Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
United States Senate
Committee on Homeland Security and Governmental Affairs
Subcommittee on Regulatory Affairs and Federal Management

Hearing on "Examining the Proper Role of Judicial Review in the Federal Regulatory Process"

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Chairman Lankford, Ranking Member Heitkamp, and members of the subcommittee, thank you for the opportunity to appear today. It is a privilege to be able to participate in this hearing on the proper role of judicial review in the federal regulatory process. In this statement I will concentrate specifically on review of rulemaking.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for more than thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. Much of my scholarship is devoted to studying judicial review as well as legislative revision of the administrative process. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA); and I currently serve as a public member of the Administrative Conference of the United States (ACUS) and chair of its Judicial Review Committee. Today I am testifying solely in my individual capacity and not on behalf of any organization. However, I will refer to various positions taken by ACUS, the ABA, and the Section where those positions are relevant.

My starting point is a premise that I expect all of us share: that the institution of judicial review of administrative action is a cornerstone of our legal system and an indispensable safeguard of the interests and rights of the American people. This notion was well expressed years ago by a jurist who now serves as a member of the United States Senate. In an opinion for the Supreme Court of Texas, Justice John Cornyn wrote as follows:

> Judicial review of administrative rulemaking is especially important because, although the executive and legislative branches may serve as political checks on the consequences of administrative rulemaking, the judiciary is assigned the task of policing the *process* of rulemaking. Given the vast power allocated to governmental agencies in the modern administrative state, and the broad discretion ordinarily afforded those agencies, judicial oversight of the rulemaking process represents an important check on government power that might otherwise exist without meaningful limits.[1]

The premise that judicial review is vital does not, however, lead automatically to the

[1] Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d 667, 670 (Tex. 1996).

conclusion that the process by which it operates is in need of legislative revision. On the whole, the theme of my remarks today will be that the system is not particularly broken and does not need significant fixes. The ABA Administrative Law Section made this point a few years ago in its comments on the House version of the proposed Regulatory Accountability Act (RAA):

> Judicial review of agency decisionmaking today is relatively stable, combining principles of restraint with the careful scrutiny that goes by the nickname "hard look review." Since the time of such landmark decisions as *Chevron* and *State Farm* (and, of course, for decades prior to their issuance), courts have striven to work out principles that are intended to calibrate the extent to which they will accept, or at least give weight to, decisions by federal administrative agencies. Debate on these principles continues, but the prevailing system works reasonably well, and no need for legislative intervention to revise these principles is apparent.[2]

More specifically, in this statement I will recommend against two specific proposals that have recently been under discussion. One is to provide for broad judicial review of regulatory analyses; the other is to modify or abolish the deference that courts display when reviewing an agency's interpretation of its regulations.

I. Legislative reform of judicial review

The law of judicial review has largely been developed by courts themselves, but Congress has also played a significant role in its evolution. First, and most obviously, Congress codified fundamental elements of the system in chapter 10 of the Administrative Procedure Act (APA) in 1946.[3] These provisions largely reflected existing case law doctrines, but their presence in the statute books has provided a focus for debate and decisionmaking ever since.

Moreover, in subsequent years Congress has occasionally stepped in to update the system, sometimes with reforms that could only have been accomplished through legislation. In 1976, Congress adopted several measures that widened access to the courts. It largely eliminated sovereign immunity as a defense to review of government action (except in suits seeking money damages) and dispensed with the need for a litigant to name the United States as an indispensable party in APA litigation.[4] The same legislation also eliminated the then-prevailing requirement of a jurisdictional amount in challenges to federal government action (a few years before Congress eliminated the amount requirement in federal question cases generally).

Later, in 1982, Congress adopted a useful measure providing that when a person files for judicial review in a federal court that does not have subject matter jurisdiction, that court may transfer the action directly to a court that does have jurisdiction.[5] This provision can apply

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[2] ABA Sec. of Admin. L. & Reg. Prac., *Comments on H.R.3010, the Regulatory Accountability Act of 2011,* 64 Admin. L. Rev. 619, 667 (2012). In the current Congress, the House has passed an almost identical version of the RAA on January 13 of this year (six days after the bill was introduced), and it is now pending before your committee. H.R. 185, 114th Cong. (2015).

