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## The Self-Delegation False Alarm: Analyzing Auer Deference's Effect on Agency Rules

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## THE SELF-DELEGATION FALSE ALARM: ANALYZING AUER DEFERENCE'S EFFECTS ON AGENCY RULES

Daniel E. Walters\*

*Auer deference holds that reviewing courts should defer to agencies when the latter interpret their own preexisting regulations. This doctrine relieves pressure on agencies to undergo costly notice-and-comment rulemaking each time interpretation of existing regulations is necessary. But according to some leading scholars and jurists, the doctrine actually encourages agencies to promulgate vague rules in the first instance, augmenting agency power and violating core separation of powers norms in the process. The claim that Auer perversely encourages agencies to “self-delegate”—that is, to create vague rules that can later be informally interpreted by agencies with latitude due to judicial deference—has helped to persuade the Supreme Court to take up this term the question of whether to overturn the doctrine. Yet, surprisingly, the self-delegation thesis has never been tested.*

*This Article scrutinizes the thesis empirically, using an original and extensive dataset of the texts of federal rules from 1982 to 2016. My linguistic analysis reveals that agencies did not measurably increase the vagueness of their writing in response to Auer. If anything, rule writing arguably became more specific over time, at least by one measure, despite Auer’s increasing prominence.*

*These findings run against common wisdom, but they should not be at all surprising. The self-delegation thesis depends on a model of agency behavior that is inconsistent with what is known about the institutional pressures and cognitive horizons that cause agencies to pursue clarity in rule writing. By revealing the failures of theoretical predictions*

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*about Auer, this Article more generally draws attention to the need to test behavioral theories of administrative law against empirical reality before unsettling settled law.*

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## INTRODUCTION

A core concern of administrative law is constraining the discretion of agencies, given that they often operate under broad delegations of authority in statutes that contain vague standards and aspirations. As Professor Kenneth Culp Davis described it, administrative law primarily ought to encourage agencies to exercise their “rule-making power to replace vagueness with clarity.”<sup>1</sup> Much of the development of American administrative law in recent decades has aimed to promote and fine-tune notice-and-comment rulemaking under the Administrative Procedure Act (APA) as a means of reducing discretion in the administrative state and making law more certain.<sup>2</sup>

Today, leading scholars and jurists view a core administrative law doctrine known as *Auer* deference as an existential threat to this project and even an affront to fundamental constitutional separation of powers norms. *Auer* deference (also sometimes referred to as *Seminole Rock* deference<sup>3</sup>) holds that a court reviewing an agency’s interpretation of its own regulations should defer to the agency’s construction so long as it is not “plainly erroneous or inconsistent with the regulation.”<sup>4</sup> This principle crucially allows agencies to avoid the impractical (and potentially debilitating) need to make every slight adjustment in regulatory understanding of existing rules through cumbersome formal amendment of written rules.<sup>5</sup> With *Auer* deference available, agencies can

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1. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 56–57 (1971).

2. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 *Duke L.J.* 1490, 1491–92 (1992) (observing that “most American academic students of administrative law have been overly enamored of the formal beauty of the notice-and-comment process” and have “reiterated unanimously over the years that agencies are free to choose between rulemaking and other forms of agency action for making policy”); Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 *Admin. L. Rev.* 1139, 1150 (2001) (noting that a shift from ad hoc adjudication to rulemaking and policy statements was “the most common recommendation of all the critics who examined the administrative state at the end of the 1950s and beginning of the 1960s”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1698 (1975) (suggesting that a “possible response to the problems created by broad legislative delegation is to acknowledge the large discretion enjoyed by agencies and to require that it be exercised in accordance with consistently applied general rules”).

3. The alternate moniker refers to a 1945 case, *Bowles v. Seminole Rock & Sand Co.*, that initially used the “plainly erroneous or inconsistent” formulation in response to an agency’s “administrative construction” of its regulation. 325 U.S. 410, 414 (1945). A wave of recent scholarship suggests that the strong version of deference that exists today is of relatively recent vintage, mostly attributable to the Supreme Court’s unanimous restatement of the principle in *Auer v. Robbins*, 519 U.S. 452, 461 (1997). See *infra* section I.A.

4. *Auer*, 519 U.S. at 461 (internal quotation marks omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

5. See *infra* note 108 and accompanying text. Technically, as long as there is a gap in the meaning of an existing regulatory text, an agency can interpret that gap in nonbinding fashion without resorting to notice-and-comment rulemaking whether it receives deference or not. See 5 U.S.C. § 553(b)(A) (2012) (providing exemptions from

instead issue guidance documents or policy statements that merely interpret existing rules in ways that achieve regulatory goals. However, the argument against *Auer* deference posits that if agencies know that they will win most cases involving their interpretations of previously promulgated rules, they have strong incentives to write vague rules in the first instance.<sup>6</sup> That way, it is claimed, agencies will be able at a later time to package a more significant change as a regulatory interpretation and need only make a plausible argument that this new interpretation is loosely contemplated by the original rule's capacious language.<sup>7</sup> With such a strategy, agencies could systematically "self-delegate" by writing rules that subsequently allow them to circumvent the APA's call for notice-and-comment rulemaking, effectively affording themselves the opportunity to make significant policy decisions merely by issuing guidance.<sup>8</sup>

Consider Title IX of the Civil Rights Act, which prohibits discrimination "on the basis of sex" in public schools.<sup>9</sup> In 2000, under this statutory

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the notice-and-comment rulemaking requirement for nonbinding interpretive rules and general statements of policy). But the promise of deference frees agencies to make that decision with less concern about being haled into court and subjected to probing review.

6. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring) (arguing that *Auer* "encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases").

7. See, e.g., Jennifer Nou, *Regulatory Textualism*, 65 *Duke L.J.* 81, 102 (2015) ("[A]fter an agency promulgates a legislative rule through notice and comment, it can then continuously revise its interpretations without meaningful notice to regulated entities and with little judicial accountability."); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 *Geo. Wash. L. Rev.* 1449, 1453 (2011) ("[B]road judicial deference to an agency's interpretation of its own regulations may enable an agency to enact binding rules without subjecting itself either to meaningful procedural safeguards or to rigorous judicial scrutiny.").

8. Kevin M. Stack, *Preambles as Guidance*, 84 *Geo. Wash. L. Rev.* 1252, 1254 (2016) ("[C]ritics contend that agencies rely on guidance documents in ways that circumvent the notice-and-comment rulemaking process. Their concern is that agencies are turning increasingly to guidance to establish norms that have significant de facto weight without the participation and accountability virtues of a notice-and-comment process."). This general turn might feed a perceived trend away from the quasi-constitutional norms of the APA and its preference for traditional forms of agency policymaking toward less formal (and less accountable) forms of policymaking, such as guidance documents and policy statements. See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 *Tex. L. Rev.* 1137, 1140 (2014) ("Our thesis is simple but powerful: the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed."); Mila Sohoni, *The Administrative Constitution in Exile*, 57 *Wm. & Mary L. Rev.* 923, 964 (2016) ("The aspects of administrative law that enable procedurally unfettered regulation have a far larger footprint now than they formerly did; they have attained a new level of importance in the allocation of power across various parts of the government.").

9. 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

provision, the U.S. Department of Education promulgated a rule that allowed school districts to install sex-separate restrooms in public school buildings but required these separate facilities to be comparable.<sup>10</sup> Sixteen years later, in response to questions schools were confronting over how to accommodate transgender students within this regulatory framework, the Department issued an opinion letter that further interpreted its own regulation to require that “[w]hen a school elects to separate or treat students differently on the basis of sex,” it must “treat transgender students consistent with their gender identity.”<sup>11</sup> The Fourth Circuit upheld the Department’s policy, giving *Auer* deference to the agency’s interpretation contained in the opinion letter in part because the original regulation simply did not speak to how transgender students should be accommodated.<sup>12</sup>

Suppose that the Department of Education had actually been clearer in its 2000 rule, explicitly stating how it expected transgender students to be treated. Suppose further that the Department in 2016 wanted to adopt a different stance with respect to the treatment of transgender students and issued an opinion letter to that effect. In a response to a properly framed challenge to the opinion letter, the Department could argue that *Auer* deference should apply to its new interpretation contained in the letter; however, there would be limits to how far the clear language in the original rule could be stretched before the subsequent interpretation would become “plainly inconsistent” with it. By speaking clearly and explicitly about transgender students in its original rule, the Department would have substantially limited its own flexibility down the road and very well may have been forced to pursue any changed view in 2016 by going through the full notice-and-comment rulemaking process.

Return now to what actually happened. Whether the Department actually intended it or not at the time, the fact that it left out any mention of transgender students in the original rule in 2000 gave the Department of Education interpretive flexibility in 2016 when it decided to make clear that schools must treat transgender students in a manner consistent with their gender identity. *Auer* deference all but guaranteed that the exercise of this flexibility would not be substantially curtailed by reviewing courts.

If agencies see similar scenarios often enough, they may come to realize that there are potential benefits to making their rules in the first

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10. 34 C.F.R. § 106.33 (2018) (providing that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex”).

11. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016) (internal quotation marks omitted) (quoting James A. Ferg-Cadima, U.S. Dep’t of Educ., Office for Civil Rights, Opinion Letter (Jan. 7, 2015) (on file with the *Columbia Law Review*)).

12. *Id.* at 722–23.

place more amenable to capacious interpretation down the road. For instance, perhaps on reflection the Department would realize that it could have even more discretion in the Title IX domain were it to write something like “schools should not discriminate on the basis of sex except when it is reasonable to fulfill the purposes of Title IX.” Such a woefully vague (even perhaps nonsensical) construction would only give more flexibility to the Department at a later time to pivot in and out of various specific approaches to protecting (or not protecting) transgender students.

Owing to concern about expansive agency discretion, critics of the *Auer* doctrine—including current Harvard Law School Dean John Manning<sup>13</sup> and several current and former Supreme Court Justices<sup>14</sup>—claim that the doctrine creates perverse incentives for agencies to make their regulations unclear (or at least not worry too much if they are), knowing that the courts will back agencies up if they later decide to issue informal opinion letters or other guidance documents interpreting those regulations as they please.<sup>15</sup> In other words, the critics’ claim, as Professors Cass Sunstein and Adrian Vermeule have characterized it, is that “agencies will issue vague, broad regulations, knowing full well that when the time comes, they will be able to impose the interpretation they prefer.”<sup>16</sup>

This argument, which might be called the “self-delegation” or “perverse incentives” thesis, has powerfully captured the attention of judges and scholars alike because it cuts straight through normatively contested debates about whether any deference to administrative action is desirable as a policy matter. The critics posit that, at least when it comes to deference to agencies’ interpretations of their own regulations, judicial deference inexorably leads to agencies expanding the scope of their own discretion through a kind of regulatory sandbagging. *Auer*, its critics claim, perversely encourages agencies to promulgate indeterminate regulations with the intention that they can be molded through interpretive moves made at a later time without the need to go through the notice-and-comment process.

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13. See *infra* notes 112–113 and accompanying text.

14. See *infra* section I.B.

15. See *infra* section II.A.

16. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 308 (2017) [hereinafter Sunstein & Vermeule, *Unbearable Rightness*]; see also Cynthia Barmore, *Auer* in Action: Deference After *Talk America*, 76 Ohio St. L.J. 813, 818 (2015) (“If *Auer* requires deference to an agency’s interpretation of ambiguous (but not unambiguous) regulations, agencies would maximize future flexibility and power by promulgating ambiguous regulations.”); John Yoo & James C. Phillips, *With Kavanaugh, the Court Could Tame the Administrative State*, Nat’l Rev. (Oct. 25, 2018), <https://www.nationalreview.com/2018/10/supreme-court-brett-kavanaugh-administrative-state/> [<https://perma.cc/YC2V-5P89>] (arguing that *Auer* “motivates agencies to maximize their power by promulgating ambiguous regulations”).

Of course, the possibility that agencies could interpret their regulations without going through notice-and-comment procedures is somewhat consistent with the APA's core compromises.<sup>17</sup> Reasonable people might well disagree about whether *Auer* strikes precisely the right balance between flexibility and fair notice when agencies seek to flesh out rules on the back end of the administrative process.<sup>18</sup> But it is much harder to disagree that a doctrine that causes agencies literally to augment their own authority—and purposefully to withhold their understanding of the law from those who bear its burdens—is flawed, both pragmatically and constitutionally. That is presumably why the self-delegation thesis has had such sway in the Supreme Court and among legal practitioners and why the Court now appears to be on the verge of overturning or significantly limiting *Auer* deference.<sup>19</sup>

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17. See Conor Clarke, *The Uneasy Case Against Auer and Seminole Rock*, 33 *Yale L. & Pol'y Rev.* 175, 179 (2014) (describing the APA's, and the Court's, "preference" for an administrative law that affords agencies great flexibility in how they proceed). Agencies thus have, under current law, vast discretion to choose from a wide range of policymaking forms, only some of which require extensive formal public engagement and purely prospective application, and they use these authorities liberally. See generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 *Duke L.J.* 1311, 1313 (1992) (explaining that agencies can "make a substantive nonlegislative rulemaking document binding on private parties" through the issuance of an interpretive rule); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 *Cornell L. Rev.* 397, 398 (2007) (noting that the volume of agencies' general statements of policy and interpretive rules, as compared to legislative rules promulgated through notice-and-comment procedures, is "massive"); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 *Admin. L. Rev.* 159, 160 (2000) (discussing the "growing tendency of American administrative agencies to return to what we, in the United States, think of as informal administrative procedures"); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 *Admin. L. Rev.* 803, 804 (2001) ("Publication rules—interpretative rules, statements of general policy, staff manuals, and the like—are an important element in the hierarchy of agency law.").

18. See Clarke, *supra* note 17, at 191 (noting that the question with regard to the propriety of deference doctrines is "always relative: what's the best way to strike the pragmatic balance").

19. In December 2018, the Supreme Court granted a petition for writ of certiorari in *Kisor v. Wilkie*, No. 18-15, 2018 WL 6439837, at \*1 (U.S. Dec. 10, 2018), a case involving a regulatory interpretation by the Department of Veterans Affairs and squarely presenting the question of whether *Auer* and *Seminole Rock* should be overruled. See Amy Howe, *One New Grant, One Dissent from the Denial of Review*, SCOTUSblog (Dec. 10, 2018), <http://www.scotusblog.com/2018/12/one-new-grant-one-dissent-from-the-denial-of-review/> [<https://perma.cc/UA7J-K2QX>]. The grant, along with the Court's decision to limit the review to the question of whether *Auer* and *Seminole Rock* should be overturned—the petitioner had presented the alternative question of whether *Auer* deference should be replaced with a canon of regulatory construction, *Petition for a Writ of Certiorari in i, Kisor v. O'Rourke*, No. 18-15 (U.S. June 29, 2018), 2018 WL 3239696—has led many Court watchers to predict that the Court will use the case as a vehicle to overturn the doctrine. See, e.g., Ellen M. Gilmer, *Deference Rule May Be on the Chopping Block*, E&E News (Dec. 10, 2018), <https://www.eenews.net/stories/1060109209> [<https://perma.cc/3ZRE-3U8T>].



All of this raises the question: Does the self-delegation thesis have any basis in reality? Recognizing how important evidence is to the future of the debate over *Auer*, this Article scrutinizes the self-delegation thesis from an empirical perspective. I test the thesis by analyzing the linguistic clarity of an original and extensive dataset of federal rules from 1982 to 2016.<sup>20</sup> My analysis reveals that agencies did not measurably increase the vagueness of their rules in response to *Auer*. If anything, rule writing became more specific over time despite *Auer*'s increasing prominence.<sup>21</sup> The findings persist across a range of measurement strategies and modeling specifications.

These results are striking when considered in light of the prominence and influence of the criticisms that have been leveled at *Auer* in recent years. Yet, given what social scientists know about how agency officials make decisions in the real world, the lack of empirical evidence of an “*Auer* effect” on rule writing should not be as surprising as it might be to *Auer*'s critics.<sup>22</sup> The self-delegation thesis is based on a simplified model of the choices officials must make in determining the timing of clarification of their meaning. Regulators issue rules to address certain problems before them, and as a result they always face functional pressures in the short term for making rules clear. After all, it will presumably be difficult to ensure compliance if regulated entities cannot understand what a rule means, and changes in administration (and the political uncertainty that follows) likewise often favor locking in policy in ways that might bind potentially hostile future overseers. Moreover, *Auer*'s critics appear to overlook entirely how other core features of administrative law reinforce agencies' short-term focus. The most immediate legal concern that agency rule writers face is the threat of vacatur under “hard look” review under the APA's arbitrary and capricious clause.<sup>23</sup> Hard look review, through its imperative that agencies thoroughly justify a chosen policy

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The critical vote will likely come from Justice Kavanaugh, who predicted years ago that the Court would “someday” overrule *Auer*. Jimmy Hoover, ‘*Auer* Someday Will Be Overruled,’ Kavanaugh Said in 2016, Law360 (Dec. 17, 2018), <https://www.law360.com/appellate/articles/1112357/-auer-someday-will-be-overruled-kavanaugh-said-in-2016> (on file with the *Columbia Law Review*) (internal quotation marks omitted) (noting, however, that then-Judge Kavanaugh “was careful to point out in his speech that ‘these are not necessarily my wants, nor my fears, just my predictions’”).

20. This range of years was selected based on data availability. The White House Office of Information and Regulatory Affairs' list of economically significant rules—the list from which the sample was generated—extended from 1981 to the present. It appeared that the records from 1981 were incomplete, so that year was excluded. Likewise, 2017 was excluded because data were available only for part of the year. The 1982 to 2016 range also makes for a roughly symmetric set of years before and after the 1997 *Auer* decision. See *infra* section III.A.1.

21. See *infra* sections III.B–E.

22. See *infra* sections IV.A–B.

23. See *infra* section IV.C.

over its alternatives, creates incentives for clarity in rules—precisely the opposite of what *Auer* allegedly encourages.<sup>24</sup>

These and other factors are abstracted away in the simplified model that implicitly stands behind the self-delegation thesis and that appears to assume that *Auer* is the only legal factor affecting agencies' decisions. More generally, and overlaying all these factors favoring clarity, agencies have limited bandwidth to address all the considerations that might affect tradeoffs between providing clarity now or later. As with individuals more generally, agency officials can be expected to discount long-term benefits and overvalue short-term gains.<sup>25</sup> *Auer*'s critics' claims about the doctrine's perverse incentives run counter to these well-documented features of agency behavior and human cognition that lead agencies to focus more on immediate outcomes at the expense of longer-term strategic gambits.<sup>26</sup>

In short, recognizing the full range of institutional and cognitive factors likely at play makes plain why no one should be at all surprised that the self-delegation thesis finds no support when subjected to careful empirical inquiry.

Beyond the obvious implication that the ongoing assault on *Auer* deference needs revisiting, the faulty assumptions of the self-delegation thesis point more generally to the importance of an evidence-based understanding of how administrative law doctrine and institutional structure shape agency behavior. Claims about the behavioral effects of administrative law are both pervasive and fundamental to the field, but they are too infrequently addressed empirically by administrative law scholarship.<sup>27</sup> One contribution of this Article, then, is to show that, in at least one important context, a facially plausible intuition about behavioral effects has led us astray. The broader implication, though, is that this error could be pervasive in separation of powers jurisprudence and scholarship more generally, as it is much easier to generate abstract claims about agency incentives than it is to sustain a reasonable burden of proof through empirical analysis.<sup>28</sup> In short, a failure to check whether

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24. See *infra* section IV.C.

25. See *infra* section IV.A.

26. See *infra* section IV.B.

27. See, e.g., Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 *Yale J. on Reg.* 85, 95 (2008) [hereinafter Coglianese, *Rhetoric and Reality*] (describing a “longstanding disjunction between the rhetoric and reality of regulatory reform” with regard to reform’s effects on “delay and paralysis” in administrative agencies).

28. For a recent example of a court being persuaded by an argument that agency structure violated separation of powers principles, see *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 6–8 (D.C. Cir. 2016) (holding that the structure of the Consumer Financial Protection Bureau is unconstitutional in part because it is “an independent agency headed by a single Director and not by a multi-member commission,” which concentrates power in the one Director), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

theory accords with reality can create a grossly distorted understanding of the effects of legal doctrine on administrative power.

Moreover, reckoning with administrative law's linkages with agency behavior also bears on perennial debates about the role of administrative agencies within the American constitutional framework.<sup>29</sup> Formalist separation of powers theory resists many aspects of the administrative state because, as the argument goes, the administrative state often involves the breakdown of hard lines demarcating the constitutionally prescribed allocation of powers, which in turn creates dangerous combinations of powers that misalign incentives in a manner inconsistent with republican government.<sup>30</sup> The criticism leveled against *Auer* is hardly the only manifestation of these larger concerns about vesting various combinations of legislative, executive, and judicial powers in the agencies that make up the administrative state. Indeed, claims about these kinds of combinations—and the opportunities they create for the “arrogation of power”<sup>31</sup>—are ubiquitous in contemporary criticisms of the administrative state.<sup>32</sup> But if agencies are often pulled in different directions by competing doctrinal incentives and the inherent complexities of their task—not to mention that they might be institutionally and cognitively predisposed to err in predictable ways—then they are unlikely to invariably seek to maximize their discretion and power, and the formalist insistence on prophylactic divisions of powers to prevent agency tyranny loses much of its persuasive force.

The Article proceeds as follows. Part I introduces *Auer* deference and describes how it evolved from an earlier principle into a central feature of litigation in the federal courts in the 1990s. This Part also details how *Auer* deference has more recently come under assault by some in the judiciary and the academy. Part II then presents the critique of *Auer* in greater detail, showing how the doctrine's critics claim that it creates perverse incentives for rule writing by relaxing the strict separation of rulemaking and rule-interpreting authority. That Part argues that the debate over *Auer* has reached an impasse because neither proponents nor critics have treated this claim as what it is: a testable empirical hypothesis.

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29. See *infra* notes 387–392 and accompanying text.

30. See *infra* notes 383–386 and accompanying text.

31. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part).

32. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1248 (1994) (noting that “[a]dministrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body”); *id.* at 1248–49 (describing the Federal Trade Commission's enforcement cycle as including the power to “promulgate[] substantive rules of conduct,” to “consider[] whether to authorize investigations,” to conduct investigations, to file administrative complaints, and to both prosecute and adjudicate the violation).

Part III is the core of the Article. It provides an empirical linguistic analysis of agency rule writing, showing statistically that *Auer*'s incentives do not translate into any measurable changes in agencies' propensity to produce vague rules. I used computer-assisted text analysis methods, some drawn from existing work in computational linguistics and psychology, to measure different facets of textual vagueness for some 19 million words of regulatory text from 1982 to 2016. This effort yielded nuanced, variegated, and comprehensive data on agency rule-writing behavior that I then used to test the self-delegation thesis. On these measures, *Auer* shows no sign of having undermined clarity in rule writing.

Part IV then shows that the results in Part III find firm support in a broader social science literature on individual and organizational decisionmaking. If it were not for the prominence and influence of the adherents of the self-delegation thesis, the results in Part III likely would not come as any news. After all, an extensive body of social science research points to cognitive and institutional tendencies that lead administrative agencies to give primacy to providing clarity and specificity in the here and now and to ignore any future purported benefits to the agency that might come from crafting vague rules. These tendencies reinforce and amplify the innumerable factors operating to induce clarity in rule writing, including the immediate possibility of judicial review under the arbitrary and capricious standard, which administrative law scholars widely accept as a threat that weighs heavily on agency officials' minds in rulemaking.

Finally, the Article concludes with a discussion of the implications that this analysis has for the ongoing assault on *Auer* and for larger debates about the legitimacy of bureaucracy in a separation of powers framework. Before changing the law in response to formalist concerns about incentives, scholars and judges should insist that critics meet their burden of demonstrating actual perverse effects.

### I. AUER'S ORIGINS AND ASCENSION

*Auer* stands for the principle that an agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"<sup>33</sup> When courts apply *Auer*, they defer to an agency's

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33. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). In recent years, the Court has delineated several circumstances when *Auer* does not apply. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (holding that *Auer* is not to be afforded "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment'" (quoting *Auer*, 519 U.S. at 462)); *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* does not apply when the rule's text "parrots," or mimics, the legislative ambiguity that justified *Chevron* deference in the first place—something widely known as the "anti-parroting" principle or canon). Together, these caveats have prompted some to consider whether there is an emerging "step zero" in *Auer* doctrine. See Clarke, *supra* note 17, at 189 ("But many of these doctrinal innovations do to *Auer*

exercise of interpretive discretion. Reasonable interpretations are credited, even if the court might actually believe that another possible interpretation is a better one.<sup>34</sup> *Auer* is thus sometimes compared to its more familiar doctrinal cousin, step two of *Chevron* deference,<sup>35</sup> and in some ways the comparison is apt—all the more so now that several empirical studies have shown that the government’s win rate in *Auer* cases is consistent with that in *Chevron* cases.<sup>36</sup> *Auer* deference, like *Chevron* deference, has been justified on a number of grounds, including that interpretive deference broadly accords with notions of agencies as the most expert and most accountable body to implement statutory programs.<sup>37</sup>

The difference between *Chevron* and *Auer*—and the impetus for the bulk of the skepticism of *Auer* deference—lies in the source of the interpretive discretion. With *Chevron*, the agency’s discretion, if it exists,

what *United States v. Mead* does to *Chevron*: they limit the ‘domain’ of deference by adding what is often described as a ‘step zero.’”).

34. *Decker*, 568 U.S. at 613 (“It is well established that an agency’s interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.”).

35. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“[T]he court does not simply impose its own construction on the statute . . . [I]f the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”); see also Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 *Geo. J.L. & Pub. Pol’y* 87, 92 (2018) (noting that *Auer* is often viewed as “a kind of Baby *Chevron* doctrine”).

36. Barmore, *supra* note 16, at 815 (“[C]ourts of appeals have responded to the Court’s recent *Auer* decisions by narrowing their application of the doctrine, leading to a steady decline from 2011 to 2014 in the rate at which courts grant *Auer* deference.”); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 *Admin. L. Rev.* 515, 519 (2011) (finding a 76% validation rate for a set of cases decided by lower courts); William Yeatman, *Note, An Empirical Defense of Auer Step Zero*, 106 *Geo. L.J.* 515, 547 (2018) (finding that, from 1993 to 2013, the government won 74.4% of cases when a court invoked *Auer* and 68.6% when a court invoked *Chevron*). These findings show a noticeable drop in actual deference compared with the Supreme Court’s actual deference in the few *Auer* cases it has decided. According to a leading empirical study, the Supreme Court applied *Auer* in 1.1% of agency interpretation cases and deferred to the agency 90.9% of the time it applied *Auer*. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 *Geo. L.J.* 1083, 1099 tbl.1 (2008). Thus, although *Auer*’s “controlling ‘unless plainly erroneous or inconsistent with the regulation’” language might have suggested a kind of “super deference,” see Daniel Mensher, *Seminole Rock in Environmental Law: A Window into Weirdness*, *Yale J. on Reg.: Notice & Comment* (Sept. 15, 2016), <http://yalejreg.com/nc/seminole-rock-in-environmental-law-a-window-into-weirdness-by-daniel-mensher/> [<https://perma.cc/MJ8X-5ZCE>] (“[W]hat I find most perplexing about *Auer* is that it demands courts defer to nearly any agency interpretation of its regulations, regardless of where, when, or how the agency offers that interpretation. This leads to some bizarre results.”), *Auer* is in practice within the normal range of the continuum of deference.

37. See Stephenson & Pogoriler, *supra* note 7, at 1460 (describing a host of “pragmatic arguments” for *Auer*, including “expertise, efficiency, flexibility, and accountability”); see also Clarke, *supra* note 17, at 179–81 (reviewing the evolution of justifications of *Auer*).

comes from Congress's statutory delegation of authority, express or implied.<sup>38</sup> With *Auer*, the discretion comes from lingering ambiguities in the agency's own previously promulgated regulatory text.<sup>39</sup> When *Auer* comes up in litigation, it is most often because an agency has issued a guidance, policy statement, advisory letter, or manual—that is, a nonlegislative rule—that clarifies a legislative rule<sup>40</sup> previously promulgated through notice-and-comment rulemaking under section 553 of the APA.<sup>41</sup> Usually, the agency could have made an identical change by amending the initial rule through a new round of notice-and-comment rulemaking, but issuing a guidance or other nonbinding document can be accomplished more quickly because the strictures of section 553 do

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38. See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (noting that, even if Congress has not “expressly delegated authority” to an agency, “it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law”). For a helpful explication of *Chevron*, see Cary Coglianese, *Chevron’s Interstitial Steps*, 85 *Geo. Wash. L. Rev.* 1339, 1347–51 (2017) (discussing in detail the ways that Congress can delegate interpretive questions to administrative agencies).

39. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (applying *Seminole Rock* rather than *Chevron* because the “salary-basis” test at issue was “a creature of the Secretary’s own regulations”).

40. The difference between legislative rules and nonlegislative rules is that legislative rules “are designed to have binding legal effect on both the issuing agency and the public” and are therefore required to “undergo the expensive and time-consuming process known as notice-and-comment rulemaking before being promulgated.” David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Shortcut*, 120 *Yale L.J.* 276, 278 (2010) (citing 5 U.S.C. § 553(b)–(c) (2012)). “Nonlegislative rules, by contrast, are not meant to have binding legal effect, and are exempted from notice and comment by the APA as either ‘interpretative rules’ or ‘general statements of policy.’” *Id.* (citing 5 U.S.C. § 553(b)(A)).

41. Of course, if the agency adds something too new, changing the substance of the rule in a way that binds the public, it risks a procedural challenge under the APA alleging that it should have gone through notice-and-comment rulemaking. See, e.g., *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015) (enjoining the Department of Homeland Security from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program following a challenge from twenty-six U.S. states that claimed DAPA had not been promulgated in compliance with the APA’s notice-and-comment procedures), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d mem.* by an equally divided court, 136 S. Ct. 2271 (2016) (*per curiam*); Franklin, *supra* note 40, at 287–89 (discussing the various tests that courts employ in determining whether agency action is a “legislative rule” that should have gone through notice-and-comment procedures). Likewise, in certain cases an agency’s new interpretation in an enforcement context can raise issues of fair notice that will prevent post hoc application of the interpretation. See, e.g., *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (outlining the “ascertainable certainty” requirement for fair notice in the enforcement realm (quoting *Diamond Roofing Co. v. Occupational Safety & Health Review Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976))).

not apply.<sup>42</sup> In effect, *Auer* blesses some procedural corner-cutting in the name of administrative efficiency.<sup>43</sup>

*Auer* is not as widely cited as *Chevron*,<sup>44</sup> but it has become an established feature of litigation involving federal administrative agencies.<sup>45</sup> It was not always so. The first section of this Part chronicles the rise of *Auer* deference from its humble origins in *Bowles v. Seminole Rock & Sand Co.*<sup>46</sup> to its unquestioned endorsement by the Supreme Court in the late 1990s. The next section then turns to more recent years, which have seen both an increasing acceptance of *Auer* deference across the federal judiciary as well as some growing apprehension about the doctrine among some current and former Supreme Court Justices.

#### A. *Early Origins—The Road from Seminole Rock to Auer*

Although the Supreme Court decided *Auer* in 1997, the deference principle it represents actually stems from an unassuming case from the 1940s involving an interpretation issued by the Office of Price Administration (OPA) of its General Maximum Price Regulation under the Emergency Price Control Act.<sup>47</sup> In *Seminole Rock*, the Court confronted an ambiguity in this regulation, which provided that “each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942.”<sup>48</sup> *Seminole Rock & Sand Company* wanted to charge customers for crushed rock at a rate that it had formally contracted for during the month of March, but which it had not yet fulfilled.<sup>49</sup> OPA believed that the “highest price charged” was to be determined by reference to sales that had actually been delivered; reference to contracted charges could be made only if there had been no delivery in the month of March, which was not the case.<sup>50</sup> In fact, at the

42. William Funk, *Saving Auer*, Jotwell (June 23, 2016) (reviewing Sunstein & Vermeule, *Unbearable Rightness*, supra note 16), <http://adlaw.jotwell.com/saving-auer/> [<https://perma.cc/K5RS-HCBX>] (arguing that “it will be infinitely faster and easier for the agency to use [interpretive rulemaking techniques]” because it would “avoid the requirements for notice-and-comment rulemaking under the APA”).

43. See infra notes 104–111 and accompanying text for discussion of the advantages of policymaking by nonlegislative rule.

44. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823, 824 n.2 (2006) (reporting that *Chevron* was cited a staggering 2,414 times in its first decade, 2,584 times in its next six years, and 2,235 times in the next five years).

45. See *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring) (“Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis.”).

46. 325 U.S. 410 (1945).

47. *Id.* at 411–14.

48. *Id.* at 413.

49. *Id.* at 412.

50. *Id.* at 415. The delivery that had been made was simply at a lower price than *Seminole Rock* would have preferred. See *id.*

same time it issued the General Maximum Price Regulation, OPA had issued a “bulletin” in which it used the more precise “actually delivered” language.<sup>51</sup> Siding with OPA, the Supreme Court stated that, in interpreting an agency’s regulation, “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>52</sup>

Little has changed in the black letter formulation of this principle between then and now.<sup>53</sup> But, as several scholars have shown, it is not clear that the Justices were aware that they were creating such an enduring principle in administrative law with their decision in *Seminole Rock*. Professor Jeffrey Pojanowski, for instance, argues that the “‘plainly erroneous’ verbiage” from *Seminole Rock* originated as a product of a relatively straightforward application of the Court’s *Skidmore* review,<sup>54</sup> which then morphed over the years into a standalone deference doctrine.<sup>55</sup>

Consistent with this conclusion, *Seminole Rock* only slowly caught on over the first few decades after the decision. As Figure 1 makes clear, citations to *Seminole Rock* first ebbed through the 1950s and then began to occur more regularly beginning in the 1960s. During this period, courts began to demonstrate an increasing willingness to apply *Seminole Rock*’s deference principle outside the price control context and to interpretations that were not “official.”<sup>56</sup> In addition, whereas in the years immediately following *Seminole Rock* courts tended to “engage[] in what looked like de novo interpretive analysis, only to cap off their decision with a reference and citation to *Seminole Rock*,” courts in the 1960s “began to articulate *Seminole Rock* as giving rise to a type of rebuttable presumption, a burden that would have to be overcome if the court were to adopt a

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51. *Id.* at 417.

52. *Id.* at 414.

53. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that an agency’s interpretation of its own regulations is “under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation’” (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))).

54. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that, even when not controlling, an agency decision may be persuasive based on 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”).

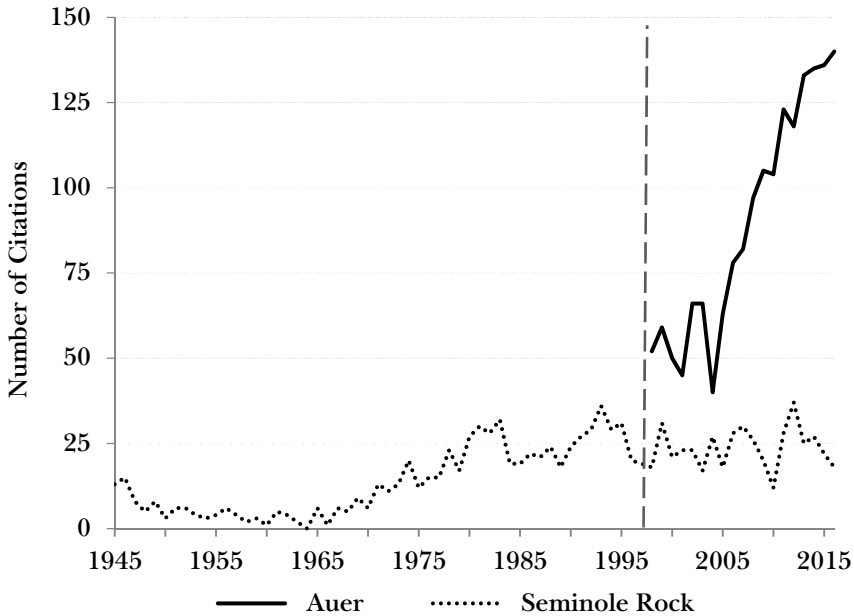
55. Pojanowski, *supra* note 35, at 88–89 (arguing that this evolution makes *Auer* bad law in the sense that it misstates *Seminole Rock*’s true meaning); see also Aditya Bamzai, Henry Hart’s Brief, Frank Murphy’s Draft, and the *Seminole Rock* Opinion, Yale J. on Reg.: Notice & Comment (Sept. 12, 2016), <http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/> [<https://perma.cc/UVD7-E98U>] (noting that the briefing in *Seminole Rock* seemed geared toward application of *Skidmore*, not toward creation of a new deference doctrine).

56. See Sanne H. Knudsen & Amy J. Wildermuth, Unearthing the Lost History of *Seminole Rock*, 65 Emory L.J. 47, 69–70 (2015) [hereinafter Knudsen & Wildermuth, Unearthing Lost History] (citing *Boesche v. Udall*, 303 F.2d 204 (D.C. Cir. 1961), *aff’d*, 373 U.S. 472 (1963)).



contrary interpretation.”<sup>57</sup> In the 1965 case *Udall v. Tallman*, the Supreme Court gave *Seminole Rock* some added authority as a general administrative law principle (rather than a provincial enclave of price-regulation law)<sup>58</sup> by “tying *Seminole Rock* to a broader body of well-accepted statutory interpretation doctrines.”<sup>59</sup>

FIGURE 1: TOTAL CIRCUIT COURT CITATIONS TO *AUER* AND *SEMINOLE ROCK*, 1945–2016<sup>60</sup>



These changes cultivated a steady, but quite limited, institutionalization of *Seminole Rock* in the circuit courts through the 1970s, 1980s, and early 1990s, as Figure 1 demonstrates. While average total citations to *Seminole Rock* increased by more than 800% from the lowest period (1955–1965) to the period just before *Auer* was decided in 1997 (1990–1996), the frequency of citation remained low, averaging just twenty-one citations per year from 1970 through 1996. And while the Supreme

57. *Id.* at 73–74.

58. 380 U.S. 1, 16–17 (1965).

59. Knudsen & Wildermuth, *Unearthing Lost History*, *supra* note 56, at 78.

60. The data reported were obtained through Lexis Advance by searching for citations to the *Shepard's* Citations footnotes concerning the principle of deference in both *Auer* and *Seminole Rock* and aggregating the citations by type and by year. Total citations include those defined by *Shepard's* as neutral and routine citations. The vertical dashed line shows the year 1997, when *Auer* was decided.

Court occasionally cited *Seminole Rock* during the six years prior to 1997, it did so without closely examining the doctrine.<sup>61</sup>

The principle's low profile changed abruptly in 1997 with the Court's decision in *Auer v. Robbins*.<sup>62</sup> In *Auer*, the question centered on the lawfulness of the Secretary of Labor's interpretation of its "salary-basis test" regulations<sup>63</sup>—a policy interpreting the Fair Labor Standards Act's exemption from entitlement to overtime pay for "bona fide executive, administrative, or professional" employees.<sup>64</sup> Part of the salary-basis test was whether an employee was subject to disciplinary reductions in salary. If employees were "subject to" such requirements, they were not salaried employees and, therefore, not exempt.<sup>65</sup> The petitioners wanted to be classified as nonexempt, nonsalaried employees because they were, at least in theory, subject to disciplinary reductions in pay under their employee manual.<sup>66</sup> But in an amicus brief requested by the Court, the Secretary of Labor argued that its salary-basis test required a showing of "an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions."<sup>67</sup> Characterizing the "controlling unless 'plainly erroneous or inconsistent with the regulation'" language from *Seminole Rock* as a "deferential standard," the unanimous Court, in an opinion written by Justice Scalia, concluded that the Secretary's interpretation was valid.<sup>68</sup> The critical inquiry, in the Court's estimation, was whether the triggering language "subject to" in

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61. See, e.g., *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 94–95 (1995) ("The Secretary's position . . . is a reasonable regulatory interpretation, and we must defer to it."); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("[W]e presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 358–59 (1989) ("This interpretation of the agency's own regulation is not 'plainly erroneous or inconsistent with the regulation,' and is thus controlling." (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))); *Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 159–60 (1987) ("The agency's interpretation . . . is deserving of substantial deference 'unless it is plainly erroneous or inconsistent with the regulation' . . ." (quoting *Seminole Rock*, 325 U.S. at 414)); *Lyng v. Payne*, 476 U.S. 926, 939 (1986) ("[A]n agency's construction of its own regulations is entitled to substantial deference.").

62. 519 U.S. 452 (1997). Of course, as Figure 1 shows, citations to *Seminole Rock* itself did not change much, but insofar as *Auer* enunciated much the same principle, there was a significant change after 1997.

63. *Id.* at 454–55.

64. See 29 U.S.C. § 213(a)(1) (2012).

65. See *Auer*, 519 U.S. at 461 (describing the Secretary of Labor's interpretation of the salary-basis test); see also 29 C.F.R. § 541.118(a) (2018).

66. *Auer*, 519 U.S. at 459–60.

67. *Id.* at 461 (quoting Brief for the United States as Amicus Curiae Supporting Affirmance at 21, *Auer*, 519 U.S. 452 (No. 95-897), 1996 WL 595843).

68. *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

the salary-basis regulations could support a more restrictive interpretation that would preclude the mere technical possibility of disciplinary reductions from preventing application of the Fair Labor Standards Act exemption.<sup>69</sup> To this, the Court replied that the words “comfortably bear[] the meaning the Secretary assigns.”<sup>70</sup> Nor did the fact that the interpretation was contained only in a brief filed in the litigation sway the Court’s conclusion that *Seminole Rock* demanded deference to the Secretary’s interpretation.<sup>71</sup>

With the unanimous decision in *Auer*, the Supreme Court clarified that, whatever it had once meant, *Seminole Rock* now required substantial deference to agencies’ interpretations of their own regulations. The Secretary of Labor’s interpretation was hardly inevitable, and its justification was far from a paragon of transparent reasoning, but that interpretation was nonetheless entitled to deference because it was not specifically foreclosed by the regulatory text. As can be seen in Figure 1, this strong statement about the scope of the long-standing *Seminole Rock* principle led to a substantial increase in total citations to the doctrine. Total citations to *Auer* and *Seminole Rock* rose by 330% in 1997; positive citations likewise rose by over 2,300%. After *Auer*, it became possible to describe the principle as a “full-blown and widely applied ‘axiom of judicial review.’”<sup>72</sup>

#### B. *Recent Developments—Auer’s Second Revolution*

Between 1997 and 2005, citations to *Auer* and *Seminole Rock* remained stable and overwhelmingly favorable to the doctrine, with total citations averaging about sixty-seven per year for the period, explicitly positive citations holding at about fifteen per year, and negative citations remaining rare, at about two per year. Beginning in 2006, however, *Auer/Seminole Rock* deference experienced a second revolution. Total citations essentially doubled from 2006 to 2016. Much of this increase is actually attributable to the growth of positive treatments of the doctrine: Positive citations to *Auer* and *Seminole Rock* doubled over this period. But some of the change appears to be driven by growing concern about the doctrine, too, with the courts quadrupling the average yearly rate of explicitly negative treatments during this period.

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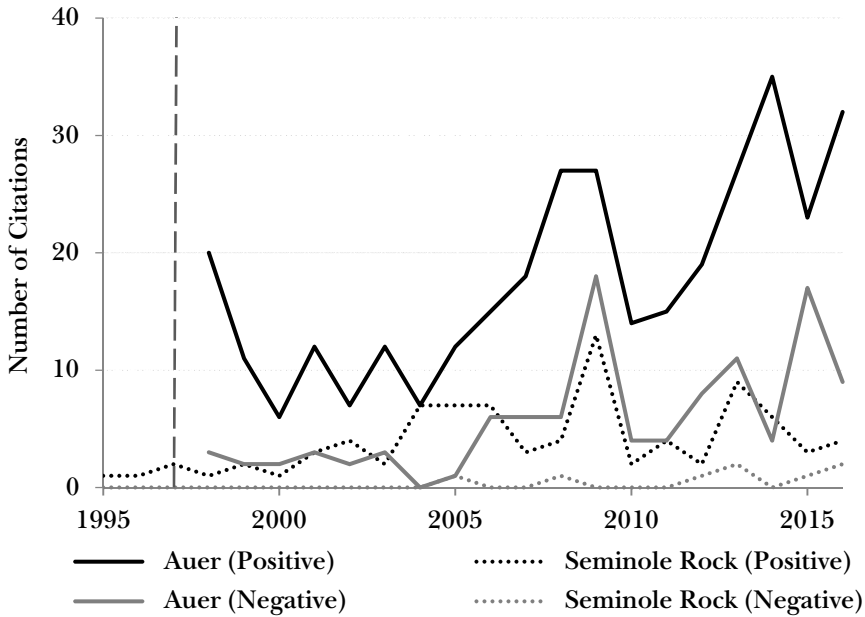
69. *Id.*; see also 29 C.F.R. § 541.118(a).

70. *Auer*, 519 U.S. at 461.

71. *Id.* at 462.

72. Sanne H. Knudsen & Amy J. Wildermuth, Lessons from the Lost History of *Seminole Rock*, 22 *Geo. Mason L. Rev.* 647, 648 (2015) (quoting Allen M. Campbell Co. Gen. Contractors v. Lloyd Wood Const. Co., 446 F.2d 261, 265 (5th Cir. 1971)).

FIGURE 2: CIRCUIT COURTS' NEGATIVE AND POSITIVE CITATIONS TO *AUER* AND *SEMINOLE ROCK*, 1995–2016<sup>73</sup>



The impetus behind this second revolution was a series of Supreme Court cases giving greater attention—sometimes sharply critical—to the doctrine. First, in early 2006, the Court decided *Gonzales v. Oregon*, holding that the Attorney General’s interpretive rule prohibiting the use of controlled substances in carrying out otherwise state-sanctioned assisted suicides was invalid under the terms of the Controlled Substances Act.<sup>74</sup> Although the Court nominally reaffirmed the validity of the *Auer* doctrine, it ultimately concluded that the doctrine was “inapplicable” because “the underlying regulation [did] little more than restate the terms of the statute itself.”<sup>75</sup> By endorsing a new “anti-parroting principle,” the *Gonzales* decision suggested for the first time that there might be a “step zero”<sup>76</sup> requiring that certain criteria be fulfilled before an agency’s

73. The data reported were obtained through Lexis Advance by searching for citations to the *Shepard’s* Citations footnotes concerning the principle of deference in both *Auer* and *Seminole Rock* and aggregating the citations by type and by year. The vertical dashed line shows the year 1997, when *Auer* was decided.

74. 546 U.S. 243, 274–75 (2006); see also *id.* at 249 (citing 21 U.S.C. §§ 801–971 (2012)).

75. *Id.* at 256–57.

76. Scholars often refer to a somewhat analogous “*Chevron* step zero,” where courts consider whether certain criteria—namely, whether Congress has expressly or implicitly delegated authority to the agency to make rules with the force of law—are met before even applying *Chevron*’s two steps. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s*

interpretation could be afforded *Auer* deference. The case drew little attention from observers at the time, but in light of subsequent developments, it is clear that the Court's power to "simply invent[] an exception to *Auer*"<sup>77</sup> undermined the stability of the doctrine and opened the door to more concerted questioning by federal courts.<sup>78</sup>

It was not until six years later, however, that any of the Justices explicitly broached the possibility of jettisoning *Auer* deference. In 2011, the Court in *Talk America, Inc. v. Michigan Bell Telephone Co.* afforded *Auer* deference to the interpretation that the Federal Communications Commission (FCC) advanced of its regulations governing what kinds of access to transmission facilities incumbent telecommunications providers must give to competitors.<sup>79</sup> The majority was satisfied that there was "no danger that deferring to the Commission would effectively 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation,'"<sup>80</sup> nor was there "any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'"<sup>81</sup> In a concurrence, Justice Scalia agreed that FCC's interpretation of the regulation controlled, but only because it was "the fairest reading of the orders in question."<sup>82</sup> With respect to *Auer* deference, Justice Scalia indicated that he had come to have second thoughts about the doctrine since his opinion for a unanimous Court in *Auer*—a change of heart that some have observed created "widespread confusion" in the circuits.<sup>83</sup> Justice Scalia argued that, upon further

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Domain, 89 Geo. L.J. 833, 873 (2001) (describing "step zero" as "the inquiry that courts should undertake before moving on to step one of *Chevron*, or turning instead to *Skidmore* (or resolving the issue *de novo*)"); Cass R. Sunstein, *Chevron* Step Zero, 92 Va. L. Rev. 187, 191 (2006) (describing the "step zero" inquiry as the "inquiry into whether the *Chevron* framework applies at all").

77. The Supreme Court, 2005 Term—Leading Cases, 120 Harv. L. Rev. 361, 365 (2006).

78. See Stephen M. Johnson, Bringing Deference Back (But for How Long?): Justice Alito, *Chevron*, *Auer*, and *Chenery* in the Supreme Court's 2006 Term, 57 Cath. U. L. Rev. 1, 3 (2007) (suggesting that "*Gonzales* seemed to signal a shift away from *Auer* deference for an agency's interpretations of its regulations"). Professor Stephen Johnson noted two other cases, however, that signaled vitality for the doctrine. *Id.* (citing *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007)). One might add *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* to the list of cases that signaled the Court was still not quite fully convinced of the dangers of *Auer*. 557 U.S. 261, 274–75 (2009). The case involved an interpretation of EPA's regulation determining which agency, EPA or the Army Corps of Engineers, had authority to issue a fill permit under the Clean Water Act. *Id.* at 265–66. The Court cited *Auer* in holding that EPA's interpretation was acceptable. *Id.* at 274–75.

79. 564 U.S. 50, 53 (2011).

80. *Id.* at 63 (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)).

81. *Id.* at 63–64 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

82. *Id.* at 67–68 (Scalia, J., concurring).

83. See, e.g., 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, 832 (2014).

reflection, it is “contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well,” and doing so in fact “encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”<sup>84</sup>

Justice Scalia’s about-face, and his theoretically driven argument that *Auer* has perverse effects on rule writing, provided a strong signal of growing discontent with the doctrine.<sup>85</sup> Over the next few years, the depth of that discontent among the Court’s other Justices began to reveal itself. First, in *Christopher v. SmithKline Beecham Corp.*, the Court clarified another requirement in *Auer*’s emerging “step zero”: that the agency’s interpretation cannot be one that creates a risk of “unfair surprise,”<sup>86</sup> whether because it “conflicts with a prior interpretation” or because it appears to be “nothing more than a ‘convenient litigating position.’”<sup>87</sup> Echoing Justice Scalia’s *Talk America* concurrence, Justice Alito’s majority opinion in *Christopher* invoked the self-delegation thesis but declined to reach the question of whether the doctrine ought to be discarded.<sup>88</sup> The next term, the Court took its most serious collective look at the doctrine to date in *Decker v. Northwest Environmental Defense Center*.<sup>89</sup> Justice Scalia penned a partial dissent to the application of *Auer* deference, urging his colleagues to recognize that “enough is enough.”<sup>90</sup> Chief Justice Roberts, joined by Justice Alito, also authored a concurring opinion that acknowledged their reticence about *Auer*,<sup>91</sup> but for the time, the emerging coalition against *Auer* again declined to force the issue, preferring to “await a case in which the issue is properly raised and argued.”<sup>92</sup> Finally, although the question in *Perez v. Mortgage Bankers Ass’n* only tangentially raised questions related to *Auer*, most of the Court’s conservatives again laid out their concerns with *Auer* in separate opinions.<sup>93</sup>

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84. *Talk America*, 564 U.S. at 68–69 (Scalia, J., concurring).

85. See Aaron L. Nielson, *Beyond Seminole Rock*, 105 Geo. L.J. 943, 955 (2017) [hereinafter Nielson, *Beyond Seminole Rock*] (describing the concurrence as “the first shot” in the assault on *Auer*).

86. 567 U.S. 142, 155–56 (2012) (internal quotation marks omitted) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007)).

87. *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)).

88. *Id.* at 158–59 (“Our practice of deferring to an agency’s interpretation of its own ambiguous regulations . . . creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit . . .”).

89. 568 U.S. 597 (2013).

90. *Id.* at 616 (Scalia, J., concurring in part and dissenting in part).

91. *Id.* at 615 (Roberts, C.J., concurring) (“It may be appropriate to reconsider [*Auer* deference] in an appropriate case.”).

92. *Id.* at 616.

93. 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment) (“I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.”); *id.* at 1211–12 (Scalia, J., concurring in the judgment) (“By supplementing the APA with judge-made doctrines of deference, we 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

Prior to its grant of certiorari in *Kisor v. Wilkie*,<sup>94</sup> the Court had several opportunities to take up cases that would have squarely presented the question of whether to overturn *Auer*. Until now, however, the Justices in favor of revisiting *Auer* had not appeared to have the necessary votes.<sup>95</sup> First, amidst a maelstrom of speculation that the Supreme Court would grant a petition for writ of certiorari in *United Student Aid Funds* precisely to overturn *Auer*, the Court instead denied the petition over a vigorous dissent from the denial by Justice Thomas.<sup>96</sup> Then, after the Fourth Circuit ruled that a school district had to allow a transgender student to use the bathroom matching his gender identity, citing and deferring to a Department of Education guidance,<sup>97</sup> the Supreme Court received a petition for certiorari squarely requesting that the Court abandon *Auer*. In a surprising development, the Court granted this petition, but not on the question of whether *Auer* should be overruled,<sup>98</sup> prompting speculation that the Court would at most narrow *Auer* deference.<sup>99</sup> Even that possibility evaporated—at least for the time

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bind them.”); *id.* at 1213 (Thomas, J., concurring in the judgment) (questioning “the legitimacy of our precedents requiring deference to administrative interpretations of regulations”).

94. See *supra* note 19 and accompanying text.

95. It is reasonably clear that the confirmation of Justice Kavanaugh will change the math. Although he never had occasion to weigh in on *Auer* deference in a live case during his time as a circuit judge, overall, he appears to be a deference skeptic. See Christopher Walker, Judge Kavanaugh on Administrative Law and Separation of Powers (Corrected), SCOTUSblog (July 26, 2018), <http://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/> [https://perma.cc/3FD3-4NAR] (“Although Kavanaugh has not addressed the propriety of *Auer* deference . . . , his concerns about interpretive doctrines that turn on ambiguity, coupled with his views on separation of powers, seem to suggest he would be receptive to calls to eliminate—or at least further limit—*Auer* deference.”). In extrajudicial remarks before his nomination, Justice Kavanaugh opined that Justice Scalia’s dissent in *Decker* had “eviscerated” *Auer* deference and predicted that “some day *Auer* will be overruled, and that Justice Scalia’s dissent in *Decker* will be the law of the land.” Adam K. Lasky & Daniel Radthorne, Why Judge Kavanaugh’s Confirmation Could Be Good News for Government Contractors, Procurement Playbook (Sept. 4, 2018), <https://www.procurementplaybook.com/2018/09/why-judge-kavanaughs-confirmation-could-be-good-news-for-government-contractors/> [https://perma.cc/MT34-E4YY]. That outcome appears to be in Justice Kavanaugh’s hands now.

96. *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari).

97. See *supra* notes 9–12 and accompanying text.

98. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (mem.) (granting certiorari to only two of the three questions presented by the petition); see also Amy Howe, Court Adds Five New Cases, Including Transgender Bathroom Dispute, to Docket, SCOTUSblog (Oct. 28, 2016), <http://www.scotusblog.com/2016/10/court-adds-five-new-cases-including-transgender-bathroom-dispute-to-docket/> [https://perma.cc/WPF6-L5TG] (“In granting review today, the justices sidestepped the most prominent issue they had been asked to take on: whether they should overrule their decision in *Auer*, which has been the target of criticism by conservative lawyers and jurists.”).

