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## Auer Deference: Doubling Down on Delegation's Defects

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## ARTICLES

### **AUER DEFERENCE: DOUBLING DOWN ON DELEGATION'S DEFECTS**

*Ronald A. Cass\**

*Together with the better-known Chevron deference rule, the doctrine articulated in Auer v. Robbins two decades ago—which makes reasonable administrative constructions of ambiguous administrative rules binding on courts in most circumstances—has become a focal point for concerns about the expanding administrative state. Auer deference, even more than Chevron deference, enlarges administrative authority in ways that are at odds with basic constitutional structures and due process requirements. Objections to Auer have provided cogent reasons for why courts should not grant deference to administrative interpretations merely because an agency's rule is unclear. The most commonly voiced objections, however, do not explain why Congress should be disabled in all instances from granting administrators discretionary authority over rule interpretation—even in settings that do not raise serious risks of partiality or unfair surprise in administrative construction.*

*Examining the relationship between statutorily directed deference and constitutional-structural principles clarifies the essential underlying objection to Auer and the limits of that objection. When Congress by law confers discretionary authority that does not exceed its constitutional power to delegate functions to an administrator, courts should respect that assignment of authority, unless it violates other specific constitutional commands. Yet, when delegations are at most only arguably consistent with the Constitution, extending deference—especially expanding deference as Auer does in successive determinations—exacerbates delegations' difficulties.*

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*A reinvigorated nondelegation doctrine would solve the major Auer problem directly, and elimination of Auer-like deference would clearly be preferable to retaining the doctrine in its current form. Short of that, demanding that the statutory basis for deference is clearly articulated would provide a modest first step in cabinining problems associated with constitutionally questionable delegations of lawmaking authority. Those who embrace the rule of law, whether advocates or opponents of the modern administrative state, should support that step.*

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#### INTRODUCTION

Twenty years ago, the U.S. Supreme Court's decision in *Auer v. Robbins*<sup>1</sup> announced that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"<sup>2</sup> The internal quotation marks traced the *Auer* doctrine back through an earlier citation to the Court's 1945 opinion in *Bowles v. Seminole Rock & Sand Co.*,<sup>3</sup> a relatively obscure decision on a challenge to a detail in the administration of wartime price controls.<sup>4</sup> *Auer* seemed, at the time, a matter-of-fact application of law in a setting that evinced little reason for debate. It was a short, straightforward opinion for a unanimous Court, authored by one of the Court's most universally recognized experts on administrative law: Justice Antonin Scalia.

In the following two decades, however, the consensus behind *Auer* unraveled. Justice Scalia himself became one of the doctrine's most ardent critics, declaring publicly that there was "no good reason" for deference to an agency interpretation of its own rules.<sup>5</sup> He commented privately and publicly that the opinion did not grapple with the weakness of the doctrine it extracted from *Seminole Rock* because no one on the Court at the time thought the doctrine debatable (a problem he attributed more generally to

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1. 519 U.S. 452 (1997).

2. *Id.* at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

3. 325 U.S. 410 (1945).

4. *See generally id.*

5. *See Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

unanimous decisions).<sup>6</sup> Since that admission, several other justices have also openly questioned the doctrine, and the Court limited its application in at least one respect.<sup>7</sup>

The academic community has also generated a growing body of criticism and skepticism about the doctrine. Specifically, critics comment on its evolution from a modest rule for review of price-controls administration, to a general rule of deference to interpretations of agency regulations.<sup>8</sup> Most trenchantly, contemporaneous with *Auer*'s expansion of *Seminole Rock*, Professor (now Dean) John Manning articulated a cogent assault on conflating *Chevron* deference—deference at least nominally based on the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>9</sup>—with deference to an agency's interpretation of its own rules.<sup>10</sup> Professor Manning explained that the settings in which *Chevron* and *Auer* apply have very different implications for separation of powers and due process concerns about deference.<sup>11</sup> Additionally, he explained that *Auer* deference undermines a key due process concept—separating law creation and application.<sup>12</sup>

The challenges to *Auer* deference may not undo the doctrine in the near term. Despite the criticisms, some justices may prefer to maintain avenues for deference to agency decisions, even while retrenching from the stronger forms of deference represented by *Chevron* and *Auer* as once conceived by Justice Scalia.<sup>13</sup>

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6. See, e.g., *Decker*, 568 U.S. at 616–21 (“Our cases have not put forward a persuasive justification for *Auer* deference. The first case to apply it, *Seminole Rock*, offered no justification whatever . . .”).

7. See, e.g., *Mortg. Bankers*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); *Decker*, 568 U.S. at 615–16 (Roberts, C.J., concurring); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–59 (2012).

8. See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 924–27 (2017); Michael P. Healy, *The Past, Present, and Future of Auer Deference: Mead, Form, and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 644 (2014); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 68–99 (2015); Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 953–55 (2017) [hereinafter Nielson, *Beyond*]; see also Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 105–10 (2018); Aaron Nielson, *Reflections on Seminole Rock: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, NOTICE & COMMENT (Sept. 12, 2016), <http://yalejreg.com/nc/reflections-on-seminole-rock-the-past-present-and-future-of-deference-to-agency-regulatory-interpretations/> [https://perma.cc/Z8Z4-QLEJ].

9. 467 U.S. 837 (1984).

10. See generally John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

11. See *id.* at 638–54. Because *Auer* had yet to be decided when Professor Manning wrote his article, he referred to *Seminole Rock* deference, not *Auer* deference. Text references to *Auer* deference in describing his work are for consistency with the rest of this Article.

12. See *id.*; see also *id.* at 669–74.

13. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 238 (2001). Justice Scalia's view of *Chevron* deference, as well as of *Auer* deference, changed over time as he recognized that his defense of it as deference to reasonable agency determinations within the scope of law-bound agency discretion (as interpreted by courts) did not represent the dominant,

Nonetheless, the doctrine should be rejected. The argument made by Professor Manning highlights one legal-structural problem with *Auer*.<sup>14</sup> Professor Manning's work, along with other scholarship and commentary from Supreme Court justices, also points to potential strategic concerns with *Auer*—ways in which administrators might consciously expand their own authority through less clear rules expecting that they will receive deference to their subsequent interpretations.<sup>15</sup> Reflections on *Auer*'s impact also point to considerations, such as the absence of “fair warning,”<sup>16</sup> that intersect with both due process and strategic-action critiques.<sup>17</sup>

The best reason for abandoning the doctrine, however, is not either of the principal arguments already suggested by scholars and justices disaffected with *Auer*. Instead, deference to agency interpretations of agency rules should be seen as problematic in settings where the agency's authority itself is problematic for reasons directly related to questions about how that authority fits specific statutory instructions and, more generally, the underlying constitutional structure. The set of considerations associated with concerns over the sort of authority delegated to administrators holds the key to understanding *Auer*'s difficulty. Finding grounds to believe that administrators actually enjoy statutory discretion to both adopt rules and interpret them is the starting point. More often, the problem lies in the nature of the statutory delegation. Simply put, in settings that do not involve questionable delegations of authority, deference is defensible (even when not preferable)—but where agency authority exceeds or at least strains constitutional-structural limits, deference has particularly pernicious effects.

At times, agency authority is clearly within the bounds of executive power, and the rules being interpreted and applied make the sorts of technical or managerial judgments that appropriately are left to administrators.<sup>18</sup> In those

consistent approach taken by the courts. See, e.g., Ronald A. Cass, *Administrative Law in Nino's Wake: The Scalia Effect on Method and Doctrine*, 32 J.L. & POL. 277, 287–90 (2017).

14. See Manning, *supra* note 10, at 631–54 (discussing the legal-structural problem that was established in *Seminole Rock* “[b]y permitting agencies both to write regulations and to construe them authoritatively”); see also *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (“It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.”).

15. See, e.g., Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 11–12 (1996); Nielson, *Beyond*, *supra* note 8 at 953–57; see also *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (“[F]or an agency to issue vague regulations . . . maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.”).

16. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012).

17. See, e.g., *id.* at 155–57; *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring); Anthony, *supra* note 15, at 11–12; Manning, *supra* note 10, at 647–48, 655–57; Nielson, *Beyond*, *supra* note 8, at 954; Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1485–86 (2011).

18. In fact, that has been a principal argument in favor of deference to agency determinations cast as interpretations of law, but probably better characterized as decisions on matters for which the law prescribes administrative discretion. See, e.g., *Thomas Jefferson Univ.*, 512 U.S. at 512; *Pauley v. BethEnergy Mines*, 501 U.S. 680, 697 (1991). See generally, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV.

settings, deference to the agency's interpretation of its own rule may well make sense. The agency, after all, possesses expertise on such matters and presumably will better understand and articulate the meaning of a rule that may be less clear to judges. This vision of deference conforms to the understanding supporting *Seminole Rock*.<sup>19</sup>

Other times, agency authority is difficult to square with a robust vision of constitutionally separated powers, where Congress must, through constitutionally prescribed lawmaking processes, make the judgments on critical issues.<sup>20</sup> In those settings, administrative decision-making, unless carefully cabined, at best stretches, and more likely breaks, the separation of powers embedded in the Constitution.<sup>21</sup> Where that is the case, allowing administrators not only to write the rules, but also to receive deference when interpreting them, significantly expands a questionable power. Interpretive deference inevitably accords scope for administrators to reinterpret and revise the rules.<sup>22</sup> Arguments for expertise, efficiency, or predictability must be viewed differently—and a great deal more skeptically—in such settings. *Auer* serves, in this context, to magnify problems created by a nonworking nondelegation doctrine. Reinvigorating that doctrine would be beneficial, but replacing *Auer* with a more thoughtful approach to deference is an essential first step.

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549 (1985); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987).

19. See, e.g., Knudsen & Wildermuth, *supra* note 8, at 55–63.

20. See, e.g., Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 141–61 (2016); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002). See generally, e.g., Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985) [hereinafter Schoenbrod, *Substance*]; David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987) [hereinafter Schoenbrod, *Separation of Powers*].

21. See, e.g., Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1042–43 (2007) [hereinafter Alexander & Prakash, *Running Riot*]; Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1311–12 (2003); Cass, *supra* note 20, at 177; Lawson, *supra* note 20, at 343–53; Schoenbrod, *Separation of Powers*, *supra* note 20, at 378–79.

22. Post-*Auer* decisions have somewhat reduced the scope for such revisionist authority. See generally *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). Scholarly commentary has suggested other amendments to *Auer* that could further limit that authority. See, e.g., Healy, *supra* note 8, at 677–93; Nielson, *Beyond*, *supra* note 8, at 989–1001; Stephenson & Pogoriler, *supra* note 17, at 1466–1503; Walker, *supra* note 8, at 107–10; Derek A. Woodman, *Rethinking Auer Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721, 1746–48 (2014). As discussed *infra*, however, deference to agency rule interpretation predicated on *Auer* necessarily accords a degree of additional authority at odds with the sort of concerns articulated by those qualifications of the *Auer* doctrine.

I. BASICS OF DEFERENCE: APA TO *CHEVRON*

Understanding the need to replace *Auer* with a more thoughtful approach to deference begins with understanding the place of discretion and its corollary, deference, in our basic statutory framework for administrative process and review of administrative actions—the Administrative Procedure Act (APA)—and the concepts of governance it incorporates. That framework, along with the Supreme Court’s attempt in *Chevron* to articulate better when deference is appropriate, is the focus of this Part.

## A. Law Interpretation and Policy Discretion

The APA, which both codified and organized prior precedents on judicial review, states that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”<sup>23</sup> The Act goes on to specify that the court will “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>24</sup>

These provisions plainly make judges the decision makers on questions of law—all questions of law—that are properly brought before them for review. That much should be common ground to any discussion of judicial review of administrative actions.<sup>25</sup> For interpretations of law, there is no mention of judicial deference to administrators or anyone else in the APA’s direction, either on the meaning of statutory provisions or on the “meaning or applicability of the terms of an agency action,”<sup>26</sup> a phrase that unequivocally includes agency rules.<sup>27</sup> However, the APA also makes two other matters clear that provide grist for a host of arguments about what constitutes a question of law and about what questions are properly before courts for review.

First, while courts determine the meaning of statutes and give instruction to the agencies on the law’s boundaries around the agencies’ authorized sphere of action, the APA contemplates that there are matters on which the law grants administrators discretion.<sup>28</sup> Exercises of discretion are generally

23. 5 U.S.C. § 706 (2012).

24. *Id.* § 706(2)(A).

25. See, e.g., Bamzai, *supra* note 8, at 989–90; Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron’s Step Two*, 2 ADMIN. L.J. AM. U. 255, 262–63, 266–67 (1988); 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, 57–58 (Dean Reuter & John Yoo eds., 2016); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 472–73 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187–90 (1992); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–14.

26. 5 U.S.C. § 706.

27. *Id.* § 551(13) (“‘[A]gency action’ includes the whole or a part of an agency rule . . .”).

28. *Id.* §§ 701(a)(2), 706(2); see also *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory*



reviewable, but only for certain defects of reasoning or process, rather than for simple mistakes in judgment. The basic rule of deference to administrative judgments on matters of discretion is encapsulated in the provision for reviewing courts to set aside agency decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>29</sup>

Second, the scope of the courts’ authority to review—and, thus, necessarily, to make decisions on the meaning of legal instructions and the consistency of agency actions with them—is also limited by the law’s commitment of discretion to an agency. The introductory language to the APA’s chapter on judicial review states that “[t]his chapter applies . . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”<sup>30</sup> Statutory *preclusion* of judicial review necessarily excepts from review all matters of administrative discretion.<sup>31</sup> *Commitment* of a matter to agency discretion gives administrators a zone of unreviewable discretion for a subset of determinations otherwise subject to judicial scrutiny under the APA.<sup>32</sup>

### B. Discretion: Reviewable and Not

Understanding just where the line is between what courts can review and what falls within administrators’ unreviewable discretion—and how to think about those issues—is important and has a fairly clear logic within the text of the law. The understanding starts with the way the APA’s two references to review of agency discretionary decision-making fit together.

#### 1. Ordinary Discretion

The instructions in APA section 701 on the applicability of the provisions on judicial review and section 706 on the specific standards to be employed in judicial review describe two sides of the same coin with respect to agency discretion and judicial authority.<sup>33</sup> When matters are properly before them, courts pronounce the meaning of law but do not intrude on matters of implementation given to agency discretion. That is the reason that section 701 makes the review chapter applicable “*except to the extent that . . . agency action is committed to agency discretion by law.*”<sup>34</sup> The emphasized wording is plainly different from a statement that review is unavailable *whenever*

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*Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 47–50, 52–55 (2016) (statement of George Shepherd, Professor, Emory University School of Law); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1488–89 (1982).

29. 5 U.S.C. § 706(2).

30. *Id.* § 701(a).

31. *See, e.g.*, Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 495–502 (1986).

32. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 599–601 (1988); Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

33. *See* 5 U.S.C. §§ 701(a), 706(2).

34. *Id.* § 701(a)(2) (emphasis added).

agency action is committed to agency discretion; the law does not employ that wording or other, similar language indicating that *any* degree of discretion, large or small, ousts courts of review authority.

The sense of the APA's phrasing is that whatever discretion the law gives to the agency lies outside the purview of judicial second-guessing, but most discretionary authority coexists with review of some dimension. So, for example, the Federal Communications Act's assignment of broad authority to the Federal Communications Commission (FCC), to allocate the radio spectrum to different broadcasting outlets and to select licensees to operate them,<sup>35</sup> obviously is not unlimited. It would not encompass preferences for commissioners' relatives or failure to accord statutorily prescribed hearing rights to applicants.<sup>36</sup> This was accepted law before the APA and comports with section 706's directive for courts to set aside actions that constitute an abuse of discretion—agency discretion generally permits action up to (but *only* up to) the limits set by governing legal instructions and in many settings also by notions of reasonableness and procedural regularity.