[3] 5 U.S.C. §§ 701-706 (2012).

[4] *Id*. § 702, added in relevant part by Pub. L. No. 94-574, § 1 (1976).

[5] 28 U.S.C. § 1631 (2012), added by the Federal Courts Improvement Act of 1982, § 301, Pub. L. 97-164, 96 Stat. 55.

when, for example, the plaintiff files in district court instead of a court of appeals, or vice versa. In 1988, Congress enacted legislation to ameliorate the "race to the courthouse" problem that can arise when more than one court of appeals has venue to entertain a petition for review of an agency decision. Prior to that year, the first court to receive a petition would acquire jurisdiction, and this rule induced competing parties to "race" to file in a court that they expected would favor their respective interests. The 1988 legislation instituted a random selection method to determine which court will hear the case (subject to a change of venue motion).[6] Another bill enacted in 1988 removed barriers to judicial review of legal issues (but not factual issues) in veterans' benefits cases.[7]

All of these measures have been generally well received and have improved our system of judicial review. They confirm the intuition that congressional reform can potentially play a valuable role in shaping the law of judicial review. On the other hand, in part because of these successful innovations, the system has matured to a point at which there does not appear to be widespread support among administrative lawyers for new legislation that would further revamp the system in major ways.[8] This does not necessarily mean that nothing should be done, but at the very least, proposals for substantial changes in the extant law of judicial review should be evaluated critically, not impulsively embraced.

II. Judicial review of regulatory analysis procedures

In testimony before the Homeland Security and Governmental Affairs Committee earlier this year, Dr. Jerry Ellig of the Mercatus Center at George Mason University proposed a "statutory requirement that all regulatory agencies conduct regulatory impact analysis and explain how it informed their decisions, combined with judicial review to ensure that the analysis and explanation meet minimum quality standards."[9]

I am, in general, a supporter of regulatory analysis of the kind prescribed for major rules by Executive Order 12,866,[10] as amplified by President Obama's Executive Order 13,563.[11] In fact, I am on record[12] as endorsing, in principle, the proposed Independent Agency Regulatory Analysis Act, which Senators Portman, Warner, and Collins introduced in the 112th and 113th

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[6] 28 U.S.C. § 2112(a) (2012), as amended by Pub. L. 100-236 (1988).

[7] 38 U.S.C. § 7292 (2012), added by the Veterans' Judicial Review Act, Pub.L. 100-687 (1988).

[8] Professor Michael Herz has recently taken note of a shift among administrative law specialists away from proposals to increase the availability of judicial review. He observes: "Presumably, this shift reflects (a) the fact that … the availability of judicial review *has* been expanded since the 1960s and (b) some loss of enthusiasm for the benefits of judicial review for the administrative process from the pre-*Vermont Yankee* days of an extremely muscular judicial role, particularly in the D.C. Circuit." Michael Herz, *ACUS – and Administrative Law – Then and Now*, forthcoming in 83 Geo. Wash. L. Rev. (2015) (draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562721) (draft at 25).

[9] *Toward a 21st-Century Regulatory System: Hearing Before the Senate Comm. on Homeland Security and Gov'tal Affairs*, 114th Cong. (Feb. 25, 2015) (statement of Jerry Ellig, Ph. D.).

[10] 58 Fed. Reg. 51,735 (1993).

[11] 76 Fed. Reg. 3821 (2011).

[12] Letter to Senators Lieberman and Collins from twelve legal scholars, http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=3f7b2523-c274-438e-9892-5d8dcbcc0345.

Congresses.[13] This measure would affirm the President's authority to extend executive oversight to independent regulatory agencies, which are currently exempted from such oversight. However, I do not support Dr. Ellig's proposal insofar as it would empower the courts to invalidate a rule on the basis that the agency did not sufficiently comply with procedural requirements such as those prescribed in the executive orders.

