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Administrative Law: Whose Job Is It Anyway?

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Administrative Law: Whose Job Is It Anyway?

Abstract

This Note examines the current state of judicial deference to administrative agencies and suggests modifying the doctrine to better comport with the Constitution. It examines the history of administrative agencies and the rise of judicial deference. The Note explores the present-day applications of judicial deference and analyzes whether the current doctrine is consistent with both its initial underlying policies and the Constitution. Ultimately, judicial deference to administrative agencies raises serious separation of powers concerns and should be modified to remain faithful to the nation's founding principles.

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I. INTRODUCTION

With six-in-ten Americans saying that the fundamental design and structure of the United States government requires significant changes to better serve the country for current times,¹ government, politics, and the rule of law have grown in both prevalence and complexity.² To address the ever-expanding demands of a fast-paced and progressive society, the United States government developed what has come to be known as the “administrative state,” which is full of complicated agencies, rules, and regulations created to tackle the many facets of the country’s needs.³ As of 2019, there were 449 administrative agencies in the United States promulgating regulations to execute the laws of the Legislative and Executive Branches.⁴ Amidst the vast number of governmental task forces, several scholars and politicians have begun to question whether the interactions between the government and its “fourth branch” have strayed too far from the framework set forth in the Constitution.⁵

During the 2018 Senate Judiciary Committee hearings for Justice Kavanaugh’s confirmation, Senator Ben Sasse opened his remarks with a *Schoolhouse Rock* civics lesson:

Number one: In our system, the legislative branch is supposed to be the center of our politics.

1. PEW RESEARCH CTR., THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY 11–12 (April 2018), <http://www.people-press.org/2018/04/26/the-public-the-political-system-and-american-democracy/> [hereinafter PEW RESEARCH CTR., THE PUBLIC].

2. See PEW RESEARCH CTR., SINCE TRUMP’S ELECTION, INCREASED ATTENTION TO POLITICS—ESPECIALLY AMONG WOMEN 1 (July 2017), <http://www.people-press.org/2017/07/20/since-trumps-election-increased-attention-to-politics-especially-among-women/> (explaining that “52% of Americans say they are paying more attention to politics since Donald Trump’s election”).

3. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (explaining the importance of Congress’s power to delegate to administrative agencies).

4. *Agency List*, FED. REG., <https://www.federalregister.gov/agencies> (last visited Sept. 26, 2019) (listing 449 current administrative agencies) [hereinafter *Agency List*]. Administrative agencies are widely considered the “fourth branch” of government. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 582 (1984) (“The civil service, largely insulated from politics, may appropriately be regarded as the fourth effective branch of government . . .”).

5. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446–47 (2019) (Gorsuch, J., concurring) (describing the administrative state’s “explosive growth”); *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (calling for reconsideration of judicial deference to administrative agencies).

Number two: [I]t's not. Why not? Because for the last century, and increasing by the decade . . . , more and more legislative authority is delegated to the executive branch every year. Both parties do it.⁶

Senator Sasse explained that the United States “badly need[s] to restore the proper duties and the balance of power from [its] constitutional system.”⁷ He discussed the rise of the administrative state, noting:

Over the course of the last century, but especially since the 1930s and then ramping up since the 1960s, a whole lot of the responsibility in this body has been kicked to a bunch of alphabet soup bureaucracies. All the acronyms that people know about their government or don't know about their government are the places where most actual policymaking, kind of in a way, lawmaking is happening right now.

This is not what Schoolhouse Rock says. There's no verse of Schoolhouse Rock that says give a whole bunch of power to the alphabet soup agencies and let them decide what the governance decisions should be for the people because the people don't have any way to fire the bureaucrats.⁸

Acknowledging the rational argument that “Congress can't manage all the nitty-gritty details of everything about modern government” and thus the administrative state “tries to give power and control to experts in their fields” where congressional knowledge may fall short, Senator Sasse still urged for the government “to restore a proper constitutional order with the balance of powers. . . . We need a Congress that writes laws and then stands before the

6. Senator Ben Sasse, Remarks at Supreme Court Confirmation Hearing (Sept. 4, 2018) (transcript available at <https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this>).

7. *Id.*; see also PEW RESEARCH CTR., *THE PUBLIC*, *supra* note 1, at 23 (finding that a large majority of Americans—seventy-six percent—say that having a balance of power between government branches is “very important”).

8. Sasse, *supra* note 6; see also Lynn Ahrens, *Three Ring Government*, SCHOOLHOUSE ROCK LYRICS, <http://www.schoolhouserock.tv/ThreeRing.html> (last visited Sept. 25, 2019) (“Meet the President. I am here to see that the laws get done. The ringmaster of the government. . . . See what they do in the Congress. Passin' laws and juggling bills, The courts take the law[s] and they tame the crimes[.] Balancing the wrongs with your rights.”).

people and suffers the consequences.”⁹ The Senator reiterated that the United States needs “an executive branch that has a humble view of its job as enforcing the law, not trying to write laws in the Congress’[s] absence” and “a judiciary that tries to apply written laws to facts in cases that are actually before it.”¹⁰

The interplay between the administrative agencies and the Judicial Branch has evolved over the years into a relationship with the courts deferring to agencies’ interpretations of ambiguous statutes and regulations.¹¹ Because judicial deference shifts constitutional powers, this doctrine requires closer scrutiny, especially given that agency rules often directly impact the public’s legal rights and obligations.¹² This Note examines the current state of judicial deference and suggests its modification to better comport with the Constitution. Part II of this Note discusses the background and history of administrative law, focusing on the creation and rise of administrative agencies, and the development of judicial deference to those agencies in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.* and *Auer v. Robbins*.¹³ Part III addresses the current state of the law, honing in on *Chevron* and *Auer* deference and the courts’ present application of those doctrines.¹⁴ Part IV analyzes whether the current application of judicial deference is consistent with both the initial policies underlying the doctrine’s creation and the Constitution.¹⁵ Finally, Part V touches on the impact and significance of judicial deference, ultimately concluding that courts should modify judicial deference to remain faithful to the constitutional separation of powers.¹⁶

9. Sasse, *supra* note 6; cf. Strauss, *supra* note 4, at 663 (“Individual agencies almost necessarily lack the political accountability and the intellectual and fiscal resources necessary to achieve such balancing and coordination.”).

10. Sasse, *supra* note 6.

11. See *infra* Parts II–III.

12. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–15 (1996) [hereinafter Manning, *Constitutional Structure*].

13. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997). See *infra* Part II for discussion of the two seminal judicial deference cases.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Part V.

II. BEGINNINGS OF THE ADMINISTRATIVE STATE AND JUDICIAL DEFERENCE

The administrative state did not always exist; it has developed and expanded over time with grants of power from Congress and actions of the Executive and Judicial Branches of government.¹⁷ The creation and rise of administrative agencies, as well as the role of the Judiciary in applying the doctrine of judicial deference to agency actions, are fundamental to understanding the current state of administrative law.¹⁸

A. *Constitutional Structure*

The Constitution provides express grants of authority to each of the three branches of government.¹⁹ Each act of Congress, for example, must be tied back to one of Congress's powers enumerated in the Constitution.²⁰ The constitutional structure sets forth boundaries that allow for a functional government while maintaining the core principles of checks and balances on governmental power.²¹

1. Creation of Administrative Agencies

While administrative agencies derive authority from both the Legislative and Executive Branches, Congress creates most agencies.²² Article I of the

17. Strauss, *supra* note 4, at 581–86.

18. *See infra* Part II.

19. U.S. CONST. arts. I–III. Article I grants legislative authority to Congress to create and pass laws. *Id.* art. I, § 1. Article II vests executive power in the President. *Id.* art. II, § 1. Article III provides judicial power to the Supreme Court and the present federal court system. *Id.* art. III, § 1.

20. *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”).

21. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1945 (2011) (explaining that the Constitution “not only separates powers, but also blends them in many ways in order to ensure that the branches have the means and motives to check one another”) [hereinafter Manning, *Separation of Powers*]; *see also* *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (“[C]hecks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent . . .”).

22. *See generally* OFF. OF THE FED. REG., NAT’L ARCHIVES & RECS ADMIN., U.S. GOVERNMENT MANUAL, HISTORY OF AGENCY ORGANIZATIONAL CHANGE (2015), <https://www.gpo.gov/fdsys/pkg/GOVMAN-2017-08-02/pdf/GOVMAN-2017-08-02-History-of-Agency-Organizational->

United States Constitution provides Congress the authority “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²³ From this clause, Congress has passed “enabling” statutes that create and give authority to administrative agencies to implement laws or policies.²⁴ The congressional actions creating the agencies set statutory bounds that limit agency actions and scope of authority.²⁵

In 1877, Congress passed a law establishing the first independent administrative agency—the Interstate Commerce Commission (ICC)—with limited power to oversee state railroad commissions.²⁶ The objective of the ICC and subsequent agencies was to bring greater “expertise, specialization[,] and continuity” to issues than Congress could.²⁷ Under the direction of President Theodore Roosevelt and progressive reformers, Congress passed the Hepburn Act in 1906, which markedly expanded the ICC’s authority to regulate the railroads.²⁸ During the Progressive Era, the administrative state welcomed agencies like the Federal Trade Commission (FTC), Federal Reserve, Food and Drug Administration (FDA), Federal Radio Commission, and Federal Power

Changes-104.pdf (providing a history of agency creation and organizational changes). The term “agency” encompasses “cabinet departments, cabinet-level agencies headed by individual administrators responsible to the President, independent regulatory commissions, federal corporations, [and] independent regulatory commissions within cabinet departments.” Strauss, *supra* note 4, at 583–84. The key difference between departmental or executive agencies and independent regulatory agencies is that independent agencies’ “heads do not serve at the pleasure of the president,” such that the president cannot remove independent agency officials without cause. John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 953–54 (2001). *But see* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 775 (2013) (finding that the differences between independent and executive agencies are overstated).

23. U.S. CONST. art. I, § 8.

24. AJ Blechner, *Administrative Law Research*, HARV. L. SCH. LIBR., <https://guides.library.harvard.edu/administrative?hs=a>. (last updated Feb. 27, 2019).

25. Edward J. Markey, *Congress to Administrative Agencies: Creator, Overseer, and Partner*, 1990 DUKE L.J. 967, 968–69 (1990).

26. Joseph Postell, *From Administrative State to Constitutional Government*, HERITAGE FOUND. 1, 7 (Dec. 7, 2012), http://thf_media.s3.amazonaws.com/2012/pdf/sr116.pdf.

27. *A Brief History of Administrative Government*, CTR. FOR EFFECTIVE GOV’T, <https://www.foeffectivegov.org/node/3461> (last visited Oct. 14, 2018).