99. See Jonathan H. Adler, Supreme Court to Hear Transgender Bathroom Case, Wash. Post: The Volokh Conspiracy (Oct. 28, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/28/supreme-court-to-hear-transgender-bathroom->

being—when the Trump Administration withdrew the guidance at issue, prompting the Supreme Court to return the case to the Fourth Circuit.<sup>100</sup>

The effect of this second wave of *Auer* cases, as the data in Figure 1 show, has not been to stanch the flow of citations to *Auer*; it has seemingly been to bring *Auer* to unprecedented prominence.<sup>101</sup> At the same time, the data show that the federal judiciary is becoming deeply divided about the desirability of the doctrine, and at least some of the Justices on the Court are clearly interested in revisiting *Auer*.<sup>102</sup> The Court is poised to do so this term in *Kisor*.<sup>103</sup> The next Part of the Article examines the source of the deep disagreement developing in the federal courts: a theoretical argument about *Auer*'s behavioral incentives.

## II. AUER'S PERVERSE INCENTIVES

The principle of deference to agency interpretations of regulations serves a fundamental purpose in administrative law.<sup>104</sup> Whenever there is rulemaking, there is an inescapable need for expert application of those rules to increasingly fine-grained, unforeseen situations that fall within the purview of the rules<sup>105</sup>—even the most perspicacious of rule writers cannot anticipate every circumstance that might require application of a

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case/ (on file with the *Columbia Law Review*) (“If *Auer* and *Seminole Rock* are to be reconsidered, it will not be in this case.”).

100. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017) (mem.) (vacating and remanding the case to the Fourth Circuit “in light of the guidance document issued by the Department of Education and Department of Justice”); see also Amy Howe, Justices Send Transgender Bathroom Case Back to Lower Courts, No Action on Same-Sex Marriage Cake Case, SCOTUSblog (Mar. 6, 2017), <http://www.scotusblog.com/2017/03/justices-send-transgender-bathroom-case-back-lower-courts/> [https://perma.cc/AQV8-KYJ3].

101. See *supra* Figure 1.

102. See *supra* notes 90–93 and accompanying text.

103. See *supra* note 19 and accompanying text.

104. See Scott H. Angstreich, Shoring up *Chevron*: A Defense of *Seminole Rock* Deference to Agency Regulatory Interpretations, 34 U.C. Davis L. Rev. 49, 92–93 (2000) (citing leading administrative law treatises endorsing *Seminole Rock* “as ‘based on common sense’” and noting that the Court often treated the rationale for deference as “self-evident” (quoting 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.10, at 282 (3d ed. 1994))); see also *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring) (noting that *Auer* deference presents issues “going to the heart of administrative law”).

105. The literature identifies two somewhat related bases for deference to agency interpretations: First, agencies are in the best position to resolve ambiguities according to the “regulative intent.” See Stephenson & Pogoriler, *supra* note 7, at 1456; Sunstein & Vermeule, *Unbearable Rightness*, *supra* note 16, at 306–07. Second, agencies have expertise that allows them to more coherently “resolve any gaps, conflicts, or ambiguities” in the regulatory scheme. See Stephenson & Pogoriler, *supra* note 7, at 1456. For a general account of the unique challenges of regulatory interpretation, as opposed to statutory interpretation, see Kevin M. Stack, *Interpreting Regulations*, 111 Mich. L. Rev. 355, 365–77 (2012).



rule.<sup>106</sup> It is for precisely this reason that the APA provides for avenues other than notice-and-comment rulemaking, such as nonlegislative rulemaking.<sup>107</sup> It would be highly inefficient to require every needed clarification or interpretation to be formulated as an amendment to a rule—even as it would increase accountability to do so—yet that is what would be encouraged by deferring to rules and not to interpretations of rules. In essence, *Auer* deference attempts to balance out pragmatically a classic tension in administration—namely, “accommodating the need for agency flexibility while guarding against the specter of what Justice Jackson memorably described as ‘administrative authoritarianism’—the ‘power to decide without law.’”<sup>108</sup>

*Auer* vindicates core values of administrative flexibility and efficiency by giving rule writers some assurance that their agency’s good-faith application of the codified regulatory text to novel, but related, problems will be respected by the courts, in part because of the recognition that agencies are hardly inexpert when it comes to determining the intended meaning and purpose of regulatory text they drafted themselves.<sup>109</sup> In doing so, *Auer* gives agencies greater freedom to avoid undergoing cumbersome notice-and-comment rulemaking whenever they seek to make these adjustments.<sup>110</sup> Some might quibble with the precise balance

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106. Nor do they necessarily want to. See Barmore, *supra* note 16, at 819 (“An agency could try to answer every potential interpretive question, but such clarity would increase the length and complexity of regulations until they were too opaque for regulated parties to understand.”).

107. See 5 U.S.C. § 553(b)(A) (2012) (describing nonlegislative rulemaking); *id.* § 554 (describing formal adjudication); see also Franklin, *supra* note 40, at 303–04 (highlighting the benefits of nonlegislative rulemaking, including the relief it grants to resource-strapped agencies that might otherwise be forced to undergo cumbersome notice-and-comment rulemaking).

108. Clarke, *supra* note 17, at 178 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 216 (1947) (Jackson, J., dissenting)) (describing these as “two classic concerns of the modern administrative state”); see also Stephenson & Pogoriler, *supra* note 7, at 1453 (“[W]hole-sale rejection of *Seminole Rock* would be quite disruptive, and would likely have serious disadvantages, including loss of regulatory flexibility and efficiency.”).

109. See *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151–53 (1991) (“Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question.”). Indeed, some scholars have argued that agencies’ unique ability to interpret regulatory texts is a reason for making *Auer* deference “more robust than *Chevron* deference.” Stephenson & Pogoriler, *supra* note 7, at 1454–57 (acknowledging the argument but noting that it has been replaced by an ascendant “pragmatic” rationale analogous to the rationale for *Chevron*); see also Angstreich, *supra* note 104, at 92–93 (citing sources making the argument).

110. See Barmore, *supra* note 16, at 819–20 (“*Auer* allows agencies to apply their rules to unanticipated situations that fall within the interstices of the regulatory language.”). It bears noting, however, that agencies are apparently quite involved in revisiting existing rules through legislative rulemaking. As Professor Wendy Wagner and colleagues show, notwithstanding how cumbersome notice-and-comment rulemaking might be, agencies commonly make these workaday adjustments through this channel. Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. Rev. 183, 202, 211 (2017) [hereinafter Wagner et al.,

struck by *Auer*, arguing that more interpretations should be made in the form of notice-and-comment rulemaking.<sup>111</sup> But these arguments, like arguments against the Court's hands-off approach to the nondelegation doctrine, fail to persuade because they fail to explain why accountability must always be maximized at the expense of efficiency and flexibility.

The growing skepticism of *Auer* from vocal members of the federal judiciary, as detailed in section I.B, does not rely primarily on a fruitless second-guessing of the need for agency flexibility. Instead, the skeptical treatments from some Justices in cases like *Talk America*, *Decker*, *Christopher*, and *Perez* rely on a theoretical apprehension about the doctrine's incentives for rule writing. That is—according to Manning, who largely inspired the recent judicial questioning of the doctrine<sup>112</sup>—*Auer* has an “untoward effect upon [the agency's] incentive to speak precisely and transparently when it promulgates regulations.”<sup>113</sup> It is that apprehension that the Article now turns to in more detail.

#### A. *The Critique of Auer—Incentives for Self-Delegation*

*Auer* deference differs fundamentally from other deference doctrines in administrative law that concern statutory interpretations by agencies. With a doctrine like *Chevron*, the agency itself has no control over the scope of the discretion embedded in the raw statutory text, and Congress retains no power to limit the exercise of interpretive discretion after the fact except through further legislation.<sup>114</sup> This institutional allocation of law-writing and law-interpreting authority means that “Congress's incentive is to speak as clearly as possible on the matters it regards as important,”<sup>115</sup> substantially limiting the scope of agencies' interpretive authority. In contrast, with *Auer*, there is a fusion of legislative

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Dynamic Rulemaking] (estimating, based on the authors' sample, that agencies revised 73% of rules at least once and engaged in notice-and-comment rulemaking for one-third of those revisions).

111. See Funk, *supra* note 42 (arguing that *Auer* plays a role in encouraging agencies to “cut corners” by adopting interpretive rules instead of amending rules through notice-and-comment rulemaking and that this occurs with sufficient regularity to justify some change to the doctrine).

112. See Nielson, *Beyond Seminole Rock*, *supra* note 85, at 954 (noting that “Manning's analysis appears to have played a considerable role in flipping Justice Scalia's views” on *Auer*); see also Leske, *supra* note 83, at 790.

113. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612, 655 (1996) [hereinafter Manning, *Constitutional Structure*]. For a more generalized critique of the perverse incentives that regulation by guidance creates, see Robert A. Anthony & Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, *Admin. & Reg. L. News*, Fall 2000, at 10, 11.

114. *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).”).

115. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part).

and interpretative authority within the same institution.<sup>116</sup> Agencies write rules in one breath and interpret or enforce those rules in another. Affording deference to regulatory interpretations, as *Auer* does, makes agencies authoritative as to the meaning of regulatory text they have previously written.

According to critics, this distinction makes all the difference and renders *Auer* highly suspect.<sup>117</sup> Because it “allows an agency to both write the law (the regulation) and determine its application,”<sup>118</sup> *Auer* deference creates the possibility that agencies will seek to maximize their interpretive discretion by writing vague, underspecified regulatory text in the first instance.<sup>119</sup> That is, “[r]egulatory ambiguity, unlike statutory ambiguity, does not entail an implicit delegation to *another* institution”—and that difference “makes such ambiguity relatively more attractive.”<sup>120</sup>

Recall the Title IX example: Instead of bearing the cost of specifying its meaning *ex ante*, as *Auer* critics claim it would have been more likely to do if another actor had the ultimate interpretive authority, the Department of Education allegedly had no incentive to specify in its rule how it would like to treat transgender students with regard to bathroom choice. Under *Auer*, Manning notes, “if an agency issues an imprecise or vague regulation, it does so secure in the knowledge that it can insist upon an unobvious interpretation, so long as its choice is not ‘*plainly erroneous*.’”<sup>121</sup> In other words, an agency could simply leave more discretion for itself on the front end, when writing a rule, and leave for another day the task of specifying its meaning, as courts applying *Auer* will simply defer to any plausible construction of capacious or underspecified language.

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116. See *id.*

117. This argument is often cast in terms of formalist separation of powers logic, see *id.* at 619 (arguing that there could be “no congressional implication that the agency can resolve ambiguities in its own regulations” because “that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands”), but it is ultimately based on, and influential because of, a consequentialist claim about the dangers of self-delegation that inhere in a breakdown of the strict separation of powers, see *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (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.”).

118. Barmore, *supra* note 16, at 817.

119. *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part) (“[W]hen an agency interprets its *own* rules—that is something else. Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect.”).

120. Stephenson & Pogoriler, *supra* note 7, at 1461 (emphasis added).

121. Manning, *Constitutional Structure*, *supra* note 113, at 657 (emphasis added by Manning) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Taken to its logical endpoint, the argument is not merely that *Auer* eliminates the incentive to speak with clarity but that it actually creates an incentive to “maximize” opacity.<sup>122</sup> When agencies consider making policy by nonlegislative rule (that is, by guidance document, policy statement, and the like), the most important parameter to consider is how much risk there is that the interpretation will stretch the meaning of the regulatory text too far, such that a reviewing court would reject that interpretation.<sup>123</sup> But because agencies have control over the regulatory text as well as the interpretation, this key parameter is actually under their control in the *Auer* context. Agencies could promulgate texts that are so vague that virtually any interpretations would be at least arguably consistent with them. The optimal strategy, critics charge, would amount to a type of regulatory sandbagging: deliberately withhold some clarity now in order to augment flexibility down the road.<sup>124</sup> Indeed, critics might speculate that agencies could even subvert the statutes they are administering by first translating statutory language into vague terms, and then retranslating that translation into the agency’s preferred meaning. As Justice Scalia argued in *Decker*, if *Auer* functions in this way, then the doctrine gives to agencies a “dangerous permission slip for the arrogation of power.”<sup>125</sup> For Manning, the danger of self-delegation inherent in any breakdown of the strict separation of rule-writing and rule-interpreting authority is sufficiently serious that it justifies a constitutional presumption against any institution or doctrine with that feature.<sup>126</sup>

The key prediction of the self-delegation thesis, then, is that agencies operating in a world with *Auer* deference will systemically underspecify the

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122. Barmore, *supra* note 16, at 818 (“If *Auer* requires deference to an agency’s interpretation of ambiguous (but not unambiguous) regulations, agencies would maximize future flexibility and power by promulgating ambiguous regulations. . . . Critics worry that the incentive to promulgate vague regulations would lead to predictably more ambiguous regulations . . .”); see also Sunstein & Vermeule, *Unbearable Rightness*, *supra* note 16, at 308 (explaining *Auer* critics’ concern that agencies “will issue vague, broad regulations, knowing full well that when the time comes, they will be able to impose the interpretation they prefer”).

123. See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1395–96 (2004) (exploring how an agency’s choice of regulatory form will impact the judicial review that its policy will receive).

124. Nielson, *Beyond Seminole Rock*, *supra* note 85, at 955 (“[W]hen agencies promulgate regulations that do not tackle the hard problems, the agency does not ‘pay’ upfront, and when the agency later issues an interpretative rule to tackle those problems—even though interpretative rules are not subject to the same rigorous procedure—the agency does not ‘pay later’ either.” (citing Stephenson & Pogoriler, *supra* note 7, at 1464)).

125. *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part).

126. See Manning, *Constitutional Structure*, *supra* note 113, at 631; see also Anthony & Asimow, *supra* note 113, at 10 (arguing that the *Auer* doctrine violates separation of powers principles because “[i]t authorizes the agencies to make law through an informal format where Congress has not delegated such power either explicitly or by implication”).

rules they write relative to a counterfactual world where *Auer* does not exist.<sup>127</sup> That is, whereas under ordinary circumstances, agencies would balance various considerations to settle on some kind of “optimal” level of rule precision,<sup>128</sup> *Auer* would seem to promise a greater payoff for writing a relatively vague rule, and in fact could be thought to shift baseline rule-writing styles across the board. With vague rule texts, it is far easier for agencies to cut corners. They can avoid notice-and-comment rulemaking and make major policy changes by issuing guidance documents, policy statements, opinion letters, and the like instead, as they may be more naturally inclined to do anyway.<sup>129</sup> Notice-and-comment procedures can be costly and time-consuming.<sup>130</sup> Indeed, by one study’s estimation, the average time to complete notice-and-comment rulemaking is between one and three years.<sup>131</sup> In contrast, agencies can, in principle, issue a nonlegislative rule in a matter of days, as there is no prescribed procedure in the APA for such actions.<sup>132</sup> The cost savings on the

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127. Some have also argued that agencies would have incentives to issue more nonlegislative rules than they otherwise would because of the availability of *Auer*. See Funk, *supra* note 42. On the margins, this may be true, although it is always the case that agencies have strong incentives to cut corners around notice-and-comment rulemaking regardless of the level of deference. Whether *Auer* makes a difference in this calculation is an open question (and one that deserves further research), but the existing evidence is, notably, inconsistent with the notion that there has been an explosion of significant guidance (relative to significant rulemaking) in recent decades. See Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 *Yale L.J.* 782, 813–15 (2010) (finding that significant guidances make up a negligible percentage of agency work and are often used to “clarify highly technical details”).

128. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *Yale L.J.* 65, 71–72 (1983) (arguing that such an “optimal” approach would require a normative balancing of various factors, including “transparency, accessibility, and congruence”); see also Adam I. Muchmore, *Uncertainty, Complexity, and Regulatory Design*, 53 *Hous. L. Rev.* 1321, 1327–28 (2016) (arguing that much legal uncertainty is irreducible and that agencies balance many factors in designing regulatory programs).

129. See, e.g., James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, *Law & Contemp. Probs.*, Spring 1994, at 111, 127 (theorizing that strategic agencies might choose to regulate by guidance as a means of avoiding the costs of notice-and-comment rulemaking).

130. See Kathryn E. Kovacs, *Getting Back to the Basics with Agency Rulemaking*, *Reg. Rev.* (Nov. 13, 2017), <https://www.theregreview.org/2017/11/13/kovacs-basics-agency-rulemaking/> [<https://perma.cc/RYM9-V27W>] (“Although scholars argue about why the rulemaking process is ossifying and how much it is happening, there is little debate that rulemaking is a big pain for federal agencies.”).

131. Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 *Va. L. Rev.* 889, 958–59 (2008) [hereinafter O’Connell, *Political Cycles of Rulemaking*] (“The average duration of completed rulemakings, both significant and more routine, for the ten agencies in Charts 5 and 6 ranged from 243.74 days for the [Department of Commerce] to 760.93 days for the [Department of Health and Human Services].”).

132. See 5 U.S.C. § 553(b)(3)(A) (2012). Executive actions have added some procedural gloss. For instance, the Office of Management and Budget issued a bulletin during the George W. Bush Administration encouraging agencies to develop standard

back end can literally be accounted for in the decision about how specific to be on the front end.

### B. *The Defense of Auer*

Although the self-delegation critique of *Auer* has been quite influential, both in the courts and in the academy, a few voices supportive of the doctrine have emerged. Recently, Sunstein and Vermeule addressed the tenuous assumptions behind the separation of powers critique of *Auer*.<sup>133</sup> They note that, strictly speaking, agencies are not engaged in legislating or adjudicating when they engage in rule writing and rule interpretation, respectively. Rather, they are engaged in executing the law.<sup>134</sup> This task, with its mix of legislative and expository authority, is pervasive in the administrative state.<sup>135</sup> Thus, the self-delegation argument that critics make against *Auer* has far-reaching implications not just for agency rule writing, but also for the majority of actions agencies undertake.<sup>136</sup> Indeed, Sunstein and Vermeule argue that such an amalgam of institutional functions is so common in the modern administrative state that those who advance a formalistic critique of *Auer* bear a heavy burden of explaining why *Auer* must go but modern administrative agencies may stay.<sup>137</sup> Others have noted that *Auer* is part of a fragile equilibrium;

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procedures for the issuance of significant guidance documents. See Office of Mgmt. & Budget, Exec. Office of the President, OMB Bull. No. 07-02, Final Bulletin for Agency Good Guidance Practices (2007), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-07.pdf> [<https://perma.cc/CVK3-GKVZ>].

133. Sunstein & Vermeule, Unbearable Rightness, *supra* note 16, at 310 (discussing the separation of powers critique—which suggests that it involves a “constitutionally suspect combination of the power to make law with the power to interpret law”—and rejecting that critique as “both unsound and too sweeping”).

134. *Id.* at 311 (“When agencies make rules and interpret law in the course of exercising their statutory grant of authority, they are carrying out or completing a legislative plan . . .”); see also Jack L. Goldsmith & John F. Manning, The President’s Completion Power, 115 *Yale L.J.* 2280, 2282 (2006) (defining the “completion power” as “the President’s authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme”).

135. See Lawson, *supra* note 32, at 1248 (discussing the extensive enforcement activities of a typical federal agency).

136. Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* 78 (2016) [hereinafter Vermeule, *Law’s Abnegation*] (“If the combination of lawmaking and law-interpreting functions in agencies really is constitutionally suspect as such, then there are much larger problems than *Auer* to discuss.”); Cass R. Sunstein & Adrian Vermeule, *Auer, Now and Forever*, *Yale J. on Reg.: Notice & Comment* (Sept. 19, 2016), <http://yalejreg.com/nc/auer-now-and-forever-by-cass-r-sunstein-adrian-vermeule/> [<https://perma.cc/V6KA-7X6F>] [hereinafter Sunstein & Vermeule, *Now and Forever*] (“The constitutional critique of *Auer* rests on generalities about the separation of lawmaking from law-execution and law-interpretation. If those generalities were applied consistently, however, they would require declaring unconstitutional dozens of major federal agencies exercising combined functions.”).

137. Sunstein & Vermeule, *Now and Forever*, *supra* note 136.

change the ground rules, and different and potentially worse incentives might take hold. For instance, Professor Aaron Nielson argues that one possible effect of overturning or watering down the *Auer* doctrine would be to discourage agencies from writing rules in the first place, instead using their prerogative under the *Chenery* doctrine to make policy iteratively through ad hoc adjudication.<sup>138</sup> If the concern about *Auer* is in part about its failure to deliver fair notice and public accountability, a world in which agencies avoid prospective rulemaking in favor of retrospective and often-piecemeal adjudication would be a decidedly worse one. Moreover, some have argued that the likely result of overturning *Auer* and handing interpretive authority to courts would be to greatly undermine clarity in the law.<sup>139</sup> Instead of having agencies announce one authoritative (albeit ephemeral) interpretation, there would likely be circuit splits about the proper interpretation of important regulatory provisions, thereby increasing the costs of compliance for regulated entities.<sup>140</sup> Then there is the fact that overturning *Auer* might throw the validity of countless existing interpretations, many of which have induced substantial reliance interests, into question.<sup>141</sup>

These arguments, as persuasive as they might be, elide the central question in the debate over *Auer*: that is, the self-delegation thesis. Indeed, the response to the self-delegation thesis itself has been strikingly muted. Responding to the self-delegation thesis, *Auer*'s rehabilitators have generally thought it sufficient to point out what Manning anticipated<sup>142</sup>—that there are cross-cutting incentives that actually encourage clarity in rule writing.<sup>143</sup> Agencies gain greater assurance that regulated

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138. Nielson, *Beyond Seminole Rock*, supra note 85, at 948 (noting that, under the *Chenery* doctrine, “agencies can choose to interpret the statutes they administer by promulgating rules or, if they prefer, by simply enforcing the statutes directly through case-by-case adjudication”). Nielson argues that *Auer*'s infusion of back-end flexibility makes rulemaking more attractive, with attendant benefits for notice of legal obligations even if gaps remain to be interpreted. *Id.* at 948–50. But if *Auer* were “off the table, agencies may rely more often on *Chenery*” and make policy in an iterative, unpredictable fashion through adjudication. *Id.* at 948.

139. See Derek A. Woodman, *Rethinking Auer Deference: Agency Regulations and Due Process Notice*, 82 *Geo. Wash. L. Rev.* 1721, 1736 (2014) (noting the “disuniformity that could result if courts were to substitute the agency’s interpretation of the regulation with their own”).

140. See *id.*

141. Clarke, supra note 17, at 193 (noting that there are substantial reliance interests in interpretive rules and that virtually every interpretation under the APA would be affected in some way since *Seminole Rock* predated the APA).

142. Manning, *Constitutional Structure*, supra note 113, at 655–56 (anticipating that “an agency may have various other reasons to draft clear, self-limiting rules, even when it possesses the right of self-interpretation,” including keeping enforcement costs low, maintaining hierarchical control of agency staff, and binding future administrations).

143. Sunstein & Vermeule, *Now and Forever*, supra note 136 (“And there is a cross-cutting incentive as well: agencies who want to bind their own successors, perhaps because a change of administration looms, are better off creating a binding rule, repealable only through the same relatively costly process.”).

entities will comply with the law, as the agency understands it, when they craft with clarity their understanding of a legislative rule.<sup>144</sup> Likewise, both agencies and regulated entities benefit from certainty against future changes when issues are settled in legislative rules rather than in later guidance documents or policy statements,<sup>145</sup> as rules can be formally changed only through a new legislative rule.<sup>146</sup> Citing these cross-cutting incentives, Sunstein and Vermeule argue that *Auer*'s critics have committed what they call the "sign fallacy"—"identify[ing] the likely *sign* of an effect and then . . . declar[ing] victory, without examining its *magnitude*" and "without asking whether it is realistic to think that the effect will be significant."<sup>147</sup>

Some commentators have also noted that there is an absence of the kind of circumstantial evidence that we would expect if the self-delegation theory had any power. For instance, no former agency general counsel has come forward to say that any rule has been deliberately obfuscated in response to the incentives.<sup>148</sup> Quite to the contrary, when Professor Christopher Walker asked agency rule drafters what they thought about *Auer*, one respondent answered, "I personally would attempt to avoid issuing ambiguous regulations that we would then have to interpret."<sup>149</sup> Such sentiments are widely shared among regulators.<sup>150</sup> Indeed, as Walker further shows, most agency rule writers are apparently generally unaware of the doctrine, at least relative to other administrative law doctrines, such as *Chevron* deference.<sup>151</sup>

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144. See Diver, *supra* note 128, at 72 (arguing that clarity in regulations can streamline enforcement, or perhaps even make it less necessary if regulated entities can be relied on to comply).

145. See Anthony, *supra* note 17, at 1317 (noting the confusion and uncertainty that can result when agencies rely on guidances and policy statements rather than on legislative rules).

146. See *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (stating that an "agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked").

147. Sunstein & Vermeule, *Unbearable Rightness*, *supra* note 16, at 299–300.

148. Ronald M. Levin, *Auer* and the Incentives Issue, *Yale J. on Reg.: Notice & Comment* (Sept. 19, 2016), <http://yalejreg.com/nc/auer-and-the-incentives-issue-by-ronald-m-levin/> [<https://perma.cc/WCJ7-LWC2>] ("When I refer to [the lack of] evidence, I do not mean to insist on specific case citations or empirical studies. As yet, however, the critics of *Auer* have not even produced any good anecdotes to support their theory.").

149. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 *Stan. L. Rev.* 999, 1065 (2015) [hereinafter Walker, *Statutory Interpretation*] (internal quotation marks omitted).

150. See, e.g., Aditi Prabhu, *How Does Auer Deference Influence Agency Practices?*, *Admin. & Reg. L. News*, Winter 2015, at 11, 12 ("[A]gencies have a strong interest in writing clear regulations. Agencies can effectively enforce only clear regulations; otherwise, they risk running afoul of fair notice and due process considerations.").

151. See Walker, *Statutory Interpretation*, *supra* note 149, at 1019 fig.1 (reporting survey data showing that only 53% of agency rule drafters knew of *Auer/Seminole Rock* deference by name, whereas 94% knew of *Chevron* deference by name). The same study revealed that only 39% of agency rule drafters actually claimed to use *Auer/Seminole Rock*



In sum, the response to the self-delegation critique has been to say that there is a “palpable lack of realism” and “lack of empirical grounding” behind the self-delegation thesis.<sup>152</sup> But, notably, *Auer*’s rehabilitators have not offered any empirical analysis of their own to test the self-delegation thesis or assess the strength of any cross-cutting incentives they postulate. Instead, the response to the self-delegation thesis has been to make an argument based on empirical agnosticism.<sup>153</sup>

### C. *The Need for Evidence in Assessing the Self-Delegation Critique*

Despite the efforts of *Auer*’s rehabilitators, *Auer* today finds its future uncertain. The Court has taken up the question of whether *Auer* and *Seminole Rock* should be overruled,<sup>154</sup> and it is not difficult to count to five. Chief Justice Roberts<sup>155</sup> and Justices Alito,<sup>156</sup> Thomas,<sup>157</sup> and Gorsuch<sup>158</sup> have expressed strong reservations about *Auer*, and Justice Kavanaugh’s previous statements as a circuit judge suggest some antipathy

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in shaping their drafting decisions, *id.* at 1020, and it was even unclear what respondents had in mind when they said they “use” the doctrine, *id.* at 1066. These findings are consistent with the data analyzed in Part III: Not one of the preambles among rules in the sample contained any reference to either *Seminole Rock* or *Auer*.

152. Sunstein & Vermeule, *Unbearable Rightness*, *supra* note 16, at 309–10 (“We do not believe that agencies often preserve ambiguity on purpose—in fact we think that that is highly unusual—but when they do, *Auer* is hardly ever . . . part of the picture. The critics speak abstractly of possible abuses, but present no empirical evidence to substantiate their fears.”); see also Levin, *supra* note 148 (“[T]he factual basis of the critique of *Auer* isn’t paltry. It’s one hundred percent guesswork.”).

153. See Sunstein & Vermeule, *Unbearable Rightness*, *supra* note 16, at 309 (refusing to press the cross-cutting incentives argument too far for fear that doing so would “commit the sign fallacy (with a different sign)”).

154. See *supra* note 19 and accompanying text.

155. See *Decker v. Nw. Evtl. Def. Ctr.*, 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring) (“The bar is now aware that there is some interest in reconsidering [*Auer* and *Seminole Rock*], and has available to it a concise statement of the arguments on one side of the issue.”).

156. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring) (“The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect.”).