## 2. Discretion Beyond Review

At times, however, the level of decision-making discretion given to agencies does not allow for any meaningful judicial review. Imagine, for example, that the director of the Central Intelligence Agency (CIA) is given clear discretion by law to decide which agents to send on particular assignments. Permitting judicial review of the director's decisions would inevitably undermine his authority as director and potentially compromise CIA operations. Claims that he routinely gave the worst, most dangerous assignments to evangelical Christians—or Jews or Muslims or Asian Americans—could not be brought into court without compromising control over agency functioning, which is exactly the opposite of what the commitment of discretion to the director was designed to accomplish. As bad as those sorts of discrimination are, the choice the law makes is to live with the risk of that occurring (or to address it through avenues other than the courts) rather than chance undermining the CIA's core functions.

The example above is analogous to allowing players to challenge a football coach's decisions on who should be the primary receiver on a passing play or who should be a starting player in a given game. While a coach can make mistakes and even give sway to indefensible prejudices, providing avenues for challenging such decisions inevitably undermines the coach's authority. That is not to say there is no recourse for bad decisions by the coach. A pattern of bad decisions (or even an especially significant single bad decision) based on personal, religious, racial, or other biases rather than reasoned judgment on players' merits would harm team performance and, of course, could provide ground for the team's management to replace the

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35. 47 U.S.C. § 307 (2012); *see also* FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).

36. *See, e.g.*, Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945).

coach. In fact, management could replace the coach simply because it deems the coach's decisions inappropriate or based on biases that management does not endorse or accept. But reviewing each decision to assess its basis is incompatible with vesting authority in the coach.

Similarly, bad management by the CIA director would provide reason for the president to replace the director. But the notion of judicial review coexisting with discretion in the director's decisions on how to deploy his personnel—just like review of coaching decisions on use of players—is unreasonable. That is why APA section 701 supposes that there are some decisions for which the extent of discretion given by law effectively prevents review.<sup>37</sup>

The Supreme Court's decision in *Webster v. Doe*,<sup>38</sup> in a factual setting close to the CIA hypothetical above, takes up the scope of section 701's exception for decisions committed to agency discretion by law.<sup>39</sup> Section 102(c) of the National Security Act of 1947 states that "the Director of Central Intelligence may, in the discretion of the Director, terminate the employment of any officer or employee of the Central Intelligence Agency whenever the Director deems the termination of employment of such officer or employee necessary or advisable in the interests of the United States."<sup>40</sup> A "covert electronics technician"<sup>41</sup> employed by the CIA was terminated on the ground that his "homosexuality posed a threat to security."<sup>42</sup> The nature of the threat was not disclosed to the employee or during subsequent litigation, which asserted, among other things, violations of the plaintiff's constitutional rights.<sup>43</sup>

The majority declared that the statute's language "fairly exudes deference to the Director, and appears . . . to foreclose the application of any meaningful judicial standard of review."<sup>44</sup> It added, "[t]he language of § 102(c) thus strongly suggests that its implementation was 'committed to agency discretion by law'"<sup>45</sup> and also observed that "assessment [of whether a termination protects the interests of the United States] is the Director's alone."<sup>46</sup> The majority repeated that "the section does commit employment termination decisions to the Director's discretion, and precludes challenges to these decisions based upon the statutory language of § 102(c)."<sup>47</sup> Yet, the majority also decided that the law permits "consideration of colorable constitutional claims arising out of the actions of the Director pursuant to

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37. See, e.g., Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 368 (1968).

38. 486 U.S. 592 (1988).

39. See generally *id.*

40. 50 U.S.C. § 3036(e)(1) (2012).

41. *Webster v. Doe*, 486 U.S. at 594.

42. *Id.* at 595.

43. *Id.* at 596.

44. *Id.* at 600.

45. *Id.*

46. *Id.* at 603.

47. *Id.*

[§ 102(c)]”<sup>48</sup> because those claims are not to be presumed barred without a “heightened showing”<sup>49</sup> of legislative intent to do that.<sup>50</sup>

Justice Sandra Day O’Connor and Justice Scalia agreed that the termination decision is committed to the director’s discretion, and his alone, but dissented from the conclusion that it could still be subject to review for possible constitutional defect.<sup>51</sup> Justice O’Connor observed that the protection of national security lies at the core of executive responsibility and the commitment of discretion to the executive branch in such matters is consistent with constitutional design and historical practice.<sup>52</sup>

Even more than Justice O’Connor, Justice Scalia framed the matter in terms of the division between discretion that is made unreviewable by APA section 701(a)(2) and other discretion (what might be termed “ordinary” discretion).<sup>53</sup> He explained that section 701(a)(2) covers “discretion . . . of the sort that is traditionally unreviewable” and “operates to keep certain categories of agency action out of the courts; but when agency action is appropriately in the courts, abuse of discretion is of course grounds for reversal.”<sup>54</sup> In addition to the sort of security-related judgments presented in the legislation at issue in *Webster v. Doe*, the category of unreviewable discretion encompasses judgments assigned to prosecutorial discretion. These include prosecution-like regulatory enforcement, such as the discretion recognized in *Heckler v. Chaney*,<sup>55</sup> which rejected as unreviewable a challenge to the Food and Drug Administration’s (FDA) failure to bring enforcement actions against allegedly unauthorized uses of FDA-approved drugs.<sup>56</sup>

Scalia’s *Webster v. Doe* dissent explained that the difference between the phrasing of the first provision of APA section 701(a) (“*statutes preclude* judicial review”) and the second provision (“*committed* to agency discretion *by law*”) reflects the broader set of legal rules that insulate certain decisions from review in the latter setting.<sup>57</sup> In essence, his argument is that the structure of government and of historically accepted roles for executive and other officials place certain decisions squarely in executive hands and, hence, without clear statutory instruction to the contrary, off-limits to courts.<sup>58</sup>

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48. *Id.*

49. *Id.*

50. *Id.* at 603–04.

51. *Id.* at 605–06 (O’Connor, J., concurring in part and dissenting in part); *id.* at 606–10 (Scalia, J., dissenting).

52. *Id.* at 605–06 (O’Connor, J., concurring in part and dissenting in part).

53. *Id.* at 606–10 (Scalia, J., dissenting).

54. *Id.* at 610.

55. 470 U.S. 821 (1985).

56. *Id.* at 837–38; see *Webster v. Doe*, 486 U.S. at 608–10 (Scalia, J., dissenting).

57. *Webster v. Doe*, 486 U.S. at 608–10 (Scalia, J., dissenting).

58. See *id.*

C. Chevron: *Discretion's Sounds of Silence*

Although the Supreme Court's decision in *Chevron* has spawned a voluminous literature,<sup>59</sup> the decision as conceived and understood at the time was entirely in line with the approaches embraced in the APA.<sup>60</sup> Further, even though *Chevron* predates those approaches, it was also consistent with the approaches taken in *Chaney* and in the O'Connor and Scalia dissents in *Webster v. Doe*. *Chevron* concerned the Environmental Protection Agency's (EPA) implementation of section 172(b)(6) of the Clean Air Act Amendments of 1977.<sup>61</sup> That provision required states that failed to meet national air quality standards ("nonattainment" states) to set up permit programs to regulate emissions from "new or modified major stationary sources" of pollution.<sup>62</sup> The EPA adopted a rule that permitted states to treat "pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble.'"<sup>63</sup> For example, it would allow states to implement section 172(b)(6)'s mandate by treating all smokestacks on a single factory property as one "stationary source" for purposes of regulation.<sup>64</sup>

The Natural Resources Defense Council (NRDC) challenged the EPA's rule as contrary to the meaning of the law's requirement to regulate emissions from "stationary sources" and asserted that each individual smokestack had to be regulated independently.<sup>65</sup> The Supreme Court, reversing the U.S. Court of Appeals for the D.C. Circuit, upheld the EPA rule as a reasonable policy judgment on a matter within its authority under a complex statutory scheme that did not explicitly define the meaning of "stationary source."<sup>66</sup> The Court emphasized that the dispute over the "bubble concept" was in reality a debate over policy, concluding:

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the

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59. In fact, *Chevron* is the most cited and most discussed decision in administrative law. See, e.g., 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, 782 (2010); Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 2 (2013); Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. REV. 551, 552–53 (2012); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143, 1144 n.1 (2012).

60. See, e.g., Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398, 398–402 (Peter L. Strauss ed., 2006). *Chevron* actually was not decided under the APA, but instead under a provision of the Clean Air Act that repeated—almost verbatim—the relevant scope-of-review language from APA section 706.

61. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

62. *Id.*

63. *Id.*

64. *Id.* at 846–47.

65. *Id.* at 859–60.

66. *Id.* at 859–66.

32 jurisdictions opting for the “bubble concept,” but one which was never waged in the Congress.<sup>67</sup>

The Court went on, “[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’”<sup>68</sup>

Before upholding the EPA’s “bubble concept” as a proper exercise of policymaking authority, however, the Court had to establish that the EPA possessed the discretion to make that policy choice.<sup>69</sup> Although some provisions in the Clean Air Act speak expressly to the agency’s discretionary authority,<sup>70</sup> the language respecting permit programs in “nonattainment” states did not. Recognizing that, the Court made plain in *Chevron* what it had decided in other cases: that statutory silence or ambiguity could indicate a commitment of authority to an agency charged with implementing the statutory scheme.<sup>71</sup> *Chevron*’s famous two-step test—asking, first, if the law spoke to the precise question at issue (decided by the courts using “traditional tools of statutory construction”)<sup>72</sup> and, second, if not, whether the agency decision fits within a reasonable construction of the law<sup>73</sup>—simply recapitulates the understanding encapsulated in the APA, that the courts construe the law, decide how far the law grants discretion to agency policymaking, and check reviewable exercises of discretion by agencies only for reasonableness.<sup>74</sup>

The basic message of *Chevron*, thus, was neither novel nor in tension with prior law.<sup>75</sup> It merely held that when the law gives discretion to an executive

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67. *Id.* at 864.

68. *Id.* at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

69. *Id.* at 843–45.

70. For discussion of one example, see generally Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. BRIEF 75 (2007).

71. *Chevron*, 467 U.S. at 862, 865.

72. *Id.* at 843 n.9.

73. *Id.* at 842–44.

74. See, e.g., Cass, *supra* note 25, at 58; Scalia, *supra* note 25, at 516. There are many reasoned arguments against *Chevron* deference. See, e.g., Byse, *supra* note 25, at 260–61. See generally, e.g., Beermann, *supra* note 59; Cass, *supra* note 25; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–211 (1998); Farina, *supra* note 25; Herz, *supra* note 25. These arguments are almost invariably predicated on applications of *Chevron* that are in tension with its emphasis on courts as ultimate decision makers on statutes’ meaning or on the infelicitous phrasing in parts of the *Chevron* opinion that permitted such applications. See generally Cass, *supra* note 25 (discussing misconceived applications of *Chevron*).

75. See, e.g., *id.* at 57–58; Lawson & Kam, *supra* note 59, at 33; Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 833–34 (2001); Merrill, *supra* note 60, at 400; Strauss, *supra* note 59, at 1161–63. Some arguments promote the idea that *Chevron* can be seen as taking a positive step by clarifying the understanding that laws can commit discretion to agencies by implication and, yet, appropriately circumscribing deference. See, e.g., Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1257–58 (1997); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 310–12 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986).

official, judges should give deference to the official's exercise of that discretion up to its legal limits.<sup>76</sup> As the Court put the point later:

We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.<sup>77</sup>

The sense of this position should be evident if one looks, for example, at the Communications Act of 1934's directive to the FCC to allocate radio licenses as "the public convenience, interest, or necessity" requires.<sup>78</sup> The law does not use the words "in its discretion" nor did it need to—the grant of discretion was clear from the structure of the law (assigning the FCC wide-ranging authority over spectrum allocation and licensing) and the broad language of the statutory directive.<sup>79</sup> As already noted, that implicit grant of discretion was not unlimited, and *Chevron*, consistent with decisions stretching back before the APA,<sup>80</sup> would recognize both the statutory terms' implicit grant of discretion and the law's implicit limitations on the agency's discretion.<sup>81</sup>

## II. AGENCY RULE INTERPRETATION: *AUER*'S WRONG TURN

Understood as a commonsense canon of statutory construction, *Chevron*—in keeping with the APA's approach to deference and the Supreme Court's elucidation of that approach in cases like *Chaney* and, more clearly, Justice Scalia's *Webster v. Doe* dissent—reflects an appreciation that the root concepts underlying reviewability and review standards are separation-of-powers considerations.<sup>82</sup> While courts interpret the laws as needed to resolve disputes properly before them, they respect the power over implementation of the laws assigned to agencies by Congress. Deference follows delegation.<sup>83</sup>

76. See, e.g., Cass, *supra* note 25, at 57–58; Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1314 (2015); Scalia, *supra* note 25, at 516.

77. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996).

78. See, e.g., 47 U.S.C. § 307(a) (2012).

79. See, e.g., *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214–17, 224 (1943); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940); Cass, *supra* note 25, at 58.

80. See generally, e.g., *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1943); *Gray v. Powell*, 314 U.S. 402 (1941); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933).

81. See, e.g., Cass, *supra* note 25, at 58; Lawson & Kam, *supra* note 59, at 33; Merrill, *supra* note 60, at 400.

82. See, e.g., Cass, *supra* note 25, at 57; Cass, *supra* note 76, at 1302–03; Scalia, *supra* note 25, at 515; see also 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, 1098–120 (2008) (explaining seven levels of deference, keyed primarily to statutory and constitutional delegations of authority).

83. See, e.g., Cass, *supra* note 25, at 58; Cass, *supra* note 76, at 1314–15; Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the*

The Court's decision in *Auer*, however, is a striking departure from that understanding. It is especially striking given that the decision's author, Justice Scalia, was one of the Court's strongest and clearest exponents of bedrock separation-of-powers concepts.<sup>84</sup> Further, the case *Auer* purports to follow, *Seminole Rock*, can be squared with those concepts in ways *Auer* cannot. Even the case through which *Auer* traces its *Seminole Rock* quote, *Robertson v. Methow Valley Citizens Council*,<sup>85</sup> provides little help. In the end, *Auer* is best seen as announcing a rule that is poorly explained and is an unnecessary departure from prior law.

#### A. Right Start, Wrong Turn: Switching Auer

Justice Oliver Wendell Holmes Jr. famously opined (in a case he thought was not so hard) that “hard cases make bad law.”<sup>86</sup> In administrative law, however, easy cases repeatedly have been vehicles for announcements of bad law.<sup>87</sup> The *Auer* decision and the cases it leaned on for support are examples.

##### 1. Simply Chevron

The plaintiffs in *Auer*, St. Louis police sergeants and a lieutenant, sued for overtime pay allegedly due under terms of the Fair Labor Standards Act (FLSA).<sup>88</sup> The Act's overtime pay provisions exempt employees who hold “executive, administrative, or professional” positions,<sup>89</sup> and the Secretary of Labor had issued regulations specifying that this exemption applied to employees who, among other things, were paid a certain amount on a “salary basis.”<sup>90</sup> The regulations also explained that payment on a “salary basis” required set compensation that was not subject to reduction (within a certain time period) “because of variations in the quality or quantity of work performed.”<sup>91</sup>

The primary arguments in *Auer* concerned whether the plaintiffs fit the definition of “executive, administrative, or professional” employees and

*Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 742–43 (2002); Manning, *supra* note 10, at 623; Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25–27 (1983); Robert Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 106–07 (1944), cited in Monaghan, *supra*, at 27.

84. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 417–22 (1989) (Scalia, J., dissenting); *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting); Cass, *supra* note 13, at 279–88.

85. 490 U.S. 332 (1989).

86. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). For a broad explanation of the uneasy fit between facts and principles, see generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

87. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (misapplying the “major questions” canon of *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000)); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153–56 (1970) (misreading APA section 702 to create a new “zone of interests” test for standing to sue).

88. *Auer v. Robbins*, 519 U.S. 452, 455 (1997).

89. 29 U.S.C. § 213(a)(1) (2012); see also *Auer*, 519 U.S. at 454.

90. *Auer*, 519 U.S. at 455.

91. *Id.*



whether they were subject to reductions in pay because they could suffer pay deductions under disciplinary rules dealing with various regulatory infractions.<sup>92</sup> Plaintiffs also argued that the Secretary's rules should not apply—at least not in the same way—to public sector employees, by specifically asserting that the “no disciplinary deductions” aspect of the salary-basis rule cannot reasonably apply in the public sector.<sup>93</sup>

At the outset, the Court recounted that “[t]he FLSA grants the Secretary broad authority to ‘defin[e] and delimit’ the scope of the exemption for executive, administrative, and professional employees.”<sup>94</sup> It then observed that the FLSA does not provide specific direction on the question presented and that it was reasonable for the Secretary to have concluded that the same rule can apply to public sector employees as to private sector employees.<sup>95</sup>

So far, the *Auer* Court was engaged in straightforward application of the *Chevron* test in a context in which the law was consistent with the grant of significant policy-implementation authority to the Secretary of Labor. Despite language sounding as if the question were one of statutory interpretation, the Court effectively recognized only the administrative discretion to give effect to the general legal directive embodied in the FLSA.

## 2. Reasonable Construction, Unreasoned Deference

The next segment of the Court's decision, however, in which it turned to application of the Secretary's salary-basis regulation to the St. Louis police officers, took a decidedly wrong turn. The question was whether being “subject to” salary reductions for discipline required regular imposition of such deductions on similar employees or only the possibility of their imposition under the employees' terms of employment.<sup>96</sup> That question had divided the courts of appeals, and the Supreme Court had asked the Secretary of Labor (who was not a party to the litigation between the police officers and the St. Louis Board of Police Commissioners) to submit an amicus brief explaining his view.<sup>97</sup> The Secretary's brief stated that the regulation applied only when disciplinary deductions from employees' salaries were “significantly likely” to be imposed on the employees at issue, and the Court found that reading consistent with dictionary meanings of “subject to” as well as the logic of the regulation.<sup>98</sup>

The problem with *Auer* was not its acceptance of the Secretary's reading as a proper interpretation of the regulation; on its face, it is a reasonable—probably the most reasonable—reading of the rule. The Court erred, however, in framing acceptance of that reading as a matter of deference. In the Court's words: “Because the salary-basis test is a creature of the

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92. *Id.*

93. *Id.* at 457.

94. *Id.* at 456 (second and third alterations in original) (quoting 29 U.S.C. § 213 (a)(1)).

95. *Id.* at 457–58.

96. *Id.* at 459–60.

97. *Id.* at 460–61.

98. *Id.* at 461–62.

Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "plainly erroneous or inconsistent with the regulation." That deferential standard is easily met here.<sup>99</sup> Having explained clearly just two years earlier that *Chevron* deference follows from legal delegation of discretion—and *only* so far as that discretion reaches<sup>100</sup>—and then having applied that understanding in the first part of its opinion in *Auer*, one might have thought that the Court would have asked whether the FLSA granted discretion to the Secretary that extended far enough to cover his interpretation of this regulation.

In other words, the justices could have asked directly what the parameters of the Secretary's discretion were beyond those necessary to apply *Chevron*: what discretion did the law give the Secretary not only to *adopt* rules implementing the statute and to *revise* rules if he thought a different regulation better advanced relevant policy goals,<sup>101</sup> but also to *interpret* regulations already adopted? The Court's opinion instead treats the matter as if it is disposed of by the regime of deference to agency rule interpretation set out in two prior cases, and it articulates a broader deference principle than applies under *Chevron*—and much broader than the terms of the APA.

### B. Unforced Errors: *Seminole Rock* and *Robertson*<sup>102</sup>

Before examining the problem with this approach, it is worth looking at the two cases cited by the *Auer* Court, *Seminole Rock* and *Robertson*. As explained below, while those cases did lay out the test repeated in *Auer*, they did not implement it or provide a reasonable basis for it.<sup>103</sup>

#### 1. *Seminole Rock*'s Pricing Problem

*Seminole Rock* concerned the interpretation of a regulation adopted by the Administrator of the Office of Price Administration (OPA) under the Price Control Act of 1942.<sup>104</sup> In keeping with the Act, the Administrator adopted a general price control regulation as well as regulations for specific products and industries. The specific regulation challenged in *Seminole Rock* was Maximum Price Regulation No. 188.<sup>105</sup> The regulation mandated a price "freeze" on building products and pegged maximum prices to those charged

99. *Id.* at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

100. *See Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1995).

101. Respecting revision of rules as part of the *Chevron* framework, see, for example, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (explaining that the FCC's choice among policies is discretionary and survives judicial affirmance of a different discretionary—not legally mandated—choice).

102. This section draws on Brief of Professors—Dean Ronald A. Cass et al.—as *Amici Curiae* in Support of Petitioner, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273) [hereinafter Professors' Brief].

103. *See infra* Parts II.B.1–4.

104. The basic framework for the Act is set out in *Seminole Rock*, 325 U.S. at 413–16. *See also* Knudsen & Wildermuth, *supra* note 8, at 55–59; Helen B. Norem, *The "Official Interpretation" of Administrative Regulations*, 32 IOWA L. REV. 697, 701–10 (1947).

105. *Seminole Rock*, 325 U.S. at 411; 7 Fed. Reg. 5872, 7967, 8943 (July 30, 1942).

by the seller in March 1942.<sup>106</sup> The regulation also gave three alternative methods for calculating prices charged in that month and set the order in which those methods should be utilized (starting with a preferred methodology with the other methods only used, in the order listed, if facts necessary for the preferred, higher-listed approach or approaches were not present).<sup>107</sup>

The OPA determined that a contract entered into by Seminole Rock for a sale of crushed stone to a government contractor violated Regulation No. 188 and sought enforcement of the regulation in district court.<sup>108</sup> The specific question posed by the sale was whether the correct maximum price under the regulation was fixed by a prior contract entered into in October 1941 or by one entered into in January 1942.<sup>109</sup> The actual delivery dates for such contracts vary depending on the buyer's need for the stone (used primarily for making concrete), and Seminole Rock made a delivery under the earlier contract in March 1942 while its delivery under the later contract was delayed until August.<sup>110</sup> OPA read its regulation as fixing the correct price as that set in the October 1941 contract in light of its actual delivery date.<sup>111</sup> Seminole Rock argued that the regulation's first-listed methodology required both a charge and delivery during March 1942 (not a much earlier contract and later delivery); without that, OPA should have used the second-listed methodology under which the price that should control was the (far-higher) price set in the January 1942 contract.<sup>112</sup> Both the district court and court of appeals agreed with Seminole Rock.<sup>113</sup>

## 2. Reading Regulations—Construction's Traditional Tools

The Supreme Court disagreed with the lower courts. In explaining the basis for its different conclusion, the Court repeatedly emphasized its own reading of the regulation at issue. It stated, for example, “[a]s we read the regulation . . . rule (i) clearly applies to the facts of this case,”<sup>114</sup> and “[o]ur reading of the language of . . . Maximum Price Regulation No. 188 and the consistent administrative interpretation of the phrase ‘highest price charged during March, 1942’ . . . compel the conclusion” respecting the meaning of the rule.<sup>115</sup> Professor Aditya Bamzai reports that the original draft of the opinion declared that the Court's reading was “compelled” by the “plain

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106. *See Seminole Rock*, 325 U.S. at 413.

107. *See id.* at 414–15.

108. *See id.* at 412–13.

109. *See id.*

110. *See id.* at 412.

111. *See id.* at 415.

112. *See id.*

113. *See id.* at 412–13.

114. *See id.* at 415 (emphasis added).

115. *Id.* at 418 (emphasis added) (footnote omitted).

words” of the regulation, an even more clearly nondeferential statement than appeared in the Court’s published opinion.<sup>116</sup>

If any reasonable administrative construction sufficed, as the opinion asserts in passing (in the quotation that became the *Auer* test), the Court would not have needed to emphasize that construction’s accord with the Court’s own interpretation of the rule—much less present its interpretation before any discussion of reasons to credit the agency’s reading. In a very short opinion that is noted for its articulation of a principle of judicial deference, the number of statements indicating that the Court is construing the regulation directly, not deferentially, is striking.<sup>117</sup> To be sure, the Court did specifically note the fact that its reading of the regulation was the same as the agency’s reading and that the agency had construed the regulation consistently in this manner.<sup>118</sup> But these observations seem less prerequisites to the Court’s decision than window dressing to its independent reading of the rule.<sup>119</sup>

Basing the decision on its own reading of the regulation, just as it would a decision on the meaning of a law, also fit the arguments made by the agency. Professor Bamzai recounts that the brief filed for OPA by Henry Hart (working at OPA on leave from his teaching post) urged that the Court should construe the rule like it would a statute and should look to the intention of the rule’s author—in this case, the agency.<sup>120</sup> Hart argued that this was also a reason for deference, as the Administrator of OPA would have special insight on the intent of the rule.<sup>121</sup>

More tellingly, Hart’s special plea was that the construction of the rule urged by the agency fit with extrinsic evidence that this was the *correct* interpretation, and he noted that this construction was not advanced for the first time in litigation but instead had been followed by the agency consistently since the regulation’s adoption.<sup>122</sup> That provided evidence of the agency’s understanding of the rule and at least inferential evidence of what those subject to the rule would have understood it to mean (assuming that they had access to the agency’s interpretation).

### 3. Deference Defended: *Seminole Rock*’s Special Case

On this last point, *Seminole Rock* presents the most compelling factual basis for deference: as the Court’s decision relates, OPA had not only adopted its reading of the rule contemporaneously with the rule’s

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116. See Aditya Bamzai, *Henry Hart’s Brief, Frank Murphy’s Draft, and the Seminole Rock Opinion*, NOTICE & COMMENT (Sept. 12, 2016), <http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/> [<https://perma.cc/CLR4-DTWQ>].

117. See, e.g., Healy, *supra* note 8, at 639; Knudsen & Wildermuth, *supra* note 8, at 60; Manning, *supra* note 10, at 619; Stephenson & Pogoriler, *supra* note 17, at 1454.

118. *Seminole Rock*, 325 U.S. at 418.

119. See, e.g., Healy, *supra* note 8, at 639.

120. See Bamzai, *supra* note 116.

121. See *id.*

122. See *id.*

promulgation, it had announced and publicly disseminated its interpretation at the same time and in the same place as its public notifications about the underlying rule.<sup>123</sup> This is the functional equivalent of having made the agency interpretation part of the rule itself. Viewed in this way, reliance on the agency's interpretation simply gives effect to the rule as adopted. At that point, any question of agency authority collapses into the inquiry encapsulated in the APA and original *Chevron*: Was the rule within the scope of the agency's authority under law?

*Seminole Rock*'s peculiar context offers reasons why the Court may have been willing to defer to OPA's interpretation. First, the case arose during wartime and the decision at issue was part of a wartime measure to constrain prices. Historically, government actions linked to engagement in war have received greater deference—at least while the war is ongoing—than peacetime measures.<sup>124</sup> Second, deference to administrative interpretations of price-control rules often was seen as constraining, rather than expanding, administrative authority, as judicial adoption of prior constructions of a rule served to bind the agency in future applications.<sup>125</sup>

These factors could help explain the Court's uncritical acceptance of a broadly stated rule of deference. However, the overwhelming reasons for its embrace of the Administrator's interpretation of the rule are its consistency with the justices' own reading combined with the simultaneous announcement of the interpretation and adoption of the regulation, its widespread and contemporaneous dissemination, and its consistent application. The Court obviously would have reached the same result in *Seminole Rock* with or without deference.<sup>126</sup> That, together with the peculiar facts of the case supporting deference, severely limit the credence that should be given to the Court's broadly stated deference rule.

#### 4. Here's to You, Mr. *Robertson*

The other case relied on to support *Auer*'s sweeping deference rule was the Court's decision in *Robertson v. Methow Valley Citizens Council*, forty years after *Seminole Rock*.<sup>127</sup> The *Auer* Court did not really rely on *Robertson* as much more than a carrier bringing *Seminole Rock*'s rule closer in time. Nonetheless, it is worth noting that *Robertson*, like *Seminole Rock*, plainly reads as a decision based on the Court's own reading of the law, not on deference to administrative interpretation.

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123. See *Seminole Rock*, 325 U.S. at 417.

124. See, e.g., Knudsen & Wildermuth, *supra* note 8, at 59–60; Nathaniel L. Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review*, 9 LAW & CONTEMP. PROBS. 60, 61–62 (1942); see also Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 607 (2003). See generally Donald H. Wallace & Philip H. Coomes, *Economic Considerations in Establishing Maximum Prices in Wartime*, 9 LAW & CONTEMP. PROBS. 89 (1942).

125. See, e.g., Knudsen & Wildermuth, *supra* note 8, at 55–58; Norem, *supra* note 104, at 702–04.

126. See, e.g., Healy, *supra* note 8, at 639.

127. 490 U.S. 332 (1989).

*Robertson* primarily concerns issues of *statutory* interpretation relating to the National Environmental Protection Act's (NEPA)<sup>128</sup> meaning. The Court painstakingly reviews the language of NEPA, its purposes, precedents respecting its application, and the steps taken by the Forest Service to implement it, in deciding whether the Service's NEPA-mandated "Environmental Impact Statement" sufficiently detailed plans for mitigating environmental effects from allowing recreational uses of certain lands under its control.<sup>129</sup>

Of the twenty-three pages covered by the opinions in the case, only two pages address the related contention that the Forest Service also violated its own regulations by failing to adopt a detailed mitigation plan.<sup>130</sup> Justice John Paul Stevens's opinion for the Court explains the nature of the mitigation steps proposed; rejects the contention that these steps are inadequately detailed, at least with respect to environmental effects pertaining directly to the site to be occupied and the entities using the site; and also declares that nothing in the Forest Service rule should be read to require advance detailed plans for mitigation of other effects.<sup>131</sup> The final two sentences at the end of this examination declare that the Service did not behave unreasonably in interpreting its regulation to permit that result and add the quotation from *Seminole Rock* that an agency interpretation that is not "plainly erroneous or inconsistent with the regulation" is controlling.<sup>132</sup> As with *Seminole Rock*, that addition was unnecessary to the Court's conclusion.

In short, neither *Seminole Rock* nor *Robertson* turned on—and neither required—the deference rule these decisions bequeathed to the *Auer* Court.

### III. DEFERENCE, DELEGATION, AND *AUER*

The rule announced in *Auer*, and before that in *Seminole Rock* and *Robertson*, was not just unnecessary to deciding those cases; it also lacks the implicit connection to constitutional-structural imperatives that explain *Chevron* and its eponymous test, at least in its original form. Examination of the difference between the underpinnings of *Auer* and *Chevron* reveals the real deficit of *Auer*'s rule.