That plan would be a sharp departure from longstanding practice. At present, executive orders of this kind expressly disavow any intention to create judicial review rights,[14] and the courts have respected this disavowal.[15] At the same time, regulatory analysis documents are routinely added to the administrative record for judicial review and considered by the court in its decision as to whether the rule is arbitrary and capricious.[16] This accommodation of competing interests is a stable part of contemporary regulatory practice and has met with wide acceptance. Both the ABA and ACUS have taken the position that the process of executive oversight should not be reviewable in court.[17]

The design issue that Dr. Ellig raises is not new. The same questions were at issue in the debate over regulatory reform bills in the middle to late 1990s. These bills would have imposed broad requirements for cost-benefit analysis and risk analysis upon federal agency rulemaking, and the role of the courts in such potential legislation was vigorously debated. In 1995, the predecessor of this committee – the Committee on Governmental Affairs – endorsed language that approximately embodied the same intermediate position that I have just mentioned. Under this language, the agency's compliance or lack of compliance with procedural obligations in the bill would not itself be reviewable (unless the agency did not perform the analysis at all), but the documents created through such analysis would become part of the record and considered by the court in an appeal from the issuance of the rule.[18]

Defending this approach at the time, I argued that the procedures of regulatory analysis are not well suited to judicial enforcement. Dr. Ellig maintains that such a judicial task would not be particularly difficult,[19] but I took a more pessimistic view:

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[13] S. 1173, 113th Cong. (2013); S. 3468, 112th Cong. (2012).

[14] *See, e.g.*, Exec. Order 12,866, § 10.

[15] Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986); Alliance for Natural Health US v. Sebelius, 775 F. Supp. 2d 114, 135 n.10 (D.D.C. 2011).

[16] Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1031, 1040 (D.C. Cir. 2012); *Michigan v. Thomas*, 805 F.2d at 188-89.

[17] ABA Recommendation 302, 115-3 ABA Ann. Rep. 40 (Aug. 1990) ("the presidential review process should not be judicially reviewable"); ACUS Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (1989) ("The presidential review process should be designed to improve the internal management of the federal government and should not create any substantive or procedural rights enforceable by judicial review.").

[18] The bill reported by the committee in 1995 would have allowed a court to vacate a rulemaking in which a required regulatory analysis was "wholly omitted"; but if the analysis were performed, "the court shall not review to determine whether the analysis or assessment conformed to the particular requirements of this chapter." S. 291, 104th Cong., § 623(d) (1995), as reported in S. Rep. 104-88, 104th Cong., at 78 (1995). At the same time, "any regulatory analysis for such agency action shall constitute part of the whole administrative record … and shall, to the extent relevant, be considered by a court in determining the legality of the agency action." *Id*. § 623(e).

[19] "To enforce the law, judges … would merely need to check that an agency's analysis covered the topics specified in the law (such as analysis of the systemic problem, development of alternatives, and assessment of benefits and

> [I]ssues of whether the agency complied with the bill's exacting and detailed instructions would raise intricate questions about policy analysis methods and risk assessment techniques. Those questions could test the outer limits of the competence of the reviewing courts, staffed as those courts are by generalist judges, most of whom deal only infrequently with those subjects. Even if those encounters are not so rare in the D.C. Circuit, they surely are in the regional circuits.
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> It's true that the courts would be applying a statutory framework, which may not seem very difficult. However, … even if a court were convinced that the agency had not complied with one of the regulatory analysis requirements, it would then need to decide whether this error had infected the final rule (making it arbitrary and capricious). That determination could call for a quite sophisticated analysis of the overall development of the proceeding – a real challenge for the reviewing court.
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> By shifting the focus of attention toward compliance with regulatory analysis requirements, perhaps at the expense of other issues, reviewability … might make judicial review of major rules less reliable and credible than it is today. Remember also that if one of the reviewing courts misconstrues the provisions spelling out the new procedures, that interpretation would have precedential effect (even if the specific rule were upheld) and could haunt many subsequent rulemaking proceedings.
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> I am concerned about costs and delays stemming directly from the reviewability of the new regulatory analysis requirements. … I am thinking of all the issues that counsel would have to study in deciding what grounds they have for appeal. This would add up to a lot of associates' billable time. Then, depending on what issues the parties chose to raise, courts would need to spend time composing opinions responding to those issues. They might affirm in the end, but they would still need time to think their way carefully through these complex arguments.
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> Finally, there is the impact of judicial review on workload at the agency level. … [T]he result [of reviewability] could be more satellite litigation during the rulemaking proceeding – not so much on the question of what the rule should say, but on whether the agency complied with the precise requirements of … the new APA.[20]

At the same time, I noted that the addition of regulatory analysis studies to the rulemaking record necessarily opens up opportunities for significant judicial control of policymaking.[21] The agency must defend the rule in an explanatory statement that takes account of the record, including the results of its impact analysis. As experience in our own era makes abundantly clear, the courts' scrutiny of such agency explanations can at times become quite probing.[22]

Indeed, one of the major current debates in administrative law is over whether modern

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costs of alternatives), ensure that the analysis included the quality of evidence required by the legislation, and ensure that the agency explained how the results of the analysis affected its decisions." Ellig statement, *supra* note 9, at 7.