157. See *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., dissenting from denial of certiorari) (“*Seminole Rock* is constitutionally suspect.”).

158. See *id.* Justice Gorsuch’s views about deference doctrines may well be the strongest on the Court. See, e.g., Kathryn M. Schroeder & Jason B. Hutt, *Gorsuch May Further Tip Balance Against Deference to EPA*, *Law360* (Feb. 14, 2017), <https://www.law360.com/articles/890417/gorsuch-may-further-tip-balance-against-deference-to-epa> (on file with the *Columbia Law Review*) (discussing Justice Gorsuch’s expressed skepticism of judicial deference to agency interpretation and discussing the possibility of *Auer* being overturned following Justice Gorsuch joining the Court); see also *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”).

toward *Auer* as well.<sup>159</sup> In the circuit courts, *Auer* continues to be followed (at least for now), but it also finds itself subjected to stern criticism. For example, Judge William Jordan of the Third Circuit recently indicated that he believes *Auer* “deserves another look,” arguing that it is “contrary to the roles assigned to the separate branches of government” and “embed[s] perverse incentives in the operations of government.”<sup>160</sup>

Even when courts nominally accept the premises of *Auer* deference, the tenor of some analysis has recently shifted in a less deferential direction due in part to courts’ recognition that the critique of *Auer* has purchase with some members of the Supreme Court. For instance, in *Perez v. Loren Cook Co.*, a majority of the en banc Eighth Circuit held that a Department of Labor (DOL) regulation requiring “machine guarding” as a means of protection from “hazards such as those created by . . . rotating parts” did not require barrier guards to protect against ejection of rapidly rotating pieces of metal, contrary to DOL’s interpretation.<sup>161</sup> But as the four dissenting judges noted, the majority’s “hypertechnical” parsing of the regulation was contrary to the spirit of *Auer* and risked undermining the Secretary of Labor’s ability to “adjust its interpretation . . . over time.”<sup>162</sup> Even if *Auer* survives *Kisor v. Wilkie* in some form, skepticism and avoidance like this will likely continue to pervade courts’ decisionmaking.

The reason for the persistence and influence of the critique of *Auer* is that its account of strategic agencies’ self-delegating authority has a certain theoretical appeal. If one assumes that agencies have preferences, and that those preferences are chiefly to maximize power and discretion in a self-interested manner,<sup>163</sup> then there is little that stands in the way of the seemingly elegant model offered by *Auer*’s critics. It may be that there are cross-cutting incentives that make agencies consciously pass on the opportunity for self-delegation,<sup>164</sup> but this more complex story may not seem as facially plausible or nearly as self-interested as the one offered by *Auer*’s critics. This is presumably why Manning, fully aware of cross-cutting incentives for agencies to craft clear rules, nevertheless argued that *Auer*’s perverse incentives are stronger than the benign or laudable ones

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159. See *supra* note 95.

160. *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

161. 803 F.3d 935, 937, 943 (8th Cir. 2015) (en banc) (quoting 29 C.F.R. § 1910.212(a)(1) (2015)).

162. *Id.* at 944–50 (Melloy, J., dissenting).

163. See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *Geo. L.J.* 97, 99 (2000) (describing the early public-choice literature as “portraying agency bureaucrats as shirking, self-interested budget-maximizers who thwart the will of the people and good government”).

164. See Levin, *supra* note 148 (noting that *Auer*’s incentive to write vague rules “does not exist in a vacuum” and that many factors “militate toward specificity rather than vagueness”).

created by other doctrines or operational exigencies.<sup>165</sup> Although Sunstein and Vermeule are right to point out that critics' self-delegation theory commits the "sign fallacy,"<sup>166</sup> those critics can still appeal to an intuition that suggests that *Auer* must matter in some way by creating some kind of structural bias. The persuasiveness of the self-delegation critique of *Auer* boils down to the fact that it paints an intuitively plausible picture of agency self-dealing that stands so long as no one puts forward any evidence.

The main obstacle to advancing the debate is a lack of evidence. As Professor Steve Johnson has written, we have two choices: "[A]ware of the possibility of abuse described by Manning and Scalia, we could disregard [*Auer*] deference entirely because of the possibility, or we could stay our hand until a convincing record has been established that the possibility turns into actuality with sufficient frequency and consequence."<sup>167</sup> In what follows, the Article turns to the project of filling out our understanding of *Auer*'s effects on agency rule writing—particularly, examining whether *Auer* encourages an increase in the vagueness of agency rules.

### III. TESTING THE SELF-DELEGATION THESIS

*Auer*'s future would seem to hinge in no small part on what the evidence actually says about the potentially perverse incentives created by the doctrine. This Part makes an in-depth and systematic effort to assess whether *Auer*'s incentives do manifest in changed rule-writing behavior. In examining whether *Auer* has changed the ways agencies write rules, this Part draws on several different strands of textual-analysis methods used in computational linguistics, psycholinguistics, political science, and regulatory studies. Public law scholars are increasingly turning to corpus linguistics methods to bring systemic empirical evidence to bear on large bodies of legal text.<sup>168</sup> In order to test the key predictions of the self-delegation thesis, it is necessary to use these kinds of sophisticated linguistic techniques to analyze over time the work product of agencies—that is, the text of their regulations.

#### A. Data

This section reviews the original data I collected to test the self-delegation thesis, including the sample of rules used for analysis and the specific measures of textual vagueness employed.

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165. See *supra* note 142 and accompanying text.

166. See *supra* note 147 and accompanying text.

167. Steve R. Johnson, *Auer/Seminole Rock* Deference in the Tax Court, 11 Pitt. Tax. Rev. 1, 40 n.213 (2013).

168. See, e.g., Thomas R. Lee & Stephen C. Mouritsen, Judging Ordinary Meaning, 127 Yale L.J. 788, 830–36 (2018) (detailing the range of corpus linguistic tools available to study "ordinary meaning").

1. *Sample.* — Seeking to capture as broad a sample of regulatory texts as possible, I gathered every “economically significant”<sup>169</sup> final rule reviewed by the White House Office of Information and Regulatory Affairs (OIRA) and published in the *Federal Register* between 1982 and 2016.<sup>170</sup> In all, there were 1,218 such rules published by twenty-eight different departments, agencies, and boards during the observation period. These entities ranged from the familiar—for example, the Environmental Protection Agency (EPA), the Department of Transportation (DOT), the Department of Health and Human Services (HHS), the Department of Agriculture (USDA), and the like—to the less familiar—for example, the Architectural and Transportation Barriers Compliance Board and the Emergency Oil and Gas Guaranteed Loan Board.<sup>171</sup> The textual data assembled represent a broad swath of the administrative

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169. Technically, economically significant rules are those identified by the agencies as having “an annual effect on the economy of \$100 million or more or adversely affect[ing] in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.” Maeve P. Carey, Cong. Research Serv., R43056, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register* 10–11 (2016), <https://fas.org/sgp/crs/misc/R43056.pdf> [<https://perma.cc/FY8P-96MM>]. This definition originated in Executive Order 12,866 in 1993 and was the trigger for the requirement of a full regulatory impact analysis. See Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993). Before Executive Order 12,866, the trigger was a slightly broader category of “major” rules, of which one subset was what would today be considered economically significant rules. See Steven Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. Chi. L. Rev. 821, 825 (2003) (citing Exec. Order No. 12,291, 3 C.F.R. § 128 (1981)). The Office of Information and Regulatory Affairs has logged in historical reports the reviews of economically significant rules back to 1981; these reports are what I used to identify a sample of rules. See *infra* note 170.

170. These data were assembled in a two-step process, one involving rule identification and one involving text collection and cleaning. First, rules were identified using XML reports of data on rule reviews conducted by OIRA. These data are housed on OIRA’s website [Reginfo.gov](https://www.reginfo.gov) and go back to 1981. See Office of Information and Regulatory Affairs, XML Reports, [Reginfo.gov](https://www.reginfo.gov/public/do/XMLReportList), <https://www.reginfo.gov/public/do/XMLReportList> [<https://perma.cc/BH6K-7H8V>] (last visited Sept. 12, 2018). A research assistant extracted all rules that fit certain criteria: Principally, to be included, an entry had to be a final rule, listed as economically significant, and listed as having been published. Almost all of the rules listed in the reviews conducted in 1981 were not published, so I made the decision to exclude 1981 from the analysis. For the rest of the years available, most reviews resulted in publication, and they were therefore included. Second, using data culled from the XML reports, I was able to manually identify the *Federal Register* notice publishing the rule for all but a handful of the rules in the sample. Using Lexis Advance’s Federal Register Library, I then bulk downloaded the entire text of the notice for each of the identified rules.

171. This sample excludes independent agencies, such as the Federal Energy Regulatory Commission, SEC, and FCC, because they are not subject to OIRA review, and therefore, their rules were not available in the dataset derived from [Reginfo.gov](https://www.reginfo.gov).

state and capture the bulk of the important rulemaking activity conducted by it.<sup>172</sup>

2. *Measures of Vagueness.* — For each rule in the sample, I first partitioned the document into the preamble and the rule text.<sup>173</sup> I then subjected each rule’s text to computer-assisted content analysis to generate a number of measures of vagueness for each text.<sup>174</sup> Relative to human coding, computer-assisted content analysis is faster, cheaper, and orders of magnitude more reliable.<sup>175</sup> Human coders tire and make computational mistakes; computers do not. Thus, with over 1,200 rules and over 19 million words, computer-assisted content analysis is by far the best approach to measuring the vagueness of texts, although substantial care has to be taken to ensure that what the computer is measuring captures what we mean when we say that a regulatory text is vague.<sup>176</sup> This section describes the steps I took—including the deployment of multiple measures and validation with human readers—to provide that assurance.

The concern with *Auer* is a concern about an agency’s propensity to promulgate what the D.C. Circuit has called “mush.”<sup>177</sup> Specifically, the concern is with language that is cast with such a degree of vagueness that it fails to meaningfully constrain or guide subsequent interpretation,

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172. One might object that economically significant rules are critically different from other rules and that focusing only on these rules risks introducing sampling bias insofar as the goal is to say something about rulemaking writ large. This concern is addressed in section III.F.2.

173. The process in note 170 *supra* actually identified 1,318 rules, but some of the *Federal Register* notices associated with these rules failed to provide regulatory text distinct from the preamble. As such, they were excluded from the final analysis.

174. For three of the measures of vagueness (legal vagueness, laxity, and cognitive complexity), I used the program Linguistic Inquiry and Word Count (LIWC), which allows the user to apply both built-in and user-provided dictionaries to selected texts, counting the instances of each dictionary term and generating statistics on the percentage of the document composed of terms in the dictionary. See Yla R. Tausczik & James W. Pennebaker, *The Psychological Meaning of Words: LIWC and Computerized Text Analysis Methods*, 29 *J. Language & Soc. Psychol.* 24, 25–28 (2010) (reviewing the history of LIWC and describing the software’s processing and dictionary features); see also James W. Pennebaker et al., *Univ. of Tex. at Austin, The Development of Psychometric Properties of LIWC2015 2–7* (2015), [https://repositories.lib.utexas.edu/bitstream/handle/2152/31333/LIWC2015\\_LanguageManual.pdf](https://repositories.lib.utexas.edu/bitstream/handle/2152/31333/LIWC2015_LanguageManual.pdf) (on file with the *Columbia Law Review*) (explaining how the latest version of the LIWC software analyzes words and phrases based on psychometric categories assigned to words in built-in or user-generated dictionaries). For the final measure (polysemy), I used Python to analyze the textual data. See generally Python Frequently Asked Questions, Python Software Found., <https://docs.python.org/3/faq/> [<https://perma.cc/Y5MD-6HRU>] (last visited Sept. 19, 2018).

175. See Justin Grimmer & Brandon M. Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, 21 *Pol. Analysis* 267, 267–69 (2013) (discussing the methodology of automated language analysis and its advantages in validity); David S. Law, *Constitutional Archetypes*, 95 *Tex. L. Rev.* 153, 192 (2016) (same).

176. See *infra* note 179 and accompanying text.

177. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (“It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’”).

giving agencies more room within which to operate. As the concept of “vagueness” might be conceived in different ways,<sup>178</sup> to provide a robust assessment of the self-delegation thesis, I selected several complementary measures that serve as proxies for vagueness. My four measures—legal vagueness, laxity, cognitive complexity, and polysemy—are described in the following paragraphs. In the empirical analysis, each measure is scaled so that greater values equate to greater vagueness, and lower values equate to greater clarity. The discussion of each of these measures of vagueness provides examples from a validation exercise using real regulatory texts in Title 21 of the *Code of Federal Regulations*—governing food labeling and packaging—and human coders’ evaluations of the vagueness of those texts.<sup>179</sup>

a. *Legal Vagueness.* — The first measure is an index based on a list of commonly used legal terms that fail to convey much practical guidance. Phrases like “reasonable precautions” and “prudent investor” use terms that do not by themselves convey criteria capable of deciding concrete cases. When these kinds of expressions appear in regulations, they add little precision and thus are prime candidates for identifying instances of an agency “enacting placeholder regulations and doing the real policymaking work in subsequent so-called interpretations.”<sup>180</sup> In *Shalala*

178. Vagueness is generally defined as the “use [of] concepts that have indefinite application to particular cases,” Lawrence Solum, Legal Theory Lexicon: Vagueness & Ambiguity, Legal Theory Blog (June 28, 2015), <https://lsolum.typepad.com/legaltheory/2015/06/legal-theory-lexicon-vagueness-ambiguity.html> [<https://perma.cc/J3HX-TZMG>], and it usually is sharply distinguished from ambiguity by linguists, see, e.g., George Dunbar, Towards a Cognitive Analysis of Polysemy, Ambiguity, and Vagueness, 12 Cognitive Linguistics 1, 2 (2001) (“A word is vague with respect to an interpretative element of meaning if it does not supply it; it is ambiguous between two elements if it supplies one or the other.”). Moreover, linguists often describe vagueness as having specialized classes, including soritical vagueness, combinatorial vagueness, and pragmatic vagueness. See Geert Keil & Ralf Poscher, Vagueness and Law: Philosophical and Legal Perspectives, in *Vagueness and Law: Philosophical and Legal Perspectives* 1, 1–2 (Geert Keil & Ralf Poscher eds., 2016) [hereinafter *Vagueness and Law*] (discussing different categories of vagueness and the legal implications of their distinctions).

179. I tested the validity of the measures by sampling sentences from Title 21, chapter 1, subchapter B, identifying the sentences that registered as extreme (both high and low) on each of my four measures, and giving those sentences to twelve human coders to rate on a seven-point Likert Scale for overall vagueness. A statistical analysis showed that raters were able to systematically distinguish between high-scoring sentences and low-scoring sentences, which in turn suggests that the measures are capturing much of what human readers consider to be vagueness. In addition, the fact that preambles scored significantly higher on average than the associated rule texts for three of the four measures (and basically identically in the fourth) reinforces the validity findings. After all, in Justice Thomas’s formulation of the self-delegation thesis, the problem is that rule texts affected by the incentives read more like preambles than rules. See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 518–19 (1994) (Thomas, J., dissenting) (outlining his concern about affording deference to “precatory” language that “reads more like a preamble than a law”).

180. Stephenson & Pogoriler, *supra* note 7, at 1468–69. Indeed, Stephenson and Pogoriler use the example of an agency “announcing that regulated entities must behave

*v. Guernsey Memorial Hospital*, for example, the Supreme Court dealt with vague language of this kind.<sup>181</sup> The question in that case hinged on the Secretary of Health and Human Services' interpretation of a regulation outlining "principles of cost reimbursement"<sup>182</sup> in the Medicare program, and whether it permitted the Secretary to depart from generally accepted accounting principles (GAAP) in determining reimbursement for "reasonable costs."<sup>183</sup> The Secretary maintained that the regulation only described the recordkeeping steps providers needed to take and remained silent on whether the Secretary could depart from GAAP.<sup>184</sup> The Supreme Court seized on language from the relevant regulation providing that "the methods of determining costs payable under Medicare involve making use of data available from the institution's basis accounts, as usually maintained, to arrive at equitable and *proper* payment for services to beneficiaries"<sup>185</sup> to conclude that the Secretary's interpretation was correct, and that "a provider's basic financial information is organized according to GAAP as a beginning point" from which the Secretary can make an equitable and proper reimbursement decision on grounds other than GAAP.<sup>186</sup> Manning's influential article in fact highlighted the vagueness in this regulation as a prime example of *Auer's* alleged perverse incentives for rule writing.<sup>187</sup>

While it would probably be difficult to capture all of the words and phrases in the law that might fit the billing of legal vagueness, I constructed a core dictionary of paradigmatically vague terms, such as *reasonable*, *prudent*, *appropriate*, and *feasible*.<sup>188</sup> Using the program Linguistic Inquiry and Word Count (LIWC), I then calculated the total percentage of the words in each document falling in the dictionary. The resulting percentage is the measure referred to as legal vagueness in my analysis.

"appropriately" to show how agencies might use inherently vague terms to increase their discretion. *Id.* "Appropriate" is one of the terms included in the "vagueness" dictionary in this Article. See *infra* note 188.

181. See 514 U.S. 87, 92 (1995) (noting that the case turned, in part, on the meaning of the vague phrase "[s]tandardized definitions, accounting, statistics, and reporting practices" (alteration in original) (internal quotation marks omitted) (quoting 42 C.F.R. § 413.20(a) (1994))).

182. *Id.* (quoting 42 C.F.R. § 413.20(a)).

183. *Id.* at 91 (internal quotation marks omitted) (quoting 42 U.S.C. § 1395x(v)(1)(A) (1994)).

184. *Id.* at 92–93.

185. *Id.* at 92 (emphasis added) (internal quotation marks omitted) (quoting 42 C.F.R. § 413.20(a)).

186. *Id.* at 92–93.

187. Manning, *Constitutional Structure*, *supra* note 113, at 657–60.

188. I constructed this list by reading a number of statutes and noting words that seemed inherently vague, given some level of legal sophistication. The complete list of words used in the legal vagueness measure is as follows: *reason\**, *prudent*, *best*, *available*, *possible\**, *optimal\**, *appropriate\**, *feasible\**, *acceptable*, *unreason\**, *careful\**, *proper\**, *undue\**, *unavailable*, *impossible\**, *infeasible\**, *unacceptable\**, *caution*. Asterisks indicate that I included all derivatives from suffixation (for example, *appropriate\*ly*).

The measure is quite effective at distinguishing high-vagueness text from low-vagueness text. An example of a regulatory sentence that scored extremely high on this measure reads as follows: “Reasonable deficiencies of calories, total sugars, added sugars, total fat, saturated fat, *trans* fat, cholesterol, or sodium under labeled amounts are acceptable within current good manufacturing practice.”<sup>189</sup> In contrast, the following sentence scored extremely low on the measure: “The calorie declaration for a packaged food must include the total calories present in the packaged food, regardless of whether the packaged food contains a single serving or multiple servings.”<sup>190</sup>

b. *Laxity*. — The second measure relies on the distinction between legal terms that are inherently binding and those that are inherently lax.<sup>191</sup> For instance, words like *shall* and *must* indicate a clear command; regulated parties ignore these kinds of commands at their peril. But at the same time, words like *may* and *should* leave regulated parties with greater uncertainty and leave law enforcers with a greater degree of discretion. Capturing the balance of these two categories of terms in a given legal text could reveal just how clear a regulator has been about the legal duty the text imposes. Lest a regulator do serious damage to its programs, it will most likely not issue a stern command unless it has itself confirmed that the accompanying requirements are spelled out to capture precisely the conduct that the regulator means to capture.

To construct the laxity measure, I started by developing a simple list of common permissive legal terms and a list of common compulsory legal terms and ran the dictionary on the rule texts as with the measure above.<sup>192</sup> I then subtracted the percentage of compulsory terms in a text from the percentage of permissive terms in a text to generate an aggregate index for laxity that measures the degree to which a given text fails to give relatively binding instructions. Again, the measure of laxity seems to capture intuitive distinctions between sentences. An example of a high-laxity sentence reads: “Such representations may be made either by statements, photographs, or vignettes.”<sup>193</sup> By contrast, an example of a low-laxity sentence is the following: “A common fraction shall be reduced

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189. 21 C.F.R. § 101.9(g)(6) (2018).

190. *Id.* § 101.8(c)(2)(C).

191. To some extent, the resulting measure is related to the Mercatus Center’s RegData measures of regulatory constraint, see Omar Al-Ubaydli & Patrick A. McLaughlin, RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997–2012, 11 Reg. & Gov. 109, 112 (2017), but it was necessary to construct my own measure because the RegData are only available for all regulations that have already been promulgated and incorporated into the Code of Federal Regulations. My sample identification process thus precluded use of RegData.

192. The complete list of words in the “compulsory” dictionary is as follows: *must, shall, will, cannot, never*. The complete list of words in the “permissive” dictionary is as follows: *could, might, can, probably, may, should*.

193. 21 C.F.R. § 101.13(1)(2).



to its lowest terms; a decimal fraction shall not be carried out to more than two places.”<sup>194</sup>

c. *Cognitive Complexity*. — Psychologists have argued that writing can be scaled in terms of its degree of “cognitive complexity.”<sup>195</sup> For the third measure, I employed a widely used measure of cognitive complexity<sup>196</sup> on the assumption that regulations may be more malleable when they

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194. *Id.* § 101.7(d).

195. See Tausczik & Pennebaker, *supra* note 174, at 35 (“Cognitive complexity can be thought of as a richness of two components of reasoning: the extent to which someone differentiates between multiple competing solutions and the extent to which someone integrates among solutions.”).

196. I followed the lead of a number of recent studies of Supreme Court opinion writing in employing the measure of cognitive complexity. See, e.g., Pamela Corley & Justin Wedeking, *The (Dis)Advantage of Certainty: The Importance of Certainty in Language*, 48 *Law & Soc’y Rev.* 35, 43 (2014) (using the LIWC program to measure the degree of certainty in Supreme Court majority opinions); Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 *Mich. St. L. Rev.* 853, 866 (using the LIWC program to analyze cognitive processes in opinions from the first five years of the Roberts Court); Deborah H. Gruenfeld, *Status, Ideology, and Integrative Complexity on the U.S. Supreme Court: Rethinking the Politics of Political Decision Making*, 68 *J. Personality & Soc. Psychol.* 5, 9–10 (1995) (comparing cognitive complexity in majority and dissenting Supreme Court decisions and in decisions written by liberal and conservative Justices); Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of Supreme Court Opinions*, 45 *Law & Soc’y Rev.* 1027, 1039–40 (2011) [hereinafter Owens & Wedeking, *Justices and Legal Clarity*] (describing a method for measuring cognitive complexity in Supreme Court opinions using the LIWC program); Ryan J. Owens & Justin Wedeking, *Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court*, 74 *J. Pol.* 487, 491–93 (2012) [hereinafter Owens & Wedeking, *Predicting Drift*] (measuring the cognitive complexity of Supreme Court Justices over their lifetime, both before and after being nominated to the Court, using a LIWC program); Philip E. Tetlock, Jane Bernzweig & Jack L. Gallant, *Supreme Court Decision Making: Cognitive Style as a Predictor of Ideological Consistency of Voting*, 48 *J. Personality & Soc. Psychol.* 1227, 1229–31 (1985) (describing the linguistic analysis required to measure integrative complexity in Supreme Court opinions). For a useful summary of this literature, see Ryan C. Black et al., *U.S. Supreme Court Opinions and Their Audiences* 40–46 (2016).

The built-in dictionaries I used, following the literature above, contained categories of words that are theorized to be proxies for cognitive complexity. These dictionaries include: causation words (for example, *because*, *effect*, *hence*, and *depend*), insight words (for example, *think*, *know*, and *consider*), discrepancy words (for example, *should*, *would*, and *could*), tentativeness words (for example, *maybe*, *perhaps*, and *fairly*), certainty words (for example, *always*, *never*, and *absolutely*), difference words (for example, *hasn’t*, *but*, and *else*), negation words (for example, *no*, *not*, and *never*), and six-letter words (that is, words with more than six letters, which are thought to be correlated with sophistication and complexity). After obtaining raw percentage scores for each of these categories in each text, I standardized the scores by obtaining z-scores for each category in each text. The z-score is simply  $z = \frac{x - \mu}{\sigma}$ , where  $x$  is the observed raw score,  $\mu$  is the mean score for all texts, and  $\sigma$  is the standard deviation. Finally, again following the method outlined in prior studies, see Owens & Wedeking, *Justices and Legal Clarity*, *supra*, at 1039–40, I summed the standardized scores that indicated greater cognitive complexity and subtracted the standardized scores associated with simplicity (that is, certainty and negation words) to create an aggregate measure of cognitive complexity for each text in the dataset.

implicitly (or explicitly) acknowledge different layers of a policy problem. These layers might provide the policy justification for an interpretive change at a later time. Indeed, cognitive complexity seems to have been the focus of Justice Thomas's concerns in *Thomas Jefferson University v. Shalala*, in which he lamented that a rule that he asserted had succumbed to the perverse incentive thesis looked more like preamble text than law proper.<sup>197</sup> Preambles contain more of the justification for, and purposes behind, a rule, often highlighting competing considerations at play in the agency's thinking, responding to various critiques of a proposed action, and seeking to build a complete record for judicial review. They are inherently cognitively complex.

Cognitive complexity, therefore, is well suited to capture at least this dimension of vagueness in rule texts. Rule texts that score high on cognitive complexity tend to use "multidimensional terms and to integrate a variety of evidence,"<sup>198</sup> while low cognitive complexity denotes the kind of "conceptual organization of decision-relevant information" characteristic of codified legal text.<sup>199</sup> When an agency writes in a cognitively complex style, it is in effect leaving itself room to emphasize different facts or different considerations in the next round of decisionmaking. For instance, Professors Ryan Owens and Justin Wedeking find that measures of cognitive complexity in the opinions authored by Supreme Court Justices predict ideological drift over the course of their careers.<sup>200</sup> This is precisely what critics of *Auer* see agencies doing—using under-specification in the first round of play to sandbag for greater authority or discretion in future situations. In other words, cognitive complexity proxies for the capacity for plausible drift.

The expectation is that prose low in cognitive complexity will appear crisp and simple, whereas prose high in cognitive complexity will read as muddled and complicated. Indeed, an example of a high-scoring sentence on the measure reads: "Fat and/or oil ingredients not present in the

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197. 512 U.S. 504, 519 (1994) (Thomas, J., dissenting).

198. Tetlock, Bernzweig & Gallant, *supra* note 196, at 1228. More specifically, cognitive complexity consists of two related concepts called "differentiation" and "integration." The former "represents the degree to which an individual can see multiple perspectives or dimensions in an issue," and the latter indicates "the degree to which a person recognizes relationships and connections among these perspectives or dimensions and integrates them into their decision or judgment." Black et al., *supra* note 196, at 44.

199. Gruenfeld, *supra* note 196, at 5. There are obviously important parallels with the literature on rules versus standards. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 586–90 (1992) (discussing the varying degrees of complexity that can be written into rules and standards); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 *Or. L. Rev.* 23, 32 (2000) (noting that dispute resolution through standards is usually, but not always, more complex than dispute resolution through rules). Indeed, Owens and Wedeking find that Justice Scalia, a well-known enthusiast of rules, wrote opinions that displayed comparatively low scores on measures of cognitive complexity. Owens & Wedeking, *Justices and Legal Clarity*, *supra* note 196, at 1044.

200. See Owens & Wedeking, *Predicting Drift*, *supra* note 196, at 498–99.

product may be listed if they may sometimes be used in the product.”<sup>201</sup> In contrast, a low-scoring example is: “Label serving size for ice cream cones, eggs, and breath mints of all sizes will be 1 unit.”<sup>202</sup> The first sentence takes time to process because it involves contingencies, whereas the second sentence is a straightforward command.

d. *Polysemy*. — A final measure relates to what philosophers of language call “combinatorial vagueness,” which arises when a speaker or writer “ha[s] not formed an intention with regard to the inclusion or exclusion of certain objects.”<sup>203</sup> This kind of categorization problem is likely the source of the lion’s share of disputes about federal statutes, and it extends well beyond the kind of paradigmatic legal vagueness discussed above.<sup>204</sup> For instance, courts have had to grapple with such questions as whether a statute defining “motor vehicle” to include “an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails” includes airplanes.<sup>205</sup> They have also had to grapple with whether the Voting Rights Act’s use of the term “elect[ed] representatives” includes judges who are elected.<sup>206</sup> In essence, vagueness arises when a legal text chooses a word that is general enough to elide costly determinations about what is and what is not included.