#### A. Deference from Legislative Delegation

As explained in Part I and underscored at the beginning of Part II, deference follows delegation. Deference to administrative decisions is not—or at least should not be—predicated on judicial assessment of judges' competence versus administrators' capabilities with respect to a given

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128. *Id.* at 336.

129. *See id.* at 336–56. The Court also considered the application of regulations from the Council on Environmental Quality implementing NEPA requirements. *Id.* at 351–56. That agency's actions were not at issue in the question respecting deference to the Forest Service's interpretation of its own rule.

130. *See id.* at 357–59.

131. *See id.* at 357–58.

132. *See id.* at 359.

decision.<sup>133</sup> It should not flow from a sense that administrators will do a good—or good enough—job at interpreting the law.<sup>134</sup> Deference should not be accorded to administrative judgments because administrators are more responsive to political influence or more democratically accountable.<sup>135</sup>

Each of these considerations may be relevant to issues of governmental design or academic reflection on its benefits, but these are not issues given to the courts for free-form resolution. Instead, the essence of constitutional construction is the assignment of functions to each level and branch of government, dividing responsibility between federal and state governments and among the three branches of the federal government.<sup>136</sup> Courts properly give deference to administrative decisions only when, and only so far as, either constitutional or statutory provisions confer discretion on the president or his subordinates.<sup>137</sup>

This limitation on deference to instances of legally conferred discretion, as identified through judicial interpretations of governing legal texts, does not necessarily justify *Chevron's* canon on construing statutory silence or ambiguity. Justice Stephen Breyer has argued often that silence or ambiguity alone is insufficient to indicate legislative commitment of a matter to executive discretion,<sup>138</sup> and Justice Clarence Thomas has expressed strong concern that the courts have been abdicating their constitutional duties through excessive deference.<sup>139</sup>

Yet, *Chevron's* canon, at least as initially presented, anchors deference in a construction of statutory text that looks to the parameters of legislative delegation. Agencies were to receive deference so far, and only so far, as statutory commitments of authority are framed in ways consistent with that

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133. *But see, e.g.*, Mashaw, *supra* note 18, at 94.

134. *But see, e.g.*, Diver, *supra* note 18, at 582–92.

135. *But see, e.g.*, Pierce, *supra* note 18, at 397.

136. *See, e.g.*, THE FEDERALIST NOS. 10, 42, 45–51 (James Madison), NOS. 21–23, 78, 84 (Alexander Hamilton); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4–5 (1990); ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 157–64 (Christopher J. Scalia & Edward Whelan eds., 2017); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 524, 536–47 (1969).

137. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment); Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1447–56 (2017); Cass, *supra* note 25, at 57–58; Cass, *supra* note 76, at 1308–09; Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 712–13 (2007); Scalia, *supra* note 25, at 513–16; *see also* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 4–8 (2014); Byse, *supra* note 25, at 262–65.

138. *See, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 308–12 (2013) (Breyer, J., concurring in part and concurring in the judgment); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379 (1986).

139. *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240–53 (2015) (Thomas, J., concurring in the judgment) (expressing broad concerns over judicial failures to police lines between constitutionally vested powers); *Mortg. Bankers*, 135 S. Ct. at 1217–20 (Thomas, J., concurring in the judgment).

result.<sup>140</sup> *Chevron* combined that notion with the observation that statutory delegations of authority in broad, ambiguous, or incomplete instructions may often be consistent with an implicit understanding that this confers additional degrees of discretion beyond what a narrower, more focused, or more fully articulated instruction would convey.<sup>141</sup>

### B. Deference Without Delegation or Two-Level Delegation?

This Part takes up the questions that follow any effort to connect *Auer* to *Chevron*. It asks, first, whether there could be a delegation-based explanation for deference to agency rule interpretation. Second, after exploring the concept of two-level delegation, it also asks how a statutory commitment of discretionary authority to administrators could encompass both rule writing and rule interpretation.

#### 1. Non-*Chevron* Deference

*Auer*'s rule is markedly different from *Chevron*'s at its core. Whether it is sensible in a given instance to read statutory ambiguity or silence as indicating a legislative commitment of discretionary authority to another branch can be debated.<sup>142</sup>

However, it is not open for debate how the statutory construction canon reads in *Auer*'s context. Simply put, one cannot infer a *congressional* delegation of discretionary authority to an agency from silence or ambiguity in a rule adopted by the *agency* itself.

Moreover, an agency cannot delegate additional authority to itself. It cannot create authority it otherwise lacked by adopting ambiguous or incomplete regulations or conferring discretion on itself to interpret and apply them as it sees fit. Contrary to a common assumption of the similarity between *Auer* deference and *Chevron* deference,<sup>143</sup> in the most crucial aspect of deference as a corollary of delegated discretion, there can be no rule of deference to agency decisions respecting agency rules that mirrors *Chevron*.

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140. See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

141. See, e.g., *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1995); Cass, *supra* note 25, at 68–69; Scalia, *supra* note 25, at 520–21; see also *supra* notes 35–36, 78–81 and accompanying text (discussing FCC spectrum allocation and licensing authority).

142. That is, indeed, the principal fault line in the debate over differences between original *Chevron* and *Chevron* in practice. See, e.g., Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 597–98 (2009). See generally, e.g., Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611 (2009); Bednar & Hickman, *supra* note 137, at 1450–56; Beermann, *supra* note 59; Byse, *supra* note 25; Cass, *supra* note 76; Herz, *supra* note 25; Levin, *supra* note 75; Merrill & Hickman, *supra* note 75; Pierce, *supra* note 75.

143. See, e.g., Stephenson & Pogoriler, *supra* note 17, at 1454–58 (discussing and criticizing common rationales for strong judicial deference to an agency's interpretation of its own regulation); see also Healy, *supra* note 8, at 644–45, 649–51, 653–56 (discussing and criticizing simple analogies of rationales for deference in *Auer*'s settings to reasons for deference in *Chevron*-type settings).



## 2. Finding Two-Level Delegation

This does not mean that there is no possible delegation-based explanation for deference to agency rule interpretation. A statutory commitment of discretionary authority to an administrator could encompass not only rule writing but rule interpretation as well.<sup>144</sup>

Look back, for example, at the sort of discretion recognized in *Webster v. Doe* and *Chaney*.<sup>145</sup> Although both decisions concerned the exercise of statutory discretion rather than rule interpretation, the deference appropriate to the decision of the director of the CIA in *Webster v. Doe* or the FDA Administrator in *Chaney* would have been identical if either administrator had first adopted a rule to guide his exercise of discretion. Certainly, in Justice Scalia's and Justice O'Connor's view, the statutes in each case, read in light of the sorts of decisions at issue—in *Webster v. Doe*, personnel decisions made in the context of national security concerns that the CIA director was peculiarly well-positioned to understand and, in *Chaney*, decisions respecting when to institute enforcement activity, a matter within the understood discretion of the FDA—committed unreviewable discretion to the administrators.<sup>146</sup> Whether they exercised that discretion through case-by-case decisions without prior guidance or through decisions guided by a prior rule should not matter.

The *Webster v. Doe* and *Chaney* decisions were predicated on notions of delegation and separation of powers that combined functional and textual approaches to drawing the line between what is committed to agencies and what is within the purview of judges. Yet, the heart of the matter for *Chaney*—and for Justice Scalia, at least, in *Webster v. Doe*—was the scope of *statutorily delegated* discretionary authority (and the concomitant limitations on judicial review). In the same vein, courts have sought to determine the scope of discretion to interpret regulations reasonably associated with statutory enactments and, thus, the deference owed from courts.<sup>147</sup>

The Supreme Court's decisions in *Martin v. Occupational Safety and Health Review Commission*<sup>148</sup> and *Pauley v. BethEnergy Mines, Inc.*,<sup>149</sup> for instance, followed this route to find statutory grants of discretion for interpretation of regulations. In both cases, the Court anchored deference to agency reading of regulations in the underlying congressional delegation of responsibility over the subjects at issue.

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144. For various visions of what such deference might entail, see, for example, Healy, *supra* note 8, at 653–57; Manning, *supra* note 10, at 623; Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 365 (2012); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 306–08 (2017). For another example, see generally Monaghan, *supra* note 83.

145. See *supra* notes 37–56 and accompanying text.

146. See *Webster v. Doe*, 486 U.S. 592, 608–10 (1988) (Scalia, J., dissenting); *Heckler v. Chaney*, 470 U.S. 821, 832–38 (1985).

147. See, e.g., Healy, *supra* note 8, at 650–57.

148. 499 U.S. 144 (1991).

149. 501 U.S. 680 (1991).

The *Martin* decision begins its analysis with a broad statement of the reason to think that statutes' commitment of policy discretion to agencies often will encompass a degree of freedom to interpret rules: "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."<sup>150</sup> After examining the specific provisions and statements respecting the particular division of authority between the Secretary of Labor, who enjoys rulemaking and enforcement authority under the Occupational Safety and Health Act (OSH Act), and the Occupational Safety and Health Review Commission, which reviews departmental decisions under the Act, the Court said:

We conclude from the available indicia of legislative intent that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them.

. . . The Secretary's interpretation of an ambiguous regulation is subject to the same standard of substantive review as any other exercise of delegated lawmaking power.<sup>151</sup>

Similarly, the *BethEnergy* decision, addressing the Secretary of Labor's authority under the Black Lung Benefits Act, restates the Court's prior observation that the prerequisite for deference under *Chevron* is the delegation of authority to an administrative agency, particularly policymaking authority.<sup>152</sup> It then declares that "[a]s delegated by Congress, then, the Secretary [of Labor]'s authority to promulgate regulations 'not . . . more restrictive than' the [rules adopted by the Department of Health, Education and Welfare (HEW)] interim regulations necessarily entails the authority to interpret HEW's regulations and the discretion to promulgate" new regulations based on a reasonable interpretation of what HEW's rules meant.<sup>153</sup> Without that authority, it would have been difficult to see what rulemaking discretion Congress could have accorded the Department of Labor under the revised legal framework for combatting black lung disease and compensating its victims.<sup>154</sup>

### C. Limited Support for Expanded Delegation-Based Deference

That a case can be made for supporting expanded delegation-based deference in some settings is far from persuasive support for a broad deference rule. This Part explains why values that may provide justification for the assignment of certain decisions to administrative agencies do not

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150. *Martin*, 499 U.S. at 151.

151. *Id.* at 157–58.

152. *BethEnergy*, 501 U.S. at 696–97 (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990)).

153. *Id.* at 698.

154. Indeed, Justice Scalia, dissenting, pointed out the difficulty with reading the law as conferring any discretion on this score to the secretary. *See id.* at 707–13 (Scalia, J., dissenting).

justify the assumption that all statutory ambiguity indicates a legislative commitment of policymaking discretion to administrators.

### 1. Supporting Expanded Deference

*Martin* and *BethEnergy* are consistent with finding a two-level delegation of authority from Congress, as each decision references a possible statutory basis for deference to rule interpretations that could overcome the basic approach of the APA. However, neither decision rests its conclusion on a compelling, straightforward reading of the law as delegating the sort of discretion for interpretation of rules that the Court finds. Both cases blend apparent assumptions that *Chevron* deference automatically extends to rule interpretation with more careful explanations as to why the underlying legislative scheme is consistent with that result. Justice Harry Blackmun's opinion for the Court in *BethEnergy*, for instance, moves directly from recapitulating the bases for *Chevron* deference in reviewing administrative regulations to the assertion that the same considerations necessarily apply to the Secretary of Labor's interpretation of already adopted rules in *BethEnergy* (rules adopted a decade earlier by a different agency).<sup>155</sup>

Despite questions about the explanations in those cases, the instinct behind *Martin* and *BethEnergy* is sound. When conferring authority on an agency to exercise judgment on matters for which special expertise or experience is critical, Congress certainly can grant administrators discretion (at least within the parameters of constitutional permit).<sup>156</sup> Technical, scientific, or experiential judgments inform not only the way agencies frame regulations, but the way they interpret and apply them as well.<sup>157</sup> The same is true for policy determinations calling on judgments about the best use of agency resources or the best route to implement enforcement activities of the sort at issue in *Chaney*.<sup>158</sup> It is true as well for decisions necessarily based in information that cannot be widely disclosed, as with the national security considerations implicated in *Webster v. Doe*.

Assignment of these decisions to administrative discretion can be defended in particular cases on the efficiency or democratic-legitimacy values frequently used to justify broad delegations of authority to administrators.<sup>159</sup> Those are the values often claimed to provide justification for *Chevron* deference.<sup>160</sup> Even *Chevron* skeptics admit that those values often align with construction of particular statutes as delegating authority to administrators

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155. See *id.* at 696–99.

156. For a discussion of constitutional limitations on delegation, see *infra* Part III.F.2.

157. See, e.g., Krotoszynski, *supra* note 83, at 736–37, 739–41.

158. For a discussion of the general case for commitment of similar managerial decisions to administrators (in contrast with legislative-like determinations), see, for example, HAMBURGER, *supra* note 137, at 4, 83–110.

159. See generally, e.g., PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994); Diver, *supra* note 18; Freeman & Vermeule, *supra* note 18; Mashaw, *supra* note 18; Pierce, *supra* note 18.

160. See generally, e.g., Breyer, *supra* note 138; Freeman & Vermeule, *supra* note 18; Pierce, *supra* note 75; Pierce, *supra* note 18; Sunstein & Vermeule, *supra* note 144.

and with the further inference that statutory silence or ambiguity is consistent with delegation of discretionary authority for specific administrative officials to make decisions within the confines of the law.<sup>161</sup>

Those same values can cohere with statutory construction of delegated discretionary authority over interpretation and implementation of rules. The authority granted, for example, to the OPA Administrator in *Seminole Rock*, is consistent with deference to determinations respecting the application of the rule. Put aside the fact that the Court actually construed the law and rule.<sup>162</sup> If finding delegated discretion over the issue had mattered, this was the perfect case for it. The issue was technical, the grant of authority over prices was a wartime enactment (limited to and applied during wartime), and experience in the assessment of contracts and pricing arrangements in a particular line of business framed the interpretive issue in the case.<sup>163</sup>

In addition, the textual bases for deference in *Seminole Rock* lined up with other considerations that have supported deference. The position taken was one of long-standing, consistent application, starting contemporaneously with adoption of the rule being construed, and not a “convenient litigating position,” or a ‘*post hoc* rationalizatio[n]’ advanced . . . to defend past agency action against attack.”<sup>164</sup>

## 2. Requirements for Finding Deference-Worthy Delegation

Although prodelegation values can buttress a reading of the law in specific instances, such as the Price Control Act’s provision at issue in *Seminole Rock*, as conferring discretion to implement rules, those values do not justify an assumption that *every* statutory ambiguity signals a legislative commitment of policymaking discretion to administrators to resolve the ambiguity. That is not an adequate basis for construing statutes generally as granting first-level delegations of broad rulemaking authority, and certainly not an adequate basis for assuming that vague regulatory laws routinely comprehend second-level delegations of discretionary rule-implementing authority.

The Supreme Court’s “extraordinary case” or “major questions” canon of statutory construction, as announced in *FDA v. Brown & Williamson Tobacco Co.*,<sup>165</sup> rightly makes that point as a matter of first-level delegation:

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161. See, e.g., Bednar & Hickman, *supra* note 137, at 1447–56; Duffy, *supra* note 74, at 199. See generally, e.g., Beermann, *supra* note 59; Byse, *supra* note 25; Cass, *supra* note 25; Cass, *supra* note 76; Farina, *supra* note 25; Foote, *supra* note 137; Herz, *supra* note 25; Walker, *supra* note 8. That is essentially the assessment made by the Court in *Chaney*, and by Justices O’Connor and Scalia in *Webster v. Doe*.