[20] Ronald M. Levin, *Judicial Review of Procedural Compliance*, 48 Admin. L. Rev. 359, 361-62 (1996).

[21] *Id*. at 361.

[22] See, e.g., Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014); Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

"hard look" review induces judges to intrude excessively into complex regulatory matters as they consider whether an agency rule is arbitrary and capricious.[23] I do not propose to delve into that debate here, except to note that Congress can do a great deal to influence the extent of this judicial scrutiny by defining the tasks it instructs agencies to perform in individual organic statutes, or by adjusting those mandates over time. That type of legislative control is, in my judgment, a sounder approach than the transformative, and probably disruptive, solution advanced by Dr. Ellig.

As I have mentioned, the Governmental Affairs Committee's position on judicial review in the mid-1990s was broadly similar to current practice. The same premises underlie the proposed Independent Agency Regulatory Analysis Act. The bill states that "[t]he compliance or noncompliance of an independent regulatory agency with the requirements of an Executive order issued under this Act shall not be subject to judicial review." At the same time, "any determination, analysis, or explanation produced by the agency [or the Office of Information and Regulatory Affairs] pursuant to an Executive Order issued under this Act, shall constitute part of the whole record of agency action in connection with [judicial] review."[24] In short, the intermediate approach that I have been discussing is largely a consensus view today, and I see no good reason to depart from it.

III. Judicial review of agencies' interpretations of regulations

The second topic that I have been asked to address is judicial deference on issues of law. A specific area of concern is what is commonly known as "*Seminole Rock* deference"[25] or "*Auer* deference"[26] – the doctrine that when the meaning of a regulation is in doubt, the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." This is a remarkably complex and subtle area of administrative law, and I cannot do justice to all of its nuances in this presentation. I will, however, attempt to address the main issues that have arisen in recent discussions of the topic.

In the past few years, several members of the Supreme Court have expressed interest in reassessing this old principle.[27] Last month's decision in *Perez v. Mortgage Bankers Ass'n*[28] has fueled additional discussion of this point. In *Mortgage Bankers* the Court held that an agency need not engage in notice and comment rulemaking when it replaces one interpretive rule with

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[23] *Compare, e.g.*, Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 Yale J. on Reg. 289 (2013) (criticizing *Business Roundtable* and kindred decisions), *and* Thomas O. McGarity, *Some Thoughts on "De-Ossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1412 (1992) (lamenting the propensity of hard look review to impede rulemaking process by making agencies overly cautious), *with* Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Revaluation*, 49 Admin. L. Rev. 599, 632-34 (1997) (supporting hard look review).

[24] S. 1173, §§ 4(a)-(b).

[25] *See* Bowles v. Seminole Rock & Sand Co., 325 U. S. 410 (1945).

[26] *See* Auer v. Robbins, 519 U. S. 452 (1997).

[27] *See* Decker v. Northwest Envtl. Law Ctr., 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part); *id*. at 1339 (Roberts, J., joined by Alito, J., concurring); Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

[28] 135 S. Ct. 1199 (2015).

another. The Court was unanimous, but in separate opinions Justices Scalia and Thomas contended that their concurrence in that ruling amplified the need to abandon *Auer* (and Justice Alito expressed continuing interest in the topic, although he did not stake out a specific position).[29] Thus, the status of *Auer* is now very much up for grabs. In the abstract, it is a legitimate subject for congressional inquiry – but I will urge caution today.