In an effort to account for this kind of vagueness in the rules in the sample, I employed the concepts of hyponymy and hypernymy, which provide a way of hierarchically mapping the relationships between words on the dimension of specificity.<sup>207</sup> A hyponym is a subordinate of a hypernym: For instance, the word *orange* is a hyponym of *fruit*, and *fruit* is a hyponym of *food*. Conversely, a hypernym is a superordinate of another word.<sup>208</sup> Thus, the word *fruit* is a hypernym of *orange*, but so is *color*. These concepts, when applied to the words that are actually used in a text, capture quite cleanly at least one key dimension of what concerns *Auer*’s

201. 21 C.F.R. § 101.4(b)(14) (2018).

202. *Id.* § 101.12 tbl.2 & n.8.

203. See Ralf Poscher, An Intentionalist Account of Vagueness: A Legal Perspective, *in* *Vagueness and Law*, supra note 178, at 65, 85.

204. See Lawrence M. Solan, *The Language of Statutes: Laws and Their Interpretation* 35 (2010) (“Cases involving linguistic ambiguity are far less common than those involving conceptual vagueness . . .”).

205. *McBoyle v. United States*, 283 U.S. 25, 25–26 (1931) (quoting National Motor Vehicle Theft Act, ch. 89, § 2(a), 41 Stat. 324, 324 (1919) (current version at 18 U.S.C. § 2311 (2012))).

206. *Chisom v. Roemer*, 501 U.S. 380, 385 (1991) (quoting Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2(b), 96 Stat. 131, 134 (current version at 52 U.S.C. § 10301 (2012))).

207. See George A. Miller, *WordNet: A Lexical Database for English*, Comm. of the ACM, Nov. 1995, at 39, 40, <https://pdfs.semanticscholar.org/ec6e/56339e0b2f5c2f464a7a48b536b78bfeafba.pdf> (on file with the *Columbia Law Review*) (defining and explaining “hyponymy” and “hypernymy”).

208. *Id.*

critics, which is systematic evasiveness in providing the details of what triggers a legal obligation. If the count of hyponyms associated with the words in a text is relatively large (that is, the words actually used are hypernyms of a relatively high number of hyponyms), this suggests forgone specificity, because a “hyponym inherits all the features of the more generic concept and adds at least one feature that distinguishes it from its superordinate and from any other hyponyms of that superordinate.”<sup>209</sup> If an agency is withholding clarity strategically, we would expect that agencies would choose more words that decline to specify that additional, clarifying feature. Likewise, a high count of hypernyms could create vagueness because a large number of superordinate concepts associated with a given word would require the reader to differentiate that word’s true subordinate relationship from those distinct concepts. Of course, hypernymy is also associated with specificity, as the agency could have used a more overarching term. The end goal is to use the concepts of hypernymy and hyponymy to place each word in a hierarchy of more general terms to more specific terms. In essence, the higher a word is in the hierarchy—and the greater the number of distinct words below it—the more potentially vague the word is.

Using a lexical database called WordNet,<sup>210</sup> which is widely used in natural language processing and artificial intelligence, I was able to count the number of hyponyms and hypernyms linked to each word in the sample rules and generate document-level averages of these counts.<sup>211</sup> The result generated two measures of possible vagueness—nondistinction of subordinate concepts (that is, average rate of hyponyms for the words in a given text) and nondistinction of entirely different word senses, or lexical ambiguity (that is, average rate of hypernyms for a given text)—which I then added together to form an index labeled “polysemy.” Again, examples from the FDA’s food-labeling regulations help demonstrate what distinguishes text under this measure. A low-scoring sentence reads: “The gram (mL) quantity between 2 and 5 g (mL) should be rounded to the nearest .05 g (mL) and the g (mL) quantity less than 2 g (mL) should be expressed in .01-g (mL) increments.”<sup>212</sup> A high-scoring example stands in sharp contrast for its verbosity: “Substance means a specific food or component of food, regardless of whether the food is in conventional food form or a dietary supplement that includes vitamins,

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209. George A. Miller et al., Introduction to WordNet: An On-line Lexical Database 8 (1993), <http://wordnetcode.princeton.edu/5papers.pdf> [<https://perma.cc/BSV6-LPM6>].

210. WordNet, <https://wordnet.princeton.edu/> [<https://perma.cc/SQP3-ZX2D>] (last visited Sept. 14, 2018). For background on WordNet and its potential applications, see generally Richard Beckwith et al., WordNet: A Lexical Database Organized on Psycholinguistic Principles, *in* Lexical Acquisition: Exploiting On-Line Resources to Build a Lexicon 211 (Uri Zernik ed., 1991).

211. WordNet uses a Directed Acyclic Graph (DAG) to hierarchically graph the links between words in terms of hypernymy and hyponymy. For a visual example of a WordNet DAG, see Beckwith et al., *supra* note 210, at 216 fig.9.1.

212. 21 C.F.R. § 101.9(b)(7)(ii) (2018).

minerals, herbs, or other similar nutritional substances.”<sup>213</sup> This latter sentence employs general categories, such as food, minerals, and herbs, that leave the agency with ample room to make arguments that a particular item is really outside the ambit of the overarching category. The polysemy measure aims to pick up differences between regulatory texts on just this tendency to employ broad categories instead of specific terms.

### B. *Aggregate Trends*

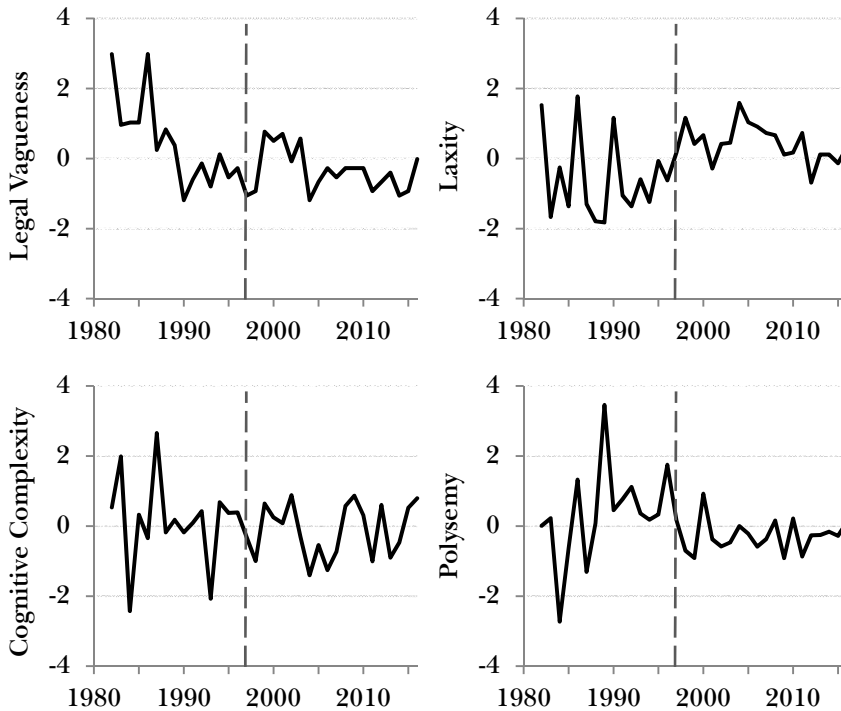
My starting point for testing whether *Auer*'s incentives translate into effects on agency behavior was to look at aggregate trends on the core measures of linguistic “mush” described in section III.A.2. Figure 3 presents the time series trends of the median values of each of the four vagueness measures for rules from 1982 through 2016. If there is a systemic perverse effect of the doctrine on rule writing, there should be a generally positive trend on the measures of vagueness following *Auer*, given that positive citations to *Auer* have continued to grow over time. At the very least, if *Auer* created strong perverse incentives, there should be some indication that the post-*Auer* period has seen higher levels of vagueness than the pre-*Auer* period.

Even at this general level, it is clear that there are some difficulties for the self-delegation thesis. First, for the entire sample, only two of the measures show statistically significant trends over time. Legal vagueness decreased by an average of .004 per year from 1982 through 2016 ( $p > |t| = .000$ ), while laxity increased by an average of .005 per year over the same time period ( $p > |t| = .048$ ). For the other two measures, agencies have been static in terms of the specificity of their writing over a nearly forty-year period that saw the rise of *Auer* deference.<sup>214</sup>

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213. *Id.* § 101.14(a)(2).

214. See *supra* section I.A & Figure 1 (describing and showing the increasing prominence of *Auer* and *Seminole Rock*).

FIGURE 3: STANDARDIZED INDICES OF RULE-TEXT VAGUENESS, 1982–2016<sup>215</sup>

Second, none of the four measures of vagueness show any statistically significant trend when looking only at rules published in 1997 or later. Two measures—cognitive complexity and polysemy—show increases in the propensity for vagueness but fall far short of statistical significance ( $p > |t| = .587$  and  $.926$ , respectively) during this period. The other two measures—legal vagueness and laxity—indicate decreases in vagueness since 1997, even though those changes also fall short of statistical significance ( $p > |t| = .184$  and  $.115$ , respectively). In contrast, the period before *Auer* did see statistically significant movement on at least one of these variables. From 1982 through 1996, agencies’ rules trended downward (statistically significantly so, at the  $.01$  level) on the measure of legal vagueness. Two of the other variables—laxity and cognitive complexity—showed a negative trend, but not statistically distinguishable from zero. Polysemy trended upward but, again, not at a statistically significant rate.

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215. The solid lines represent median values, shown as z-scores, for each year on the selected index across all agencies. The vertical dashed lines show the year 1997, when *Auer* was decided.

TABLE 1: DIFFERENCE OF MEANS, PRE- AND POST-AUER<sup>216</sup>

	<i>Legal Vagueness</i>	<i>Laxity</i>	<i>Cognitive Complexity</i>	<i>Polysemy</i>
Mean Pre-Auer	.277	-.603	-.208	4.63
Mean Post-Auer	.241	-.462	.105	4.40
Difference in Means	-.036	.141	.313	-0.23
P-Value	.014*	.000***	.158	.000***
N	1218	1218	1218	1218

In terms of simple differences in means between the two periods, most of the data are, again, inconsistent with the self-delegation thesis. As Table 1 shows, the post-Auer mean for two of the measures—legal vagueness and polysemy—was significantly lower than the pre-Auer mean. The difference with cognitive complexity is not statistically distinguishable from zero. Only one piece of evidence possibly squares with the self-delegation thesis's basic predictions: Laxity does show a statistically significant increase post-Auer.

While this comparison of means offers just an initial overview of the data, it is a highly suggestive one. Most of the evidence suggests that the post-Auer period has been marked by abnormally precise regulatory language or that it has not been substantially different than it was before Auer.<sup>217</sup>

### C. Agency-Specific Trends

As informative as aggregate trends can be, collapsing the data into one time series for all agencies sacrifices much of the interesting variation. Although there is significant coordination between agencies in rulemaking,<sup>218</sup> agencies are largely independent of one another and come to the rule-writing task with drastically different baselines.<sup>219</sup>

216. P-values are from a two-tailed test of the null hypothesis that the difference of means is zero. Statistical significance is denoted as follows:  $p < .1 = ^\wedge$ ,  $p < .05 = *$ ,  $p < .01 = **$ ,  $p < .001 = ***$ . Statistically significant p-values indicate that the null hypothesis of zero difference can be rejected in favor of the alternative hypothesis that there was a significant change not attributable to natural variation.

217. The analysis to this point does not allow one to say whether the post-Auer rules changed the trend, or slope, relative to the pre-Auer trend. This possibility is explored in greater detail in sections III.D and III.E using interrupted time series methods.

218. See Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1136–37 (2012) (discussing efforts to promote coordination across government agencies).

219. Some agencies may deal with subject matter that is inherently more vague compared to the matters others deal with (imagine, for instance, the difference between

Consequently there are significant differences in patterns in the data across agencies. For instance, there is great variation in the frequency with which each of the agencies produced rules. Only DOL, DOT, EPA, HHS, and USDA published more than twenty economically significant final rules during the period of observation. That means the rest of the twenty-three agencies that published at least one rule during this entire period averaged less than one final rule per year—and often much less than that.

If agencies produce rules at starkly different rates, it might also stand to reason that agencies would produce rules in very different ways. That intuition is supported even when focusing just on agencies that produce larger numbers of rules annually. Figure 4 plots the measures of vagueness used for this study for the six agencies—the Department of the Interior (DOI), DOL, DOT, EPA, HHS, and USDA—that produced the greatest number of economically significant final rules. The measures are standardized (adjusted so that they all have means of zero and standard deviations of one) for ease of presentation. As Figure 4 makes clear, the agencies vary significantly in terms of the vagueness of their rules, and the patterns do not necessarily correspond to the aggregate trends discussed in section III.B.

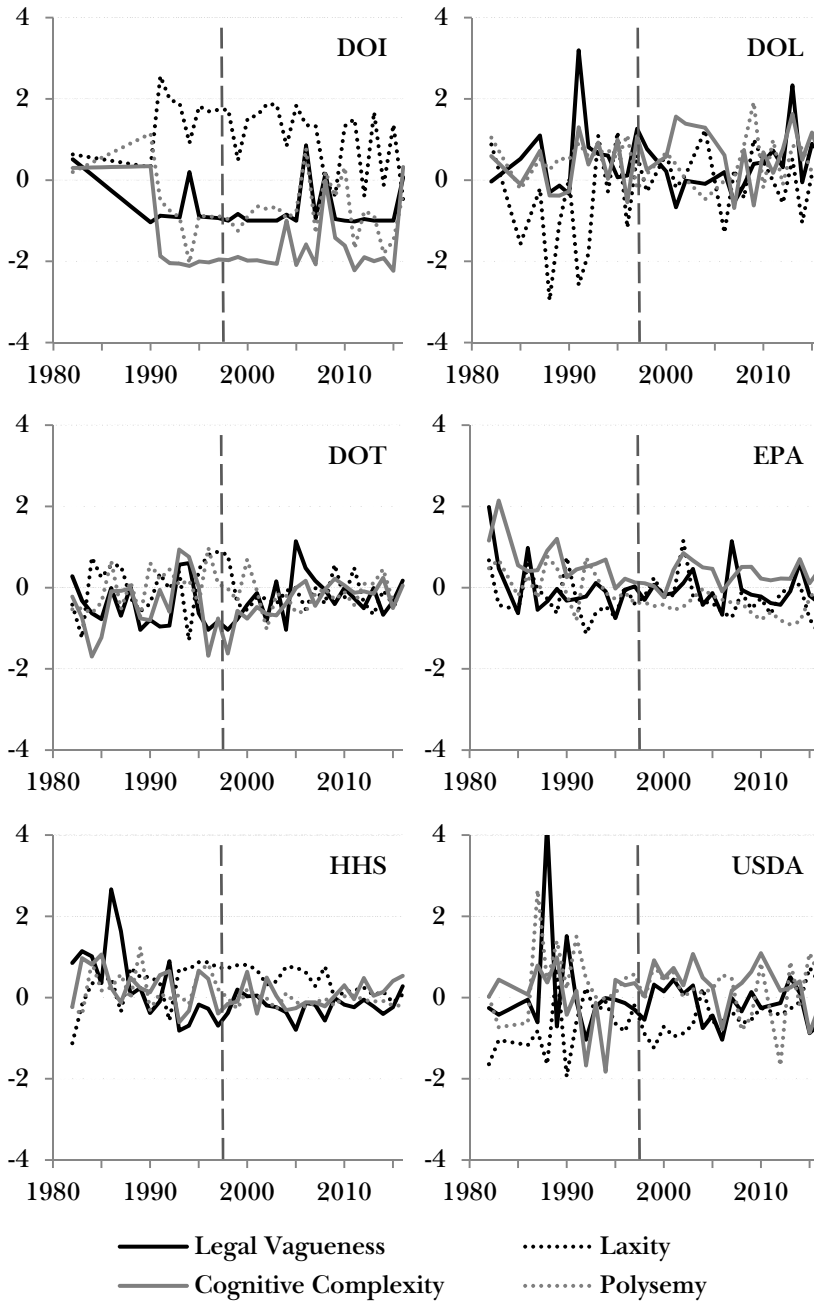
This heterogeneity is both a feature and a problem from the standpoint of studying *Auer*'s incentives and effects. On the positive side, it is possible to see a more nuanced picture of how individual agencies might have responded to *Auer*. For instance, Figure 4 shows that, on the whole, EPA and HHS have more or less steadily increased the clarity of their rule texts over time. In contrast, DOL, DOT, and USDA show more volatile patterns, with major upticks and downticks in vagueness both before and after *Auer*. Statistically speaking, the data suggest that there may not be a one-size-fits-all determinant of rule vagueness across agencies, and any statistical analysis should control for agency differences.

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technical air pollution regulations and antidiscrimination regulations), and some variation might also exist because of the level of vagueness in the governing statutes that the regulations seek to implement.



FIGURE 4: STANDARDIZED INDICES OF VAGUENESS BY MAJOR RULEMAKING AGENCY, 1982–2016<sup>220</sup>



220. Each panel displays agency-specific median values, shown as z-scores, for all four measures of vagueness. The vertical dashed lines show the year 1997, when *Auer* was decided.

That said, the variation in these data suggests a problem because the self-delegation thesis posits a systematic effect that, in theory, should apply across the board to all agencies. If certain agencies have highly unique trends, outlier values, or just more rules than other agencies, statistical methods that do not take account of agency-level effects will be biased. Fortunately, it is possible to take account of this variation by exploiting the panel structure of the data.<sup>221</sup> The next two sections turn to statistical tests to determine whether, accounting for this agency-level heterogeneity, there is any effect from *Auer*.

#### D. *Searching for a Link Between Incentives and Effect in Auer*

In order to test more fully whether *Auer* might have had the effect of encouraging agencies to write rules more vaguely, I used a quasi-experimental method called an interrupted time series (ITS) design.<sup>222</sup> An ITS design allows me to measure the pre-*Auer* trend, or slope, using ordinary least squares (OLS) regression, and then to estimate the post-*Auer* trend on the same variable. The measure of interest is the difference between the pre-*Auer* trend—which serves as a counterfactual prediction of what would have occurred without any change in agency behavior—and the observed post-*Auer* trend.<sup>223</sup> This approach has been used to address treatment effects in a wide range of legal and policy fields, from criminal justice to education.<sup>224</sup>

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221. Most empirical research on administrative behavior thus includes fixed effects at the agency level. See O’Connell, *Political Cycles of Rulemaking*, supra note 131, at 932, 940. Fixed effects allow one to “control for all stable characteristics of the [entities] in the study,” even without measuring these characteristics, by “completely ignor[ing] the between-[entity] variation and focus[ing] only on the within-[entity] variation.” Paul D. Allison, *Fixed Effects Regression Methods for Longitudinal Data Using SAS 3–4* (2005). Thus, each agency serves as its own control.

222. See generally Andrea Cann Chandrasekher, *Empirically Validating the Police Liability Insurance Claim*, 130 *Harv. L. Rev. Forum* 233, 239–40 (2017), [http://harvardlawreview.org/wp-content/uploads/2017/04/vol130\\_Chandrasekher.pdf](http://harvardlawreview.org/wp-content/uploads/2017/04/vol130_Chandrasekher.pdf) [<https://perma.cc/WV3G-F5G5>] (“With interrupted time series, the researcher compares the level of some outcome variable . . . right before and right after the imposition of some policy that affects the availability (or level) of the treatment . . .”).

223. See generally Ariel Linden, *Conducting Interrupted Time-Series Analysis for Single- and Multiple-Group Comparisons*, 15 *Stata J.* 480, 481–82 (2015) (providing background on the methodology and usefulness on ITS analysis); A.K. Wagner et al., *Segmented Regression Analysis of Interrupted Time Series Studies in Medication Use Research*, 27 *J. Clinical Pharmacy & Therapeutics* 299, 301 (2002) (same).

224. See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on *Miranda*'s Harmful Effects on Law Enforcement*, 50 *Stan. L. Rev.* 1055, 1071–74 (1998) (using interrupted time series analysis to determine if crime clearance rates declined after *Miranda v. Arizona*); Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 *Ga. L. Rev.* 543, 602–04 (1998) (measuring change in education spending and centralization in school districts following school-finance litigation); Malcolm D. Holmes et al., *Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis*, 26 *Law & Soc’y Rev.* 139, 143–45 (1992)

Table 2 presents the results of an ITS model using the entire time series and a single treatment period starting in 1997. For each core measure of vagueness, Table 2 presents first the pre-*Auer* trend and then the change to that trend. Three separate specifications are reported. All three models include a fixed effect for the issuing department. Model 2 controls for the differences in baseline vagueness that might exist between different rulemakings with very different subject matter. For this, I used the preamble score for the corresponding measure of vagueness. If, for example, a rule on the meaning of “waters of the United States” in the Clean Water Act deals with an inherently vague subject matter, both the rule text and the preamble likely reflect that baseline subject-matter vagueness. By including the control for preambles, there is less risk that differences are driven by chance variation in the subject matter that agencies choose (or are forced) to tackle. Finally, I included standard measures about the political environment in Model 3. Agencies might adjust their rule-writing strategy in response to their perceptions about the likelihood of political oversight or the preferences of their political principals. Thus, I included measures of whether the rule was promulgated during (a) divided or unified government and (b) a Republican or Democratic presidency.

The results in Table 2 provide no support for the hypothesis that *Auer* caused agencies to write rules that are more “mushy” than the norm. In fact, the strongest finding, from a statistical perspective, is that *Auer* seems to have encouraged agencies to write *less* vaguely than before, by one measure at least. During the post-*Auer* period, the average measure of rule laxity decreased by between .31 and .40 per year relative to the pre-*Auer* trend—a total reversal for the agencies from their pre-*Auer* trend toward more vagueness, and one that is statistically significant. For the rest of the variables, the findings are not statistically significant. That is, while there are directional changes indicated—negative for polysemy and positive for legal vagueness and cognitive complexity—these findings are not statistically distinguishable from the null hypothesis of no change in trend.

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(examining the relationship between plea bargaining policies and state court caseloads); Brian J. Ostrom et al., Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act, 78 *Notre Dame L. Rev.* 1525, 1546 & n.71 (2003) (determining whether 28 U.S.C. § 1983 cases were filed less often in each circuit court as a result of passage of the Prison Litigation Reform Act); Jonathan W. Penney, Chilling Effects: Online Surveillance and Wikipedia Use, 31 *Berkeley Tech. L.J.* 117, 143–45 (2016) (exploring whether internet traffic to “privacy-sensitive” Wikipedia articles decreased following the June 2013 revelation of the NSA/PRISM surveillance program).

TABLE 2: INTERRUPTED TIME SERIES MODELS OF THE EFFECT OF *AUER* ON RULE VAGUENESS<sup>225</sup>

	(1)	(2)	(3)
<i>Legal Vagueness</i>			
Pre- <i>Auer</i> Trend	-.006	-.001	-.000
Post- <i>Auer</i> Change	.006	.001	.000
<i>Laxity</i>			
Pre- <i>Auer</i> Trend	.026**	.018 <sup>^</sup>	.014
Post- <i>Auer</i> Change	-.040***	-.034**	-.031**
<i>Cognitive Complexity</i>			
Pre- <i>Auer</i> Trend	-.110 <sup>^</sup>	-.095 <sup>^</sup>	-.078
Post- <i>Auer</i> Change	.109	.086	.074
<i>Polysemy</i>			
Pre- <i>Auer</i> Trend	.020 <sup>^</sup>	.021*	.016
Post- <i>Auer</i> Change	-.015	-.015	-.011
<i>Controls</i>			
Department	√	√	√
Preamble		√	√
Political Environment			√

These findings are also robust to adding a one-year lag to the treatment.<sup>226</sup> Even after accounting for a possible delayed onset by adding a one-year lag, there are no statistically significant results. As an additional robustness check, I also tested for short-term effects on agencies that were only observable in the first few years immediately following the decision. I used two windows of time: one with an observation period of two years before and after *Auer* and a second with an observation period of three years before and after *Auer*. For these two observation windows, I estimated the same regressions as in Table 2. Limiting the analysis to these windows, I found that none of the ITS estimates of post-*Auer*

225. Estimates are OLS with Newey-West Standard Errors. Observations are at the department-year level (N=362). Statistical significance is denoted as follows:  $p < .1 = ^$ ,  $p < .05 = *$ ,  $p < .01 = **$ ,  $p < .001 = ***$ .

226. Using a lag accounts for a possible delayed effect. I do not report the results because they are substantially similar to the results reported in Table 2.

change were statistically significant. Thus, even if the hypothesized effect of *Auer* is merely a short-term effect, there is no evidence to support it.

E. *Testing the Effect of the Second Revolution*

As a further effort to evaluate the self-delegation thesis, I tested whether developments since 2005—namely, the Supreme Court’s significant *Auer*-related decisions in *Perez*, *Decker*, *Christopher*, *Talk America*, and *Gonzales*<sup>227</sup>—have had any effect on agency rule writing. It is not exactly clear as a matter of theory what kind of effect these developments might have had on agency rule writing. On one level, the growing apprehension about *Auer*—as signaled by statements of disapproval from Chief Justice Roberts, Justices Thomas and Alito, and the late Justice Scalia<sup>228</sup>—suggests that the perverse incentive might have lost some of its luster for agencies. If the Supreme Court is on the precipice of overturning *Auer*, any rule intentionally obscured now would have an uncertain payoff were there a change to the doctrine. At the same time, *Auer* is still good law. Moreover, as Figures 1 and 2 suggest, *Auer* has never been more popular in the circuit courts, as measured both by explicitly positive citations and by total citations. Additionally, given that some scholars have viewed recent decisions such as *Perez*<sup>229</sup> and the certiorari decisions in *United Student Aid Funds* and *Gloucester County*<sup>230</sup> as a signal that *Auer* was safe, at least temporarily,<sup>231</sup> there might be reason to suspect that *Auer*’s “second revolution” had positively reinforced its perverse incentives.

Teasing out which, if any, of these hypotheses is correct involved applying the same methodology from section III.D to these later treatment dates. As a first cut, and taking my cue from Figures 1 and 2, which show spikes in total citations, positive citations, and negative citations in 2005, I analyzed whether trends in agencies’ rule clarity changed appreciably relative to the pre-2005 trend. I also tested whether there was any change to the pre-2011 trend after the citations to *Auer* rose sharply in 2011. These dates roughly correspond to the litigation in *Gonzales* and *Talk America*, two significant cases in which several Justices expressed reservations about *Auer*.<sup>232</sup> Table 3 presents the results of this ITS analysis.

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227. See *supra* notes 74–93 and accompanying text.

228. See *supra* notes 85–93 and accompanying text.

229. See *supra* note 93 and accompanying text.

230. See *supra* notes 96, 98 and accompanying text.

231. See *supra* notes 96–100 and accompanying text. The Court’s decision to revisit *Auer* deference this term in *Kisor v. Wilkie* suggests that the doctrine might no longer be safe. See *supra* note 19 and accompanying text.

232. See *supra* notes 74–84 and accompanying text.

TABLE 3: INTERRUPTED TIME SERIES MODELS OF RECENT AUER-RELATED SUPREME COURT CASES<sup>233</sup>

	Post-2005 ( <i>Gonzales</i> )			Post-2011 ( <i>Talk America</i> )		
	(1)	(2)	(3)	(4)	(5)	(6)
<i>Legal Vagueness</i>						
Pre-Trend	-0.005*	-0.002	-0.002	-0.004*	-0.002	-0.003
Trend Change	.008	.004	.007	.014	.012	.012
<i>Laxity</i>						
Pre-Trend	.020***	.017***	.016***	.009*	.007*	.008*
Trend Change	-.022 <sup>^</sup>	-.023 <sup>^</sup>	-.037*	.002	-.010	-.011
<i>Cognitive Complexity</i>						
Pre-Trend	-.024	.003	.014	-.016	.002	.011
Trend Change	.049	.007	.050	.179	.152	.144
<i>Polysemy</i>						
Pre-Trend	-.008	-.008	-.012*	-.003	-.003	-.005
Trend Change	.000	.002	.000	.017	.015	.018
<i>Controls</i>						
Department	√	√	√	√	√	√
Preamble		√	√		√	√
Political Environment			√			√

The results in Table 3, again, provide no support for the self-delegation hypothesis. As with the analysis of *Auer*'s effect, both the post-2005 and the post-2011 periods show virtually no statistically significant changes in agency rule writing, despite the fact that these years marked the beginning of major upticks in citations to the doctrine. And, again, the one statistically significant finding that does stand out is the statistically significant *negative* change in the trend for laxity post-2005.