162. See *supra* Part II.B.2.

163. See, e.g., Knudsen & Wildermuth, *supra* note 8, at 55–60; Norem, *supra* note 104, 708–10; see also Nathanson, *supra* note 124, at 61–62 (discussing the necessity for immediate action in a war economy); Wallace & Coomes, *supra* note 124, at 99 (explaining the need for price control efforts during wartime to be “capable of rapid and flexible operation”).

164. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (first alteration in original) (citation omitted) (first quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); then quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

165. 529 U.S. 120 (2000).

Deference under *Chevron* to an agency's construction of a statute that it administers 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 extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.<sup>166</sup>

Justice Scalia captured the same point more pithily in pointing out that Congress was not likely to make major changes in the law surreptitiously. That would have been the case if it were found to have delegated authority to the FDA broadly to restrict sales of tobacco products (the issue in *Brown & Williamson*) or to have delegated to the EPA broad discretion to weigh the costs and benefits of ozone regulation and make determinations respecting its permissibility on that basis (the issue in *Whitman v. American Trucking Ass'ns*<sup>167</sup>). Writing for the Court in *American Trucking*, Scalia said: "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."<sup>168</sup>

More generally, as already noted, justices on the Supreme Court—at times a majority—have expressed strong concern about the breadth of the *Chevron* assumption of delegated discretion (as it is applied). In addition to Justice Thomas's expansive objection to the Court's abdication of their constitutional responsibilities to interpret and apply legal texts that govern resolution of the disputes before them,<sup>169</sup> other justices—including Justices Kennedy, Ginsburg, and Breyer (among the eight-justice majority in *United States v. Mead Corp.*<sup>170</sup>)—have supported requirements for deference that demand additional indicia that Congress, enacting the relevant law, plausibly committed discretionary authority consistent with deference.<sup>171</sup> In addition, Justices Kennedy and Alito joined with Chief Justice Roberts (dissenting in *City of Arlington v. FCC*<sup>172</sup>) in arguing against deference to decisions on

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166. *Id.* at 159.

167. 531 U.S. 457 (2001).

168. *Id.* at 468.

169. See, e.g., *Cuozzo Speed Tech., LLC v. Lee*, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring in judgment); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217–20 (2015) (Thomas, J., concurring in the judgment); cf. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240–53 (2015) (Thomas, J., concurring in the judgment) (discussing concerns respecting abdication of the Court's responsibility to assure that constitutionally vested powers are not delegated to or assumed by entities that are not authorized to exercise them).

170. 533 U.S. 218 (2001).

171. See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1003–04 (2005) (Breyer, J., concurring); *Barnhart v. Walton*, 535 U.S. 212, 218–20 (2002); *Mead Corp.*, 533 U.S. at 230–34; *Christensen v. Harris Cty.*, 529 U.S. 576, 586–87 (2000). In *Christensen*, Justice Thomas, writing for the majority, limited the types of administrative pronouncements qualifying for *Chevron* deference, an approach later reconfirmed in *Mead*. For discussion of the differences among the approaches of the justices and cases on this score, see, for example, Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 536–47 (2014).

172. 569 U.S. 290 (2013).

agency jurisdiction.<sup>173</sup> Although the majority in *City of Arlington* embraced Justice Scalia's skepticism about courts' ability to separate "jurisdictional" questions from other issues of statutory authority,<sup>174</sup> the majority plainly also had doubts about the wisdom of assuming that *Chevron* deference should apply whenever imprecise or incomplete statutory language could be construed to grant administrators' discretion.<sup>175</sup>

The justices' skepticism over the application of *Chevron* is doubly problematic for *Auer* deference. If something more than silence or ambiguity is needed to ground an inference that Congress has conferred deference-worthy discretion for agency rulemaking, it plainly follows that even more is required to support a second level of deference to the agency's interpretation of its rule.<sup>176</sup>

#### D. *Auer Deference's Due Process Problems*

In light of the preceding discussion, the underlying requirement for deference to agency interpretations of agency rules, at a minimum, should be some meaningful basis for concluding that Congress has in fact delegated discretion over that determination to the agency. That minimum requirement, however, may not be enough. This section and the succeeding section explore reasons for questioning the legitimacy of actual delegations of authority over both rulemaking and rule interpretation or rule application.

Scholarly and judicial commentary has offered two principal reasons—apart from logical inferences from the reservations discussed above respecting broad application of "*Chevronesque*" deference—for concern over deferring to agency rule interpretation *even if* there is evidence of a congressional commitment of such authority.<sup>177</sup> These are: (1) the conflict between deference and structural or due process considerations respecting

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173. *See id.* at 312–23 (2013) (Roberts, C.J., dissenting).

174. *See id.* at 306 (majority opinion).

175. For data consistent with observations of the justices' statements and decisions, see Eskridge & Baer, *supra* note 82, at 1130–35 and see also *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring). Judge (now-Justice) Gorsuch, in addition to writing the opinion for the court, wrote separately to express concern over the Supreme Court's *Chevron* jurisprudence in terms that evoked considerations voiced by Justice Thomas.

176. *See, e.g.*, Professors' Brief, *supra* note 102, at 16–17. A similar point is suggested by Justices Scalia and Thomas in their concurrences in *Perez v. Mortgage Bankers Ass'n*, which both noted the tension between the APA and deference to administrative rule interpretations accomplished without notice-and-comment rulemaking. *See* 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment). Justice Thomas presents an even more basic objection to any deference: that it is an invasion of the judicial role. *See id.* at 1224; *see also infra* Part III.E.2. *But see* Nielson, *Beyond, supra* note 8, at 964–82 (noting the availability of interpretation through adjudication as an alternative to interpretive rulemaking).

177. Professor Walker has suggested that there are at least four significant arguments for narrowing the scope of *Auer* deference. *See* Walker, *supra* note 8, at 107–10. The arguments collected under this heading in his helpful review, however, include both analytical rationales for *Auer*'s impropriety or illegality and proposed strategies for altering the deference doctrine to limit problems associated with *Auer* deference.

impartial adjudication; and (2) the conflict between deference and due process considerations respecting fair notice. Both of these arguments encompass suppositions about strategic behavior by agency officials as well as analysis of appropriate procedures for applying rules.

### 1. Impartial Adjudication: Can the Rule Writer Decide?

The best-known challenge to *Auer* deference—although in fact pitched at *Seminole Rock*, as it was published prior to the decision in *Auer*—is Professor John Manning’s elaboration of a separation-of-powers concern which can also be cast as a due process concern rooted in the requirement of an impartial adjudicator.<sup>178</sup> His article recalls the ideas, articulated by writers such as Montesquieu, Locke, and Blackstone, that informed the framing of our Constitution, particularly concerns with the aggregation of different powers in one official or governmental body.<sup>179</sup>

Those concerns largely explain the division of powers in the national government, separating lawmaking from law-interpretation and law-implementation functions. The Vesting Clauses of the Constitution make clear that Congress is responsible for making law, the executive branch for implementing it, and courts for interpreting it as necessary to its application in cases properly brought before them.<sup>180</sup> While this oversimplifies a bit—for example, the president participates in lawmaking through the requirement of presentment and in some respects is empowered to take action in areas of national security and international affairs even in the absence of specific legislation<sup>181</sup>—it is a fair picture of the overall constitutional design.

Further, because the Constitution’s framers had special concerns over lawmaking authority, the Constitution imposes onerous requirements on how laws are made.<sup>182</sup> They divided legislative power between two houses of Congress with members chosen in different ways, at different times, for different-length terms, representing differently composed constituencies, and

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178. See generally Manning, *supra* note 10, at 631–54.

179. See *id.* at 640–48.

180. See U.S. CONST. art. I, § 1, cl. 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1. The degree to which conclusions about the scope of the powers delegated to each branch can be drawn strictly from the Vesting Clauses is contested. Some scholars draw strong conclusions from the Vesting Clauses themselves. See, e.g., GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 22–43 (2004); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). Others, however, contest those conclusions. See generally, e.g., Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467 (2011); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004). Nonetheless, the argument for understanding them as actually dividing powers is overwhelming.

181. See, e.g., U.S. CONST. art. I, § 7, cl. 2; *id.* art. II, § 2; *INS v. Chadha*, 462 U.S. 919, 946–48 (1983); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–22 (1936).

182. See, e.g., THE FEDERALIST NOS. 47–51 (James Madison).

required bicameral agreement along with presentment of legislation to the president for acceptance or veto.<sup>183</sup>

Yet, Professor Manning notes, Congress has effectively delegated lawmaking power to administrators. As Manning frames it, Congress has “delegated authority that gives agencies the right to promulgate statute-like ‘legislative rules’ under exceptionally open-ended statutory standards.”<sup>184</sup> The result is that “important and binding specifics of legislation are defined not through bicameralism and presentment, but through executive policymaking, which occurs apart from the legislative process.”<sup>185</sup>

Because separation-of-powers considerations demand that law-interpretation and law-implementation powers be divided from lawmaking, Manning concludes that the exercise of lawmaking power by administrators requires that administrators not enjoy the sort of control over interpretation and implementation that the rule of *Seminole Rock* (and later *Auer*) grants.<sup>186</sup> The combination of powers not only violates concerns that generally limit officials to one type of power; it also provides incentives for officials to augment their power through strategic behavior.<sup>187</sup> Although officials will not always want to adopt vague rules to preserve interpretive freedom (doubtless wanting at times to bind successors), they will be more inclined to choose imprecision than would have been the case without *Auer* deference.<sup>188</sup>

Although Professor Manning’s critique is thoughtful and influential—it has been picked up by others, notably by Justice Scalia<sup>189</sup>—it is too general a response to *Seminole Rock*’s (and, more, *Auer*’s) flaws. First, while logically *Auer*’s rule applies only to legislative-type rules, like *Mead*, it is not limited to instances where agency rules have the force of law.<sup>190</sup> Second, and more significantly, some rules that do have the force of law do not give rise to concerns about interpretation of the sort Manning identified. They do not, that is, present likely difficulties with inappropriate expansion of administrative power or likely inclination of interpretations toward results that prejudice individuals or entities affected by agency rules.

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183. See, e.g., U.S. CONST. art. I, §§ 2, 3, 7; THE FEDERALIST NO. 73 (Alexander Hamilton), NOS. 48, 51 (James Madison).

184. Manning, *supra* note 10, at 652–53.

185. *Id.* at 653.

186. See *id.* at 654–57.

187. See *id.* at 659–60, 664–69.

188. See *id.* at 655–56, 659–60, 663–64.

189. See, e.g., *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment); *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 616–23 (2013) (Scalia, J., concurring in part and dissenting in part); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

190. See *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997); see also *Christensen v. Harris Cty.*, 529 U.S. 576, 589–91 (2000) (Scalia, J., concurring in part and concurring in the judgment); Michael Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 579–80 (2002); Hickman, *supra* note 171, at 533; Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 352 (2003).



On the latter point, it is helpful to start with the more general question of combination of functions. Justice Scalia rightly observed in his dissenting opinion in *Mistretta v. United States*<sup>191</sup>—which considered a challenge to the constitutionality of the United States Sentencing Commission—that administrators frequently are assigned functions that look very much like adjudication or legislation, but that either of those functions is appropriately assigned to administrators *only* as an adjunct of some executive function.<sup>192</sup> In other words, the constitutional basis for administrators to engage in either legislative-type rulemaking or court-like functions of interpretation and dispute resolution must be the combination of one of these functions with another function squarely in the executive's domain.

In the same vein, James Madison recognized during the debates on constitutional ratification that the division of authority over the three types of power assigned to the three branches by the Vesting Clauses cannot be perfectly captured by any verbal formula, or entirely separated among the departments.<sup>193</sup> Further, he defended the blending of functions in spots—as, for example, with the president's involvement in lawmaking or the Senate's participation in official appointments—as providing a salutary check on excessive discretionary power in one branch of government.<sup>194</sup>

Professor Manning's argument, in line with the arguments from Madison and Scalia—and despite Manning's invocation of more general separation-of-powers arguments from philosophers—does not challenge *all* combinations of functions as violating separation-of-powers strictures. Instead, his more limited challenge to combining functions asserts that allowing a rule writer to interpret rules is problematic because it compromises the impartiality ideally required of interpreters and, consequently, the incentives to be clear in the rules as well.<sup>195</sup>

Yet, even some combinations of exactly this sort seem unobjectionable. As noted above, *Seminole Rock* is an example of facts that made it reasonable to interpret the underlying law (the Price Control Act of 1942) as granting a second level of discretion.<sup>196</sup> The interpretive question at issue was narrow, technical, and affected by experience associated with the work of the Office of Price Administration.<sup>197</sup> The issue also was one on which there was no reason to expect the administrative decision makers to have a bias that would call their interpretation into question—which among the alternative methods for calculation of the price comparator was appropriate for the crushed stone contracts and how the spacing of sales and delivery fit OPA's rule were not matters on which OPA should have been seen as an unfit umpire.

The same is true for some of the technical questions respecting appropriate frequency separation, acceptable degrees of frequency overlap and signal

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191. 488 U.S. 361 (1989).

192. *See id.* at 413, 417–19 (Scalia, J., dissenting).

193. *See* THE FEDERALIST NOS. 37, 47–51 (James Madison).

194. *See* THE FEDERALIST NOS. 47–48, 51 (James Madison).

195. *See* Manning, *supra* note 10, at 647–48.

196. *See supra* Part II.B.3.

197. *See supra* note 163 and accompanying text.

attenuation, and other items that were important to early decisions on spectrum allocation by the Federal Radio Commission (FRC) and FCC.<sup>198</sup> Although important policy considerations were (perhaps wrongly) delegated to administrators,<sup>199</sup> there is no reason to expect that decisions on technical issues were biased or that the FRC or FCC used interpretive judgments on that portion of agency authority to expand their power or to prejudice individual rights.<sup>200</sup> Insofar as the concern is with *biased* interpretations, the circumstances here, as in the *Seminole Rock* example, do not lend credence to that basis for rejecting deference.

Ultimately, Professor Manning's article presents a thoughtful objection to the *Seminole Rock-Auer* doctrine, but the objection is sufficiently broad that it must be judged an incomplete guide to when Congress should be able to delegate second-level discretionary authority.

## 2. Fair Notice: Strategy and Due Process Concerns

A second objection to *Auer* deference, even for instances in which legislation is consistent with a second level of deference to administrative determinations, focuses on the opportunity that deference provides for decisions that unfairly surprise those affected by a rule's interpretation. This concern has been voiced, for instance, by several justices. Justice Samuel Alito, writing for a five-justice majority in *Christopher v. SmithKline Beecham Corp.*,<sup>201</sup> refused to grant *Auer* deference on the ground that the Department of Labor had changed position after the grant of certiorari in a manner that failed to give fair notice of the new interpretation of its rule:

[T]he DOL's interpretation of ambiguous regulations [would] impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced. To 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

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198. On the nature of early radio allocation and licensing decisions, see generally, 1 ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES* (1966).

199. See generally, e.g., R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Thomas Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990); Glen O. Robinson, *Radio Spectrum Regulation: The Administrative Process and the Problems of Institutional Reform*, 53 MINN. L. REV. 1179 (1969).

200. In this regard, technical judgments by the administrators stand in marked contrast to their manipulation of other considerations on frequency allocation and licensing. See, e.g., RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 861–72 (6th ed. 2011) (discussing the *Cowles* saga). See generally, e.g., Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & ECON. 529 (1998); Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978).

201. 567 U.S. 142 (2012).