28. Postell, *supra* note 26, at 8.

Commission.²⁹ “These agencies had broad delegations of authority that gave them the power to make law, not simply execute it.”³⁰ “The heads of these agencies [were] not accountable to the President, . . . exist[ing] as [the] ‘fourth branch’ of government not directly accountable to any of the other three branches.”³¹ The administrative state grew even more under President Franklin Roosevelt with the creation of the Securities and Exchange Commission (SEC) and the National Labor Relations Board (NLRB).³² The Nixon Administration created the Environmental Protection Agency (EPA), Consumer Product Safety Commission (CPSC), and National Highway Traffic Safety Administration (NHTSA).³³

29. *Id.* The FTC “polices against false and deceptive commercial practices and, in conjunction with the Department of Justice, oversees the structure of the nation’s industries under the antitrust laws.” Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 42 (1986). The Federal Reserve “regulates . . . the banking industry and controls the nation’s money supply.” *Id.* The FDA is responsible “for regulating the safety of food, drugs, cosmetics, tobacco, and medical devices.” Datla & Revesz, *supra* note 22, at 817. The Federal Radio Commission was the predecessor of the Federal Communications Commission, which now “controls many aspects of the nation’s telephone, radio, and television industries.” Miller, *supra* at 42, n.7. Likewise, the Federal Power Commission succeeded many of its responsibilities to the Federal Energy Regulatory Commission, which oversees “energy pricing and distribution.” *Id.* at 42, n.10.

30. Postell, *supra* note 26, at 8. For example, the Federal Communications Act of 1934 created the Federal Communications Commission and instructed it “to grant broadcast licenses to applicants ‘if public convenience, interest, or necessity will be served thereby.’” *Id.* (quoting 47 U.S.C. § 307 (2000) (originally enacted June 19, 1934) (ch. 652, § 307)).

31. *Id.*

32. *Id.* These independent regulatory commissions were “the hallmark of the New Deal.” *Id.* at 9. The SEC regulates “the issuance and subsequent resale of securities on national exchanges and over-the-counter markets.” Miller, *supra* note 29, at 42. The NLRB “oversees the relationship between organized labor and management in all but the smallest businesses.” *Id.*

33. Postell, *supra* note 26, at 8. The Nixon Administration created the EPA to address concerns about protecting the environment. U.S. Env’tl. Prot. Agency, *The Origins of the EPA*, EPA HISTORY, <https://www.epa.gov/history/origins-epa> (last visited Mar. 12, 2019). The CPSC also formed under the Nixon Administration “with a mission to protect the public against unreasonable risks of injury or death from consumer products through education, safety standards activities, regulation, and enforcement.” U.S. Consumer Prod. Safety Comm’n, *Contact / FAQ*, ABOUT CPSC, <https://www.cpsc.gov/About-CPSC/Contact-Information> (last visited Mar. 12, 2019). The NHTSA “carries out programs relating to the safety performance of motor vehicles and related equipment” and administers highway safety programs. *National Highway Traffic Safety Administration*, FED. REG., <https://www.federalregister.gov/agencies/national-highway-traffic-safety-administration> (last visited Mar. 12, 2019).

Currently, the President has fairly broad influence and control over administrative decision-making, with “the President’s right to dictate agency action through executive orders . . . largely unquestioned in courts.”³⁴ This expansive delegation of authority to the Executive Branch, and in turn to the agencies, is largely due to “[t]he complexities of the modern economy and administrative state, along with the heightened role of the United States in foreign affairs.”³⁵ As of 2019, 449 administrative agencies in the United States promulgated regulations to execute laws created by the Legislative and Executive Branches.³⁶

2. Congress’s Power to Delegate

The United States Constitution grants Congress all authority to create and pass legislation: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”³⁷ Historically, this created a “principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution”: that Congress cannot delegate its legislative power to another branch of government.³⁸ However, the Court has interpreted

34. Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 202–03 (2013). “Courts have justified this more deferential treatment of presidential political pressure from both constitutional and practical perspectives,” including the need for the President to monitor whether agency regulations are consistent with executive policy and the Constitution vesting “the execution of federal law solely in the President.” *Id.* at 203. However, the historically unchallenged executive orders may not survive with the Trump Administration. *See, e.g., Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1122–23 (D. Haw. 2017) (granting a temporary restraining order enjoining enforcement of President Trump’s executive order that restricted entry of foreign nationals from specified countries).

35. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 444–45 (2012); *see also* *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (holding that because of our “increasingly complex society,” Congress needs “an ability to delegate power under broad general directives”).

36. *Agency List*, *supra* note 4.

37. U.S. CONST. art. I, § 1.

38. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). Additionally, in his drafted amendments to the Constitution (Bill of Rights), James Madison had originally proposed an amendment reading:

The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial powers vested in the Legislative or Executive.

Senate Revisions to House-passed Amendments to the Constitution (draft of Bill of Rights), September

the nondelegation doctrine as allowing Congress to give its legislative authority to administrative agencies so long as it lays down an “intelligible principle” to guide the agencies’ use of that authority.³⁹ Accordingly, the Court generally upholds “Congress’[s] ability to delegate power under broad standards.”⁴⁰

Complementing the nondelegation doctrine is the complete delegation doctrine: once Congress delegates its legislative powers or authority to the Executive Branch via administrative agencies, Congress is restricted from continuing any role played in law administration.⁴¹ This is to avoid any gross expansion of congressional power akin to English Parliament.⁴² Congress retains virtually none of the policymaking power that it delegates to agencies; the courts have severely restricted methods available to Congress for regulating its delegated authority.⁴³ Although Congress “checks” this delegation by passing guidelines for agencies and approving budgets, in *INS v. Chadha*, the Court held that Congress cannot truly “check” the Executive Branch agencies because it cannot revoke its delegation of legislative power.⁴⁴ In that case, the

9, 1789, 3, Bill of Rights, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/bor> (last visited Nov. 24, 2018). The Senate struck down this proposed amendment and it did not become part of the Constitution. *Id.*

39. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). In *Mistretta*, the Court explained that it is “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” 488 U.S. at 372–73 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

40. *Mistretta*, 488 U.S. at 373. In *American Power & Light Co.*, the Court upheld the delegation of authority to the Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders. 329 U.S. at 105–06. Another example is *National Broadcasting Co. v. United States*, where the Court upheld Congress’s delegation to the Federal Communications Commission to regulate broadcast licensing as “public interest, convenience, or necessity” require. 319 U.S. 190, 225 (1943).

41. Sharpe, *supra* note 34, at 185 n.6.

42. *Id.* at 185. For example, the monarchy’s “attempting to influence Parliament by offering its members handsomely compensated executive positions” turned into systematic corruption, with joint office holding becoming a chief mechanism through which Parliament influenced the executive. *Id.* at 190–91; *see also infra* notes 173–76 and accompanying text (discussing the Incompatibility Clause).

43. Sharpe, *supra* note 34, at 185 n.6; *see also* *Bowsher v. Synar*, 478 U.S. 714, 721–27 (1986) (holding that Congress can reserve no authority to remove an officer exercising delegated power because “[a] direct congressional role in the removal of officers charged with the execution of the laws beyond [the impeachment power] is inconsistent with separation of powers”).

44. 462 U.S. 919 (1983). In *Chadha*, after an East Indian man’s nonimmigrant student visa expired, the Immigration and Naturalization Services held a deportation hearing, where an immigration judge ordered his deportation be suspended. *Id.* at 923–24. The Attorney General’s recommendation

issue concerned the congressional veto provision of § 244(c)(2) of the Immigration and Nationality Act, which allowed either house of Congress to invalidate a decision of the Executive Branch made pursuant to the congressional delegation of authority.⁴⁵ The Court held that § 244(c)(2) violated Article I's requirements of bicameralism and presentment by granting Congress a legislative veto over the Attorney General's discretionary grant of deportation suspension orders.⁴⁶ Congress could not nullify agency decisions through a unicameral veto; the only way to do this was through bicameralism and presentment.⁴⁷ The Court made clear that "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."⁴⁸

B. *The Rise of Judicial Deference*

Most agencies have internal dispute resolution mechanisms to adjudicate and resolve ensuing complaints related to their decisions.⁴⁹ The Administrative Procedure Act (APA) is one of the more prominent vehicles for challenging federal agency actions in court.⁵⁰ The APA imposes procedural requirements on agencies and permits federal courts to review agency compliance.⁵¹ As with all cases, the availability of judicial review of agency actions depends

for suspension of Chadha's deportation was transmitted to Congress. *Id.* at 924–25. The House of Representatives subsequently passed a resolution pursuant to 28 U.S.C. § 244(c)(2) opposing Chadha's grant of permanent residence in the United States. *Id.* at 927. Chadha filed a petition for review of his subsequent deportation order. *Id.* at 928.

45. *Id.* at 923. The House action pursuant to § 244(c)(2) in *Chadha* "was not treated as an Article I legislative act," and thus the House did not submit it to the Senate or present it to the President. *Id.* at 927–28.

46. *Id.* at 952–53; *see also* Sharpe, *supra* note 34, at 195 ("The Court framed the issue in the case as whether § 244's legislative veto allowed Congress to legislate in a manner barred by the Constitution. . . . [B]y asking whether the unicameral veto was essentially 'legislation,' in the sense that it 'had the purpose and effect of altering the legal rights, duties, and relations of persons.'").

47. *Chadha*, 462 U.S. at 954–55. Bicameralism means that "no law [can] take effect without the concurrence of the prescribed majority of the Members of both Houses," *id.* at 948, while presentment mandates that "all legislation be presented to the President before becoming law," *id.* at 946.

48. *Id.* at 955.

49. Strauss, *supra* note 4, at 585. For example, the Social Security Administration grants and denies individuals disability benefits. *See* 42 U.S.C. §§ 301–06, 401–34, 901–14 (2018).

50. Administrative Procedure Act of 1946, 5 U.S.C. §§ 551–59, 701–06 (2018).

51. JARED P. COLE, CONG. RESEARCH SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 2 (2016), <https://fas.org/sgp/crs/misc/R44699.pdf>.

on “constitutional, prudential, and statutory considerations.”⁵² Further, courts must have subject matter jurisdiction over the challenged agency action, which is not conferred by the APA.⁵³ Federal courts have statutory jurisdiction to hear cases involving questions of federal law,⁵⁴ meaning those cases arising under the APA in addition to nonstatutory (where an agency action is *ultra vires*) and constitutional claims.⁵⁵ Also, the petitioner or plaintiff must have a viable cause of action to challenge the agency action in federal court.⁵⁶ A specific statute can explicitly provide a cause of action, or “the APA [can] provide[] a general cause of action for individuals aggrieved by a ‘final agency action’ if ‘there is no other adequate remedy in a court.’”⁵⁷ Once an individual has completed the agency’s internal review process, a court may review the agency’s final action.⁵⁸

Traditionally, the Judiciary checks Executive authority because Congress cannot do so.⁵⁹ However, “courts have long recognized considerable weight should attach to an agency’s construction of a statutory scheme it administers.”⁶⁰ Since the Supreme Court has held that courts must give deference to

52. *Id.* (footnotes omitted); *see, e.g.*, 5 U.S.C. § 704 (2018) (allowing judicial review under the APA of only “final” administrative actions).

53. *Califano v. Sanders*, 430 U.S. 99, 107 (1997).

54. 28 U.S.C. § 1331 (2018) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); *see also* Thomas O. Sargentich, *The Jurisdiction of Federal Courts in Administrative Cases: Developments*, 41 ADMIN. L. REV. 201, 205–07 (1989) (discussing the origins of the federal appellate courts’ exercise of jurisdiction to review federal agency actions).

55. *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 185 (D.C. Cir. 2006) (“Section 1331 is an appropriate source of jurisdiction for” three different types of claims: “(1) the APA; (2) a ‘nonstatutory action, independent of the APA,’ . . . ; and (3) [constitutional claims].” (internal citation omitted)). An agency action is *ultra vires* if the action is beyond the scope of its delegated power. Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1470–71 (2000).