The results in Table 3 show changes in trends relative to the entire pre-2005 and pre-2011 periods (that is, 1982 onward), and that is probably the appropriate baseline, given that section III.D found that *Auer* had no effect. Nevertheless, as an additional robustness check, Table 4 presents the results of models looking at just the segment of time between each of these salient treatment periods. That is, the models look at the effect on the preexisting trend from 1997 up to 2005, and then at the

233. Estimates are OLS with Newey-West Standard Errors. Observations are at the department-year level (N=362). Statistical significance is denoted as follows:  $p < .1 = ^{\wedge}$ ,  $p < .05 = *$ ,  $p < .01 = **$ ,  $p < .001 = ***$ .

effect on the preexisting trend from 2005 up to 2011. The results in Table 4 provide no evidence in favor of either possible effect. On the whole, these data show that the recent flurry of cases has had no effect on agency rule writing one way or the other.

TABLE 4: SEGMENTED INTERRUPTED TIME SERIES RESULTS<sup>234</sup>

	Post-2005 ( <i>Gonzales</i> )			Post-2011 ( <i>Talk America</i> )		
	(1)	(2)	(3)	(4)	(5)	(6)
<i>Legal Vagueness</i>						
Trend Change	-.004	-.009	.016	.017	.017	.006
<i>Laxity</i>						
Trend Change	-.004	.052	-.016	-.029	-.042	-.013
<i>Cognitive Complexity</i>						
Trend Change	.057	-.045	-.256	-.023	.084	.156
<i>Polysemy</i>						
Trend Change	.027	.029	-.020	-.015	-.015	.011
<i>Controls</i>						
Department	√	√	√	√	√	√
Preamble		√	√		√	√
Political Environment			√			√

Arguably, agencies may still be waiting for the Court to make a move before committing to any particular strategy. But this seems unlikely given that the lack of any change in Table 4 simply fits the pattern of all the other analyses. Agencies' rule clarity appears quite strikingly to remain unaffected by *Auer*, falling short of the expectations of the self-delegation thesis.

#### F. *Other Robustness Checks*

The most notable statistically significant finding from all of the analyses is the complete opposite of what the self-delegation thesis would have predicted—clarity over legal duty actually increased following *Auer*,

234. Estimates are OLS with Newey-West Standard Errors. Observations are at the department-year level (N=362). Models 1 through 3 show change in trends from 2005 onward relative to the approximate period of time between *Auer* and *Gonzales* (1997–2005). Models 4 through 6 show change in trends from 2011 onward relative to the approximate period of time between *Gonzales* and *Talk America* (2005–2011). Statistical significance is denoted as follows: p<.1 = ^, p<.05 = \*, p<.01 = \*\*, p<.001 = \*\*\*.

as shown in Table 2.<sup>235</sup> Otherwise, the findings from the ITS analysis are null. Although null results mean that the analysis has yielded evidence that the *Auer* effect is statistically indistinguishable from zero, they are not, by themselves, sufficient to infer that the effect of *Auer* is truly zero. There are thus limits to what can be inferred from this kind of evidence, but null results are not meaningless and ignoring them can be problematic.<sup>236</sup> This is particularly the case when other attempts to analyze the problem also fail to find any effect.

To that end, I supplemented the main analysis with a number of robustness checks, and across the board the results are similar: *Auer* appears to be unassociated with any systematic trends in agency rule writing. If numerous efforts to identify an effect fail to yield results, we can be more confident that the null results are meaningful in their own right. If nothing else, the burden of proof surely should shift decisively to adherents of the self-delegation thesis to put forward evidence in support of their assertions.

1. *Alternate Treatment.* — One potential concern might be that the ITS methodology employed above fails to capture a true treatment effect—that is, it might fail to capture the extent to which agencies were aware of and likely to act on *Auer*'s incentives. That seems unlikely, as the data in Part I indicated that *Auer* became widely cited and widely perceived only in 1997,<sup>237</sup> but perhaps there are reasons to believe that an agency's "hot hand" (that is, recent success in deploying *Auer*) is more likely to activate the perverse incentives than any kind of general awareness about *Auer*.

Using data collected by William Yeatman, I measured this hot-hand treatment by computing agency-level win rates and *Auer*-related litigation rates in the U.S. Courts of Appeals from 1993 through 2013.<sup>238</sup> Do experiences with *Auer* deference in real-world litigation affect agency rule writing down the road? In order to answer this question, I estimated models of the effect of *Auer* case win rates, total *Auer* cases per year, and their interaction on the indices of rule vagueness. Since rule writing takes time—and the effects of one year's litigation successes would not likely

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235. Specifically, Table 2 reported a statistically significant shift in the trend line for the laxity measure after *Auer*. See supra Table 2.

236. See Robert Rosenthal, The "File Drawer Problem" and Tolerance for Null Results, 86 *Psychol. Bull.* 638, 640 (1979) (discussing the problem that statistically nonsignificant studies are not generally published, which could make erroneously significant studies appear more credible than they actually are).

237. See supra Figures 1 & 2.

238. Yeatman, supra note 36, at 523–45 (discussing the methodology employed in assembling the dataset). Because Yeatman's data ran for only a subset of the years in my data, and because many agencies never experienced *Auer*-related litigation during this period, the models include only fifteen agencies. Moreover, because even agencies that did experience *Auer*-related litigation did not litigate every year, the data were further limited to just those agency-year pairs for which there was observable litigation.



appear until the next year at the earliest—I estimated the models with lags of one and two years. Table 5 reports the results.

Overall, the results show that *Auer*-related litigation successes do not produce increases in rule vagueness in subsequent years, or at least not increases that are statistically distinguishable from zero. Only two of the models—the two-year lagged models of cognitive complexity and polysemy—show any statistically significant relationship, and only one of these (polysemy) is consistent with the self-delegation thesis’s prediction that greater exposure to *Auer* would trigger *more* vagueness. Moreover, it is notable that the interaction of the agency’s win rate and the number of cases in a given year—which represents the strongest possible measure of “hot-hand” exposure to *Auer*’s incentives—is almost uniformly negatively signed. That is, when agencies are winning a great deal of cases, they are, if anything, writing more clearly in the year or two after. While these findings on the interaction are not statistically significant, the negative sign is inconsistent with the basic intuition of the self-delegation thesis.

TABLE 5: THE EFFECT OF AUER-RELATED LITIGATION SUCCESS ON AGENCY RULE WRITING<sup>239</sup>

	<i>Legal Vagueness</i>	<i>Laxity</i>	<i>Cognitive Complexity</i>	<i>Polysemy</i>
<i>Win Rate</i>				
Lag 1	-.006	-.048	.154	.214
Lag 2	.056	-.136	-1.53 <sup>^</sup>	.278 <sup>**</sup>
<i># Cases</i>				
Lag 1	.004	.004	.184	.075
Lag 2	.026	-.067	-.283	.123 <sup>*</sup>
<i>Win Rate × # Cases</i>				
Lag 1	-.013	-.011	-.387	-.135
Lag 2	-.037	.085	.649	-.098

2. *Sample Bias.* — There are major advantages to limiting the sample to economically significant rules. These are the rules that most affect business and the public,<sup>240</sup> and they are often new regulatory programs rather than amendments to existing programs. Both of these factors mean that there is greater potential for agencies to act on *Auer*’s perverse

239. Estimates are OLS with robust standard errors and agency-level fixed effects. “Lag 1” rows give coefficients from models estimated with one-year lags. “Lag 2” rows give coefficients from models estimated with two-year lags. Statistical significance is denoted as follows: p<.1 = <sup>^</sup>, p<.05 = \*, p<.01 = \*\*, p<.001 = \*\*\*.

240. See Carey, *supra* note 169, at 12 (noting that economically significant rules might be of “higher salience and political importance”).

incentives—the agency is often writing on a blank slate in a policy arena that is almost certainly important enough that the agency will have to revisit it time and again. Beyond these substantive reasons for focusing on economically significant rules, identifying and collecting the entire population of economically significant rules for several decades is relatively tractable, given that the White House Office of Information and Regulatory Affairs posts these data on its *Reginfo.gov* website.<sup>241</sup>

Notwithstanding the importance of rules deemed economically significant, they are admittedly only a subset of all the rules agencies promulgate every year.<sup>242</sup> One notable difference between these two categories of rules is that economically significant rules are vetted extremely carefully relative to other significant rules because they require a Regulatory Impact Analysis quantifying, to the extent possible, the costs and benefits of both the regulation and its alternatives.<sup>243</sup> It might be reasonable to ask whether economically significant rules are less likely to make it out of this process with unresolved ambiguities—the stakes are simply too high, and the scrutiny too probing, to allow agencies to act on even the strongest incentives from *Auer*.

To address this possibility, in a separate analysis I used a different sampling strategy that brought so-called “other significant” rules into the fold.<sup>244</sup> But the results were similar to the null results for the economically significant rules.<sup>245</sup> In this additional robustness analysis, I selected three agencies with a high guidance-to-rulemaking ratio<sup>246</sup>—HHS, DOL, and EPA—and collected all significant rules and proposed rules issued from 2010 through 2016. I then tested whether these three agencies altered their rule clarity following a series of Supreme Court cases addressing *Auer* deference during this period. For each of these cases, there were no statistically significant effects.<sup>247</sup> Not only do these findings confirm that economically significant rules are not a grossly distorted subset of rules to look at for the main analysis, but they also reinforce the findings above: There is no evidence that agencies have changed rule-writing practices in response to *Auer*.

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241. See *supra* notes 169–170 and accompanying text.

242. See Carey, *supra* note 169, at 11 tbl.4 (comparing the total number of OIRA reviews of economically significant rules and non-economically significant reviews from 1994 through 2015).

243. Office of Mgm’t & Budget, Exec. Office of the President, Circular A-4, Regulatory Analysis (Sept. 17, 2003), <https://georgewbush-whitehouse.archives.gov/omb/circulars/a004/a-4.html> [<https://perma.cc/CVK3-GKVZ>].

244. See Daniel E. Walters, *Auer’s Incentives* 26 (June 28, 2017) (unpublished manuscript) (on file with the *Columbia Law Review*). This separate analysis was a pilot study for the more extensive analysis in this Article.

245. *Id.* at 50.

246. Connor Raso’s work on guidance issuance in agencies allowed me to identify this ratio. See Raso, *supra* note 127, at 813 tbl.3.

247. Walters, *supra* note 244, at 35.

### G. *Summary of Empirical Findings*

This Part has presented an extensive empirical analysis of the self-delegation thesis. The empirical analysis of over 1,200 rules and 19 million words of regulatory text fails to support the claim that agencies respond to *Auer* by deliberately obfuscating regulations. The effects of *Auer* on rule vagueness are either absent or, at least in the case of one particular kind of vagueness (laxity), exactly the opposite of what the self-delegation thesis would suggest. Moreover, these findings remain robust even after looking at the data from a number of angles. The analysis started with a basic statistical breakdown of the aggregate patterns, finding that the aggregate trend appears to be toward greater rule clarity—a challenge, at the very least, to the notion that agency behavior is becoming more unconstrained. More nuanced empirical analyses of whether salient moments in *Auer*'s development were pivot points, slowing down or accelerating preexisting trends, also showed no evidence of any perverse effect. Finally, more agency-specific exposure to *Auer* deference, as measured by win rates and number of cases invoking *Auer*, did not correlate with any decrease in clarity down the road. These results, if nothing else, shift the burden in the debate over *Auer*. The self-delegation theory has played a critical role in elevating the assault on *Auer*, but there simply is no solid evidence to support it, and there even is some evidence to refute it.

## IV. PROBLEMATIZING THE SELF-DELEGATION THESIS

As discussed in Part II, *Auer*'s critics see agencies as having a self-interested motive to maximize future interpretive discretion through the kind of strategic sandbagging that *Auer* supposedly makes possible or more attractive.<sup>248</sup> In economic parlance, *Auer* is said to change the expected utility of writing vague rules by making the payoff from reserving interpretive clarity for subsequent, less formal pronouncements more

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248. This assumption that agencies will maximize their own self-interest (often against the public interest) animates much economic, or “public choice,” scholarship on the bureaucracy. See Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 131–57 (1997) (“[A]gencies may appear to behave more like independent entrepreneurs seeking funding from the Congress for projects of their own than like well-instructed agents implementing their principal's orders.”); André Blais & Stéphane Dion, Are Bureaucrats Budget Maximizers? The Niskanen Model & Its Critics, 22 *Polity* 655, 656–63 (1990) (providing an overview of the public-choice model and the major criticisms that have been raised in response); Spence & Cross, *supra* note 163, at 99 (summarizing early public-choice scholarship that characterizes “agency bureaucrats as shirking, self-interested budget-maximizers who thwart the will of the people and good government”). Indeed, some argue that this assumption is the sine qua non of public-choice scholarship. See Jeffrey J. Rachlinski & Cynthia R. Farina, Cognitive Psychology and Optimal Government Design, 87 *Cornell L. Rev.* 549, 563 (2002) (“Common to all analyses labeled ‘public choice’ is the core concept, taken from economic thought, of instrumental rationality: The individual will order his behavior so as to maximize the likelihood of achieving his individually defined goals.”).

likely to materialize. The analysis in Part III, however, suggests that, if agencies are indeed acting to maximize their self-interest, they are not doing it by creating rules that are more vague, for there is no evidence that *Auer* has perversely affected agency rule writing.

This seems to present a puzzle: If the incentives are so clear, why do we not see any evidence that agencies follow through on them? In fact, though, the incentives vis-à-vis the timing of interpretive clarity are not clear, which is why the findings in Part III should not really come as any surprise. The assumption that agencies invariably seek to maximize discretion, while central to the self-delegation thesis, distorts the task of rulemaking.<sup>249</sup> In this task environment, discretion at some point down the road will not always be perceived by agencies as a good on par with certainty in the present moment.<sup>250</sup> In short, the self-delegation thesis overstates the case by oversimplifying the model parameters<sup>251</sup> and ignoring the real-world cognitive limits and institutional pressures that affect agencies' decision calculus and push them into present-mindedness. The real-world complexities and uncertainties to which I refer are myriad, but two are particularly noteworthy.

First, a longstanding research tradition—which the self-delegation thesis sells short—shows that agencies, like individuals, are not likely to make perfectly rational decisions all the time.<sup>252</sup> Much institutionally grounded research has shown that agencies are often boundedly rational, meaning that their leaders and workers have cognitive biases and tendencies that put a thumb on the scale in favor of attention to the

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249. Cf. George A. Krause, Agency Risk Propensities Involving the Demand for Bureaucratic Discretion, *in* *Politics, Policy, and Organizations: Frontiers in the Scientific Study of Bureaucracy* 41, 48, 64 (George A. Krause & Kenneth J. Meier eds., 2003) (arguing that the demand for discretion on the part of agencies is highly situational and that in many instances, particularly those with endemic uncertainty, it would be expected that agencies would reject additional discretion).

250. *Id.* at 48–50.

251. The model behind the self-delegation thesis is grounded in classical economic models of rational choice that assume comprehensive rationality and “ends-means reasoning.” See Bryan D. Jones, Bounded Rationality and Political Science: Lessons from Public Administration and Public Policy, 13 *J. Pub. Admin. Res. & Theory* 395, 397 (2003) [hereinafter Jones, Bounded Rationality] (describing how advances in behavioral sciences in the 1950s influenced political theorists who pushed back against the notion that organizations engage in “fully rational decision making”). Although there is wide variation in the rational-choice tradition across disciplines, scholarship in this vein tends to share common features, including the assumptions that “decision-makers hold stable, ranked and ordered preferences for outcomes” and that they possess the “necessary information to connect choices to outcomes.” Bryan D. Jones et al., Behavioral Rationality and the Policy Processes: Toward a New Model of Organizational Information Processing, *in* *Handbook of Public Policy* 49, 51 (B. Guy Peters & Jon Pierre eds., 2006).

252. See, e.g., Herbert A. Simon, Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations 93–97 (1997) (describing the limitations of “objective rationality” for developing models of administrative agency decisionmaking).

more immediate effects of any decision.<sup>253</sup> Existing research in cognitive psychology and behavioral economics indicates that agencies are predisposed to be present-minded and to undervalue long-term opportunities.<sup>254</sup> Indeed, agency officials have an aversion to planning long sequences of behavior because of the uncertainty that deferral creates.<sup>255</sup> Yet planning a long sequence of actions is just what the self-delegation thesis asserts that agencies do: They choose to forgo clarity now in order to have greater discretion to be clearer and more specific at some later time. The choices agencies make about the timing of interpretive clarity are likely to be substantially colored by the cognitive limitations of agency officials responsible for developing rules. Even if it is assumed that an agency generally aims to maximize its discretion when writing rules,<sup>256</sup> clear-eyed realism about the complexity and uncertainty of this task makes it unsurprising that *Auer* has had no discernible effect on rule writing.<sup>257</sup>

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253. Empirical scholarship on the bureaucracy—accumulated over the course of decades—demonstrates that administrative agencies are boundedly rational “satisficers.” See, e.g., Jonathan Bendor & Terry M. Moe, *An Adaptive Model of Bureaucratic Politics*, 79 *Am. Pol. Sci. Rev.* 755, 756 (1985) (describing a model for analyzing bureaucratic politics, based on computer simulations, that assumes decisionmakers “mov[e] in directions that appear to promise them greater utility,” without assuming that such decisionmakers “optimize” or “carry out complex calculations”); Charles E. Lindblom, *The Science of “Muddling Through,”* 19 *Pub. Admin. Rev.* 79, 80–81 (1959) [hereinafter Lindblom, *Muddling Through*] (arguing that the optimization model of agency behavior “assumes intellectual capacities and sources of information that men simply do not possess” and ignores that the “time and money that can be allocated to a policy problem is limited”); see also James G. March & Herbert A. Simon, *Organizations* 169–71 (1958) (arguing that organizations develop and use structural mechanisms to adapt to the boundaries of rationality).

254. See *infra* notes 272–274 and accompanying text.

255. See *infra* notes 275–279 and accompanying text.

256. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 *Cornell L. Rev.* 486, 488 (2002) (noting the widespread assumption that “a rational agency will promote its interests by formulating a rule that comports with the agency’s objectives to the greatest extent possible without going so far as to incite the judicial or political branches to countermand it”).

257. Indeed, agencies often bind themselves to rules and norms that seem inexplicable from a comprehensively rational, self-interested perspective. John Brehm & Scott Gates, *Working, Shirking, and Sabotage: Bureaucratic Response to a Democratic Public* 3 (1999) (finding that, despite being basically unconstrained by superiors, rank-and-file bureaucrats “for the most part are hard workers, motivated principally by . . . ‘functional’ preferences, the extent to which bureaucrats feel rewarded by performing their job duties well”); see also Elizabeth Magill, *Foreword, Agency Self-Regulation*, 77 *Geo. Wash. L. Rev.* 859, 899–900 (2009) (describing the many ways that agencies take steps to constrain their discretion, and arguing that these decisions to self-regulate are potentially revealing of what makes agencies “tick”—that is, what motivates agencies). For a wonderful volume with variations on this theme, see generally *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw* (Nicholas R. Parrillo ed., 2017). To be sure, the rational-choice tradition does not act as if uncertainty does not exist. More recent rational-choice scholarship folds uncertainty into an overall expected utility function wherein “individuals form strategic preferences probabilistically” and then “compare the probability that their most preferred outcome will occur against the possibility that their less preferred

Second, *Auer's* critics have also overlooked the many other factors that further put a thumb on the scale in favor of front-loading regulatory clarity, reinforcing a tendency that bounded rationality would already lead agencies to have.<sup>258</sup> For instance, future changes in politics and resources cannot be predicted and create substantial pressure to lock in meaning in clear legislative rules. While there are innumerable uncertainties like these, one in particular should have stood out to administrative law theorists. Hard look review under the APA's arbitrary and capricious standard is widely viewed as having had far-ranging effects on how agencies write rules.<sup>259</sup> Since the Supreme Court's endorsement of so-called hard look review in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*,<sup>260</sup> agencies by almost every account have had strong incentives to build thorough rulemaking records that vet every serious alternative and to support every choice with evidence.<sup>261</sup> As a result, agencies also have the incentive to speak with clarity. After all, it is presumably close to impossible to be thorough in justification and explanation yet vague in prescription. In some instances there are even hard look cases that take issue with agencies' failure to match rule precision with a demonstrably complex problem.<sup>262</sup> Hard look's incentives thus stand in considerable tension with many of *Auer's* purported incentives, and it should not be surprising that hard look review's more immediate incentives would tend to win out when agency officials confront the problem of the timing of interpretive clarity.

This Part explains why the failure of any of the perverse effects asserted by *Auer's* critics to materialize should have been entirely predictable based on prior empirical institutional scholarship on bureaucratic

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outcome will occur, and both against the cost of making a decision." Jones et al., *supra* note 251, at 51. The difference with bounded rationality is simply one of degree: The theory holds that "[b]ecause of human cognitive architecture, uncertainty is far more fundamental to choice than expected utility theory admits." *Id.* at 55.

258. Judge Jane Stranch of the Sixth Circuit made this exact point in a recent concurrence:

Finally, I am perplexed by the argument that *Auer* has led agencies to regulate in a way that is broad and vague with, apparently, the goal of creating maximum leeway to define the meaning of a regulation somewhere down the road. That claim assumes a world of political continuity and agency longevity that we would be hard pressed to find today. It also ignores multiple incentives and constraints. Consider the internal pressures within the agency and throughout the governing executive branch to implement the agency's program and the external pressures from those regulated and their lobbyists to obtain predictability, both of which encourage clear regulations.

United States v. Havis, No. 17-5772, 2018 WL 5117187, at \*7 (6th Cir. Oct. 22, 2018) (Stranch, J., concurring).

259. See *infra* section IV.C.2.

260. 463 U.S. 29, 43 (1983).

261. See *infra* section IV.C.2.

262. See *infra* section IV.C.3.

decisionmaking. Section IV.A reviews research in cognitive psychology, behavioral law and economics, and public administration, highlighting the ways that agency decisionmakers are generally thought to perceive intertemporal uncertainties in deciding whether to maximize discretion in decisionmaking. Section IV.B brings these insights to bear on the particular problem that *Auer* presents for agencies (and that prompted such widespread concern about *Auer*'s allegedly perverse incentives): the question of the timing of interpretive clarity. On this question, the presentist bias of bounded rationality suggests one compelling account for the results reported in this Article. Finally, section IV.C provides an additional explanation for why these results should not be at all surprising: The threat of hard look review creates immediate incentives for clarity in rule writing that can be expected to overwhelm any of *Auer*'s purported incentives.

A. *The Limits of Comprehensive Rationality in Administrative Agencies*

The theory of bounded rationality “emerged as a critique of fully rational decision making” and was motivated by Nobel laureate Herbert Simon’s efforts to ground a theory of choice in “scientific principles of observation and experiment rather than the postulation and deduction characteristic of theoretical economics.”<sup>263</sup> Acknowledging the overwhelming complexities that decisionmakers confront, as well as their fundamentally limited capacity to understand and eliminate uncertainties related to these complexities and to make tradeoffs among incommensurable goods,<sup>264</sup> bounded rationality predicts that decisionmakers will often fail to maximize or optimize what might be objectively in their long-term interest.<sup>265</sup> Instead of maximizing their utility, decisionmakers “satisfice”—“choos[ing] alternatives that are ‘good enough.’”<sup>266</sup> Moreover, decisionmakers develop heuristics, or shortcuts, that help them process the complexities of real-world decisionmaking but also often lead them astray.<sup>267</sup> We know, for instance, that decisionmakers filter and

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263. Jones, *Bounded Rationality*, supra note 251, at 397.

264. *Id.* at 397–99; see also Jones et al., supra note 251, at 55 (“[B]ounded rationalists argue that people find it difficult to trade off one goal against another when forming preferences and making choices.” (citations omitted)).

265. See Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 *Psychol. Rev.* 129, 136 (1956) (“Since the organism . . . has neither the senses nor the wits to discover an ‘optimal’ path . . . we are concerned only with finding a choice mechanism that will lead it to pursue a ‘satisficing’ path, a path that will permit satisfaction at some specified level of all of its needs.”).

266. Jones, *Bounded Rationality*, supra note 251, at 399.

267. See generally Daniel Kahneman, *Thinking, Fast and Slow* (2013) (providing an overarching summary of research on heuristics). For applications of this research tradition to administrative law, see Rachlinski & Farina, supra note 248, at 579 (arguing that the detrimental effect of heuristic decisionmaking on administrative agencies may be muted as compared to the effect on other governmental actors, due to the high level of expertise in administrative bodies); Seidenfeld, supra note 256, at 529–43 (analyzing how the group-

prioritize incoming information, selectively activate central and peripheral processing systems, and turn to previously discovered solutions before initiating a “search” for new solutions.<sup>268</sup> If a search is not activated, existing solutions, norms, and routines are usually sufficient, as they offer “simplified models that capture the main features of a problem without capturing all its complexities.”<sup>269</sup> These kinds of adaptive cognitive infrastructures mean that “objective” information will rarely be sufficient to predict behavior. As political scientist Bryan Jones has explained, “People must adapt not just to the objective circumstances in which they find themselves, but also to their own inner cognitive and emotive constitutions.”<sup>270</sup>

Research in psychology and behavioral economics shows that a key challenge for boundedly rational decisionmakers is intertemporal uncertainty.<sup>271</sup> Numerous studies have shown that decisionmakers engage in “hyperbolic discounting,” wherein the discount applied to the value of a long-term outcome grows nonlinearly as the time to reward increases.<sup>272</sup> In other words, decisionmakers do not perceive long-term benefits the same way that they perceive short-term benefits; typically, they overvalue short-term benefits relative to equally attractive long-term payoffs. Were it consistent and predictable, hyperbolic discounting might be easily reconciled with comprehensive rationality through a uniform discount rate, but the sheer number of behavioral anomalies that have been empirically documented and the “spectacular variation” in discounting behavior suggest a larger failure of economic modeling.<sup>273</sup> Some of the better explanations of the pervasive economic anomalies that economists have documented lie in cognition. That is, “temporal distance influences individuals’ responses to future events by systematically changing the way they construe those events.”<sup>274</sup>

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based context in which administrative decisionmaking occurs may either attenuate or amplify heuristic biases).

268. Jones, *Bounded Rationality*, supra note 251, at 400.

269. March & Simon, supra note 253, at 169.

270. Bryan D. Jones, *Politics and the Architecture of Choice* 10 (2001) [hereinafter Jones, *Architecture of Choice*].

271. See generally David L. Weimer, *Behavioral Economics for Cost-Benefit Analysis: Benefit Validity When Sovereign Consumers Seem to Make Mistakes* 106–09 (2017) (providing an overview of psychological research into deviations from the neoclassical model of exponential discounting for intertemporal tradeoffs).

272. David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 *Q.J. Econ.* 443, 445 (1997) (summarizing research on “[h]yperbolic discount functions” for the value of an outcome which shows that decisionmaking is “characterized by a relatively high discount rate over short horizons and a relatively low discount rate over long horizons”).

273. See Shane Frederick, George Loewenstein & Ted O’Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 *J. Econ. Literature* 351, 352, 362–65 (2002) (detailing “empirical regularities” that contradict the classical discounted-utility model).