[a regulation] prohibits or requires.” Indeed, it would result in precisely the kind of “unfair surprise” against which our cases have long warned.<sup>202</sup>

Although the Court subsequently made clear in *Perez v. Mortgage Bankers Ass’n*<sup>203</sup> that concerns over unfair surprise did not justify imposition of new procedural requirements on agency interpretive statements, the justices also reserved the prospect of using that consideration as a freestanding basis for rejecting *Auer* deference in specific cases, as it had in *Christopher*.<sup>204</sup>

Concerns that *Auer* deference might permit unfair surprise through changes in interpretation have been linked to assumptions that administrators might consciously introduce ambiguity in their regulations to increase the ambit of their own interpretive authority.<sup>205</sup> This argument includes apprehension that administrators could manipulate the content of rules in ways that elide statutory controls over process (such as generally applicable APA requirements) and prejudice those who deal with agencies.<sup>206</sup>

In this vein, Justice Thomas, for example, observed that allowing “an agency to issue vague regulations . . . maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.”<sup>207</sup> Similarly, Justice Alito, citing Justice Scalia, declared that *Auer* deference “creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrat[ing] the notice and predictability purposes of rulemaking.’”<sup>208</sup> Justice Scalia also opined that giving deference to agency interpretations “allows the agency to control the extent of its notice-and-comment-free domain,” adding that “[t]he APA does not remotely contemplate this regime.”<sup>209</sup>

The fear that administrators, aware of *Auer*’s import, will purposely frame substantive rules in vague terms to expand opportunities for discretionary judgment later on is easily overstated. Political appointees, who generally have decision-making authority on such things, most often have a decidedly

202. *Id.* at 155–56 (2012) (citations omitted) (first quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986); then citing *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007)). Justice Breyer, joined in dissent by Justices Ginsburg, Sotomayor, and Kagan, did not engage the point about *Auer* deference directly but found the agency’s interpretation of its regulation consistent with the statute and with several prior statements about the nature of certain sales and promotion activities (points that related to the interpretive question at issue). *See id.* at 169–78 (Breyer, J., dissenting).

203. 135 S. Ct. 1199 (2015).

204. *See id.* at 1209; *Christopher*, 567 U.S. at 157–60. *See generally* Leading Case, *Administrative Procedure Act—Changing Interpretive Rules—Perez v. Mortgage Bankers Ass’n*, 129 HARV. L. REV. 291 (2015).

205. *See, e.g.*, Anthony, *supra* note 15, at 11–12; Manning, *supra* note 10, at 647–48, 655–57; Nielson, *Beyond*, *supra* note 8, at 954; Stephenson & Pogoriler, *supra* note 17, at 1485–86.

206. *See, e.g.*, Anthony, *supra* note 15, at 4–12.

207. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

208. *Christopher*, 567 U.S. at 158 (alteration in original) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

209. *Mortg. Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

limited time horizon, and the likelihood that successors soon will have a different view on policy issues severely diminishes incentives to leave much discretion to future interpretation.<sup>210</sup>

Different incentives, of course, affect agency staff, who tend to be both more entrenched and more important to the details of agency decisions than often is recognized.<sup>211</sup> This is the category of agency official most likely to be interested in preserving discretion for the future.<sup>212</sup>

Even so, the impact of staff incentives is surely moderated by the incentives of politically appointed superiors. Further, the prospect that agency rulemaking will respond more than marginally to incentive effects tied to rule writers' appreciation of the legal rules on deference to agency rule interpretation itself is questionable.<sup>213</sup> Although studies have found some degree of familiarity with deference rules, the relevant decision makers are apparently far more familiar with *Chevron* than *Auer* and far more likely to take account of the former in framing regulations.<sup>214</sup>

Moreover, in contrast to the situation with legislation, there is relatively little likelihood that administrators will gain significant benefit from using opaque language to defer or mask politically difficult decisions. Officials who run for elected office and who need support from diverse constituencies often have strong reasons to avoid clear statements of position.<sup>215</sup> However, in general, ambiguity in administrative rules is apt to be the product of less clear appreciation of future problems or less clear focus on the meaning of words chosen than of deliberate attempts to preserve discretion for later decisions.

Questions about the fit between use of interpretive guidance and APA rulemaking—often conjoined with arguments about *Auer*'s contribution to risks of abrupt shifts in agency positions without appropriate signaling to the public—are serious matters. APA rulemaking requirements are designed to provide notice and to shape consideration of rules' effects in ways that facilitate clearer drafting and better advance notice to the public than more

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210. For similar points respecting administrators' incentives regarding future agency determinations, see, for example, Manning, *supra* note 10, at 656 and see generally Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285 (2013); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018).

211. See, e.g., Robinson, *supra* note 200, at 185–87, 216–19; James Q. Wilson, *The Dead Hand of Regulation*, 25 PUB. INT., Fall 1971, at 39, 48, *cited in* Robinson, *supra* note 200, at 217.

212. Anyone who has served in government as a political appointee has had the experience of longtime staff suggesting language for decisions designed to preserve agency prerogatives (including appeals to agency discretion in litigation). The pattern of permanent employees designing around short-term political agency heads is not limited to the U.S., as evidenced by the British comedy *Yes, Minister*.

213. See, e.g., Sunstein & Vermeule, *supra* note 144, at 309.

214. See, e.g., Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1059–66 (2015).

215. See generally, e.g., Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555 (1972).

casual methods of decision-making associated with other vehicles for formulating and announcing interpretive judgments.<sup>216</sup>

Use of other methods for providing guidance is certainly permitted, even when changing course on agency policy,<sup>217</sup> but agencies at times change interpretations of legal requirements in ways that are neither well-grounded in legal texts nor accomplished in ways that are designed to provide adequate notice to affected individuals and entities.<sup>218</sup> The Department of Education's change in interpretation of a Title IX regulation respecting segregation of school bathroom and locker room facilities by sex—using a private letter ruling to dramatically alter a rule that was not ambiguous, some four decades after its adoption—provided a particularly striking example.<sup>219</sup>

Certainly, when failure to utilize notice-and-comment rulemaking processes results in ill-considered judgments or interpretive shifts that lack sufficient signaling to those directly affected by agency rules, courts should (and do) have tools to prevent the most unfortunate effects of those procedural deficits.<sup>220</sup> The issues relevant to these determinations, however, are not whether deference to agency interpretations for which there is delegated discretion is *generally* unlawful but whether specific determinations fail to meet legal requirements either of process or substance. The “fair notice” objection is apposite in particular instances, as it was in *Christopher*,<sup>221</sup> and failure to meet APA requirements, absent an applicable statutory exception, would prevent a conclusion that there was in fact delegated discretion in a given setting.

On balance, as with the objection predicated on combination-of-functions concerns, while the “fair notice” argument contains insights about the impact deference to administrative rule interpretation has on important values, it does not provide a basis for across-the-board rejection of a second level of deference to administrative decisions.

#### *E. Auer's Iterated Delegation Problem: First Cuts*

The conclusion that Congress *can* delegate discretion over the implementation of law—including discretion over policy judgments framed by statute and determinations relevant to elaboration of policy judgments encapsulated in already-adopted rules—does not compel a conclusion that

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216. See, e.g., Anthony, *supra* note 15, at 17–18; Ernest Gellhorn & Glen O. Robinson, *Rulemaking “Due Process”: An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 231–32 (1981). See generally, e.g., James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979); David L. Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

217. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); *SEC v. Chenery*, 332 U.S. 194, 202–07 (1947).

218. See, e.g., *Fox Television Stations*, 567 U.S. at 252–55; *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 153–55 (2012).

219. See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 737 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), *vacated*, 137 S. Ct. 1239 (2017).

220. See, e.g., *Mortg. Bankers*, 135 S. Ct. at 1209.

221. See *Christopher*, 567 U.S. at 154–60.

Congress *has*, in any given instance, done so. So, too, finding that neither of the two commonly voiced arguments against the constitutionality of delegating second-level discretionary authority can bear the weight advocates suggest for them does not mean that all delegations of second-level interpretive authority are constitutionally permissible.

Thus, two remaining questions are: When should courts find that a statute includes a delegation of second-level discretionary authority? And, what principles limit congressional authority to make such delegations? Both the institutional bias-partiality argument first advanced by Professor Manning and the fair notice argument articulated in *Christopher* provide partial answers to the second question. As explained below, these arguments join more general concerns over delegation of authority to suggest answers to both of these questions.

### 1. Assumptions' Insufficiency: Ambiguity and Expertise

Although the settings differ in important ways, the impulse *Auer* represented was the same as that underlying *Chevron*: seeing an ambiguous, unclear, or incomplete statutory instruction as sufficient indication that Congress intended (and actually delegated authority for) administrators to resolve the ambiguity or complete the legislation reflects the same assumption about legislation. It assumes that legislators knowingly arrive at compromises that fail fully to account for decisions that need to be made for laws to be effective and would prefer that those further decisions be made by officials who are more politically accountable instead of by judges, who are insulated against political influence.<sup>222</sup> Even vigorous advocates of this supposition, however, have recognized that it is merely a fiction in respect of statutory ambiguity.<sup>223</sup> How much more of a fiction would it have to be to suggest an intent to delegate a second level of discretionary authority?

Further, while Justice Scalia, among others, for many years defended *Chevron*'s assumption that ambiguity in statutory commitment of authority to an agency carries with it discretionary authority within the domain of that ambiguity,<sup>224</sup> he coupled that interpretive canon with a decided willingness to examine particular statutory language and pronounce its meaning, notwithstanding administrators' opinions.<sup>225</sup> This made Scalia's version of *Chevron* closer than might otherwise appear to that of Justice Breyer and

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222. See, e.g., Scalia, *supra* note 25, at 516–17 (explaining *Chevron*); see also Eskridge & Baer, *supra* note 82, at 1103 (explaining *Seminole Rock-Auer* deference as based in a similar delegation of lawmaking authority).

223. See, e.g., Scalia, *supra* note 25, at 517.

224. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 549–53 (2007) (Scalia, J., dissenting); *Christensen v. Harris Cty.*, 529 U.S. 576, 589–91 (2000); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996); Scalia, *supra* note 25, at 516.

225. See generally *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1005–20 (2005) (Scalia, J., dissenting); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714–36 (1995) (Scalia, J., dissenting); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994); Cass, *supra* note 13, at 287–88.

other justices who demand particularized evidence of delegated discretion.<sup>226</sup> On either Scalia's or Breyer's vision of *Chevron*, quite a bit more than statutory ambiguity should be needed to support the extended discretion associated with *Auer*.<sup>227</sup>

As with ambiguity alone, it should not suffice that the matter over which administrative discretion is claimed can be cast as technical, narrow, or best resolved by reference to experiences and analytical capabilities that lie more in administrators' than in judges' hands. These factors make a delegation of discretionary authority less objectionable as a matter of policy,<sup>228</sup> but they do not constitute evidence that the authorities who must make such a delegation—elected officials given power to frame legislation through specified constitutional mechanisms—have made that choice.<sup>229</sup>

The legislature's commitment of discretion over rule implementation is unlikely to be clearly formalized in an express statutory statement, although at times statutory language will come close to that, as it did in the provision of the National Security Act at issue in *Webster v. Doe*.<sup>230</sup> Absent that, courts should demand something beyond a surmise that laws necessarily commit all technical questions or all experiential or complicated issues to administrators' discretion. Unusually broad legislative assignments of authority, such as those embodied in the FCC's spectrum allocation authority<sup>231</sup> or the Office of Price Administration's authority underlying *Seminole Rock*, provide one indication.<sup>232</sup> Matters historically treated as within the executive's discretion—based in constitutional authorization (as with some national security decisions<sup>233</sup>) or in the sort of interrelated resource and policy considerations at issue in exercises of prosecutorial discretion<sup>234</sup>—also can support deference.

The availability of indicia of deference in some instances, however, does not save, or even soften concerns over, *Auer*'s rule. The gap between the general assumption of delegated discretion at the heart of *Auer* and the legitimate realm for fact-based conclusions respecting delegations of second-

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226. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 308–10 (2013) (Breyer, J., concurring in part and concurring in the judgment); *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 1003–04 (Breyer, J., concurring); *Barnhart v. Walton*, 535 U.S. 212, 218–20 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 230–34 (2001); Breyer, *supra* note 138, at 370. See generally Hickman, *supra* note 171 (discussing the overlap in the justices' views on requirements for deference).

227. See, e.g., Professors' Brief, *supra* note 102, at 12–20.

228. See, e.g., Manning, *supra* note 10, at 616–17; see also Krotoszynski, *supra* note 83, at 754 (arguing that administrative expertise should be the primary basis for granting deference). See generally, e.g., Diver, *supra* note 18; Mashaw, *supra* note 18; Pierce, *supra* note 18.

229. But see Arti Rai, *Addressing the Patent Gold Rush: The Role of Deference to PTO Patent Denials*, 2 WASH. U. J.L. & POL. 199, 222–23 (2000).

230. See *supra* notes 39–56 and accompanying text.

231. See *supra* notes 78–81 and accompanying text.

232. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–16 (1945).

233. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–22 (1936).

234. See *supra* notes 56, 145–46 and accompanying text. See generally *Heckler v. Chaney*, 470 U.S. 821 (1985).

level interpretive authority is fatal to *Auer* as written. Moving beyond *Auer* to evidence-based assessments of delegation, construction of particular statutory commitments of second-level interpretive authority should be parsimonious—not only for the combination of functions and fair warning reasons discussed above<sup>235</sup> but also because some delegations, even of a first level of discretionary authority, raise serious constitutional problems.

## 2. Deference as Unconstitutional Delegation of Judicial Power

Justice Thomas has advanced one version of this argument, by asserting that any deference to administrative interpretation of either regulations or statutory requirements permits administrators to exercise judicial power constitutionally reserved to Article III judges. Concurring in the judgment in *Perez v. Mortgage Bankers Ass'n*, Thomas begins by reviewing the history, philosophical pedigree, importance, and constitutional embodiment of both separation of powers and interbranch checking principles.<sup>236</sup> Applying those principles from the *Seminole Rock-Auer* deference rule, he states:

[T]he Judiciary, insulated from both internal and external sources of bias, is duty bound to exercise independent judgment in applying the law.

. . . Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties. Defining the legal meaning of the regulation is one aspect of that determination.

*Seminole Rock* deference, however, precludes judges from independently determining that meaning. . . . That deference amounts to a transfer of the judge's exercise of interpretive judgment to the agency.<sup>237</sup>

Justice Thomas's argument forcefully and appropriately articulates the tension between *Auer*'s expansive, general deference principle and principles underlying fundamental aspects of constitutional structure. His “no deference” argument goes beyond the specific combination-of-functions contentions made by Professor Manning and the “fair notice” objection raised by others.<sup>238</sup> Rather than anchoring his opposition to deference in notions of due process, Thomas's claim rests on constitutional assignments of power and their relation to more basic concepts of liberty. His argument recognizes that judicial review serves as a valuable check on abuse of legislative and executive power and links to other concerns that deference undermines important constitutional governance features.<sup>239</sup>

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235. See *supra* Part III.D.

236. 135 S. Ct. 1199, 1213–17 (2015) (Thomas, J., concurring in the judgment).

237. *Id.* at 1219.

238. See *id.*

239. For similar discussions regarding constitutional governance structures and separation of powers, see, for example, HAMBURGER, *supra* note 137, at 4–8, 334–45, 378–85; Byse, *supra* note 25, at 261; Cass, *supra* note 25, at 57–58; Cass, *supra* note 76, at 1301–03.