That suggestion derives in part from my longtime skepticism about legislation to adjust standards of review. In 1995, I wrote an article analyzing a scope of review provision in a then-recent regulatory reform bill. I concluded that it would have posed considerable risks of mixed messages, ambiguity, and unintended consequences.[30] Generalizing, I wrote:

> [A] legislature may simply be the wrong forum for the drafting of standards of judicial review of agency action. I do not make this suggestion because of any overall antipathy to statutory reform of the administrative process. Scope of review doctrine, however, is different from most other administrative law topics. It is an unusually confusing subject--abstract, difficult, and constantly evolving. Moreover, [a] court can easily revise case law tests when their weaknesses become apparent, but statutory provisions tend to be more enduring; the inevitable inertia of the legislative process argues for caution in the design of administrative procedure codes.
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> Such caution is especially warranted in regard to the ground rules for review of agencies' legal interpretations. Courts and commentators simply have no consensus about the extent, if any, to which courts should defer to agencies on issues of law. … [A] legislative formula purporting to define in detail the manner in which courts should take account of agencies' views on issues of law runs a considerable risk of proving to be too procrustean. Confusing as the case law may be, the experience of 1995 suggests that this is one area in which Congress should recognize the virtues of benign neglect.[31]

The drafting committee for the 2010 Model State Administrative Procedure Act relied on those comments when it adopted a bare-bones scope-of-review provision that closely resembles section 706 of the federal APA, instead of a more detailed text that was also under consideration. As the official comment to that provision remarked, "scope of review is notoriously difficult to capture in verbal formulas, and its application varies depending on context. For that reason, Section 508(3) follows the shorter, skeletal formulations of the scope of review, similar to . . . the Federal APA."[32]

A. Overview of the scope of judicial review of agencies' interpretations of law

As a foundation for the discussion that is to come, I will offer a brief overview of deference doctrines that courts use in their review of agency rules. This will be a drastically simplified survey, with many complexities and nuances omitted. I will, however, try to supply enough of an introduction to these doctrines to enable you to make sense of my critiques of

[29] *Id*. at 1211-13 (Scalia, J., concurring in the judgment); *id*. at 1213-25 (Thomas, J., concurring in the judgment); *id*. at 1210 (Alito, J., concurring in part and concurring in the judgment).

[30] Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 Wake Forest L. Rev. 647, 653-64 (1996).

[31] *Id*. at 665-66.

[32] Revised Model State Administrative Procedure Act § 508 cmt (2010) (citing the article just mentioned).

current proposals.

Judicial deference to administrative agencies' interpretations of the statutes they administer has a long lineage in the American legal tradition, traceable back to the time of Chief Justice John Marshall.[33] Over time, however, courts have revised and refined the manner in which they articulate and implement that practice. For the past thirty years, the law on judicial deference has been dominated by *Chevron U.S.A. Inc. v. NRDC*,[34] which sets forth a two-step inquiry: a reviewing court should ask "whether Congress has directly spoken to the precise question at issue" and "whether the agency's answer is based on a permissible construction of the statute."[35] In simpler terms, this means that the agency interpretation should prevail if the statute is ambiguous in relation to the issue presented, and the agency's interpretation is reasonable.

The justification for *Chevron* deference rests in part on respect for congressional delegation. It recognizes that Congress often decides to entrust policymaking authority in certain areas; when it does so, and the agency acts within the scope of that delegation as the court understands it, a court is obliged to honor the legislature's expectations by upholding a rational exercise of that authority even where the agency reaches a conclusion that the reviewing court would not have reached. That aspect of the test is straightforward.[36] What is more controversial about *Chevron* is its further assumption that an ambiguity in the relevant regulatory statute should, in effect, be *presumed* to fall within the scope of the delegation to the executive.[37] As virtually everyone agrees, this presumption is a legal fiction and is not intended as a descriptively accurate model of congressional expectations. Rather, it is a judicially created principle of statutory interpretation, analogous to other canons of statutory construction. The Court created it (and has subsequently, at various times, expanded or contracted it) to serve purposes that it considers important for our legal system. The opinion itself identifies some of them: agencies tend to have expertise and experience in their respective fields of specialization and are politically accountable in ways that courts are not.[38] More generally, it promotes predictability and space for agencies to work out problems that arise in the court of administering their programs.

It is important to recognize, however, that the manner in which courts apply the two step *Chevron* test is a far cry from a policy of indiscriminate deference. The case does provide a structure for analysis of agency statutory interpretation, but the underlying reality is that courts exercise significant control over agencies as they apply both steps. Judicial opinions declaring that a statute "directly addresses the precise question at issue" (and thus is not ambiguous) are commonplace – sometimes when it does not seem at all obvious to external observers that the

[33] United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1809).