274. Yaacov Trope & Nira Liberman, *Temporal Construal*, 110 *Psychol. Rev.* 403, 403–04 (2003) (showing that “individuals form more abstract representations, or high-level construals, of distant-future events than near-future events,” with the practical effect that



Organizations—both the institutions as a whole and the individuals who compose them—have well-documented tendencies toward boundedly rational decisionmaking, and the evidence overall suggests that government officials deal with the challenge of intertemporal uncertainty, in particular, by focusing on short-term goals. For instance, policymakers have been shown to rely on a “toolkit of loosely connected heuristics” that collectively result in incremental policy adaptation.<sup>275</sup> That is, they learn how to manage uncertainty and goal ambiguity by proceeding in small, controllable steps.<sup>276</sup> Drawing on past experience, organizations adopt rules, routines, and processes that help reduce the costs of analysis and further reinforce incremental adjustment.<sup>277</sup> Bureaucratic organizations, in particular, put great faith in rules and established practices even as new evidence suggests a need to adapt.<sup>278</sup> These characteristics suggest a distinct tendency, both at the individual and organizational level, for incremental adaptation over “plan[ning] long behavior sequences.”<sup>279</sup>

In sum, the theory of bounded rationality suggests that there are limits to the capacity of individuals and organizations to specify and pursue their goals, especially over the long term, when faced with more immediate consequences of their decisions.<sup>280</sup> Within this environment of limited capacity and scant resources to adapt, choice is structured by cognitive heuristics, professional norms, and routines, some of which are barely perceptible to the decisionmaker, let alone consciously chosen.<sup>281</sup>

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“the value of outcomes is discounted or diminished as temporal distance from the outcomes increases”).

275. Jonathan Bendor, *Incrementalism: Dead yet Flourishing*, 75 *Pub. Admin. Rev.* 194, 195 (2015).

276. See *id.* at 194–95 (explaining the applications and enduring legacy of Professor Charles Lindblom’s theory of disjointed incrementalism); Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 *Pub. Admin. Rev.* 517, 517–18 (1979) (describing the different analytical strategies and preferences associated with “incrementalism”).

277. James G. March, *A Primer on Decision Making: How Decisions Happen* 58–59 (1994) (“Individuals and social systems depend on rules and on the standardization, routinization, and organization of actions that they provide.”); Barbara Levitt & James G. March, *Organizational Learning*, 14 *Ann. Rev. Soc.* 319, 323 (1988) (“[L]earning produces increasing returns to experience . . . and leads an organization, industry, or society to persist in using a set of procedures or technologies that may be far from optimal.” (citation omitted)).

278. James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 59–65 (1989) (discussing the difficulty of enacting meaningful reform in “established bureaucracies with strong professional traditions”).

279. Jones, *Architecture of Choice*, *supra* note 270, at 61.

280. March, *supra* note 277, at 9 (“Although decision makers try to be rational, they are constrained by limited cognitive capabilities and incomplete information, and thus their actions may be less than completely rational in spite of their best intentions and efforts.”).

281. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *Science* 1124, 1124 (1974) (“[P]eople rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”); see also Rachlinski & Farina, *supra* note 248, at 555–

Particularly when the choices involve complex tradeoffs over time, organizations, including administrative agencies, can be expected to engage in incremental decisionmaking that, by definition, sacrifices some long-term benefits in order to secure immediate benefits.

The point of this discussion is not to demonstrate that bounded rationality perfectly explains real-world behavior, or even necessarily to dismiss nonbounded rationality at all.<sup>282</sup> In some situations, particularly those in which complexity and uncertainty are low, agency officials can surely behave more like the archetypal homo economicus—specifying a goal *ex ante*, considering large quantities of information and numerous alternatives, and coming to a decision that maximizes goal attainment. The point is simply that the widely acknowledged constraints of bounded rationality cannot be ignored when theorizing about administrative behavior. As Professor Mark Seidenfeld has observed, the assumption that agencies are comprehensively rational utility maximizers is “not so much wrong as incomplete”: “[I]ncentives, whether applied to an institution like an agency or to individuals, matter,” but they “are not the only things that matter.”<sup>283</sup> The next section explains why the choice that agencies face in deciding whether to provide rule clarity now or later is one that is particularly understandable from the standpoint of bounded rationality.

*B. Bounded Rationality's Impact on the Timing of Interpretive Clarity in Administrative Action*

After Congress delegates to agencies the authority to interpret statutes and make policy, agencies must decide not only the *what* of policy, but also the *when*. Most obviously, they have to decide when to act rather

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56 (describing how “people rely on two primary strategies to make the most of their cognitive abilities,” namely relying on “mental shortcuts” and on “organizing principles” that “consist of a scripted set of default information and organizational themes that help people focus on the information most likely to be relevant”).

282. Neither is the aim to defend bounded rationality and incrementalism as a prescriptive theory. Much of the debate over Lindblom's *The Science of “Muddling Through”* concerned whether Lindblom's theory was defensible as a prescriptive theory, rather than a merely descriptive one. See Lindblom, *Muddling Through*, *supra* note 253. The dominant prescriptive theory in administrative law has historically been a more rational-comprehensive theory emphasizing cost-benefit analysis and other analytical methods and requirements. But, citing Lindblom, some administrative law scholars are now urging the benefits of an incrementalist approach. See Sidney A. Shapiro & Robert L. Glicksman, *Risk Regulation at Risk: Restoring a Pragmatic Approach* 22–27 (2003) (arguing that administrative law has shifted toward a paradigm of “comprehensive analytical rationality,” and that this framework should be rejected in favor of a pragmatic attitude characterized by incrementalist experimentation); Wagner et al., *Dynamic Rulemaking*, *supra* note 110, at 229–32 (noting that incrementalism “has fallen out of favor as a prescriptive model for policymaking in recent decades,” but that it “may nevertheless be advantageous under conditions of limited knowledge and political conflict”).

283. Seidenfeld, *supra* note 256, at 488.

than demur.<sup>284</sup> But the *when* also comes into play even when agencies decide to act. That is because agencies can act now with the expectation that it will be their final statement, or they can save some interpretive clarity or specificity for later.<sup>285</sup> The self-delegation thesis can be understood simply as a hypothesis that the existence of *Auer* deference alters the expected utility of aiming for greater clarity in the future rather than in the present.

The framework of bounded rationality can help us to understand why, contrary to the expectations of the self-delegation thesis, agencies might exhibit a distinct bias toward front-loading interpretive clarity, *Auer* notwithstanding.<sup>286</sup> Choices about the timing of interpretive clarity pose an extraordinarily complex set of questions for agencies, and consciously opting to play the long game introduces yet more complexity and uncertainty. If, as bounded rationality would suggest, agencies do not have the capacity to comprehensively trace out every future contingency involved in deferring some questions and to optimize a strategy to maximize their utility, they are more likely to satisfy by doing the best they can in the present to pursue their goals.<sup>287</sup>

As agencies navigate the choice between providing more clarity now or later, they also cannot avoid confronting a task environment of

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284. See, e.g., Cary Coglianese & Daniel E. Walters, Agenda-Setting in the Regulatory State: Theory and Evidence, 68 Admin. L. Rev. 93, 93–95 (2016) (synthesizing “an in-depth set of discussions” with “scholars, practitioners, and government officials to discuss agenda-setting in the regulatory process”); Michael D. Sant’Ambrogio, Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging, 79 Geo. Wash. L. Rev. 1381, 1388 (2011) (reconceiving agency delay “as a principal-agent problem between congressional enacting coalitions and the agency”); Cass R. Sunstein & Adrian Vermeule, The Law of “Not Now”: When Agencies Defer Decisions, 103 Geo. L.J. 157, 158 (2014) (“Every day of every year, administrative agencies must decide what and whether to decide.”).

285. The *Chenery* doctrine affords agencies broad authority to choose when to provide clarity by giving agencies the prerogative to make policy via prospective rulemaking or iterative adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (holding that “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency”).

286. Sunstein and Vermeule might suggest that the analysis in this section commits the sign fallacy. See Sunstein & Vermeule, *Unbearable Rightness*, *supra* note 16, at 309. If the theoretical account offered here were without the empirical analysis in Part III, this would perhaps be a problem. Part III, though, shows not only that there is no evidence to support the self-delegation thesis but also that, on one measure, agencies have increased the clarity of their writing. This is entirely consistent with the account of bounded rationality in Part IV.

287. Note, as well, that the predictions from a comprehensive-rationality framework are observationally equivalent when uncertainty is high—in both cases the agency will choose to forgo some future discretion. See Krause, *supra* note 249, at 48 (modeling the “agency preference for *more*, *less*, or the *same* level of discretion in response to a change in policy outcome uncertainty at a given (fixed) level of agency utility”). Bounded rationality helps explain why agencies may overestimate the uncertainty, feeding the impulse to speak clearly in rules.

uncertainty and complexity. The major uncertainties that exist—goal ambiguity and tactical uncertainty—each increase the relevance of more immediate and concrete concerns and deter agencies from planning long sequences of behavior as part of a comprehensive strategy.

1. *Goal Ambiguity*. — One form of uncertainty is goal or task ambiguity. Agency officials may not actually have a clear idea of what it is that they want to accomplish in the long run when they act.<sup>288</sup> At a minimum, it will probably be much more challenging to have clarity over longer-term goals than shorter-term ones. Goal uncertainty is already pervasive in administrative rulemaking and can seriously affect the rulemaking task.<sup>289</sup> Some of this ambiguity stems from multiple, conflicting delegations,<sup>290</sup> as well as from jurisdictional overlaps and the constant pull of multiple political principals.<sup>291</sup> Much of it, however, is simply inherent in the highly complex process of policymaking, in which agency officials are forced to act before they have fully formed and specified objectives,<sup>292</sup> all in the face of significant public pressures to pursue particular goals.<sup>293</sup>

In some sense, agency officials who are completely uncertain of their goals cannot even begin to think about acting strategically with respect to the timing of interpretive clarity.<sup>294</sup> Less radical uncertainty about

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288. See Bendor & Moe, *supra* note 253, at 771 (offering a dynamic model of bureaucratic goal adaptation).

289. See, e.g., Christopher Carrigan, *Structured to Fail? Regulatory Performance Under Competing Mandates* 52–82 (2017) (discussing goal ambiguity and its relationship with regulatory performance); Jung Wook Lee, Hal G. Rainey & Young Han Chun, *Goal Ambiguity, Work Complexity, and Work Routineness in Federal Agencies*, 40 *Am. Rev. Pub. Admin.* 284, 284–86 (2010) (collecting sources documenting the presence and effect of goal ambiguity in federal agency rulemaking).

290. See Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 *Harv. Envtl. L. Rev.* 1, 7 (2009) (discussing the “ubiquity” of multiple-goal agencies—for example, the National Park Service, which is “required both to protect the natural resources of the parks and to develop facilities for visitors”).

291. See Jason Marisam, *Duplicative Delegations*, 63 *Admin. L. Rev.* 181, 184 (2011) (discussing the problem of duplicative delegations and describing the “antiduplication institutions” that have emerged endogenously to help smooth over potential conflicts between agencies); Michael M. Ting, *A Theory of Jurisdictional Assignment in Bureaucracies*, 46 *Am. J. Pol. Sci.* 364, 366 (2002) (outlining a positive explanation of the existence of duplicative delegations).

292. See Biber, *supra* note 290, at 9–13 (deriving insights into agency incentives from economic models of principal–agent relationships, under which agencies are forced to produce results at the principal’s pace).

293. See Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 *J. Pub. Admin. Res. & Theory* 103, 117–19 (2005) (analyzing the impact of public comments on the content of agency rules).

294. Justin R. Pidot, *Governance and Uncertainty*, 37 *Cardozo L. Rev.* 113, 164 (2015) (“If the goals of governance are up for grabs[,] . . . this renders the project of governance inherently unstable. Where a policy’s meta-goal includes modification of its first order priorities, it risks proceeding without a compass.” (footnote omitted)).

overarching goals might clear the way for more strategic consideration of the timing question, but as it is, we would expect boundedly rational agencies—torn between these sometimes confusing pushes and pulls—to err on the side of what they can control and measure with greater certainty.<sup>295</sup> What to do in the short term will almost inevitably be more certain, particularly in the constantly changing world of executive-branch politics. With new administrations or changes in the balance of political power in Washington come new goals that agencies can only faintly imagine, let alone act on with any precision.

2. *Tactical Uncertainty*. — Assuming that goal ambiguity is overcome and an agency has determined that more discretion down the road (and less clarity now) will better advance its goals, an agency still faces significant tactical complexities in executing a self-delegation strategy that will unfold over time. Many of these complexities are also captured by models of how government decisionmakers deal with uncertainty by choosing whether to build “dynamic” elements into their rules. Facing a choice between “static law,” which “intend[s] for the intervention to remain fixed, making no special allowances that could facilitate a future modification,”<sup>296</sup> and “dynamic law,” which involves deliberately setting the stage for future revision,<sup>297</sup> agencies are forced to cope with the often-excessive cost of planning for, and monitoring over, the longer term.

The conscious attempt to save some opportunity for greater clarity or specification at some later time is analogous to a choice about how many contingencies to account for in a rule, and it is therefore subject to many of the same costs and risks.<sup>298</sup> For instance, agencies that engage in strategic deferral or self-delegation would have to commit, *ex ante*, to a number of subsequent actions. But there is no guarantee that there will be resources to carry out these subsequent actions<sup>299</sup> or that responsibility for those subsequent actions will not be given to other actors who do not share the same long-term vision. This is a particularly salient

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295. See Biber, *supra* note 290, at 12 (“Where an agency is faced with multiple goals, it will tend to overproduce on the goals that are complements and the goals that are easily measured, and it will tend to underproduce on the goals that are substitutes and the goals that are hard to measure.”); Avinash Dixit, *Incentives and Organizations in the Public Sector: An Interpretive Review*, 37 *J. Hum. Resources* 696, 715–16 (2002) (noting that “incentives will be generally weaker” in situations of multiple goals and multiple principals, and that “in their day-to-day operations, agencies will think not in terms of the multiple and vague ultimate goals, but in terms of a smaller number of immediate and measurable tasks”).

296. Pidot, *supra* note 294, at 131.

297. See *id.* at 140–41.

298. See Diver, *supra* note 128, at 67–79 (arguing that the “optimal” precision of rules is determined by tradeoffs between three incommensurable goals).

299. David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 *N.C. L. Rev.* 1, 14 n.33 (2014) (noting that “lack of clarity leads to delays and increases in transaction costs” when it comes to enforcement).

consideration for agency leaders, as the average tenure of political appointees is around two years.<sup>300</sup> Similarly, even if the tenure of an agency leader lasts longer than that, external political circumstances may change, making it more difficult to do in the future precisely what that leader might have intended in the present.<sup>301</sup>

Finally, there are back-end risks related to potential vetoes of subsequent enforcement actions. For instance, in certain cases courts have blocked subsequent enforcement when an agency's lack of clarity failed to provide fair notice from the rule itself that conduct was prohibited.<sup>302</sup> Interest group mobilization could also block implementation and updating.<sup>303</sup> In sum, as Professor Justin Pidot explains, "Creating dynamic regulation is an inherently complex task that requires lawmakers to consider more than the immediate government action at hand."<sup>304</sup> Front-end clarity, like a decision to write "static law," is in fact best understood as a default strategy for coping with these costs and uncertainties.

Front-end clarity has its own costs, to be sure, and deferral of such clarity might yield certain benefits, even if they are somewhat hard to predict.<sup>305</sup> Bounded rationality does not deny that the costs and benefits of agency decisions are, in principle, measurable. The key takeaway, though, is that the simple act of thinking through these costs and

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300. Raso, *supra* note 127, at 803; see also Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 919 n.23 (2009) (collecting sources measuring the average tenure of political appointees).

301. Elections can fundamentally change the enforcement priorities, leaving an agency engaged in a self-delegation strategy high and dry. See Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. Rev. 795, 812 (2010) (describing the ways that an incoming administration can, with relative ease, reverse the previous administration's enforcement policies).

302. See, e.g., *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1333–34 (D.C. Cir. 1995) (holding that—given the "lack of clarity in the regulations" promulgated by EPA, combined with a subsequent agency policy statement that did not adequately address the contested issue—General Electric was not fairly put on notice that its chemical distillation process violated EPA regulations).

303. See Frank R. Baumgartner et al., *Lobbying and Policy Change: Who Wins, Who Loses, and Why* 40 (2009) (describing the disproportionate ability of entrenched interests to mobilize to protect the regulatory status quo); Pidot, *supra* note 294, at 118–19 (arguing that "political and legal forces invested in the status quo" often obstruct progress in agency policymaking); Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. Pub. Admin Res. & Theory 373, 374 (2012) (theorizing that interest group lobbying "play[s] a key role during the pre-proposal stage" of agency rulemaking and that these groups' influence "manifests itself through both agenda building and agenda blocking").

304. Pidot, *supra* note 294, at 175.

305. See, e.g., Joel A. Mintz, "Running on Fumes": The Development of New EPA Regulations in an Era of Scarcity, 46 *Env'tl. L. Rep.* 10,510, 10,516 (2016) (discussing how program offices at EPA display a "preference for satisfying stakeholders," and that, as a result, they "sometimes display a 'passion for ambiguity'" as a means to "serve a program office's goal of playing conflicting interests against one another and avoiding outside pressures and subsequent legal challenges" (quoting an anonymous former EPA official)).

benefits is taxing, and agency officials likely do not have the resources or the time to thoroughly study each factor that might bear on the decision. If agencies navigate the choice of the timing of interpretive clarity in a boundedly rational manner, it becomes understandable that, on balance, “ambiguities are a threat at least as much as they are an opportunity” for agencies.<sup>306</sup>

3. *Professional Norms and Mission Focus.* — Agency staff may also be disinclined to take on the unnecessary risk of failure that accompanies a self-delegation strategy. This disinclination follows partly from the findings on risk-averse behavior in prospect theory: “[I]n the domain of gains people value certain gains over possible gains.”<sup>307</sup> That is, the possible payoff of the self-delegation strategy is hard for agencies to value properly because it is uncertain to materialize.<sup>308</sup> Beyond this general feature of individual and organizational decisionmaking under uncertainty, a great deal of research on the bureaucracy shows that career-level bureaucrats are motivated by professional norms and the agency’s mission, which likely leads bureaucrats to *overvalue* the certain win gained by having promulgated a comprehensive rule.<sup>309</sup> Political scientists John Brehm and Scott Gates show that “organizational culture” develops, in essence, from the ground up, as “uncertain individuals look[] to fellow subordinates for appropriate responses.”<sup>310</sup> This organic development of organizational culture is generalizable as well: In an extensive survey of bureaucratic preferences, Brehm and Gates find that bureaucrats “prefer work and serving the public” over sabotage, shirking, and self-interested utility maximization.<sup>311</sup> For some, these features of the career civil service—the “neutral expertise” promoted by professional commitments and the “other-regarding” motivations of bureaucrats—are part of what generates administrative legitimacy “from the inside-out.”<sup>312</sup> On the other

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306. Sunstein & Vermeule, *Unbearable Rightness*, supra note 16, at 309.

307. Jones et al., supra note 251, at 57.

308. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *Econometrica* 263, 265–69 (1979) (developing a theory of behavior under which people systematically overweight outcomes that will certainly occur over outcomes that are uncertain to occur); see also supra notes 272–274 and accompanying text (reviewing the literature on hyperbolic discounting and intertemporal uncertainty).

309. For instance, Herbert Kaufman’s classic study of the Forest Service documents one particularly strong instance of a mission orientation in a federal agency, prompted in part by Forest Service Chief Gifford Pinchot’s brilliant decision to institute an agency-wide education program to inculcate shared values. See Herbert Kaufman, *The Forest Ranger: A Study in Administrative Behavior* 85–86 (1960).

310. Brehm & Gates, supra note 257, at 194.

311. *Id.* at 196.

312. See, e.g., Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 *Wake Forest L. Rev.* 463, 465, 470–71 (2012) (arguing for a move to a “deliberative-constitutive paradigm” that “embraces, rather than rejects, the professionalism of agency staff,” viewing it as a “positive attribute that helps ensure the integration of technical expertise in rulemaking and serves as a buffer against undue influence by highly interested stakeholders”); see also Emily

hand, as others have noted, one result of this institutionalization of professional norms in agency policymaking is that agencies “at times fixate on particular missions, even when the principal has expanded the number of goals the agency is supposed to take into account.”<sup>313</sup>

The professional commitments and investment in the mission of the agency are widely thought to interact with an uncertain task environment to produce fundamentally conservative, risk-averse behavior on the part of bureaucrats. Rule writers that are invested in the purposes of rulemaking are more likely to focus on the relatively certain gains for their program that can come from rule clarity today than on the nebulous prospect of enhancing their discretion down the road.

### C. *Satisficing Rule Writers and the Shadow of State Farm*

Boundedly rational actors’ aversion to long-term strategy offers a ready explanation for why *Auer* would never be expected to have discernible behavioral consequences for rule writing. But these tendencies are only reinforced by the weight of other core features of administrative law. From the standpoint of the typical government lawyer, an agency’s primary short-term concern is crafting a legally defensible rule. This means crafting a rule that can survive hard look review in federal court, where the court will review the rule and its underlying record to ensure that the decision is thoroughly analyzed and responsive to a wide range of perspectives.<sup>314</sup> These requirements make it necessary to seek to provide clarity in regulatory language.

1. *Hard Look Review Basics.* — Hard look review developed in the 1970s out of the Supreme Court’s interpretation of section 706(2) (A) of the APA in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>315</sup> Elaborating on the Court’s reading of the arbitrary and capricious standard in *Overton Park*,<sup>316</sup> D.C. Circuit Judge Harold Leventhal wrote that a court should exercise its role with “particular vigilance if it ‘becomes aware, especially

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Hammond & David L. Markell, Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out, 37 Harv. Envtl. L. Rev. 313, 354 (2013) (noting that “[a]gency culture and professionalism can serve as internal legitimizers for agency behavior” due in part to their promotion of “neutral expertise”); Sidney A. Shapiro & Ronald F. Wright, The Future of the Administrative Presidency: Turning Administrative Law Inside-Out, 65 U. Miami L. Rev. 577, 578 (2011) (arguing that administrative law scholarship often ignores research in public administration that displays the “other-regarding motives” of career-level bureaucrats).

313. Biber, *supra* note 290, at 17.

314. The literature is replete with treatments of hard look review, with most focusing on whether hard look review serves to improve the regulatory process by requiring agencies to furnish reasoned analysis to support decisions. For a comprehensive overview of both the doctrine and the debates about it, see generally Patricia M. Wald, Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?, 67 S. Cal. L. Rev. 621 (1994).

315. 401 U.S. 402, 416 (1971) (describing an agency’s duty under the arbitrary and capricious standard to conduct a “searching and careful” inquiry).

316. *Id.*



from a combination of danger signals, that the agency has not really taken a “*hard look*” at the salient problems, and has not genuinely engaged in reasoned decisionmaking.”<sup>317</sup>

The precise contours of hard look review are difficult to pin down,<sup>318</sup> in part because it developed iteratively in the D.C. Circuit over many years, and also because it is composed of a “concert” of goals, including promoting detailed explanations from agencies, encouraging agencies to respond to salient comments and perspectives, requiring consistency over time, and requiring adequate reasons to justify an agency decision.<sup>319</sup> The most definitive statement came from the Supreme Court’s ruling in *State Farm*, in which the Court vacated the decision of the National Highway Traffic Safety Administration (NHTSA) to rescind a previously promulgated seat-belt standard applicable to new motor vehicles.<sup>320</sup> The standard had required the installation of either automatic seat belts or airbags in all new vehicles.<sup>321</sup> In rescinding the standard, NHTSA argued that it could not “reliably predict[] that the Standard would lead to any significant increased usage of restraints,” and in light of the costs of compliance, decided to change course.<sup>322</sup> The Court found NHTSA’s evidence wanting. NHTSA had not explained the basis of its belief that passengers would disengage automatic seat belts,<sup>323</sup> and it did not provide any analysis of an obvious alternative to requiring automatic seat belts: simply mandating the installation of airbags.<sup>324</sup> In rejecting NHTSA’s reasoning, the Court articulated particularly broad contours of arbitrariness review. Agency action is invalid

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>325</sup>

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317. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 511 (1974) (emphasis added by Leventhal) (quoting *Greater Bos. Television Corp. v. Fed Commc’ns Comm’n*, 444 F.2d 841, 851 (D.C. Cir. 1970)).

318. Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 Geo. L.J. 779, 786 (2002) (describing hard look review as “notoriously malleable”).

319. See Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 Harv. J.L. & Pub. Pol’y 51, 52 (1984) (outlining courts’ “efforts to police and discipline the administrative process”).

320. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56–57 (1983).

321. *Id.* at 37.

322. *Id.* at 39.

323. *Id.* at 51–57.

324. *Id.* at 46–51.

325. *Id.* at 43.

The *State Farm* decision—both in terms of the standard enunciated and the “rather strict judicial scrutiny”<sup>326</sup> the Court actually exercised in probing the agency’s justifications—indicated the Court’s strong approval of much of the D.C. Circuit’s substantive hard look doctrine. Not surprisingly, *State Farm* was then followed by a number of high-profile court decisions vacating agency rules under the hard look doctrine.<sup>327</sup> Today, courts subject agency decisions to extremely stringent analysis, often almost stochastically so,<sup>328</sup> meaning that agencies have reason to make their rules hard look–proof even though most will not be thoroughly audited.

2. *Hard Look’s Effect on Agency Behavior.* — By most accounts, the threat of hard look review has had a rippling effect on every aspect of the rule-formation process.<sup>329</sup> Agencies cannot be sure of the “precise scope or intensity of that review process,” but they can loosely predict that potential challengers, in order to maximize the chances of successful challenge, will search for “issues of such importance that the agency arguably should have discussed them more thoroughly or in greater detail.”<sup>330</sup> Agencies acting in the shadow of *State Farm* are said to “make every effort to ensure a thorough record that can withstand review the first time around” despite this substantial uncertainty.<sup>331</sup> Thus, the incentives widely accepted as having been created by hard look review should be clear to agencies: Leave no rock unturned in the administrative record; address every argument and counterargument, however small; hew closely to statutory criteria; and, perhaps most importantly, leverage

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326. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363, 387 (1986).

327. See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 *Nw. U. L. Rev.* 393, 412 (2000) (discussing the impact of hard look review on the outcomes of challenges to agency regulations and noting that the D.C. Circuit vacated a majority of challenged rules after *State Farm*).

328. See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 *Sup. Ct. Rev.* 51, 53–54 (2008) (arguing that *Massachusetts v. EPA*, 549 U.S. 497 (2007), which expanded the scope of hard look review to agencies’ “discretionary decisions not to promulgate regulations,” could be “*State Farm* for a new generation”). At least one study has shown that arbitrariness review is often driven more by the political preferences of the reviewing panel of judges than by anything substantive. See, e.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 *U. Chi. L. Rev.* 761, 767 (2008).

329. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *Duke L.J.* 1385, 1419–20 (1992) [hereinafter McGarity, *Deossifying*] (noting the “resource-intensive” and “time-consuming” processes agencies must engage in under the threat of hard look review).

330. Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 *Admin. L. Rev.* 59, 69 (1995).

331. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 *Mich. L. Rev.* 733, 750–51 (2011) (citing McGarity, *Deossifying*, *supra* note 329, at 1400–01).

agency expertise by populating the record with substantial scientific and technical evidence.

There is no shortage of evidence that agencies have taken such steps in response to the threat of hard look review. First, as a burgeoning literature on rulemaking “ossification” has posited, the stringency of review may prompt agencies to issue fewer rules than they otherwise might.<sup>332</sup> Instead of employing rulemaking as a first-best option, agencies are thought to have shifted their energies to nonrulemaking channels such as adjudications and nonlegislative rules to avoid costly vacatur.<sup>333</sup> The evidence of such an effect is concededly somewhat equivocal, as a number of recent empirical studies of rulemaking activities suggest that hard look review is not responsible for any change in the volume or pace of rulemaking.<sup>334</sup> Second, while there is, to date, no systematic empirical analysis of agencies’ record-building behavior after *State Farm*, “it seems a matter of common sense that agencies are mindful of the possibility of judicial review for major rulemakings and would therefore approach rulemaking more deliberately.”<sup>335</sup> As Professor Wendy Wagner has

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332. Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 *Yale J. on Reg.* 257, 262–63 (1987) (arguing that judicial review of motor vehicle safety standards prompted NHTSA to abandon rulemaking in favor of a recall-based strategy of regulation). Note also that ossification is really a two-fold concept, and some scholarship views ossification as primarily slowing the promulgation of rules rather than stopping it entirely. See, e.g., Richard J. Pierce, Jr., Response, Rulemaking Ossification Is Real: A Response to *Testing the Ossification Thesis*, 80 *Geo. Wash. L. Rev.* 1493, 1493 (2012) [hereinafter Pierce, Jr., *Ossification Is Real*] (defining ossification to mean “that it takes a long time and an extensive commitment of agency resources to use the notice and comment process to issue a rule”).