56. COLE, *supra* note 51, at 5.

57. *Id.* (quoting 5 U.S.C. § 704 (2018)).

58. *Id.* at 11. A final agency action is one that represents the “‘consummation’ of the agency’s decisionmaking process” and is “one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

59. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (providing for judicial review of executive actions).

60. Dudley D. McCalla, *Deference (And Related Issues)*, 14 TEX. TECH. ADMIN. L.J. 363, 376 (2013); *see, e.g.*, *Brown v. United States*, 113 U.S. 568, 571 (1884) (“These authorities justify us in adhering to the construction of the law under consideration[,] adopted by the executive department of

administrative agency interpretation of regulations and statutes, the courts are not truly “checking” this authority.⁶¹

1. *Chevron* Deference

The Supreme Court had the opportunity to formally solidify judicial deference to administrative agencies in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁶² In 1977, Congress amended the Clean Air Act to require states that had not achieved the EPA’s national air quality standards to establish a permit program to regulate “‘new or modified major stationary sources’ of air pollution.”⁶³ The EPA regulation implementing the new requirement allowed states to “adopt a plantwide definition of the term ‘stationary source.’”⁶⁴ When parties challenged this provision in *Chevron*, the question before the Court was “whether [the] EPA’s decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single ‘bubble’ is based on a reasonable construction of the statutory term ‘stationary source.’”⁶⁵

the government, and are conclusive against the contention of [the] appellant”); *United States v. Pugh*, 99 U.S. (9 Otto) 265, 269 (1878) (“[W]e are not inclined to interfere, at this late day, with a rule which has been acted [on] by the Court of Claims and the executive for so long a time.”); *United States v. Moore*, 95 U.S. (5 Otto) 760, 763 (1877) (“The officers concerned are usually able men, and masters of the subject.”); *Edwards’ Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) (“In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.”).

61. See *infra* text accompanying notes 63–90. Scholars defending judicial deference do so because the interpretation of statutes and regulations presents a question of policy, not a question of law. I KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.3 (3rd ed. 1994). “When Congress drafts a statute that does not resolve a policy dispute that later arises under the statute, some institution must resolve that dispute. The institution called upon to perform this task is not engaged in statutory interpretation,” but statutory construction. *Id.* “Policy disputes within the scope of authority Congress has delegated [to] an agency are to be resolved by agencies rather than by courts.” *Id.*

62. 467 U.S. 837 (1984).

63. *Id.* at 840.

64. *Id.* Congress left this definition to the states because in amending the Clean Air Act, Congress did not define “stationary source.” John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1522 (2014) [hereinafter Manning, *Chevron*].

65. *Chevron*, 467 U.S. at 840. The Clean Air Act’s legislative history did not help the Court answer this question. *Id.* at 862. First, during the Carter Administration, the EPA determined that “sta-

The United States Court of Appeal for the District of Columbia had set aside the EPA regulations because Congress did not explicitly define “stationary source” in the amended Act and the legislative history did not squarely address the issue.⁶⁶ The appellate court relied on two precedents that held the bubble concept was “inappropriate” in programs for improving air quality.⁶⁷ Because the appellate court viewed the program’s purpose as improving air quality, it “set aside the regulations embodying the bubble concept as contrary to law.”⁶⁸ The Supreme Court reversed, finding that the EPA’s use of the bubble concept was “a reasonable policy choice for the agency to make.”⁶⁹

Chevron’s two-step analysis sets forth a “basic framework . . . [for] review[ing] agencies’ interpretations of ambiguous statutes.”⁷⁰ First, courts turn to the plain language of the statute to decide whether “Congress has directly spoken to the precise question at issue”; if so, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁷¹ Second, if Congress is silent or the statute is

tionary source” means any “individual piece of pollution-emitting equipment within a plant.” Manning, *Chevron*, *supra* note 64, at 1522. However, the EPA changed its position during the Reagan Administration, defining “source” as an entire plant. *Id.*

66. *Chevron*, 467 U.S. at 841. The legislative history did not “contain any specific comment on the ‘bubble concept’ or the question whether a plantwide definition of a stationary source [was] permissible under the permit program.” *Id.* at 851.

67. *Id.* at 841. The cases the appellate court referenced were *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) and *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978). *Chevron*, 467 U.S. at 841 n.6. Both cases focused on Congress’s purpose for the particular program: *Alabama Power* determined that the bubble concept was “precisely suited” to the congressional design of preserving, rather than improving, existing air quality, 636 F.2d at 402, while *ASARCO* held that the bubble concept was impermissible when congressional intent was to improve, rather than preserve, existing air quality, 578 F.2d at 327–29.

68. *Chevron*, 467 U.S. at 842. This holding followed the appellate court’s precedent in *ASARCO*, where Congress’s objective was to improve air quality. 578 F.2d at 327–29.

69. *Chevron*, 467 U.S. at 845. The Supreme Court explained that the appellate court misunderstood “its role in reviewing the [challenged] regulations.” *Id.* Once the appellate court determined Congress did not have an intent regarding the bubble concept’s application to the permit program, “the question before it was not whether in its view the concept is ‘inappropriate’ in the general context of a program designed to improve air quality, but whether the Administrator’s view that it is appropriate in the context of this particular program is a reasonable one.” *Id.*

70. Sharpe, *supra* note 34, at 217. “At its most basic level, the *Chevron* analysis is equal parts statutory interpretation and institutional choice.” *Id.* As a general principle for statutory interpretation, “when deciding between two plausible statutory constructions, courts should adopt the construction that avoids constitutional problems.” Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1282 (11th Cir. 2008) (citing *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005)).

71. *Chevron*, 467 U.S. at 842–43; see also Sharpe, *supra* note 34, at 217.

ambiguous, then “the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.”⁷² In that case, courts defer to the agency’s interpretation of the statute if “the agency’s answer is based on a permissible construction of the statute.”⁷³

The Court adopted this two-step analysis based on the reasoning that Congress “explicitly left a gap for the agency to fill, [so] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁷⁴ Moreover, the Court reasoned that Article III judges “are not experts in the field, and are not part of either political branch of the Government.”⁷⁵ “[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones”⁷⁶ With these explicit policy considerations, *Chevron* created a foundational doctrine for judicial review involving an agency’s interpretation of a statute that it administers.⁷⁷

72. *Id.* at 843.

73. *Id.*; see Sharpe, *supra* note 34, at 218 (“The institutional choice part of *Chevron* establishes the default rule that agencies, not courts, are the primary interpreters of ambiguous regulatory statutes.”).

74. *Chevron*, 467 U.S. at 843–44; see also *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (“*Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.”). Under the arbitrary and capricious standard of review, a court upholds agency actions if, after reviewing relevant factors, it articulates a rational connection between the facts found and the decision rendered. *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1105 (9th Cir. 1989). This rational basis determination considers whether the agency based its decision “on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983)).

75. *Chevron*, 467 U.S. at 865.

76. *Id.* at 866; see also Sharpe, *supra* note 34, at 219 (“Congress’s role in managing statutory ambiguity under *Chevron* ends with the enactment of the statute being interpreted: ‘While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute’” (quoting *Chevron*, 467 U.S. at 865–66)).

77. See Kristine Cordier Karnezis, Annotation, *Construction and Application of “Chevron Deference” to Administrative Action by United States Supreme Court*, 3 A.L.R. Fed. 2d Art. 25, § 1 (2005) (“Although the Court acknowledged that it had long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer,

2. *Auer* Deference

Several years after *Chevron*, the Supreme Court decided *Auer v. Robbins*.⁷⁸ While *Chevron* held that agencies may authoritatively resolve ambiguities in statutes,⁷⁹ *Auer* held that agencies may authoritatively resolve ambiguities in administrative regulations.⁸⁰ In *Auer*, the Court extended deference to an agency's informal interpretation of its own ambiguous regulations as announced for the first time in an amicus brief.⁸¹

In *Auer*, St. Louis Police Department sergeants and a lieutenant sued the St. Louis Board of Police Commissioners for overtime pay they claimed under the Fair Labor Standards Act of 1938.⁸² The Court considered “whether the Secretary of Labor’s ‘salary-basis’ test for determining an employee’s exempt status [from overtime pay] reflect[ed] a permissible reading of the statute as it applies to public-sector employees” and “whether the Secretary ha[d] reasonably interpreted the salary-basis test to deny an employee salaried status (and thus grant him overtime pay) when his compensation may ‘as a practical matter’ be adjusted in ways inconsistent with the test.”⁸³ In support of the

and the principle of deference to administrative interpretations, in *Chevron* the Court expressly formulated the principle of deference to an administrative interpretation when the statute is silent or ambiguous with respect to the specific issue.”).

78. *Auer v. Robbins*, 519 U.S. 452 (1997). Prior to this case, the Court decided *Bowles v. Seminole Rock & Sand Co.*, which held that federal courts must defer to the administrative agency’s construction of a regulation “unless it is plainly erroneous or inconsistent with the regulation.” 325 U.S. 410, 414 (1945). *Auer* deference is sometimes referred to as *Seminole Rock* deference, but this Note will reference *Auer* as the doctrine of judicial deference to agency interpretations of its own regulation. See Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine By the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 789 (2014).

79. *Chevron*, 467 U.S. at 842–44.

80. *Auer*, 519 U.S. at 461; see also Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor’s Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1237 (2013) (“In *Auer v. Robbins*, the Court extended *Chevron* deference far beyond rulemaking to informal agency interpretations in amicus briefs.” (footnote omitted)).

81. *Auer*, 519 U.S. at 462 (“Petitioners complain that the Secretary’s interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference.”).

82. *Id.* at 454. The police department claimed that its officers were exempt from overtime pay as “bona fide executive, administrative, or professional” employees, while the officers asserted that the police department lost the exemption because the personnel manual allowed for pay deductions for disciplinary infractions. *Id.* The department had only made one such deduction, and the Court found that the “unique circumstances” of that deduction did not defeat the officers’ exemption from overtime pay. *Id.* at 460, 463–64.

83. *Id.* at 454–55.

agency's position, the Secretary of Labor filed an amicus brief with the Court setting forth the Department of Labor's interpretation of the salary-basis test.⁸⁴ Affirming the Eighth Circuit's decision that the officers satisfied both the salary-basis and duties tests,⁸⁵ the Court deferred to the Secretary "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, [thus] his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"⁸⁶ Rejecting the officers' arguments that the Court should not accord deference to an interpretation stated in an amicus brief, the Court held "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."⁸⁷

"*Auer* leaves defining the scope of an ambiguous regulation largely to the agency that promulgated it."⁸⁸ This decision has led to "regulation by amicus," which is agencies' use of amicus briefs in strategic, sometimes aggressive ways to advance the Executive agenda in courts.⁸⁹ The Court's decision in *Auer* was weighty: while administrative agency rules are not laws, they often "give effect to binding statutes, and are themselves considered binding under section 553 of the Administrative Procedure Act, and in reality have the binding effect of laws."⁹⁰

84. *Id.* at 461. The Department of Labor explained that employers may lose the administrative exemption when they make actual pay deductions, but not where there is only an unrealized possibility of such deductions. *Id.*

85. *Id.* at 456.

86. *Id.* at 461 (citations omitted).

87. *Id.* at 462; *see also* Leske, *supra* note 78, at 813 ("[E]ven agency interpretations set forth in legal briefs warrant respect because 'there is simply no reason to suspect that the interpretation . . . does not reflect the agency's fair and considered judgment on the matter in question.'" (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 838 (Fed. Cir. 2006) (citing *Auer*, 519 U.S. at 462))).

88. Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 814 (2015).

89. Eisenberg, *supra* note 80, at 1226–27. "*Auer* led to a jubilee of agency amicus activity and court confusion [as to] the appropriate level of deference that should be given to agency amicus positions. . . ." *Id.* at 1226.

90. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1202–03 (2016). Section 553 of the Administrative Procedure Act gives the notice-and-comment rule making procedures for administrative agencies. *See* 5 U.S.C. § 553 (2017). Also referred to as "informal rulemaking," notice-and-comment rulemaking first requires that "[a] notice of the proposed rulemaking is published in the Federal Register." Catherine L. Shaw, *Administrative Law—Administrative Procedure—Notice and Comment Rulemaking*, 1979 WIS. L. REV. 314, 323 (1979). Then, "interested persons are given an opportunity to participate through submission of written or oral comments, and the rule is issued,

III. CURRENT APPLICATIONS OF THE DEFERENCE DOCTRINE

The state of judicial deference has largely expanded since *Chevron* and *Auer*.⁹¹ “Broad delegations of substantial governmental power from Congress to the Executive Branch—whether of legislative, executive, or adjudicative power—have become the norm rather than the exception.”⁹² Essentially, the United States has an expanded Executive state as a result of the demands of a complex and well-regulated society.⁹³ This has resulted in “a judicially reinforced chasm between the President’s and Congress’s abilities to influence administrative [agency] action,”⁹⁴ as demonstrated by the decisions in *Fast v. Applebee’s International, Inc.*⁹⁵ and *Marsh v. J. Alexander’s, LLC*.⁹⁶

A. *Fast v. Applebee’s International, Inc.*

The Eighth Circuit applied *Auer* deference to an agency’s interpretation of its regulation set forth in a handbook in *Fast v. Applebee’s International, Inc.*, where a class of current and former servers and bartenders for Applebee’s restaurants sued under the Fair Labor Standards Act (FLSA) “based on Applebee’s use of the ‘tip credit’ to calculate their wages for purposes of meeting the minimum wage requirements of the FLSA.”⁹⁷ The employees claimed

accompanied by a concise general statement of its basis and purpose.” *Id.* Courts may review rules issued pursuant to this process and may set them aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2) (2017). Courts also defer to agency administrative records and other factual findings. *See, e.g.,* NLRB v. Hearst Publ’ns Inc., 322 U.S. 111, 114, 130 (1944) (deferring under a federal statute to the agency’s fact-finding determinations and applications of law).

91. *See infra* notes 92–94 and accompanying text.

92. Sharpe, *supra* note 34, at 186.

93. *See* *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power [to administrative agencies] under broad general directives.”); *see also* Sharpe, *supra* note 34, at 186 (“The President’s power to develop and implement public policy without any Congressional input has never been greater.”).

94. Sharpe, *supra* note 34, at 187.

95. *Fast v. Applebee’s Int’l, Inc.*, 638 F.3d 872 (8th Cir. 2011).

96. *Marsh v. J. Alexander’s, LLC*, 869 F.3d 1108 (9th Cir. 2017), *rev’d en banc*, 905 F.3d 610 (9th Cir. 2018).

97. *Fast*, 638 F.3d at 874. The issue before the court was “how to properly apply the ‘tip credit’ to employees” considered “tipped employees” as defined by the FLSA. *Id.* “The FLSA allows employers to pay a minimum cash wage of \$2.13 per hour to employees in a ‘tipped occupation’ as long

that Applebee's required them "to perform nontipproducing duties for significant portions of their shift while compensating them at the lower" wage rate used to compensate tip-earning employees under the FLSA.⁹⁸ Applebee's countered that the employees were in tip-earning occupations, and such duties were incidental to their occupations and thus subject to the tip credit; therefore, Applebee's could pay the lower hourly rate so long as it ultimately made up the difference between that rate and federal minimum wage.⁹⁹ The district court found against Applebee's and "concluded that the Department of Labor (DOL)'s interpretation of the FLSA as contained in the Wage and Hour Division's Field Operations Handbook," which recognizes that an employee may hold multiple jobs for the same employer—one generating tips and one not—and that an employee should earn full minimum wage while performing the job not generating tips, "was reasonable, persuasive, and entitled to deference."¹⁰⁰

On appeal, Applebee's argued that the Handbook was "contrary to the express language of the statute and regulations."¹⁰¹ Focusing on the "dual

as the employee's tips make up the difference" between the hourly cash wage and the federal minimum wage. *Id.*

98. *Id.* at 875. Such duties complained of included "wiping down bottles, cleaning blenders, cutting fruit for garnishes, taking inventory, preparing drink mixers, . . . cleaning up after closing hours[,] . . . cleaning bathrooms, sweeping, . . . [and] rolling silverware." *Id.*

99. *Id.* ("Applebee's counters that servers and bartenders are in tipped occupations, so that any incidental duties they perform as part of that occupation are subject to the tip credit and can be paid at the \$2.13 hourly rate, regardless of the amount of time spent performing these duties, as long as each employee's tips make up the difference between \$2.13 per hour and the full minimum wage rate.")

100. *Id.* at 874.

The DOL's 1988 Handbook [states] that if a tipped employee spends a substantial amount of time (defined as more than [twenty] percent) performing related but nontipped work, such as general preparation work or cleaning and maintenance, then the employer may not take the tip credit for the amount of time the employee spends performing those duties.

Id. at 875 (citing Department of Labor Wage and Hour Division, Field Operations Handbook § 30d00(e) (1988)).

101. *Id.* at 875. The regulation at issue provides an example of a dual job where "a maintenance man in a hotel also serves as a waiter. . . . He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man." 29 C.F.R. § 531.56(e) (1967) (amended 2011). The regulation distinguishes that situation "from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses." *Id.* Because the appeal was interlocutory to decide whose interpretation of the regulation governed, the court did not decide definitively that the Applebee's employees had qualified for minimum wage without the tip credit. *Fast*, 638 F.3d at 881. The court only determined that the twenty percent "threshold used by the DOL in its Handbook is not inconsistent with § 531.56(e) and is a reasonable interpretation of the terms 'part of [the] time' and 'occasionally' used

jobs” portion of the DOL’s regulations, the Eighth Circuit concluded that it should accord *Auer* deference to the DOL’s interpretation of the regulation because “the dual jobs test set forth in the regulation is ‘a creature of the [DOL’s] own regulations.’”¹⁰² At step one of the deference analysis, the court determined that the dual jobs regulation was ambiguous because “[b]y using the terms ‘part of [the] time’ and ‘occasionally,’ the regulation clearly places a temporal limit on the amount of related duties an employee can perform and still be considered to be engaged in the tip-producing occupation.”¹⁰³ Affirming the district court, the Eighth Circuit noted that deference is appropriate where, as here, the agency’s stated position “was consistent with its past views”¹⁰⁴ and even when that position changes over time, deference is appropriate “where there was ‘simply no reason to suspect that the interpretation [did] not reflect the agency’s fair and considered judgment on the matter in question.’”¹⁰⁵

The Eighth Circuit’s decision in *Fast* demonstrates a similar judicial deference trend of defaulting to agency interpretations.¹⁰⁶ Despite this trend, many members of the Judiciary are beginning to push back on the deference doctrine, as seen in the Ninth Circuit’s decision in *Marsh v. J. Alexander’s, LLC*.¹⁰⁷

B. *Marsh v. J. Alexander’s, LLC*

The Ninth Circuit recently addressed the issue of whether courts owe deference to an agency’s (the Department of Labor) interpretation of a particular

in that regulation.” *Id.*

102. *Fast*, 638 F.3d at 879 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

103. *Id.*

104. *Id.* at 878–79.

105. *Id.* at 879 (citing *Kennedy v. Plan Adm’r for Dupont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009) (quoting *Auer*, 519 U.S. at 462)).

106. *See, e.g.*, *Xiao Lu Ma v. Sessions*, 907 F.3d 1191, 1197–98 (9th Cir. 2018) (holding that the Immigration and Naturalization Service’s interpretation of an ambiguous statute was entitled to *Chevron* deference); *Worldcall Interconnect, Inc. v. FCC*, 907 F.3d 810, 821–25 (5th Cir. 2018) (finding that *Auer* deference was warranted where the language of the FCC’s regulation was not “clear and unambiguous”); *Bottoms Farm P’ship v. Perdue*, 895 F.3d 1070, 1073–75 (8th Cir. 2018) (accorded substantial deference to the Federal Crop Insurance Corporation’s insurance policy interpretation under *Chevron*).

107. *See* discussion *infra* Section III.B.

regulation (the dual jobs regulation, 29 C.F.R. § 531.56(e)).¹⁰⁸ In *Marsh I*, the Ninth Circuit dealt with the same deference dilemma and regulation facing the Eighth Circuit in *Fast*.¹⁰⁹ However, the panel created a circuit split when it initially disagreed with the Eighth Circuit's approach in *Fast*.¹¹⁰ Although the Ninth Circuit ultimately rectified the circuit split by deferring to the DOL's interpretation of its regulation when rehearing *Marsh* en banc (*Marsh II*), the underlying dissent reveals the tension within the Judiciary regarding the application of deference to agency actions and interpretations.¹¹¹

1. *Marsh I*: Initial Panel Opinion

Similar to *Fast*, in *Marsh I*, former servers and bartenders alleged their employers improperly claimed tip credit under the FLSA, resulting in the employers failing to pay required minimum wage.¹¹² On appeal, the employees maintained that the district court erred in failing to defer to the DOL's interpretation of its dual jobs regulation as found in the DOL's Handbook.¹¹³ As a threshold question, the Ninth Circuit panel "determine[d] whether [it] owe[d] deference to the DOL's interpretation of the dual jobs regulation."¹¹⁴ Writing for the majority, Judge Ikuta explained that while the court "generally

108. See generally *Marsh v. J. Alexander's, LLC (Marsh I)*, 869 F.3d 1108 (9th Cir. 2018).

109. Compare *id.* at 1112–13, with *Fast*, 638 F.3d at 878–79 (both determining whether to accord deference to the DOL Handbook).

110. *Marsh I*, 869 F.3d at 1124–26.

111. See generally *Marsh v. J. Alexander's, LLC (Marsh II)*, 905 F.3d 610 (9th Cir. 2018) (en banc).

112. *Marsh I*, 869 F.3d at 1112. The regulation at issue was 29 C.F.R. § 531.56(e), which reads: (e) Dual jobs. In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least \$30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of counter-men, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

29 C.F.R. § 531.56(e) (1967) (amended 2011).

113. *Marsh I*, 869 F.3d at 1112; see also U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK § 30d00(f) (2016).

