that “[t]here’s an elephant in the room with us today”).

94. The Conclusion draws substantially from Christopher J. Walker, *Do Judicial Deference Doctrines Actually Matter?*, LIBERTY L.F. (Aug. 25, 2016), <http://www.libertylawsite.org/2016/08/25/do-judicial-deference-doctrines-actually-matter> [<https://perma.cc/7CMM-2NHD>].

95. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1124–25 (2008); accord Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 992 (1992) (“[I]t is clear that *Chevron* is often ignored by the Supreme Court. . . . [T]he two-step framework has been used in only about one-third of the [time].”).

First, as I have explored, *Chevron* deference sure seems to matter to the federal agency officials who draft regulations. The 128 agency rule drafters surveyed in my prior study consider *Chevron* deference when interpreting statutes and drafting rules. They also think about subsequent judicial review and believe an agency's rule is more likely to survive judicial review under *Chevron* than under the less-deferential *Skidmore* standard or de novo review. To a somewhat lesser extent, they also indicated that their agency is more aggressive in its interpretive efforts if it believes the reviewing court will apply *Chevron* deference (as opposed to *Skidmore* deference or de novo review).⁹⁶

Second, and perhaps more importantly, when assessing the impact of deference doctrines on judicial behavior, the federal courts of appeals are the more appropriate focus. After all, these circuit courts review the vast majority of statutory interpretations advanced by agencies, and they do so knowing that further review in the Supreme Court is possible. In the largest dataset to date on *Chevron* deference, Kent Barnett and I have coded every published circuit court decision from 2003 through 2013 that refers to *Chevron* deference—for a total of more than 1,300 decisions (and more than 1,500 total agency statutory interpretations under review).⁹⁷

The findings from our study are set forth elsewhere. For present purposes, however, it is worth focusing on one finding regarding the effect of *Chevron* deference in the circuit courts: there is a difference of nearly twenty-five percentage points in agency-win rates when judges decide to apply the *Chevron* deference framework, as compared to when they refuse to do so.⁹⁸ That is to say, at least in the cases reviewed where *Chevron* was referenced in a published opinion, agency interpretations were significantly more likely to prevail under *Chevron* (77.4%) than *Skidmore* (56.0%) or, especially, de novo review (38.5%).⁹⁹ Despite methodological limitations, even these raw-number findings make it hard to argue that *Chevron* deference does not matter in the circuit courts.¹⁰⁰

The findings of these studies—regarding *Chevron*'s influence inside the federal agencies and within the circuit courts—should put to rest the argument that deference doctrines do not matter. What is left is for courts (and perhaps Congress) to figure out what to do with administrative law's deference doc-

96. See Walker, *supra* note 14, at 1062–63. These findings are explored in greater detail in Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703, 715–28 (2014).

97. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 *MICH. L. REV.* 1, 5 (2017).

98. *Id.* at 6.

99. *Id.* at 30 fig.1.

100. Of course, one should be careful not to read too much into these findings, as there are also great differences in agency-win rates by agency, circuit court, and subject matter (and to a lesser degree the type of agency procedure used to create the interpretation). Similarly, there are methodological limitations inherent in this study, as is typical with any coding project, which should counsel caution. See *id.* at 21–27 (discussing methodological limitations).

trines. Litigants and scholars will continue to play an important role in these reform efforts. Whether *Auer* or *Chevron* deference should be shelved, or at least further narrowed, is subject to considerable debate—a debate that will no doubt continue for years.