333. See, e.g., Mashaw & Harfst, *supra* note 332, at 263 (“Since the mid-1970’s, NHTSA has instead concentrated on its alternative statutory power to force the recall of motor vehicles that contain ‘defects’ related to safety performance. It has thus retreated to a traditional form of case-by-case adjudication . . .”); McGarity, *Deossifying*, *supra* note 329, at 1385–96 (noting that “[f]rustrated agencies” have begun to explore methods of “avoiding notice-and-comment rulemaking altogether,” opting instead for adjudications and “nonrule rulemaking”); Pierce, Jr., *Ossification Is Real*, *supra* note 332, at 1502 (explaining how, during the 2008 financial crisis, the Treasury Department and Federal Reserve Board identified “old statutory provisions” that would allow them to take “expedient actions” without the burden of “comply[ing] with mandatory decisionmaking procedures”).

334. See Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 *U. Ill. L. Rev.* 1111, 1127 (“The empirical evidence for a retreat from rulemaking in the face of stringent judicial review is not nearly as clear as has been generally supposed.”); O’Connell, *Political Cycles of Rulemaking*, *supra* note 131, at 963–64 (arguing that the relatively high number of notices of proposed rulemakings from 1983 to 2002 suggests that the costs to rulemaking are not as high as feared); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 *Geo. Wash. L. Rev.* 1414, 1467 (2012) (“[A]gencies—and in particular, DOI agencies—do not appear to have abandoned notice and comment wholesale, either by failing to regulate entirely, or by embracing surreptitious forms of regulation.”).

335. Mezell, *supra* note 331, at 751.

argued, the hard look doctrine would seem to encourage agencies to “load their rule and record with details and defensive statements” to the point of “defensive overkill.”<sup>336</sup>

Agencies that write a lot of rules have generally invested in an institutional infrastructure that helps them facilitate a response to the prospect of judicial review. Professor Thomas McGarity, more than anybody else, has given significant attention to the way rulemaking processes are structured, and what he describes as the “team model” that agencies usually employ seems tailor-made to respond to the threat of hard look review.<sup>337</sup> Rather than allowing one insulated program office to draft a rule in its entirety and elevate it for final approval (what McGarity calls the “assembly line” model), agencies employing the team model seek to draw out a “bureaucratic pluralism” that “transcends the knowledge and experience of any individual person or office within the agency.”<sup>338</sup> This process aims to ensure, in accordance with hard look review’s manifest goals, that every possible angle receives some attention in the process.<sup>339</sup>

According to McGarity, lawyers have come to play an especially important role in this process, “advising the relevant agency decision-makers on the many aspects of the rule that might be challenged in

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336. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 *Duke L.J.* 1321, 1357–59 (2010). Of course, in principle, the information-forcing role of hard look review is often cited as a positive one, notwithstanding Wagner’s cogent argument that the effects are often overkill. See Catherine M. Sharkey, *State Farm “with Teeth”: Heightened Judicial Review in the Absence of Executive Oversight*, 89 *N.Y.U. L. Rev.* 1589, 1605 (2014) (concluding that “[t]here is little doubt that judicial review plays a significant information-forcing role”); see also Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 *Admin. L. Rev.* 753, 755–56 (2006) (“[J]udicially-imposed explanation requirements can help reviewing courts overcome their comparative informational disadvantage for reasons that are independent of the (in)ability of courts to understand or verify the substantive content of the justifications advanced by government decisionmakers.”).

337. See generally Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, *Law & Contemp. Probs.*, Autumn 1991, at 57, 90–94 [hereinafter McGarity, *Internal Structure*] (discussing the advantages and disadvantages of a model of agency policymaking in which the basic “decisionmaking unit” is composed of “representatives from all of the institutional subunits within the agency”); Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, *Law & Contemp. Probs.*, Winter & Spring 1998, at 19, 20–21 [hereinafter McGarity, *Role of Government Attorneys*] (describing that, in the team model, all tasks associated with rule drafting, promulgation, and legal defense “are delegated to a ‘team’ or ‘work group’ composed of representatives from all of the agency subunits that have an interest in the outcome of the rulemaking process”).

338. McGarity, *Internal Structure*, supra note 337, at 61.

339. See *id.* at 90–91 (noting that an advantage of the team model is that it encourages “innovative, cross-disciplinary thinking” from people with “divergent professional perspectives”). These processes are a prime example of the kind of rules, norms, and processes that boundedly rational agencies employ to cope with uncertainty. See supra section IV.B.2.

court.”<sup>340</sup> Enforcement staff, for their part, have perhaps the strongest interest in promoting clarity in the regulatory text, as that can greatly improve the enforceability of the rule down the road (with or without the benefit of *Auer* deference).<sup>341</sup> In their role as “scrivener,” agency lawyers are said to be pivotally involved in the process of “achiev[ing] clarity in the wording of the rule,” in “provid[ing] adequate references to the record in support of the agency’s resolution of major issues,” and in “maintain[ing] a consistent line of reasoning throughout.”<sup>342</sup> The stochasticity of hard look review has apparently increased this role for lawyers in the agency at the expense of program and policy offices.<sup>343</sup> Indeed, Professors Emily Hammond and David Markell recently documented lawyerly meticulousness in a context practically devoid of judicial review—EPA’s processing of petitions to withdraw states’ authority to administer environmental programs that had been delegated as part of cooperative federalism—prompting them to query “whether EPA has so internalized the expectation of judicial review that it treats even informal matters according to the norms resulting from hard-look review.”<sup>344</sup>

If agencies “are constantly ‘looking over their shoulders’ at the reviewing courts,”<sup>345</sup> it stands to reason that these same agencies do not have their eyes on a very different ball: that is, the long-term possibility of gaining strategic advantage by self-delegating through vague rules. The costs of vacatur or remand of a rule are tangible; the benefits of self-delegation are speculative. If agencies really are satisficers, and if they are listening to the voices of their legal advisors who tell them that judicial review is likely, they will focus most of their attention on addressing that risk. In addressing the risk of hard look review, agencies will of necessity seek to reduce vagueness. In short, hard look review “requires federal agencies to fully explain their decisions at the outset, favoring a front-loaded decision process that culminates in a single record of decision that allows for judicial review.”<sup>346</sup>

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340. McGarity, *Role of Government Attorneys*, supra note 337, at 22; see also Mintz, supra note 305, at 10,517 (noting that Office of General Counsel attorneys at EPA “sometimes attempt to eliminate unenforceable language in proposed regulations,” but concluding that their concern with enforceability is not sufficient to eliminate all ambiguities); Rosemary O’Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 *Admin. L. Rev.* 549, 566 (1989) (noting that lawyers often “have the last word” in rulemaking).

341. McGarity, *Internal Structure*, supra note 337, at 62 (noting that enforcement professionals “are primarily concerned with the degree to which . . . regulated [entities] adhere to agency commands,” and therefore push the agency to “articulate its rules in unambiguous ways” that put regulated parties on notice and minimize their ability to “avoid compliance through interpretational loopholes”).

342. McGarity, *Role of Government Attorneys*, supra note 337, at 26.

343. *Id.* at 26–27.

344. Hammond & Markell, supra note 312, at 355.

345. McGarity, *Deossifying*, supra note 329, at 1412.

346. Pidot, supra note 294, at 170 (footnote omitted).

3. *Hard Look's Effects on Regulatory Precision.* — Apart from inducing a generalized institutional response, the threat of hard look review can be expected to have systemic effects on rule-writing style, presumably favoring clarity over vagueness.<sup>347</sup> Hard look review's pressure on agencies to seek regulatory clarity would seem to stem from at least three possible factors.

First, hard look challenges sometimes come packaged as claims that rule text is not clear enough.<sup>348</sup> In an early hard look case in 1971, *Environmental Defense Fund, Inc. v. Ruckelshaus*, the D.C. Circuit held that “[c]ourts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.”<sup>349</sup> While this emphasis on clarity may not appear as frequently in more recent cases, the principle in *Ruckelshaus* has never been rejected.<sup>350</sup> And it does still arise. More recently, the Ninth Circuit, in vacating a decision to delist the Yellowstone grizzly bear population as a threatened species under the Endangered Species Act, rejected “out of hand” the suggestion that a vague promise to relist the species if circumstances change could “operate as a reasonable justification for delisting” without the benefit of any specific “management responses” and “specific triggering criteria.”<sup>351</sup>

Litigants often pair the claim that a rule violates the arbitrary and capricious standard with a claim that the rule violates due process by being “too vague to warn the industry of the scope of prohibited conduct.”<sup>352</sup> Typically, these challenges are brought after an agency attempts to enforce a vague rule, and in these cases, the courts occasionally vacate

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347. See Blake Emerson & Cheryl Blake, Admin. Conference of the U.S., Plain Language in Regulatory Drafting 14–19 (2017), [https://www.acus.gov/sites/default/files/documents/Plain%20Language%20in%20Regulatory%20Drafting\\_Draft%20Report\\_Sept%2020\\_FINAL.pdf](https://www.acus.gov/sites/default/files/documents/Plain%20Language%20in%20Regulatory%20Drafting_Draft%20Report_Sept%2020_FINAL.pdf) [<https://perma.cc/BSP6-9QKU>] (reporting interview-based evidence that agencies aim for clarity in part due to the threat of judicial review).

348. See, e.g., *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 800 (10th Cir. 2010) (“We also reject Copar’s argument that by including the term ‘verifiable proof’ in the Notice of Noncompliance, the [Forest Service] imposed a vague standard.”); *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1251 (9th Cir. 2001) (“Based upon the lack of an articulated, rational connection between Condition 1 and the taking of species, as well as the vagueness of the condition itself, we hold that its implementation was arbitrary and capricious.”).

349. 439 F.2d 584, 598 (D.C. Cir. 1971). But see *PDK Labs. Inc. v. DEA*, 438 F.3d 1184, 1194 (D.C. Cir. 2006) (holding that an agency “proceeding on a case-by-case basis” need only “pour ‘some definitional content’ into a vague statutory term” to survive an arbitrariness challenge (quoting *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 2003))).

350. See *Lightfoot v. District of Columbia*, 448 F.3d 392, 400 (D.C. Cir. 2006) (stating in dicta that *Ruckelshaus’s* statement about the vagueness of rules “may well be an overly broad statement of judicial review, even under the APA, and inconsistent with our more modest jurisprudence in subsequent decades,” but stopping short of rejecting the principle outright).

351. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1029 (9th Cir. 2011).

352. E.g., *CPC Int’l Inc. v. Train*, 515 F.2d 1032, 1052 (8th Cir. 1975).

agency action based either on Fifth Amendment due process grounds or on arbitrary and capricious grounds. For instance, in *Pearson v. Shalala*, the D.C. Circuit agreed with the challengers that “the APA requires the agency to explain why it rejects their proposed health claims,” and “do[ing] so adequately necessarily implies giving some definitional content to the phrase ‘significant scientific agreement.’”<sup>353</sup> For the court, “this proposition is squarely rooted in the prohibition under the APA that an agency not engage in arbitrary and capricious action.”<sup>354</sup> However, with striking frequency, these kinds of claims are also brought in preenforcement review of rules.<sup>355</sup> These kinds of claims are surely far more numerous than they are successful,<sup>356</sup> but the claims are not frivolous enough that they do not warrant a response, which means agencies attuned to the possibility of undergoing probing review by courts will presumably take few chances and will have short-term reasons to try to make their rules clear. After all, with the availability of preenforcement review of agency rules, the shadow of review need not be very long and can be formative for agency behavior.

Second, the very same record-building strategies that agencies use to defend themselves against the threat of hard look review make it very difficult to leave major ambiguities in the rule text itself. Even though hard look review often focuses on the evidentiary record and the agency’s reasoning,<sup>357</sup> a certain level of rule clarity in the rule text is necessary just to support the kind of thorough consideration of analysis that courts expect. There would be a jarring disconnect between a rule with a lengthy preamble, filled to the brim with studies, estimates, and counterarguments, and a rule text that says not much more than that a regulated entity should take “reasonable” steps to ensure the safety of its plant.<sup>358</sup>

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353. 164 F.3d at 660 (quoting 21 C.F.R. § 101.14(c) (1998)).

354. *Id.* (citing 5 U.S.C. § 706(2)(A) (1994)).

355. A back-of-the-envelope calculation, achieved by searching Westlaw’s database of appellate briefs from the D.C. Circuit using the search terms “rule /p vague & ‘arbitrary and capricious,’” yielded 350 briefs (as of October 2018) mentioning vagueness in close proximity to a challenge to a rule under the arbitrary and capricious standard.

356. Preenforcement challenges, notwithstanding the principle articulated in *Ruckelshaus*, are often stopped, as a practical matter, by the fact that an agency is usually “entitled to proceed case by case or, more accurately, sub-regulation by subregulation.” *Pearson*, 164 F.3d at 661. Thus, an agency is not “necessarily required to define” specific terms in its “initial general regulation.” *Id.*

357. See Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look,”* 92 *Notre Dame L. Rev.* 331, 347 (2016) (noting that “as the judicial transformation of informal rulemaking took hold, agencies had to offer far more detailed notices and explanations for their rules, which meant that courts had a much richer set of ‘record’ materials to review”). For a thorough overview of the dynamics (and pathologies) of record building in notice-and-comment rulemaking, see generally Wagner, *supra* note 336.

358. *Cf. Pearson*, 164 F.3d at 660 (“To refuse to define the criteria it is applying is equivalent to simply saying no without explanation.”).

An example can make the point clearer. In *Greater Yellowstone Coalition*, the agency's formal plan for delisting the Yellowstone grizzly bear population as a threatened species avoided specifying particular risks that might justify relisting, instead offering a vague promise to carefully monitor the grizzly population.<sup>359</sup> The court demanded greater explanation of why the decline in whitebark pine, which had been linked with grizzly mortality, would not threaten the species.<sup>360</sup> Understandably, the agency had not built a record about an issue that its open-ended "management and monitoring framework" did not "even specifically discuss."<sup>361</sup> If the agency's position is that the evidence does not support a more specific standard, it will be expected to furnish that evidence, not simply invoke uncertainty as a reason for a vague standard.<sup>362</sup> In effect, if an agency were to elide clarity and specificity, it would leave itself in a bind: Its rulemaking record would likely be spotty, superficial, or both, leaving the rule vulnerable to hard look vacatur.

Finally, agencies actually perceive clarity as a way to reduce the risk of hard look vacatur. As part of its project on plain language in regulatory drafting, the Administrative Conference of the United States (ACUS) interviewed officials at seven agencies and specifically asked them what impact judicial review has on their incentives to use plain language in rule writing.<sup>363</sup> The study reports that agency officials favored clear drafting as a means of reducing the risk of judicial reversal.<sup>364</sup> As one agency official noted, the agency could "defend regulations better when we've developed the record and made the regulation clear and understandable to the public."<sup>365</sup> Another agency official stated, "[I]f regulations just aren't understandable, or they can be misconstrued, you are a lot more vulnerable legally."<sup>366</sup> As the authors of the ACUS report note, agencies are aware of their audience: Article III judges who are generalists.<sup>367</sup> While these judges are, by virtue of their expertise, more tolerant of complexity and more willing to "forgive certain lapses in

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359. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1029 (9th Cir. 2011).

360. *Id.*

361. *Id.*

362. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) ("Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions."); see also *All. for Nat. Health U.S. v. Sebelius*, 775 F. Supp. 2d 114, 133–34 (D.D.C. 2011) (rejecting the kind of arbitrariness-as-vagueness challenge described above in part because the agency *had* offered evidence that it "could not 'predict with mathematical precision' what would be the appropriate standard (quoting 72 Fed. Reg. 34,752, 34,787–88 (June 25, 2007))).

363. See *Emerson & Blake*, *supra* note 347, at 2.

364. See *id.* at 15.

365. *Id.*

366. *Id.* (internal quotation marks omitted).

367. See *id.*



linguistic clarity” than the general public, judges also appear to be skeptical of anything that seems like avoidable obfuscation.<sup>368</sup>

The hard look tradition thus stands in direct tension with any supposed perverse incentives that might be created by *Auer* deference, and the bulk of the evidence would seem to suggest it is a far greater concern to agency officials as they take on the task of trying to write rules.<sup>369</sup> Even if agencies are also aware of *Auer*’s purported incentives, the considerable short-term benefits of specificity and clarity as a means of avoiding costly vacatur are more likely to determine the behavior of boundedly rational agency officials than the remote possibility of bootstrapping some additional discretion down the road.

### CONCLUSION

For Supreme Court watchers, one of the surest bets today might be to bet against *Auer* deference. With at least five of the Justices on the record as opposing *Auer* deference or other forms of deference to agency action,<sup>370</sup> and with “continuing controversy” over *Auer* raging in the academy, it seems likely that the Court will use *Kisor v. Wilkie* as a vehicle to do away with *Auer* deference, possibly replacing it with a lesser form of deference like *Skidmore* deference or eliminating deference to agency regulatory interpretations altogether.<sup>371</sup> Yet this assault on *Auer* is unwarranted, even on the terms laid out by *Auer*’s critics.

At the core of the emerging assault on *Auer* lies a claim about the doctrine’s effect on agency officials’ incentives to promulgate vague rules that expand agency discretion.<sup>372</sup> Yet until now, that claim has never been tested. Despite looking carefully for any trace of changed rule-writing behavior in the aftermath of *Auer* and other *Auer*-related cases, I have found no empirical evidence that agencies respond to *Auer*’s rule-writing incentives in any systematic way. Further, I uncovered some limited evidence that agencies have actually shifted toward greater rule clarity over the years. This Article also identifies pressing, short-term considerations, such as the risk of hard look vacatur, that explain why any

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368. *Id.*

369. See *supra* section IV.C.2; see also Walker, *Statutory Interpretation*, *supra* note 149, at 1019 fig.1 (reporting survey data revealing an unimpressive awareness of *Auer* deference among agency respondents).

370. See *supra* notes 155–159 and accompanying text.

371. See *supra* note 19 and accompanying text; see also Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *Harv. L. Rev.* 1, 26 (2017) (noting, presciently, “that the Court will likely address *Auer*’s scope and propriety in coming Terms”).

372. Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 *Geo. J.L. & Pub. Pol’y* 103, 106–07 (2018) (noting that one “predominant” argument against *Auer* is the claim that the “combination of law-making and law-executing authority creates inappropriate incentives for agencies to draft vague regulations and interpret those regulations through less-formal means after the fact”).

supposed long-term incentives created by *Auer* would hold little sway. The research presented here undermines the self-delegation thesis upon which the critique of *Auer* has been grounded. If nothing else, it clearly shifts the burden of proof to *Auer*'s critics if they are to continue citing *Auer*'s perverse incentives as the basis for overturning or limiting the doctrine. As this Article has shown, it is not simply that *Auer*'s critics have committed the "sign fallacy," as Sunstein and Vermeule put it,<sup>373</sup> but that the self-delegation thesis is, as far as the best available evidence goes, empirically unfounded and in tension with institutional research on administrative agencies. For all of the attention it has received, the self-delegation thesis turns out just to be a false alarm.

The findings reported in this Article should give the Justices significant pause as they consider what to do in *Kisor*. *Auer* deference purports to serve important purposes in administrative law—most notably, ensuring that agencies have flexibility to clarify the law they have written.<sup>374</sup> Critics of *Auer* believe that much of this need for ex post clarification is unnecessary if rules are written clearly in the first instance. They claim that agency officials operating in a world without *Auer* would embrace ex ante clarity to a much greater degree than they do now.<sup>375</sup> The evidence amassed in this Article offers a window into this counterfactual world by examining rule writing before *Auer*'s ascension and comparing it with rule writing afterward. There is no evidence that agencies were any more likely to front-load specificity and clarity before the Court decided *Auer*.<sup>376</sup> Consequently, were the Court to scale back *Auer* deference in *Kisor*, it would presumably only sacrifice *Auer*'s current benefits with no guarantee of any offsetting or countervailing benefits.<sup>377</sup>

In addition, the fact that agencies are not self-delegating en masse by increasing the vagueness of their rules suggests that there exist outer boundaries on their ability to stretch the meaning of regulatory texts in a manner that would be unfair to regulated parties. If the existing rule texts being interpreted have not been systematically skewed toward vagueness by *Auer*'s alleged incentives, and if agency officials must still be able to make a plausible argument that these rules in some way support the agency's interpretation, there will remain inherent limits on agencies' ability to avoid accountability by couching every policy change as an interpretation of a preexisting rule.<sup>378</sup> Agencies in this world—that is, the

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373. See supra note 153 and accompanying text.

374. See supra notes 104–111 and accompanying text.

375. See supra section II.A.

376. See supra sections III.B–E.

377. Cf. Nielson, *Beyond Seminole Rock*, supra note 85, at 950 (noting that overturning *Auer* would have unintended consequences, and that this "cuts in favor of stare decisis").

378. Cf. Vermeule, *Law's Abnegation*, supra note 136, at 80 ("It is a simple confusion to suggest an agency could ever 'delegate power to itself.' Agencies just have whatever quantum of power they have, under relevant statutory grants of authority . . . Judges can always enforce the outer boundaries of the agency's grant of authority, however exercised.").

world we live in—only have whatever amount of interpretive discretion they have, given the difficult tradeoffs involved in determining the optimal precision of rules in the first instance.<sup>379</sup> Furthermore, the interpretations that stem from existing regulations must at a minimum be reasonable (even if they need not be the only possible interpretation).<sup>380</sup>

*Auer*'s critics might counter that the mere availability of the self-delegation strategy is itself a constitutional harm regardless of whether agencies actually use it. This argument proves too much. The U.S. constitutional system is rife with opportunities for *potential* abuse, and the Framers' attitude toward these potential avenues was not to eliminate them but to design institutions and specific textual bars that would make abuse less likely to occur.<sup>381</sup> The combination of evidence that agencies do not engage in self-delegation and that they apparently have at least some limits on their ability to operate within the bounds of the regulations they have written should be enough to quell any concern that existing legal structures are failing in their fundamental task.<sup>382</sup>

In fact, the research findings presented here hold more general implications for debates about the place of administrative agencies in the

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379. See Diver, *supra* note 128, at 71–72 (framing a discussion on agencies' optimal degree of specificity in rule writing). Agencies also must comply with the anti-parroting principle by adding some modicum of specificity beyond the original statutory delegation of authority. See *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (establishing the anti-parroting principle); see also *supra* note 33.

380. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); see also *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 613 (2013) ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.").

381. See *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, . . . you must first enable the government to control the governed; and in the next place oblige it to control itself.").

382. It is worth noting that Manning's later writings on the separation of powers are in some tension with the self-delegation critique. Manning has argued that there is no "free-standing principle of separation of powers" and that formalists ought to confine their arguments to textually grounded separation of powers limitations. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1944 (2011) [hereinafter Manning, *Separation of Powers*] (emphasis omitted); see also William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 *Harv. J.L. & Pub. Pol'y* 21, 29 (1998) (arguing that "we ought not consider functionalism and formalism as inevitably antipodal" because both in practice make consequentialist arguments about particular arrangements of institutional power). This insistence that separation of powers arguments be grounded in the text of the Constitution, lest they simply become another form of metafunctionalist theory, runs into problems when, as in the case of *Auer*, there is no constitutional text that is directly relevant to the combination of powers in administrative agencies. To reconcile the self-delegation critique with this more textualist approach to formalism, one would have to be skeptical of much more than just *Auer* in administrative law, essentially reading the vesting clauses as plain bars on *any* combination of functions in agencies. See *supra* note 126 and accompanying text.

separation of powers framework. Separation of powers formalists<sup>383</sup> frequently assert that the breakdown of the constitutional division of authority in the administrative state will (or at least probably will) have far-reaching consequences for limits on government power.<sup>384</sup> The constitutional critique of *Auer*, grounded as it is in the self-delegation thesis, is a primary example, but there are many other such arguments that institutions or doctrines that purportedly relax the strict separation of powers promote certain undesirable behavior.<sup>385</sup> Such arguments tend to catch on, in part because they rely on intuitive models of rational behavior geared toward power seeking and hint at a relatively simple solution: restoring some kind of strict separation, or at least greatly diminishing the scope of administrative agencies' authority, in an effort to eliminate some asserted perverse incentives. But the analysis in this Article reveals the limitations of relying on intuitions about the combination of authorities and powers in agencies. Arguments that are untethered from evidence and from an understanding of agencies as institutions may be intuitively appealing but utterly mistaken. Any realistic account of structural or doctrinal incentives must therefore grapple with what actually motivates bureaucrats, drawing support from what empirical studies reveal about the plausibility of intuitions derived from theory.<sup>386</sup>

This observation carries special importance at a moment of heated debate about the future of the administrative state in the U.S. constitutional system. As Professor Gillian Metzger recently noted, the administrative state currently appears to be in the midst of crisis, ensnared between attacks from insurgent "anti-administrativists" and defenses from equally impassioned supporters of the administrative state.<sup>387</sup> *Auer* is a primary exhibit for the kinds of attacks being levied by principled anti-administrativists: It is a purported example of the administrative state being predisposed or programmed by administrative law to

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383. See Manning, Separation of Powers, *supra* note 382, at 1958 ("Formalist theory presupposes that the constitutional separation of powers establishes readily ascertainable and enforceable rules of separation."); Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 Sup. Ct. Rev. 225, 226 (describing formalism as "emphasizing that '[t]he Constitution sought to divide the delegated powers of the new Federal government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility'" (alteration in original) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983))).

384. See Yoo & Phillips, *supra* note 16 ("Our constitutional system has the genius of diffusing power among three branches of the national government . . . [F]orsaking the Founders' limits on government in the name of administrative ease would bring far more ruin than failing to attend to the popular policy of the day.")

385. See *supra* notes 30–32 and accompanying text.

386. See *supra* Part IV.

387. Metzger, *supra* note 371, at 8–46.

“lose[] its way.”<sup>388</sup> *Auer* is thought to be low-hanging fruit in this regard<sup>389</sup>—so low, in fact, that the empirical basis for the self-delegation thesis has been taken for granted, almost as a matter of intuition. But intuition needs verification. Despite looking with some of the most powerful methods available and considering different possible manifestations, I have been unable to detect any effect on agency rule writing associated with *Auer* deference.<sup>390</sup> Moreover, the lack of evidence of any agency self-delegation in the rulemaking process should hardly be surprising, if one only considers what an extensive body of social science research teaches about agency officials’ behavioral tendencies and what administrative law scholarship has to say about the immediate legal concerns confronting agency decisionmakers.<sup>391</sup> The administrative state is an enormously complex organism, and administrative law is not the only constraint on, or facilitator of, agency discretion.<sup>392</sup> If it is as difficult to demonstrate that agencies have gone off course in other areas as it has been in the seemingly easy case of *Auer*, then the implication is that pat assumptions about administrative law’s behavioral incentives should not be enough on their own to justify calls for reform.

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388. Aaron L. Nielson, Response, Confessions of an “Anti-Administrativist,” 131 Harv. L. Rev. Forum 1, 1 (2017), [https://harvardlawreview.org/wp-content/uploads/2017/11/vol131\\_Nielson.pdf](https://harvardlawreview.org/wp-content/uploads/2017/11/vol131_Nielson.pdf) [<https://perma.cc/9PQ2-NV2W>].

389. To be clear, Nielson himself does not appear to endorse all of the assault on *Auer*—for reasons unrelated to the validity of the self-delegation thesis. See Nielson, *Beyond Seminole Rock*, *supra* note 85.

390. See *supra* Part III.

391. See *supra* Part IV.

392. Coglianese, *Rhetoric and Reality*, *supra* note 27, at 95 (“[A]dministrative law is embedded within a complex web of politics, institutions, and organizational behavior. Within this web, law is but one factor influencing behavior in government agencies among a variety of institutional, professional, social, financial, and political factors that interact with each other, and . . . adapt and change over time.”).