114. *Marsh I*, 869 F.3d at 1116.

defer[s] to an agency's interpretations of its own ambiguous regulations," the court does "not do so when the interpretation is 'plainly erroneous or inconsistent with the regulation,' or when such deference would impermissibly 'permit the agency, under the guise of interpreting the regulation, to create de facto a new regulation.'"¹¹⁵ After considering the statute, the regulation, and the DOL's interpretations in their historical contexts, the court held that because the DOL Handbook's interpretation was inconsistent with the regulation and attempted to "create de facto a new regulation," it was therefore not entitled to deference.¹¹⁶ Vacating the district court's dismissal and remanding to allow Marsh to file an amended complaint, the panel held that "no provision with the force of law permits the DOL to require employers to engage in time tracking and accounting for minutes spent in diverse tasks before claiming a tip credit."¹¹⁷

In the majority opinion, Judge Ikuta explicitly disagreed with the Eighth Circuit's approach to agency deference in *Fast*.¹¹⁸ She noted that when the Eighth Circuit concluded the DOL's use of the twenty percent temporal threshold was reasonable because the DOL Handbook was not inconsistent with the regulation and was a reasonable interpretation of the terms in that regulation, *Fast* did not explain *why* the Handbook's threshold was reasonable.¹¹⁹ Moreover, *Fast* "failed to consider the regulatory scheme as a whole, and it therefore missed the threshold question whether it is reasonable to determine that an employee is engaged in a second 'job' by time-tracking an employee's discrete tasks, categorizing them, and accounting for minutes

115. *Id.* (citations omitted) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)).

116. *Id.* at 1121. Because the DOL Handbook's interpretation was set forth in the DOL's amicus brief, and *Auer* holds that agency interpretations in amicus briefs are entitled judicial deference, the Ninth Circuit did not need to consider whether a Field Operations Handbook interpretation itself was entitled to *Auer* deference. *Id.* at 1121 n.15; *cf. Christensen*, 529 U.S. at 587 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack force of law—do not warrant *Chevron*-style deference."). The Eighth Circuit also did not address this issue, since the DOL also adopted the 1988 Handbook interpretation in its amicus brief in *Fast*. See *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 877 (8th Cir. 2011).

117. *Marsh I*, 869 F.3d at 1126, 1127. Judge Ikuta noted that the panel's decision would not "prevent the DOL from attempting to promulgate this approach through rulemaking, nor prevent Congress from requiring such an approach through legislation." *Id.* at 1126.

118. *Marsh I*, 869 F.3d at 1124.

119. *Id.*

spent in various activities.”¹²⁰ Instead, the Eighth Circuit focused only on a few words in the regulation out of context, failing to “grapple with the crucial question whether the [Handbook]’s time sheet approach is a reasonable interpretation of ‘job’ (in the regulation) or ‘occupation’ (in the statute).”¹²¹ Additionally, Judge Ikuta stated that the cases *Fast* cited for support suggested that the Handbook’s approach was unreasonable.¹²² Finally, “[b]y allowing the DOL to impose a substantive [twenty] percent cap on the performance of certain duties under the guise of interpreting the word ‘occasionally,’ the Eighth Circuit contravened the rule that agencies not be allowed to create new substantive regulations through interpretation.”¹²³

2. *Marsh II*: En Banc

Sitting en banc, the Ninth Circuit soon revisited the panel’s decision in *Marsh I*.¹²⁴ The en banc panel reversed *Marsh I*, finding that the court should give deference to the DOL’s interpretation of the regulation in the Handbook.¹²⁵ At step one of the deference analysis, the court held that the dual jobs regulation was ambiguous.¹²⁶ At step two, the court held that the DOL’s interpretation was “consistent with nearly four decades of interpretive guidance and with the statute and the regulation itself.”¹²⁷ The court rejected the argument that the Handbook was a new rule promulgated by the DOL, finding instead that the regulation was “a reasonable choice within a gap left open by Congress.”¹²⁸ The en banc panel stated, “[b]ecause the dual jobs regulation is

120. *Id.*

121. *Id.* at 1125.

122. *Id.* (“These cases hold, consistent with the dual jobs regulation and the Opinion Letters, that in order for an employee to be engaged in two different occupations there must be a clear dividing line between two different types of duties, such as when one set of duties is performed in a distinct part of the workday.” (citing *Myers v. Copper Cellar Corp.*, 192 F.3d 546 (6th Cir. 1999); *Pellon v. Bus. Representation Int’l, Inc.*, 528 F. Supp. 2d 1306 (S.D. Fla. 2007))).

123. *Id.* (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)).

124. *Marsh II*, 905 F.3d 610 (9th Cir. 2018) (en banc).

125. *Id.* at 616.

126. *Id.* at 624.

127. *Id.* at 625.

128. *Id.* at 619, 623 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)). The court held that the dual jobs regulation that the DOL “promulgated to give effect to new statutory provisions addressing tipped employees[] was neither an arbitrary reversal of a prior agency position nor ‘manifestly contrary to the statute.’” *Id.* at 622 (quoting *Chevron*, 467 U.S. at

ambiguous and the [Handbook]'s interpretation is both reasonable and consistent with the regulation, we agree with the Eighth Circuit that the [Handbook] is entitled to *Auer* deference.”¹²⁹

Judges Ikuta and Callahan dissented, stating, “[b]y deferring to the agency, and thus letting it improperly assume legislative authority, the majority fails in its duty to check the agency’s attempt to ‘exploit ambiguous laws as license for [its] own prerogative,’” and results in a holding that “raises the worst dangers of improper . . . *Auer* deference.”¹³⁰ Judge Ikuta explained that “rather than interpreting the dual jobs regulation, the DOL Time-Tracking Rule effectively replaces the concept of a tipped occupation with a new regulatory framework [I]t is a completely different approach to the tip credit.”¹³¹ The rule did “not attempt to explain or derive a general principle from” the regulation, and provided “no guidance for interpreting the terms the majority identifie[d] as ambiguous in the dual jobs regulation.”¹³² Judge Ikuta also pointed out that “[i]n recent years, a number of Supreme Court justices have noted grave concerns about the propriety and constitutionality of deferring to agency interpretations.”¹³³ This dissenting opinion in *Marsh II* highlights the continued internal strain within the Judiciary regarding deference

844).

129. *Id.* at 623. Because both the 1988 and 2012 versions of the Handbook use the twenty percent temporal benchmark, the court found that the Eighth Circuit’s deference to the earlier version in *Fast* was still persuasive. *Id.* at 623 n.11. Additionally, the court held that the “DOL’s interpretation [was] consistent with nearly four decades of interpretive guidance and with the statute and the regulation itself,” which strongly favored applying *Auer* deference. *Id.* at 625–26.

130. *Id.* at 637–38 (Ikuta, J., dissenting) (quoting *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring)). These “dangers” arise because “‘administrative interpretation’ of a regulation ‘becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” *Id.* at 638, 638 n.1 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

131. *Id.* at 641. “[A] court may not defer to a substantive rule masquerading as an interpretation even when the rule is consistent in some way with the regulation.” *Id.* at 642; see *Mission Grp. Kan., Inc. v. Riley*, 146 F.3d 775, 781 (10th Cir. 1998) (“[M]ere linguistic consistency between the rule and the regulations cannot establish that the former is within the interpretive scope of the latter.”).

132. *Marsh II*, 905 F.3d at 645–47 (Ikuta, J., dissenting).

133. *Id.* at 652 (citing *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in judgment) (noting concerns “about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court’s cases holding that courts must ordinarily defer to an agency’s interpretation of its own ambiguous regulations”); *id.* at 1211–13 (Scalia, J., concurring in the judgment) (expressing concern that the “balance between power

application.¹³⁴

C. Refining Deference

While *Fast* and *Marsh* present examples of current applications of judicial deference to administrative agencies, the courts have refined this doctrine—at least theoretically—since its inception in *Chevron*.¹³⁵ With *Chevron* standing for the principle of deferring to agency interpretations of ambiguous statutes, and *Auer* for deferring to agency interpretations of ambiguous agency regulations, courts have fine-tuned these seminal cases to limit their application and establish distinct considerations for their use.¹³⁶

For example, *Chevron* deference “is warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was

and procedure [is] quite different from the one Congress chose when it enacted the APA” and that “[b]y supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules’ exemption from notice-and-comment rulemaking”); *id.* at 1213 (Thomas, J., concurring in the judgment) (“This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”); *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 615–16 (2013) (Roberts, J., concurring) (expressing the desire to reconsider *Auer* in an appropriate case); *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.”)).

134. See Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 MO. L. REV. 983, 983–84 nn.8–11 (2016) (discussing the instances of doubt surrounding *Chevron* and *Auer* deference and possible actions to eliminate such judicial deference to agencies).

135. See discussion *infra* Section III.C. It is true that *Chevron* was not truly the inception of judicial deference, but it certainly was a landmark case that has become a founding pillar for the doctrine. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–13 (1989) (discussing the importance of *Chevron* and the history of judicial deference before the landmark decision); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 22 (2007) (“*Chevron* did not invent judicial deference, but rather routinized it.”).

136. See Leske, *supra* note 78, at 802–32 (discussing the differences in appellate courts’ applications of the deference doctrine). For example, the Supreme Court in *Epic Systems Corp. v. Lewis* expressly foreclosed according *Chevron* deference to an agency’s interpretation of a statute that it does not administer, in that case the Arbitration Act. 138 S. Ct. 1612, 1629 (2018). And despite the Court’s continued application of agency deference, it has admittedly sent “mixed messages” to the courts. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019).

promulgated in the exercise of that authority.”¹³⁷ If not, then “the interpretation is ‘entitled to respect’ only to the extent it has the ‘power to persuade.’”¹³⁸

As to *Auer* deference, the Supreme Court in *Christensen v. Harris County* made clear that “deference is warranted only when the language of the regulation is ambiguous” because if the court defers to the interpretation of an unambiguous regulation, it would “permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.”¹³⁹ The Court in *Christensen* held that the agency interpretation must appear in a format carrying the force of law to entitle it to deference: “Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”¹⁴⁰

Additionally, the Supreme Court in *Christopher v. SmithKline Beecham Corp.* upheld *Auer*, but limited its application to cases where an agency’s amicus interpretation would not constitute an “unfair surprise” to regulated entities.¹⁴¹ The Court in *Christopher* explained that deference is less likely warranted where “an agency’s announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction” because of the high potential for unfair surprise.¹⁴² The Court also held that the consistency of an agency’s

137. *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

138. *Id.* at 256 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

139. *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); accord *Kisor*, 139 S. Ct. at 2415. For example, in *Ass’n of Private Sector Colls. & Univs. v. Duncan*, the Department of Education passed a regulation that permitted an agency to sanction an institution engaging in four specific categories of proscribed misrepresentations. 681 F.3d 427, 451 (D.C. Cir. 2012). When the Department attempted to interpret the regulation as authorizing the agency to sanction misrepresentations regarding *nonproscribed* topics, the court rejected the interpretation as “plainly inconsistent with the terms of the regulation,” thus attempting to create *de facto* a new regulation. *Id.* at 451–52.

140. *Christensen*, 529 U.S. at 587.

141. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156–57 (2012) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)). The interpretation “must be the agency’s ‘authoritative’ or ‘official position,’ rather than any more ad hoc statement not reflecting the agency’s views.” *Kisor*, 139 S. Ct. at 2416 (quoting *Mead Corp.*, 533 U.S. at 257–59).