[34] 467 U.S. 837 (1984).

[35] *Id*. at 842-43.

[36] For explanations of why such deference is consistent with our constitutional tradition, see Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1 (1983); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 20-22 (1985).

[37] *Chevron*, 476 U.S. at 865.

[38] *Id*. at 865-66.

statute was actually unambiguous.[39] Moreover, the second *Chevron* step -- whether the agency's decision was reasonable – is often treated as an inquiry into whether it was *reasoned*.[40] This revised inquiry leads to an overlap with the hard look doctrine;[41] as such, it can lead to reversal even where the court is not prepared to claim the statute is clear.

Adding to the complexity of this subject is the fact that, under current doctrine, review of some agency statutory interpretations is not governed by *Chevron* at all. The threshold inquiry into whether a given interpretation falls within the "domain" of the *Chevron* test has come to be informally known as "*Chevron* step zero." The scope of this exception is evolving and somewhat indeterminate. For present purposes, one specific example is particularly relevant: the Court has held that agency statutory interpretations that appear in agency guidance documents should usually not be evaluated under the *Chevron* rubric.[42]

That a particular administrative interpretation of a statute falls outside the *Chevron* domain does not normally mean that courts will display no deference whatsoever toward it. In other words, even where courts do not find (and will not presume) that Congress itself entrusted interpretive authority to an agency, they may decide to give weight to the agency's interpretation for prudential reasons of their own devising. This mode of reasoning had taken hold long before *Chevron* entered the picture in 1984 and was most famously expressed by Justice Robert Jackson in his 1944 opinion in *Skidmore v. Swift & Co.*:[43]

> [T]he Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. … We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[44]

Thus, "*Skidmore* deference" usually comes into play when *Chevron* deference does not. Analysts sometimes say that *Chevron* stands for "strong deference" and *Skidmore* for "weak deference," although, as I will explain, that distinction does not always hold up in practice.

The meaning of *Skidmore* deference, where it does apply, is elusive, because courts implement it in a variety of ways. Some understand it to mean that an agency interpretation need

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[39] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994).

[40] ABA Sec. of Admin. L. & Reg. Prac., A Blackletter Statement of Federal Administrative Law 34-35 (2d ed. 2013).

[41] *See, e.g.*, Judulang v. Holder, 132 S. Ct. 476, 4484 n.7 (2011); Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 527 n.27 (2002); Shays v. FEC, 414 F.3d 76, 96–97 (D.C. Cir. 2005).

[42] Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[43] 323 U.S. 134 (1944).

[44] *Id*. at 139-40.

not have significance unless the judge personally finds the agency's arguments persuasive in the exercise of independent judgment. Much more common, however, is an understanding according to which *Skidmore* does express an expectation that individual judges are to display some deference, but the weight of a particular interpretation should depend on factors such as those mentioned in the Jackson quotation just above.[45] As a result of this flexible approach, "[i]n various circumstances, the rigor of a court's scrutiny when it applies *Skidmore* sometimes appears to resemble *Chevron* deference, but at other times it appears significantly more intrusive. No clear pattern emerges from the cases."[46] The wide variety of decisions in this area poses a challenge for those who advocate use of *Skidmore* as a solution to perceived problems.

In a handful of situations, courts will afford no deference of any kind to an administrative determination of an issue of law. Constitutional questions are a good illustration. Another is the manner in which the courts construe framework statutes such as the APA. Those laws apply to the government as a whole and have been enacted for the very purpose of restraining agency power, so courts do not treat any one agency's interpretation of them as authoritative.[47] When an agency is acting within its particular sphere of responsibility, however, the availability of some degree of judicial deference is all but universal, at least under current doctrine.