The strong version of the “no deference” argument, however, conflicts with other aspects of a constitutional system that accepts—indeed, embraces—the blending of functions in some respects, on the one hand, and the mandated separation of powers, on the other.<sup>240</sup> The federal courts have sole authority to exercise the judicial power of the United States, which encompasses “all Cases, in Law and Equity, arising under [the] Constitution, [and] Laws of the United States,”<sup>241</sup> but that grant of power did not create specific causes of action in law or equity.<sup>242</sup> For that reason, courts long have understood the Constitution as permitting assignments of decisional authority that are insulated from judicial scrutiny. So, for example, cases such as *Chaney* and *Webster v. Doe* reveal reasons why Congress might properly, and constitutionally, delegate unreviewable discretion to administrators.<sup>243</sup>

For similar reasons, the Supreme Court has recognized congressional prerogatives to shape the jurisdiction of federal courts, subject to a few limiting rules (such as the definition of the Supreme Court’s original jurisdiction).<sup>244</sup> The degree to which questions potentially within the federal judicial power can be put outside the reach of Article III courts—not through formal assignment to another body but through limited grants of jurisdiction to Article III courts—is contested, with thoughtful scholars expressing a range of divergent views.<sup>245</sup> Despite differences over the exact extent to

240. See, e.g., THE FEDERALIST NOS. 37, 47–51 (James Madison).

241. U.S. CONST. art. III, § 2.

242. The line of cases associated with the oxymoronically named *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), stands as a doctrinally unfortunate exception to this understanding, much narrowed in the past thirty-plus years. See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring), cited in James E. Pfander, *The Story of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in FEDERAL COURT STORIES 275, 275 (Vicki C. Jackson & Judith Resnik eds., 2010); see also *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–56 (2017); *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 51–53 (1985). See generally, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009).

243. See *supra* Parts I.B.1–2.

244. See, e.g., *Palmore v. United States*, 411 U.S. 389, 401–02 (1973); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–14 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–75 (1803); see also Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038 (1982); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005–06 (1965).

245. For varied views of required federal court jurisdiction, see generally, for example, Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); William A. Fletcher, *Congressional Power over the Jurisdiction of Federal Courts: The Meaning of the Word “All” in Article III*, 59 DUKE L.J. 929 (2010); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and*

which Congress is free to control federal courts' jurisdiction, however, the strong consensus is that Congress's control (at least as to the jurisdiction of lower courts) is extensive if not unlimited. Restricting options for review by controlling the courts' jurisdiction is essentially equivalent to granting unreviewable discretion in a world where federal courts otherwise enjoy general review authority over a set of questions respecting federal law—which constitutes a broader delegation of authority to administrators than that assumed in deference rules.

The same understanding of options for Congress by law to grant discretion to administrators beyond the purview of courts also underlies the Court's second decision in *Securities & Exchange Commission v. Chenery Corp. (Chenery II)*.<sup>246</sup> *Chenery II* recognized administrators' authority to make decisions that have retroactive effect without first adopting a general rule, much as common law courts' decisions over time produce cognizable rules based on experience with concrete problems.<sup>247</sup> The rule of *Chenery II* suggests that delegating unreviewable discretion is equally consistent with permitting case-by-case exercises of discretion as with exercise of discretion over rule-based policy choices.<sup>248</sup>

It is also consistent with recognizing congressional power to confer a second level of discretionary authority, not just a single level, on administrators. After all, if Congress can remove a category of decision from judicial review, then it can, in most circumstances, permit the discretion to be exercised as the legislators see fit (including through more expansive, more deferentially reviewed administrative authority over interpretation), which is a corollary of a legislatively delegated power.<sup>249</sup> At least, constitutional objection to these delegations must be based on more than the manner in which deferring to exercises of discretion intrudes on the judicial power to “say what the law is.”<sup>250</sup>

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*Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990); Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671 (1997).

246. 332 U.S. 194 (1947).

247. *See id.* at 202–07.

248. *See supra* notes 144–46 and accompanying text. *See generally* Nielson, *Beyond*, *supra* note 8.

249. *See, e.g.*, Monaghan, *supra* note 83, at 15–17, 26–28, 32–33; Rao, *supra* note 20, at 1504–06. *See generally* Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005). Of course, this does not mean that the assertion of a specific constitutional protection, such as due process, can be elided simply by legislating a particular procedural requirement. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154–60 (2012); *Pennoyer v. Neff*, 95 U.S. 714, 733–36 (1877). Instead, the point is that within the ambit of otherwise constitutionally permitted authorizations, the mere fact that Congress has chosen a process that reduces the ambit of judicial supervision is not enough to demonstrate its invalidity.

250. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Without taking anything away from its core concern respecting interference with constitutionally assigned and separated functions, the broadest form of the deference-as-interference-with-judicial-power thesis requires too much revision of constitutional understandings that fit the language, history, and structure of the Constitution.

*F. Auer's Larger Iterated Delegation Problem:  
Delegation of Legislative Power*

While the strong version of the objection to deference in Justice Thomas's *Perez v. Mortgage Bankers Ass'n* concurrence is overly broad, his call to link deference analysis to the Constitution's basic structural features and to skeptically view legal doctrines and statutory schemes in tension with those structural features is important. It connects to a fundamental problem that has eroded critical constitutional protections against excessive, unchecked discretionary power: the abandonment of serious judicial efforts to keep delegation of authority to administrators within constitutional bounds.<sup>251</sup>

1. The Base Delegation Problem

The Constitution's framers recognized that the primary functions of government assigned to the three branches of the national government—legislative, executive, and judicial—could not be exactly defined or hermetically insulated from the functions committed to other branches.<sup>252</sup> Yet, as best articulated by Madison, the framers even more firmly believed that keeping each branch to its own functions—keeping one branch from expanding its remit into territory constitutionally committed to one of the other branches—was critical to protecting liberty.<sup>253</sup> The branches did not enjoy authority to exercise the power committed to another branch—the courts and executive branch, for example, could not make law, nor could the legislative branch reserve to itself the authority to implement the law—but each branch could exercise some control over other branches' actions in ways that would reduce prospects of one impinging on another branch's domain.<sup>254</sup>

This limitation on officials in any one branch going awry, straying over the constitutional lines, includes judicial restraint on Congress delegating powers where they do not belong, especially delegating the lawmaking authority Congress was empowered to exercise—only in a constitutionally prescribed manner, including presentment to the president.<sup>255</sup> Chief Justice

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251. See, e.g., *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring); *id.* at 1240–41, 1253–55 (Thomas, J., concurring in the judgment). See generally Alexander & Prakash, *Running Riot*, *supra* note 21; Cass, *supra* note 20; Lawson, *supra* note 20; Rao, *supra* note 20; Schoenbrod, *Substance*, *supra* note 20.

252. See THE FEDERALIST NOS. 37, 47–51 (James Madison).

253. See THE FEDERALIST NO. 51 (James Madison).

254. See THE FEDERALIST NOS. 73, 78 (Alexander Hamilton), NOS. 48, 51 (James Madison).

255. See generally Alexander & Prakash, *Running Riot*, *supra* note 21; Cass, *supra* note 20; Lawson, *supra* note 20; Rao, *supra* note 20; Schoenbrod, *Separation of Powers*, *supra* note 20.

John Marshall's opinion for the Court in *Wayman v. Southard*<sup>256</sup> explained the line between permissible and prohibited delegations. *Wayman* concerned the Process and Compensation Act of 1792 (and, in passing, also the Judiciary Act of 1789), which provided courts authority to modify the forms used for writs and execution of process in particular circuit or district courts.<sup>257</sup> Courts generally (and historically) control procedural details for the manner in which litigation will proceed. The 1789 and 1792 laws set some basic rules for procedures to be used in federal courts but allowed federal courts to modify those rules and left many details to the judges.<sup>258</sup> The Court in *Wayman* distinguished decisions on "important subjects, which must be entirely regulated by the legislature itself"<sup>259</sup> from the modest degree of control over what was essentially a matter of judicial administration (a "subject[] . . . of less interest"<sup>260</sup>) on which Congress could legislate in general terms while leaving administrators discretion over the details.<sup>261</sup>

Justice Scalia's *Mistretta* opinion described the practical import of the restriction on delegation and followed essentially the same logic as Madison and Marshall.<sup>262</sup> Scalia explained that the exercise of executive power at times requires adjudicative methods very similar to those of courts and at other times calls for elaboration of guiding precepts in ways that look much like legislative rulemaking.<sup>263</sup> Yet, accepting the propriety of these actions is a far cry from saying that administrators or courts can exercise *Congress's* lawmaking power or that administrators can exercise *judicial power* in place of courts.

For Justice Scalia, the constitutional structure requires *both* that executive or judicial actions redolent of other powers are undertaken in the exercise of powers firmly within those branches' domains *and* that the scope of such actions is set by law:

The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.<sup>264</sup>

Where officials exercise powers properly assigned to them, they may at appropriate times exercise ancillary powers such as making rules or adjudicating their implementation.<sup>265</sup>

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256. 23 U.S. (10 Wheat.) 1 (1825).

257. *See id.* at 41–50.

258. *See id.* at 39–44, 48–50.

259. *Id.* at 43.

260. *Id.*

261. *See id.* at 42–46.

262. *Mistretta v. United States*, 488 U.S. 361, 417–19 (1989) (Scalia, J., dissenting).

263. *Id.*

264. *Id.* at 417.

265. *See id.* at 417–19.

## 2. Failures of Enforcement: Nondelegation's Open Door

Although the Supreme Court generally has been faithful to the Madison-Marshall-Scalia understanding of separated powers when it comes to purported exercises of judicial power outside Article III's framework,<sup>266</sup> delegation of lawmaking authority has been broadly, and improperly, allowed.<sup>267</sup> After announcing the "intelligible principle" test for permissible delegations in *J. W. Hampton, Jr., & Co. v. United States*<sup>268</sup>—which allows statutory assignments of administrative authority that are guided by an intelligible principle—the Court has only twice (and not since 1935) found that congressional delegations of authority failed to articulate a sufficiently constraining directive.<sup>269</sup>

Treating this test as an open door has given rise to a Code of Federal Regulations that now contains somewhere in the neighborhood of 200,000 pages of legally enforceable, *agency*-generated rules, roughly nine to ten times as many pages as the congressionally passed laws collected in the United States Code.<sup>270</sup> These rules go well beyond the sort of modest controls over process that were at issue in *Wayman* or matters such as management of personnel or resources within the government's control that were commonly delegated to executive officers in earlier eras.<sup>271</sup> Indeed, today's administrative rules regulate facets of almost every business and a multitude of individual activities; such rules govern how students and parents interact with schools,<sup>272</sup> how consumer goods are advertised and purchases

266. See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). But see *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847–59 (1986); *Crowell v. Benson*, 285 U.S. 22, 51–54 (1932).

267. For illustrative decisions, see, for example, *Mistretta*, 488 U.S. at 371–79; *Yakus v. United States*, 321 U.S. 414, 420–23 (1944); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214–18, 225–26 (1943). Critical commentary includes, for example, Alexander & Prakash, *Running Riot*, *supra* note 21; Cass, *supra* note 20; Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121 (2016); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475 (2016); Lawson, *supra* note 20; Lawson, *supra* note 249; Rao, *supra* note 20; Schoenbrod, *Separation of Powers*, *supra* note 20.

268. 276 U.S. 394, 404 (1928).

269. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–76 (2001) (holding that section 109(b)(1) of the Clean Air Act "fits comfortably within the scope of discretion permitted by our precedent"); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

270. See, e.g., Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225, 228 (2017) (citing CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 65 (2016), <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202016%20-%20May%204%202016.pdf> [<https://perma.cc/VG6E-UW9K>], and Wayne Crews & Ryan Young, *Twenty Years of Non-Stop Regulation*, AM. SPECTATOR (June 5, 2013, 10:08 AM), <http://spectator.org/articles/55475/twenty-years-non-stop-regulation> [<https://perma.cc/3BVA-EWDB>]).

271. See, e.g., HAMBURGER, *supra* note 137, at 111–28; Alexander & Prakash, *Running Riot*, *supra* note 21, at 1039–41; Cass, *supra* note 20, at 155–58, 168–70.

272. See, e.g., 34 C.F.R. § 98.4 (2018) (establishing a student's right to not be evaluated or examined without prior consent); 34 C.F.R. § 300.101 (2018) (establishing the right to a free, appropriate, public education for all children, including children with disabilities).

financed,<sup>273</sup> how employers and employees communicate,<sup>274</sup> and almost anything else one can think of—a far cry from the limited set of decisions initially thought appropriate for administrative and executive officials.<sup>275</sup>

While much government rulemaking utilizes procedures that can facilitate more thoughtful, well-considered, and well-crafted rules,<sup>276</sup> no process can guarantee the quality of the regulations produced. More important, no administratively generated rule is adopted through the mechanisms specifically required for lawmaking by the Constitution: votes by both houses of Congress (differently constituted to represent different sorts of constituent interests for differently sized, selected, and temporally situated voting groups) and presentment to the president.<sup>277</sup> These are the procedures that the Constitution’s framers deemed essential to national lawmaking.<sup>278</sup> Without them, the resulting rules are extraconstitutional and lack both legal legitimacy and the essential elements that supported cession of power to the national government.<sup>279</sup>

Although lawyers, judges, and commentators have grown accustomed to the devolution of lawmaking authority on unelected administrators, Professors Larry Alexander and Sai Prakash provide a litany of potential delegations that are laughably far from what any reasonable jurist would accept but analytically comparable to the sort of delegations tolerated today.<sup>280</sup> The fact that Alexander and Prakash’s examples at first blush seem so evidently anticonstitutional, and that the great bulk of actual delegations of lawmaking authority do not, is evidence of the legal profession’s ability to

273. See, e.g., 15 U.S.C. § 45(a)(1) (2012) (authorizing the FTC to prohibit any “unfair or deceptive act” that affects commerce); 12 C.F.R. § 1022 (2018) (establishing the Fair Credit Reporting Act).

274. See, e.g., 29 C.F.R. § 100.530 (2017) (prohibiting discrimination against individuals with handicaps from any program or activity conducted by the National Labor Relations Board); 29 C.F.R. § 500.70 (2017) (outlining protections for migrant and seasonal workers).

275. See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1254–55 (2015) (Thomas, J., concurring); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010); Cass, *supra* note 20, at 155–58, 182–93; DeMuth, *supra* note 267, at 125–26; Ginsburg & Menashi, *supra* note 267, at 491–93; Lawson, *supra* note 20, at 335–43, 360–67, 399–403.

276. See, e.g., Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163–64 (1986); William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 129; Gillian E. Metzger, *Foreword: The 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 78–82 (2017). See generally, e.g., DeLong, *supra* note 216; Shapiro, *supra* note 216.

277. See U.S. CONST. art. I, §§ 2, 3, 7; THE FEDERALIST NO. 73 (Alexander Hamilton), NOS. 48, 51 (James Madison).

278. See, e.g., THE FEDERALIST NO. 73 (Alexander Hamilton), NOS. 48, 51 (James Madison).

279. See, e.g., *Ass’n of Am. R.Rs.*, 135 S. Ct. at 1237 (Alito, J., concurring); THE FEDERALIST NOS. 45–51 (James Madison); WOOD, *supra* note 136, at 541–62; Manning, *supra* note 10, at 640–44; John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 202 (2007); Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1010–13 (2015). For similar views respecting historic limitations on delegation under the law of England, see, for example, 1 WILLIAM BLACKSTONE, COMMENTARIES \*303; A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 53–54 (9th ed. 1952).