142. *Christopher*, 567 U.S. at 158; see also *id.* at 158–59 (“It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.”).

position—whether “the agency’s interpretation conflicts with a prior interpretation”—is an important consideration because it can indicate whether the agency’s interpretation reflects “fair and considered judgment” or “is nothing more than a ‘convenient litigating position’ or a ‘*post hoc* rationalization[.]’”¹⁴³

Another factor the Court considers in applying *Auer* deference is whether the agency’s regulation merely restates or parrots the statutory language.¹⁴⁴ If it parrots the statutory language, the agency’s interpretation is actually of the statute, not of the regulation, so *Chevron* would apply instead.¹⁴⁵ Finally, courts consider the agency’s “expertise in administering technical statutory schemes.”¹⁴⁶ “[D]eference to administrative agencies is necessary when a ‘regulation concerns “a complex and highly technical regulatory program” in which the identification and classification of relevant “criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.’”¹⁴⁷

These additional considerations surrounding judicial deference to agencies as set forth in *Chevron* and *Auer* have led to some discussion about revisiting the doctrine and its application.¹⁴⁸ For instance, in a case regarding deference to the Board of Immigration Appeals’ interpretation of a statute, Justice

143. *Id.* at 155 (internal citations omitted). In a case decided before *Auer*, but after its predecessor *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the Court in *Good Samaritan Hospital v. Shalala* found that “the consistency of an agency’s position is a factor in assessing the weight that position is due.” 508 U.S. 402, 417 (1993); *see supra* note 78.

144. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (“An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”).

145. *See id.* at 257–59 (applying *Chevron* where the agency’s regulation merely parroted the language of the statute).

146. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1222 (2015) (Thomas, J., concurring). “Fundamentally, the argument about agency expertise is less about the expertise of agencies in interpreting language than it is about the wisdom of according agencies broad flexibility to administer statutory schemes.” *Id.* at 1223.

147. *Id.* at 1222 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (holding that to receive *Auer* deference, the agency’s interpretation must “implicate its substantive expertise”).

148. *See, e.g.,* *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (holding that *Chevron* deference was not required where the statute was unambiguous and resolved the case). In *Pereira*, a noncitizen native of Brazil petitioned the Board of Immigration Appeals for review of the immigration judge’s denial of his application for cancellation of removal and the judge’s subsequent order of removal. *Id.* at 2112. The question facing the Court was whether a putative “notice to appear” that fails to designate

Kennedy recently noted his “concern with the way in which the Court’s opinion in *Chevron* . . . has come to be understood and applied,” stating that “it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”¹⁴⁹ Justice Kennedy went on to explain that “[t]he proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.”¹⁵⁰ Justice Thomas voiced similar concerns in his concurrence in *Perez v. Mortgage Bankers Ass’n*, maintaining that because “this [deference] doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”¹⁵¹ With opinions like these bubbling up from the Justices, perhaps the Court will reconsider its application of deference to agencies again in the foreseeable future.¹⁵²

a specific time or place of a noncitizen’s removal proceedings is a “notice to appear” under section 1229(a) of the Immigration Reform and Immigrant Responsibility Act of 1996 such that it triggers the Act’s stop-time rule ending the noncitizen’s period of continuous presence in the United States. *Id.* at 2112–14.

149. *Id.* at 2120–21 (Kennedy, J., concurring).

150. *Id.* at 2121. In the same case, Justice Alito began his dissent by stating, “the Court’s decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent, namely *Chevron*.” *Id.* at 2121 (Alito, J., dissenting).

151. *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring). For more on these constitutional concerns, see *supra* note 133.

152. See Leske, *supra* note 78, at 787 (“But, at long last, a newfound skepticism and willingness to reconsider the . . . doctrine is gaining momentum in the U.S. Supreme Court. In the Court’s 2012–2013 Term, at least three members of the Court explicitly suggested that they were interested in re-evaluating this deference regime.”). More recently, the Court revisited *Auer* deference in its decision in *Kisor*. 139 S. Ct. at 2408. All the Justices expressed concern over the doctrine’s misapplication. See *id.* at 2415 (“So we cannot deny that *Kisor* has a bit of grist for his claim that *Auer* ‘bestows on agencies expansive, unreviewable’ authority.”) (citation omitted). But the narrow majority opted to uphold the doctrine by providing new qualifications and limitations, leaving the concurring Justices to describe the doctrine as “maimed and enfeebled—in truth, zombified.” *Id.* at 2425 (Gorsuch, J., concurring).

IV. ANALYZING DEFERENCE: TIME TO REALIGN WITH
CONSTITUTIONAL DESIGN

The current state of judicial deference to administrative agencies highlights two competing interests that are fundamentally seated at the core of the U.S. Constitution: judicial deference and judicial review.¹⁵³

A. *Judicial Deference Checks Judicial Creativity and Usurps
Judicial Authority*

On one hand, giving deference to agencies' interpretations of ambiguous statutes and their own regulations places a heavy check on the Judiciary and judicial creativity, which can be especially prevalent in courts like the Ninth Circuit.¹⁵⁴ While *Chevron* "promote[s] fidelity to Congress," one of the deference doctrine's primary goals is "to limit judicial power vis-à-vis other constitutional agents."¹⁵⁵ Cases developing judicial deference often refer to the agencies' particular expertise, "their intense familiarity with the history and purposes of the legislation at issue, [and] their practical knowledge of what will best effectuate those purposes. In other words, they are more likely than the courts to reach the correct result."¹⁵⁶ In support of this justification for deference, courts have deferred to agency interpretations of regulations where the agency has particular expertise in administering complex and technical statutory schemes.¹⁵⁷

153. See *infra* Sections IV.A–B.

154. See Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 LANDSLIDE 8, 9–10 (2010) (discussing the 80% reversal rate of the Ninth Circuit). This assertion is based off of the number of cases the Supreme Court has overturned from this jurisdiction. See *id.*; see also *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam) ("The Ninth Circuit's opinion was not just wrong. It also committed fundamental errors that this Court has repeatedly admonished courts to avoid."); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) ("We have before cautioned the lower courts—and the Ninth Circuit in particular—against 'framing our precedents at such a high level of generality.'" (quoting *Nevada v. Jackson*, 569 U.S. 505, 512 (2013))).

155. Molot, *supra* note 135, at 22.

156. Scalia, *supra* note 135, at 514; see also Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 310 (1986) ("[T]he agency inevitably enjoys an edge in understanding technical concepts and terminology contained in the statute or its legislative history. The agency is also more familiar with the regulated industry. These advantages of agency expertise are all the more evident during an era of burgeoning judicial caseloads, when judges must move rapidly from one area of the law to another.").

157. See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("[B]road deference is

Moreover, some scholars suggest that separation of powers requires judicial deference to administrative agencies because the doctrine “returns the power to set policy to democratically accountable officials” and “encourages Congress to speak with clarity, heightening its responsibility for the choices it makes.”¹⁵⁸ For statutes that agencies are tasked with implementing, if “Congress leaves an ambiguity that cannot be resolved by text or legislative history, the ‘traditional tools of statutory construction,’” then resolving such ambiguity inevitably implicates policy judgment.¹⁵⁹ The United States democracy leaves policy judgments for the political branches rather than for the courts; thus, where Congress leaves an open question of policy, deference mandates that agencies rather than the courts answer that question.¹⁶⁰

On the other hand, providing such judicial deference largely usurps judicial power and creates an issue of unchecked executive authority.¹⁶¹ The deference doctrine confers agencies great autonomy and authority to circumvent the difficult rulemaking process and instead make laws through the judicial processes.¹⁶²

all the more warranted when, as here, the regulation concerns ‘a complex and highly technical regulatory program,’ in which the identification and classification of relevant ‘criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.’” (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991))). *But see* Scalia, *supra* note 135, at 514 (“If it is, as we have always believed, the constitutional duty of the *courts* to say what the law is, we must search for something beyond relative competence as a basis for ignoring that principle when agency action is at issue.”).

158. Starr, *supra* note 156, at 312; *see id.* at 308 (“For the courts to assume such [supervisory] authority on their own would be inconsistent with the status of the judiciary as the only unelected branch. In part because federal judges are not directly accountable to any electorate, I believe they have a duty voluntarily to exercise ‘judicial restraint,’ that is, to avoid intrusions not clearly mandated by Congress or the Constitution into the processes and decisions of any other branch.”).

159. Scalia, *supra* note 135, at 515.

160. *Id.* (“Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive.”). However, Scalia disagreed with this argument, stating, “the ‘traditional tools of statutory construction’ include not merely text and legislative history but also, quite specifically, the consideration of policy consequences.” *Id.* (referencing the Latin expression “‘*Ratio est legis anima; mutata legis ratione mutatur et lex.*’” (“The reason for the law is its soul; when the reason for the law changes, the law changes as well.”)).

161. *See* Starr, *supra* note 156, at 292 (“[*Chevron*] eliminated much of the courts’ authority to invalidate agency interpretations based on perceived inconsistencies with congressional policies.”).

162. *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting) (“It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.”).

“It is emphatically the province and duty of the judicial department to say what the law is.”¹⁶³ Because the Constitution confers this duty, “Article III judges cannot opt out of exercising their check” on the other branches of government.¹⁶⁴ Thus, “to say that those views [of the Executive], if at least reasonable, will ever be *binding*—that is, seemingly, a striking abdication of judicial responsibility.”¹⁶⁵ This creates the very kind of power imbalance against which James Madison warned: “In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.”¹⁶⁶

B. *Current Compliance with Underlying Principles and the U.S. Constitution*

Judicial deference has evolved since the landmark opinion in *Chevron*.¹⁶⁷ The current state of the law has developed such that it no longer strictly comports with the original policies and intentions underlying *Chevron*, *Auer*, and their progeny.¹⁶⁸ *Chevron* explained that judicial deference serves to keep judges from legislating from the bench and to ensure that Congress’s legislative power delegated to agencies stays with those agencies, following legislative intent as closely as possible.¹⁶⁹ The Court arguably endorsed the “‘presidential control model’ of agency accountability,” meaning that “to the extent

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

164. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1221 (2015) (Thomas, J., concurring).

165. Scalia, *supra* note 135, at 514. While the note and comment period may act as a preemptive “check” on an agency’s proposed regulations, interpretative rules are not subject to any such notice and comment requirements. 5 U.S.C. § 553(b)(A) (2018).

166. THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

167. See *supra* Section III.C (discussing the Court’s refinements to the deference doctrine).

168. See Manning, *Constitutional Structure*, *supra* note 12, at 626 (“[T]he [*Chevron*] Court emphasized that our constitutional system favors relatively more accountable agencies, and not relatively less accountable courts, as repositories of policymaking discretion . . .”).

169. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute . . .”); see also Scalia, *supra* note 135, at 516 (“An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency.”).

that political accountability reduces or prevents agencies from improvidently exercising policymaking discretion, the *Chevron* Court assumed that it would be imposed primarily through the President.¹⁷⁰ However, application of judicial deference after *Auer* no longer serves the purpose of keeping policy-making decisions under the purview of officials accountable to an electorate, and it appears to give more weight to agency intent rather than congressional intent, which undermines the integrity of constitutional separation of powers.¹⁷¹ Because such important objectives underlie separation of “lawmaking from law-exposition,” this doctrine “has potentially troubling implications for administrative governance.”¹⁷²

Moreover, the current deference doctrine conflicts with the Constitution’s Incompatibility Clause: “[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”¹⁷³ This clause prohibits members of Congress from simultaneously holding an office in either the Judicial or Executive Branches.¹⁷⁴ Alexander Hamilton described the Incompatibility Clause as an “important guard[] against the danger of executive influence upon the legislative body.”¹⁷⁵ While members of the House and Senate are not executing the laws that they create, the same cannot be said for administrative agencies that both promulgate and implement regulations carrying the force of law.¹⁷⁶

170. Sharpe, *supra* note 34, at 219–20.

171. See Manning, *Constitutional Structure*, *supra* note 12, at 654 (“[*Auer*] adopts a questionable approach to the allocation of power in the modern administrative state. Given the reality that agencies engage in ‘lawmaking’ when they exercise rulemaking authority, [*Auer*] contradicts the constitutional premise that lawmaking and law-exposition must be distinct.”).