Finally, we come to the question of judicial deference to agencies' interpretations of regulations (as I will call them[48]). The roots of such deference also go far back in our history.[49] In the modern era the dominant cases are *Seminole Rock* and *Auer v. Robbins*. The canonical verbal formula derived from these cases is that the agency's interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Most authorities understand this formula to prescribe a level of deference comparable to that of *Chevron* ("strong deference"). However, as in the case of statutory interpretation, *Auer* deference does not apply across-the-board. In particular circumstances, the courts may resort to *Skidmore* review rather than *Auer* in evaluating a given interpretation. Thus, in *Christopher*, the Court found reasons to measure a Department of Labor interpretation of a regulation on the basis of *Skidmore*. Thus, the scope of the "domain" of *Auer* in the Court's opinions is still very unsettled, even apart from the advent of calls by individual Justices for reappraisal of this whole area.

Various writers articulate the rationale for *Auer* deference in differing ways, but to my

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[45] *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1271 (2007) (finding, in a study of numerous court of appeals cases, that the latter approach is three times as common as the former).

[46] ABA Blackletter Statement, *supra* note 40, at 36-37.

[47] Collins v. NTSB, 351 F.3d 1246, 1252 (D.C. Cir. 2003).

[48] Unlike the word "rule," the word "regulation" is not an APA term. It is, however, most commonly used to mean a "legislative rule" adopted under statutory authority, as distinguished from an interpretive rule that might construe it. For clarity of exposition, I will use it that way here.

[49] "The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them is entitled to the greatest weight, and we see no reason in this case to doubt its correctness." United States v. Eaton, 169 U.S. 331, 343 (1898) (sustaining the plaintiff's appointment as acting vice-consul-general to Siam, following its approval by the Department of State and Secretary of State).

mind the strongest justifications run parallel to the justifications for *Chevron*. The Court has said, for example, that such deference is important when a "regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'"[50] Indeed, another case says, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[51]

The ABA Administrative Law Section was mindful of this reasoning when, in 2011, it opposed a provision in the House version of the Regulatory Accountability Act (RAA)[52] that would (in effect) have abolished all deference to agencies' interpretations of regulations.[53] As the Section argued, "many regulations are highly technical, and their relationship to an overall regulatory scheme may be difficult to discern. Surely, when construing such a rule, a court should have the prerogative of giving weight to the views of the agency that wrote the rule and administers it."[54]

I recognize that this survey of case law on scope of review has presented a complex, perhaps even bewildering, array of doctrines. How much difference does the choice among them make? The answer seems to be: "probably less than one would at first think." Empirical studies indicate that the government wins on appeal around seventy percent of the time regardless of whether the court relies on *Chevron* or *Skidmore*.[55] The same is true of cases applying *Auer*, at least in the lower courts.[56] (In the Supreme Court, the affirmance rate when *Auer* is applied is much higher — around 91 percent.[57] I tend to think, however, that the figure for lower courts is the more meaningful of the two results, because the Supreme Court *chooses* what cases it will hear. Its behavior in rule-interpretation cases probably says more about its substantive priorities than about the influence of the nominal standard of review.) On the whole, although litigants may feel compelled to battle over the choice of a standard of review because of a fear that the court's choice *might* make a difference, the reality seems to be that so many other factors influence judicial review that the effect of the prescribed standard of review can be quite elusive.

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[50] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

[51] Martin v. OSHRC, 499 U.S. 144, 151 (1991).

[52] *See* H.R. 3010, 112th Cong. (2011). The provision under discussion here is § 7 (proposing to add § 706(b)(1) to the APA).

[53] Strictly speaking, the clause in question would have provided that a court shall not defer to an agency's interpretation of a regulation unless the agency used rulemaking procedures to adopt the interpretation. As the Section's comment letter explained, however, this would mean that the agency could never receive any deference for its interpretation of the regulation, because if it did resort to the notice and comment process, "the agency would actually be issuing a new regulation – it would not be interpreting the old one." ABA Section Comments on H.R. 3010, *supra* note 2, at 668.

[54] *Id*.

[55] *See* Richard J. Pierce, Jr., & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515, 515 (2011).

[56] Id. at 520.

[57] Id. at 516.

With this groundwork laid, I will turn to the question of where the future of *Auer* deference may lie.

B. Justice Thomas's opinion in *Mortgage Bankers*

Both Justice Scalia and Justice Thomas wrote bold concurring opinions in the *Mortgage Bankers* case, but the Thomas opinion is the more daring of the two. It appears to be a wholesale attack on any kind of judicial deference to agencies on issues of law. It is nominally directed at the *Auer* doctrine alone, but his constitutional arguments could just as easily apply to *Chevron* deference, as he occasionally does suggest.[58] As such, the implications of his opinion strike me as quite radical. His concept of separation of powers is sweeping, but it is a far cry from the way the Constitution has been interpreted in our legal tradition.