280. See Alexander & Prakash, *Running Riot*, *supra* note 21, at 1054–64.

accept and rationalize whatever set of decisions and practices have become the norm.<sup>281</sup>

Common rationalizations for delegated lawmaking authority provide scant reason for applauding the profession's analytical prowess. Despite the existence of serious arguments for preferring delegations on policy grounds,<sup>282</sup> arguments justifying the broad run of existing delegations of lawmaking often are thin reeds on which to rest.

For one, acceptance of delegations of lawmaking power should not be predicated on the nostrum that delegations, whether intended or inferred, come "at the expense of [Congress] ceding control over the particulars of its program to another branch of government."<sup>283</sup> That assumption—which gives comfort that Congress would not be giving up control over anything of importance—has been engaged to some extent by jurists and scholars who are among the most thoughtful and discerning advocates of critical structural analysis of constitutional issues, often in the context of explaining differences between *Chevron* deference and *Auer* deference.<sup>284</sup>

It manifestly is not the case, however, that delegations of authority from Congress are primarily acts of charity or means by which members of Congress selflessly give up control to others. Instead, each delegation performs functions that are useful to those who support it, not least members of Congress who gain from avoiding the appearance of responsibility for particular determinations or from acquiring more individual power because they can influence the relevant set of administrative decisions more than the details of related legislative enactments.<sup>285</sup>

In the same vein, many other contentions that delegations of lawmaking authority should be embraced—because they are essential to modern

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281. See generally, e.g., Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 175 (Matthew Adler & Kenneth E. Himma eds., 2009); Ronald A. Cass, *Quality and Quantity in Constitutional Interpretation: The Quest for Analytic Essentials in Law*, 46 *EUR. J.L. & ECON.* 183 (2018); Harry H. Wellington, *The Importance of Being Elegant*, 42 *OHIO ST. L.J.* 427, 430–34 (1981).

282. See, e.g., HOWARD, *supra* note 159, 175–81. See generally, e.g., Diver, *supra* note 18; Freeman & Vermeule, *supra* note 18; Mashaw, *supra* note 18; Metzger, *supra* note 276, at 71–89; Pierce, *supra* note 18.

283. Manning, *supra* note 10, at 653.

284. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing that "Congress cannot enlarge its own power through [delegations that result in *Chevron* deference]—whatever it leaves vague in the statute will be worked out by someone else"); Manning, *supra* note 10, at 653 (making a similar argument).

285. See, e.g., Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 66 (1982); Cass, *supra* note 20, at 153–55; Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 45 (1982); Rao, *supra* note 20, at 1478–82. See generally, e.g., David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *CARDOZO L. REV.* 947 (1999); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policies: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431 (1989); Shepsle, *supra* note 215.

government,<sup>286</sup> are not clearly barred by direct constitutional text,<sup>287</sup> or are cabined by procedural requirements<sup>288</sup>—should be seen as little more than a fig leaf covering constitutional expansionism. The point is not that prodelegation contentions are frivolous or thoughtless; rather, it is that they pull away from the structure embedded in the Constitution. The requirement that the president “take Care that the Laws be faithfully executed,”<sup>289</sup> for instance, is not a mandate to *make* law. Though it is used by some scholars as a launch vehicle for the current administrative state,<sup>290</sup> it appears in the middle of a set of manifestly ministerial duties—between receiving ambassadors and commissioning officers—and is anything but an assignment of authority to substitute administrative lawmaking for the painstakingly constrained and carefully constructed set of procedures contained in Article I.<sup>291</sup>

### 3. Extending Delegations’ Downsides: Evading Constraint, *Auer*’s Expansion, and Criminal Risks

The facts highlighted in the last section—that explanations for delegation leave substantial room for constitutional questions respecting many delegations’ legitimacy and that the practice of delegating (while reducing the institutional role of Congress) permits specific members of Congress to increase their individual influence over decisions—underscore the importance of scrutinizing each delegation for consistency with constitutional commands. That is true whether the delegation is of first-level discretionary authority to implement statutory instructions or second-level discretionary authority to further effectuate an agency’s effort to do that through rulemaking.

Yet, further expanding discretionary authority, as *Auer* does, by extending it to additional decisional steps should trigger special scrutiny, if for no other reason than to assure that the authority comes in fact from legislative direction rather than from the sort of “matryoshka doll”-style approach embraced by *Auer*, which (like the Russian nesting dolls) permits each delegation to lead to another one.<sup>292</sup> While modern commentary sometimes recalls explanations from Madison or Hamilton of the importance of particular structural features of the Constitution for protection of liberty, there is less often recognition that Madison’s and Hamilton’s arguments did not represent the skeptical side of the debate over control of official power.

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286. See generally Freeman & Vermeule, *supra* note 18; Mashaw, *supra* note 18.

287. See, e.g., Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87, 90–92 (2010); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

288. See, e.g., Metzger, *supra* note 276, at 77–81; Pierce, *supra* note 18, at 408–10.

289. U.S. CONST. art. II, § 3.

290. See, e.g., Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1886–99 (2015); Metzger, *supra* note 276, at 79–85. See generally Pierce, *supra* note 18.

291. See U.S. CONST. art. II, § 3.

292. See, e.g., Professors’ Brief, *supra* note 102, at 6, 24.



The framing generation was divided between those in the Federalist camp—who thought those structural features sufficiently protected against expanding national authority, especially concentrated discretionary authority—and the anti-Federalist camp—which doubted that the Constitution's structures (or *any* structures for a sovereign national government) could contain officials' impulses to self-aggrandizement and the potential for abuse of power that accompanies it.<sup>293</sup>

The concept of delegated power informed a central concern for both sides of the debate over the Constitution and, indeed, for broader debates in the framing generation.<sup>294</sup> The conceit underlying the Federalist arguments was that power was delegated to the national government from the people and that the delegation to exercise power through specific structures would protect against the arrogation and abuse of discretionary power that had produced invasions of liberty elsewhere.<sup>295</sup> Express commitment of power to the president, the courts, or other officials generated controversies over delegation from the days of the Marshall Court to the late 1930s, when questions arose respecting subdelegation of the Secretary of Agriculture's responsibility to grant a hearing before setting permitted rates under the Packers and Stockyards Act.<sup>296</sup> The *Morgan* cases grappled with the degree to which a cabinet officer could rely on subordinates to perform tasks for him, with the Supreme Court first significantly constraining subdelegation before ultimately sustaining an accommodation designed to signal greater investment of personal review than the Secretary would give to a routine matter.<sup>297</sup>

The issue presented by the *Auer* doctrine, in marked contrast to the questions of subdelegation at issue in *Morgan*, involves an expansion of power that will frequently be both surreptitious and in tension with basic separation-of-powers notions. The difference between these contexts is important. Subdelegation of the *Morgan* variety can raise due process issues, similar to questions respecting partiality and predictability that underlie both Professor Manning's objection to *Auer* deference and the Court's objection

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293. See, e.g., WOOD, *supra* note 136, at 548–53, 559; see also *id.* at 532–64.

294. See, e.g., *id.* (discussing the delegations of power to government and within government); see also HAMBURGER, *supra* note 137, at 378–402 (discussing the same concerns about delegation at the time of the Constitution's framing and in both prior and subsequent generations).

295. See, e.g., THE FEDERALIST NOS. 21–23, 73, 78, 84 (Alexander Hamilton), NOS. 10, 42, 45–51 (James Madison); WOOD, *supra* note 136, at 532–36, 539–42.

296. Compare *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 404–11 (1928) (discussing the constitutionality of a delegation of authority directly to the president), *Field v. Clark*, 143 U.S. 649, 692–94 (1892) (same), *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–48 (1825) (discussing the constitutionality of a delegation of authority to the Supreme Court and other courts of the United States), and *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 387 (1813) (holding that the legislature did not transfer its power to the president by prescribing evidence upon which a law should go into effect), *with Morgan v. United States*, 304 U.S. 1, 14–22 (1938) (discussing the subdelegation issue of whether the Secretary of Agriculture could delegate his power and authority under the Packers and Stockyards Act to subordinate officials).

297. See generally *United States v. Morgan*, 313 U.S. 409 (1941).

in *Christopher*.<sup>298</sup> But the vast run of subdelegations will not raise significant issues.<sup>299</sup> The text of the Constitution itself suggests recognition that the president will delegate particular functions to assist him in discharging his constitutional duties, framing the Take Care Clause in purposely elliptical form (not directing the president to *execute* the laws faithfully but to see that they *are* faithfully executed) and providing for appointment of department heads and inferior officers (officials whose principal functions will be carrying out tasks formally assigned to the president).<sup>300</sup>

The construction of formally adopted agency rules, however, is more about the expansion of government power and potential abuse of power than about the mechanics of its exercise. It can impose burdens on individuals and entities subject to the regulations and alter the impact of rules without the sort of advance warning that notice-and-comment rulemaking is designed to provide.<sup>301</sup> Even with opportunities for subsequent judicial review, the thumb on the scale that *Auer* deference provides can both prejudice outcomes and incentivize adversely affected entities to capitulate rather than litigate even when they have strong grounds to believe that the administrative construction is inappropriate.<sup>302</sup> Announcement that courts will set aside administrative interpretations that change the meaning of a rule without fair notice to those who must comply with it will ameliorate the effect of a deference rule, but it will not fully—perhaps not even substantially—eliminate those effects.

Another consideration, not often linked to *Auer* deference—the frequency with which transgression of administrative rules provides grounds for criminal punishment—adds extra weight to concerns about expanding administrative power.<sup>303</sup> The base concern is placing lawmaking authority

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298. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–57 (2012). See generally Manning, *supra* note 10.

299. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *Christopher*, 576 U.S. at 157–60. See generally, e.g., Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

300. See Cass, *supra* note 20, at 178–79 (discussing the Vesting Clause and Advice and Consent Clause of Article II, as well as the Incompatibility Clause of Article I, of the U.S. Constitution).

301. That concern certainly has been expressed repeatedly by the Supreme Court. See, e.g., *Mortg. Bankers*, 135 S. Ct. at 1209; *id.* at 1212 (Scalia, J., concurring in the judgment); *id.* 1217–24 (Thomas, J., concurring in the judgment); *Christopher*, 567 U.S. at 157–60; *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

302. See, e.g., Cass, *supra* note 270, at 250–56; see also Jonathan H. Adler, *Placing the Clean Power Plan in Context*, WASH. POST (Feb. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/10/placing-the-clean-power-plan-in-context/> [<https://perma.cc/B48A-8H3H>]; Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA’s Clean Power Plan*, WASH. POST (Feb. 9, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/> [<https://perma.cc/QR8B-BYW4>].

303. Cf. *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 31, 32–35 (2013) [hereinafter *Over-Federalization*].

that can be the basis for the most significant, coercive, government power in the hands of administrators who are not elected, do not need to go through the rigors of bicameral legislative procedures, and do not require presentment to and agreement from the president. It is difficult to find a place in our constitutional structure for such authority.<sup>304</sup>

Further, enabling creation or alteration of criminally enforceable requirements through administrative processes effectively lowers the bar to creation of criminal liability. Beyond its tension with constitutional commands, this procedural change makes the body of rules much larger.<sup>305</sup> That not only expands bases for criminal liability, it also increases the likelihood that those who are affected by the law will be caught (reasonably) unaware of the law's commands,<sup>306</sup> that many more criminally punishable transgressions, hence, will occur,<sup>307</sup> and that enforcers' discretion will be greatly expanded (given the much larger realm of potential enforcement actions and the probability that enforcers' resources will not expand commensurately).<sup>308</sup>

This complex of concerns suggests a further reason to demand, at a minimum, clear commitment of legislated discretion over interpretation and application of rules as a predicate for judicial deference. In contrast to *Auer's* rule of deference based on regulatory ambiguity, this approach should channel deference into limited areas where it fits legitimate statutory commitment of authority to administrators.

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*Hearing*] (statement of John G. Malcolm, Rule of Law Programs Policy Director, Heritage Foundation); Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 *ENGAGE*, July 2014, at 14, 14–15, 18–19; James A. Strazzella, *The Federalization of Criminal Law*, 1998 *A.B.A. CRIM. JUST. SEC.* 6–11, [http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization\\_of\\_Criminal\\_Law.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf) [<https://perma.cc/9AEA-7V4T>]. See generally John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 *B.U. L. REV.* 193 (1991).

304. See, e.g., Cass, *supra* note 303, at 18–19.

305. See generally, e.g., CREWS, *supra* note 270; Cass, *supra* note 303; Cass, *supra* note 270; George J. Terwilliger, III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 *AM. CRIM. L. REV.* 1417 (2007); Crews & Young, *supra* note 270.

306. See, e.g., Cass, *supra* note 303, at 19–20. See generally, e.g., Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 *WM. & MARY L. REV.* 671 (1976); Coffee, *supra* note 303; Terwilliger, *supra* note 305.

307. See generally, e.g., *Over-Federalization Hearing*, *supra* note 303, at 29–46 (statement of John G. Malcolm, Rule of Law Programs Policy Director, Heritage Foundation); Coffee, *supra* note 303; Terwilliger, *supra* note 305.

308. See, e.g., Cass, *supra* note 303, at 20–21; Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 38, 47 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *COLUM. L. REV.* 583, 611 (2005). See generally, e.g., Samuel W. Buell, *Potentially Perverse Effects of Corporate Criminal Liability*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT*, *supra*, at 87; David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 *HARV. ENVTL. L. REV.* 159 (2014).

## CONCLUSION

Concerns about *Auer* deference given voice by justices, judges, and scholars rightly point out difficulties with its assumption that ambiguous administrative rules essentially confer discretion on administrators to adopt any reasonable construction of those rules. Administrators hardly can be thought constitutionally capable of conferring discretionary authority on themselves and their successors. Deference to administrative decisions in such settings is in tension with structural-constitutional concepts, due process-related requirements of impartiality in rule construction, and concerns about predictability and manipulability of rules (i.e., the “fair notice” or “fair warning” concern). Technical expertise or experience enjoyed in greater measure by administrators than judges is not enough to justify deference in such settings. In short, eliminating the *Auer* doctrine in its present form serves important legal and governance values.

However, when Congress *by law* confers discretionary authority on an administrator or administrative agency—and that authority does not exceed the permissible scope of what Congress can delegate to an administrator—there is no sound basis for automatically treating that assignment as a nullity. When delegations are not problematic, exercise of discretionary authority—and the corollary of deference by reviewing courts—can be defended.

Yet, when delegations are at most only *arguably* consistent with the Constitution, extending deference—and especially expanding deference as *Auer* does in seemingly endless fashion—exacerbates delegations’ difficulties. Reinvigoration of the nondelegation doctrine is much to be hoped for—it would not eliminate the expansive administrative state but would rein in some of its worst abuses and most constitutionally questionable aspects.<sup>309</sup> That hope would fly in the face of eighty years of almost complete acquiescence in broad, unstructured, even inexplicable delegations to administrative agencies.

Absent such a development, demanding that the statutory basis for deference is clearly articulated—that Congress plainly convey authority for administrators to exercise discretion at the second level of rule implementation as well as the first level of more direct statutory implementation—is a modest first step in cabining problems associated with constitutionally questionable delegations of lawmaking authority. Both advocates and critics of the administrative state should support grounding its assignments in lawmaking that meets basic constitutional commands.

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309. See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring); *id.* at 1240–41, 1253–55 (Thomas, J., concurring in the judgment). See generally, e.g., Alexander & Prakash, *Running Riot*, *supra* note 21; Cass, *supra* note 20; DeMuth, *supra* note 267; Ginsburg & Menashi, *supra* note 267; Lawson, *supra* note 20; Rao, *supra* note 20; Schoenbrod, *Substance*, *supra* note 20.