172. *Id.*

173. U.S. CONST. art I, § 6, cl. 2.

174. See *id.*; see also Sharpe, *supra* note 34, at 191 (“[O]ne of [the Incompatibility Clause’s] practical effects is to prevent legislators from simultaneously creating and enforcing federal law.”).

175. THE FEDERALIST NO. 76, at 406 (Alexander Hamilton) (Clinton Rossiter ed., 1961); cf. *Bowsher v. Synar*, 478 U.S. 714, 722–23 (1986) (mentioning the Incompatibility Clause as integral to protecting separation of powers).

176. See Leske, *supra* note 78, at 790 (“When a court defers to an administrative agency under [*Auer*], the agency has, in a sense, both made the law, via the promulgation of its regulation, and interpreted that ‘law,’ by receiving controlling deference for its interpretation.”); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (“When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule’s meaning.”).

Even more fundamentally, judicial deference to administrative agencies creates discord with constitutional separation of powers.¹⁷⁷ The Constitution divides the national government's powers into three categories and vests those powers in three distinct branches: Legislative, Executive, and Judicial.¹⁷⁸ The theories of separation of powers and checks and balances existed long before the U.S. Constitution, and the Framers emphasized a need for separation of powers to protect individual liberty, as well as checks and balances to reinforce the separation.¹⁷⁹ However, "agencies routinely combine all three governmental functions in the same body, and even in the same people within that body."¹⁸⁰ The agency's strong presumption of correctness before the courts leaves its decisions largely unchecked,¹⁸¹ and the doctrine further "represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches."¹⁸² Under *Auer* in particular, a court defers to an agency that has "both made the law, via the promulgation of its regulation, and interpreted that 'law,' . . . receiving controlling deference."¹⁸³ This power of self-interpretation "contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and

177. See *Talk Am., Inc.*, 564 U.S. at 68 ("It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.").

178. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237 (1994).

179. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215–17 (2015) (Thomas, J., concurring) (discussing the theories of John Locke and Baron de Montesquieu and the impact of those theories on the founding principles and documents of the United States).

180. Lawson, *supra* note 178, at 1248; see also *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991) (explaining that administrative agencies generally engage in rule-making, law enforcement, and adjudication).

181. Lawson, *supra* note 178, at 1248–49 ("But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law."). This violation of separation of powers is something that foundational philosophers warned against: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." 11 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (A. Cohler, B. Miller & H. Stone trans., Cambridge Univ. Press 1989).

182. *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring).

183. Leske, *supra* note 78, at 790.

law-exposition is especially dangerous to our liberties.”¹⁸⁴ Because the Constitution delegates power to the courts to interpret law, judicial deference to agencies’ interpretations of ambiguous statutes and regulations seems misaligned with the key constitutional principles.¹⁸⁵

Additionally, this power promotes agency inefficiency by “remov[ing] an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean (unless the agency’s view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.”¹⁸⁶ Judicial deference appears to create issues for traditional rules for promulgating agency regulations under the Administrative Procedure Act (APA).¹⁸⁷ By adding judicial deference to the APA, courts “have revolutionized the import of interpretive rules’ exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them.”¹⁸⁸ This is so because “if an interpretive rule gets deference, the people are bound to obey it on pain of sanction Interpretive rules that command deference *do* have the force of law.”¹⁸⁹ However, this diverges from the congressional intent behind the APA: “[A]n agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means.”¹⁹⁰

184. Manning, *Constitutional Structure*, *supra* note 12, at 617.

185. *See* Scalia, *supra* note 135, at 514 (“If it is, as we have always believed, the constitutional duty of the courts to say what the law is, we must search for something beyond relative competence as a basis for ignoring that principle when agency action is at issue.”).

186. Manning, *Constitutional Structure*, *supra* note 12, at 655.

187. Administrative Procedure Act of 1946, 5 U.S.C. §§ 551–59, 701–06 (2018). Under the APA, agencies must comply with several procedures for promulgating regulations, including providing public notice and opportunity for comment. 5 U.S.C. § 553 (2018). Because notice-and-comment rulemaking does not apply to interpretive rules or policy statements, “the agency has an incentive to mischaracterize a legislative rule as interpretive to circumvent the APA rulemaking procedure.” Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 555 (2000). “In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

188. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring).

189. *Id.* at 1212.

190. *Id.* at 1211. The APA states that “the reviewing court shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706 (2018).

Chevron appears less antagonistic to constitutional principles than *Auer*.¹⁹¹ While *Chevron*'s principle of deference to agency interpretations of ambiguous federal statutes may just provide an additional resource for courts to evaluate in statutory interpretation, *Auer*'s deference to an agency's interpretation of its own ambiguous regulation is more dangerous to fundamental canons of liberty.¹⁹² *Auer* binds the courts and the public to agency interpretations of agency-created regulations, with the only true check being whether the agency's interpretation is reasonable or creates "*de facto* a new regulation."¹⁹³ While *Auer* presents more pressing concerns, the Court should modify both *Chevron* and *Auer* to better comport with the Constitution.¹⁹⁴

C. Time for a Change?

Given the inescapable reality that current judicial deference does not comport with the Constitution, many scholars have urged the Court to reconsider the doctrine.¹⁹⁵ In fact, many Justices have expressed interest in revisiting

191. See discussion *infra* notes 192–93 and accompanying text. “[T]he rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where ‘[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.’” *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)). Justice Scalia noted that he was “unaware of any such history justifying deference to agency interpretations of its own regulations.” *Id.*

192. See *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring) (“Because this doctrine [(*Auer*)] effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”).

193. *Id.* at 1215 (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)); see *id.* (“This narrow limit on the broad deference given the agency interpretations, though sound, could not save a doctrine that was constitutionally infirm from the start.”); see also *id.* at 1212 (Scalia, J., concurring) (“By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures.”).

194. See discussion *infra* notes 219–24 and accompanying text. It is also important to note that judicial deference and agency regulations have direct and tangible impacts on the average American. See, e.g., *Marsh v. J. Alexander’s, LLC (Marsh II)*, 905 F.3d 610, 615–16 (9th Cir. 2018) (en banc) (discussing the impact of the Department of Labor’s regulation on servers and bartenders).

195. See, e.g., Manning, *Constitutional Structure*, *supra* note 12, at 617 (“[T]he Justices’ new doubts about [*Auer*] are well founded, and that the Court should replace [*Auer*] with a standard that imposes an independent judicial check on the agency’s determination of regulatory meaning.”); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring) (“A legion of academics, lower court judges, and Members of this Court—even *Auer*’s author—has called on us to abandon *Auer*.”).

judicial deference.¹⁹⁶ While on the bench, Justice Scalia pronounced “[e]nough is enough,” explaining that it is time for the Court to reconsider *Auer*.¹⁹⁷ Additionally, in his final case on the Court, Justice Kennedy stated that the Court’s “reflexive deference . . . is troubling.”¹⁹⁸ Justice Kennedy explained, “[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”¹⁹⁹

As for current members of the Court, in *Decker v. Northwest Environmental Defense Center*, Chief Justice Roberts stated that “[i]t may be appropriate to reconsider [*Auer*] in an appropriate case.”²⁰⁰ Justice Thomas explained, “[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.”²⁰¹ Additionally, Justice Alito stated that he “await[s] a case in which the validity of [*Auer*] may be explored through full briefing and argument,” and suggested that he could be persuaded by Justices Scalia’s and Thomas’s proffered reasons for disagreeing with *Auer*.²⁰² Justice Gorsuch also seemed ready for the Court to take on *Chevron*,²⁰³ and he, along with Justices Thomas, Kavanaugh, and Alito, wrote a vigorous concurrence chastising the rest of the Court for retaining *Auer* on the basis of stare decisis.²⁰⁴ Justice Kavanaugh,

196. See Leske, *supra* note 78, at 800 (“All told, the Justices’ pronouncements in *Decker*, as well as in *Talk America* and *SmithKline Beecham*, unmistakably demonstrate that it is simply a matter of time before the Court will accept a case for review with the goal of reevaluating the [*Auer*] doctrine.”).

197. *Decker v. Nw. Envntl. Def. Ctr.*, 568 U.S. 597, 616–17 (2013) (Scalia, J., concurring in part and dissenting in part); see also *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring) (“For while I have in the past uncritically accepted that rule [*Auer*], I have become increasingly doubtful of its validity. . . . [I]t frustrates the notice and predictability purposes of rule-making, and promotes arbitrary government.”).

198. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

199. *Id.* at 2121; see also *id.* (“The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.”).

200. *Decker*, 568 U.S. at 615 (Roberts, J., concurring).

201. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring).

202. *Id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment).

203. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J.) (“But the fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems much more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”).

204. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425–48 (2019) (Gorsuch, J., concurring).

too, separately has expressed doubts about *Chevron* and judicial deference.²⁰⁵

The remaining four Justices have not expressed such strong opinions about *Chevron* and judicial deference.²⁰⁶ For example, Justice Breyer still defends *Chevron*, yet sees it more as a “rule of thumb” or guideline for statutory interpretation.²⁰⁷ Even so, with many of the Justices firmly expressing interest in reconsidering deference to administrative agencies, it seems likely that in the near future the Court may grant certiorari to address current judicial deference to the expanding administrative state.²⁰⁸

When the Court does reevaluate judicial deference, it should focus its immediate attention on *Auer* instead of *Chevron*.²⁰⁹ Some agencies have as much political accountability as judges in the sense that they, too, are comprised of unelected officials.²¹⁰ While those agency positions are not lifetime appointments, it is important to note that the public does not vote for the person in charge of the Federal Communications Commission or the Environmental

205. See Brett M. Kavanaugh, *Fixing Statutory Interpretation, Judging Statutes* by Robert A. Katzmann, 129 HARV. L. REV. 2118, 2151–54 (2016) (book review) (explaining that “*Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope” and noting that “the problem with certain applications of *Chevron* . . . is that the doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of the initial clarity versus ambiguity decision. Here too, we need to consider eliminating that inquiry as the threshold trigger”); see also *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring) (“Umpires in games at Wrigley Field do not defer to the Cubs manager’s in-game interpretation of Wrigley’s ground rules. So too here.”).

206. See *infra* notes 207–08 and accompanying text; see also *Michigan v. EPA*, 135 S. Ct. 2699, 2718 (2015) (Kagan, J., dissenting) (“Judges may interfere only if the Agency’s way of ordering its regulatory process is unreasonable—i.e., something Congress would never have allowed.”).

207. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1364 (2018) (Breyer, J., dissenting) (“I do not mean that courts are to treat [*Chevron*] like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. . . . Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have.”).

208. For a discussion of whether the Court will take on a case dealing with *Chevron*, see Valerie C. Brannon & Jared P. Cole, *Deference and its Discontents: Will the Supreme Court Overrule Chevron?*, CONG. RESEARCH SERV. LEGAL SIDEBAR 1, 1–5 (2018), <https://fas.org/sgp/crs/misc/LSB10204.pdf>. While the Court addressed the viability of *Auer* in *Kisor*, Justice Gorsuch highlighted that the majority upheld the doctrine based on stare decisis. *Kisor*, 139 S. Ct. at 2443 (Gorsuch, J., concurring). Justice Gorsuch assured that *Kisor* “hardly promises to be this Court’s last word on *Auer*.” *Id.* at 2448.

209. See *supra* note 191 and accompanying text.

210. See Manning, *Constitutional Structure*, *supra* note 12, at 675 (“[A]ll agencies are embedded in a system of government whose principals (Congress, the President, and the Judiciary) compete for influence or control over the results of the administrative process. . . . [T]he President, who appoints agency heads, can freely remove most ‘executive’ officials, and provides political and material support to agencies.”). Often times agency heads are appointed. *Id.* at 675 n.304.

Protection Agency.²¹¹ While the public can vote executives into office who may appoint agency officials whose political views align with their own, the same is true for judges because the party in power appoints them as well.²¹²

Deferring to agencies for *statutory interpretation* seems reasonable because they may very well be better-suited to help resolve ambiguities in ways consistent with current implementations of federal statutes.²¹³ This helps the agencies adapt laws as society's needs and demands change.²¹⁴ However, deferring to agencies' interpretations of *their own rules* is reckless, considering the underlying constitutional principles.²¹⁵ There is no authority in the Constitution that allows such delegation of power to agencies to make, enforce, and adjudicate laws.²¹⁶ Agency interpretations of statutes do not necessarily create new legislation; rather, they help fill in policy gaps and give the courts somewhere else to consult when interpreting ambiguous statutes.²¹⁷ However,

211. See CHRISTOPHER M. DAVIS & MICHAEL GREENE, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 1, 4 (2017), <https://fas.org/sgp/crs/misc/RL30959.pdf> (“Most appointments to departments and single-headed agencies are characterized by an indefinite tenure; office holders serve at the pleasure of the President. In contrast, terms of office for appointments to multi-member entities, such as commissions and boards, are often for fixed periods of time.”).

212. U.S. CONST. art. II, § 2, cl. 2.

213. See Scalia, *supra* note 135, at 518–19 (“[T]he agency was simply ‘changing the law,’ in light of new information or even new social attitudes impressed upon it through the political process—all within the limited range of discretion to ‘change the law’ conferred by the governing statute. *Chevron* . . . permits recognition of this reality.”).

214. See *id.* at 517 (“[O]ne of [*Chevron*’s] major advantages from the standpoint of governmental theory . . . is to permit needed flexibility, and appropriate political participation, in the administrative process.”).

215. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2011) (Thomas, J., concurring) (“Because this doctrine [*Auer*] effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.”); 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.”).

216. U.S. CONST. arts. I–III.

217. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”). Arguably, agencies would provide a more up-to-date resource than would cumbersome dives into legislative history and congressional intent. See Matthew Robinson, *Deferring to Congressional Interpretations of Ambiguous Statutory Provisions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 565, 596 (2013) (“Indeed, the agency is better equipped to navigate that area [of ambiguity], depending as it must on political acumen and

agencies' interpretations of their own regulations leave relatively no check on such regulations.²¹⁸ Accordingly, the Court should modify or overturn *Auer*, allowing courts to return to a stricter standard when evaluating such regulations.²¹⁹

Without *Auer*, major judicial deference would boil down to *Chevron*.²²⁰ To align *Chevron* best with important separation of powers, the Court should modify *Chevron* and roll back to the deference doctrine introduced in *Skidmore v. Swift & Co.*, which presents a more sliding-scale type of deference.²²¹ Under *Skidmore*, when Congress has not delegated statutory interpretive law-making authority to an agency, the agency's interpretation is not controlling,

policy expertise to make its way through the twilight.”); Scalia, *supra* note 135, at 517 (“And to tell the truth, the quest for the ‘genuine’ legislative intent is probably a wild-geese chase anyway.”).

218. See, e.g., *Marsh v. J. Alexander’s LLC (Marsh II)*, 905 F.3d 610, 637–38 (9th Cir. 2018) (en banc) (Ikuta, J., dissenting) (“By deferring to the agency, and thus letting it improperly assume legislative authority, the majority fails in its duty to check the agency’s attempt to ‘exploit ambiguous laws as license for [its] own prerogative.’” (quoting *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring))).

219. See *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring) (“I would therefore restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.”).

220. See *Adler*, *supra* note 134, at 983 (“For some three decades, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* has stood at the center of administrative law.” (footnotes omitted)).

221. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); see Jack Beermann et al., *Litigation: Time to Revisit Chevron Deference?*, Comments by Amy Wildermuth in Panel Before 2014 National Lawyers Convention (Nov. 13, 2014), in 85 *MISS. L.J.* 737, 741 (2016) (“[*Skidmore* is] a sliding scale of deference . . . [D]etermined by the thoroughness evident in its consideration, the validity of its reasoning—this is the interpretation—its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade.”); see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring) (“Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and ‘follow [the] agency’s [view] only to the extent it is persuasive.’” (quoting *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006))). In *Skidmore*, firemen and elevator operators sought compensation and overtime wages under the Fair Labor Standards Act (FLSA) for the time their employer required them to be on-call in case of an alarm, as the employer only compensated them for time spent actually responding to an alarm. 323 U.S. at 135–36. Holding that such on-call time could constitute compensable working time, the Supreme Court stated that the Administrator’s Wage and Hour Division Interpretative Bulletin containing guidance for defining worktime deserved deference according to its persuasiveness, adopting a case-by-case test for deference. *Id.* at 139–40. Because the district court deferred to the Bulletin as binding legal authority in dismissing the employees’ action, the Supreme Court reversed and remanded the case. *Id.* at 140.

but “is eligible to claim respect according to its persuasiveness.”²²² The Court in *Skidmore* held that courts accord these agency interpretations the following deference: “The weight [given to an agency’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²²³ Courts should apply *Skidmore*’s approach to judicial deference in all scenarios involving agency interpretations, substituting the prior doctrines of both *Chevron* and *Auer* with a more balanced, constitutional approach.²²⁴

V. CONCLUSION

With great power comes great responsibility, the cliché avows.²²⁵ In a time where “agency rulemaking powers are the rule rather than, as they once

222. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001); *see Skidmore*, 323 U.S. at 140; *see also Manning, Constitutional Structure*, *supra* note 12, at 681 (“Under [*Skidmore*], the agency bears the burden of persuading the court to exercise its independent judgment in the agency’s favor.”). In *Skidmore*, “[t]he Court framed the deference question as a principal-agent problem and focused on allocating power to whichever entity would be the superior agent of Congress.” Molot, *supra* note 135, at 25.

223. *Skidmore*, 323 U.S. at 140; *see also Mead*, 533 U.S. at 228 (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position” (citing *Skidmore*, 323 U.S. at 140) (footnotes omitted)).

224. *See Manning, Constitutional Structure*, *supra* note 12, at 686–90 (proposing that *Skidmore* replace the judicial deference doctrine in *Auer*). Manning provides three main reasons to support replacing *Auer* with *Skidmore*: (1) “*Skidmore* satisfies the constitutionally-inspired requirement of an independent interpretive check” by placing “the burden of persuasion upon the agency”; (2) “*Skidmore* would more generally encourage regulatory clarity by placing a premium on well-explained agency accounts of regulatory meaning”; and (3) *Skidmore* “acknowledges that by virtue of its expertise and experience, an agency may have superior insights into regulatory meaning.” *Id.* at 687–88. However, for criticism of this proposed approach, *see Mead*, 533 U.S. at 241 (Scalia, J., dissenting) (“The Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’ ‘totality of the circumstances’ test. The Court’s new doctrine is neither sound in principle nor sustainable in practice.”); *see also Molot*, *supra* note 135, at 27 n.74 (“The Court could have further eliminated uncertainty by drawing a clearer line between more formal actions like notice and comment rulemaking and formal adjudication and less formal actions like policy statements and interpretive rules.”).

225. *See Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2415 (2015) (quoting STAN LEE & STEVE DITKO, *AMAZING FANTASY NO. 15: SPIDER-MAN 13* (1962)) (“[I]n this world, with great power there must also come—great responsibility.”).

were, the exception,” it is important to ensure that such power is being used responsibly, in a manner consistent with the Constitution.²²⁶ While judicial deference to administrative agencies under *Chevron* may still be faithful to the constitutional separation of powers, *Auer* contradicts the constitutional structure.²²⁷ Given the support from several Justices, the Court should reconsider *Auer* to align the deference doctrine better with constitutional parameters.²²⁸

Each branch of government has a specific role: Congress to legislate, the Executive to administer, and the Judiciary to interpret laws.²²⁹ But two of those branches have decided to delegate and defer their roles to the third branch (which ultimately created a fourth branch).²³⁰ Congress has abdicated its power to legislate, delegating it to the administrative agencies and the Executive Branch.²³¹ The Judiciary has abdicated its responsibility to interpret the law, granting this power to administrative agencies.²³² While there are good reasons for delegation and deference, these doctrines must be exercised in accordance with the foundational strictures and structures set forth in the Constitution: providing checks and balances on major powers.²³³

226. Scalia, *supra* note 135, at 516. “[W]e are awash in agency ‘expertise.’” *Id.* at 517.

227. See Manning, *Constitutional Structure*, *supra* note 12, at 696 (“Although both *Chevron* and [*Auer*] speak in terms of agencies, courts, and deference, [*Auer*] at the end of the day leaves only one actor—the agency—to write the relevant regulatory law and then to ‘say what the law is.’”).

228. See Leske, *supra* note 78, at 833 (“Regardless, any meaningful reconsideration of the doctrine by the Court would be a positive step in the development of the doctrine . . .”). While *Auer* presents more pressing constitutional concerns, the Court should apply the same modified deference framework to *Chevron* cases (agency interpretations of statutes), according deference where *Skidmore*’s factors warrant such application. See *Skidmore*, 323 U.S. at 140 (setting forth factors for weighing an agency’s interpretation).

229. U.S. CONST. arts. I–III.

230. See *infra* notes 231–32 and accompanying text.

231. See Sasse, *supra* note 6 (“[A]t the end of the day, [Congress] punts most of its power to executive branch agencies . . . because it is a convenient way for legislators . . . to be able to avoid taking responsibility for controversial and often unpopular decisions.”).

232. See Scalia, *supra* note 135, at 513–14 (“I suppose it is harmless enough to speak about ‘giving deference to the views of the Executive’ concerning the meaning of a statute, just as we speak of ‘giving deference to the views of the Congress’ concerning the constitutionality of particular legislation—the mealy-mouthed word ‘deference’ not necessarily meaning anything more than considering those views with attentiveness and profound respect, before we reject them. But to say that those views, if at least reasonable, will ever be *binding*—that is, seemingly, a striking abdication of judicial responsibility.”).

233. See Sasse, *supra* note 6 (“The solution is to restore a proper constitutional order with the balance of powers. We need Schoolhouse Rock back. We need a Congress that writes laws and then

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stands before the people and suffers the consequences and gets to [go] back to our own Mount Vernon, if that's what the electors decide. We need an executive branch that has a humble view of its job as enforcing the law, not trying to write laws in the Congress' absence. And, we need a judiciary that tries to apply written laws to facts in cases that are actually before it.”).

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