After a lengthy historical discussion, Justice Thomas homes in what he says are "two related constitutional concerns [regarding the *Auer* doctrine]. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches."[59] As to the first concern, his point seems to be that, under Article III of the Constitution, "the Judiciary . . . is duty bound to exercise independent judgment in applying the law," and the courts' practice of giving "controlling weight" to agency interpretations of regulations is incompatible with that duty.[60] I agree with Justice Thomas about the importance of judicial independence, but not with his conclusion that *Auer* deference is incompatible with it. The phrase "controlling weight" in *Seminole Rock* and *Auer* should not be read in isolation from the qualifying language that accompanies it: deference is due only to interpretations that are not "plainly erroneous or inconsistent with the regulation." Whatever meaning one might ascribe to these phrases in the abstract, they are hardly self-defining. They leave room for the courts to impose significant control over agencies' interpretations of regulations, and, as I have noted, the courts actually do make use of that latitude. In this sense, the majority in *Mortgage Bankers* is on sound ground when it responds that "[e]ven in cases where an agency interpretation receives *Auer* deference … it is the court that ultimately decides whether a given regulation means what the agency says."[61]

It may be true that the *Auer* doctrine, in practical operation, calls for more deference to executive authority than Justice Thomas would individually choose to give. Surely, however, it is not unconstitutional for the Court to adopt principles of interpretation and to prescribe a framework for applying those principles. Judges are expected to adhere to that framework, but it is the Court that originated it and can modify it over time (as it indeed does). The wisdom of these principles is of course up for debate; but, because the judiciary itself is the source of the principles, I do not see their existence as an illegitimate intrusion on judicial independence. In other words, "independent judgment" does not have to mean "independent of the Court's jurisprudence on scope of review."

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[58] *See Mortgage Bankers*, 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment) ("Just as it is critical for judges to exercise independent judgment in applying statutes, it is critical for judges to exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties.").

[59] *Id*. at 1217.

[60] *Id*. at 1217-20.

[61] *Id*. at 1208 n.4 (opinion of the Court).

Justice Thomas's second argument – that *Auer* undermines the judicial "check" on the political branches – also seems reasonable in the abstract.[62] However, it is too onesided. The Court has developed a sophisticated, though always evolving, body of precedents in order to calibrate the complex relationship between courts and agencies. These precedents do provide for a check on executive abuses, but they also reflect a wise recognition that judges do not have a monopoly on wisdom, especially in regard to the specialized problems that arise in the interpretation of regulations. In short, there are two sides to the question of how much of a "check" is needed, and Justice Thomas's broad generalities about separation of powers do not seem helpful in determining where the line should be drawn.

C. Justice Scalia's separation of powers critique of *Auer*

In his concurring opinion in *Mortgage Bankers*, Justice Scalia makes a variety of debating points criticizing *Auer* (a decision that he himself wrote but obviously no longer supports). For present purposes, however, probably the best way to understand his opinion is as a renewal of the analysis that he has been advancing in other recent opinions – especially his separate opinion in *Decker v. Northwest Environmental Defense Center*,[63] in which he offered an extended argument as to why *Auer* deference should be abandoned. That opinion, which drew on the scholarship of Professor John Manning (Justice Scalia's former law clerk),[64] rests on considerations that are targeted specifically at deference to agency interpretations of regulations and do not pose a direct challenge to *Chevron* deference. More specifically, Justice Scalia argued in *Decker* that the proposition

> that the agency can resolve ambiguities in its own regulations … 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. …
>
> [w]hen an agency interprets its *own* rules … 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. "It is perfectly understandable" for an agency to "issue vague regulations" if doing so will "maximiz[e] agency power."[65]

I will discuss the separation of powers aspect of this analysis first, and then I will turn to its policy-oriented aspect.

The idea that *Auer* offends the constitutional separation of powers is far from self-evident. After all, any interpretation that would be a candidate for *Auer* deference must relate to a matter that the court finds or assumes is within the authority that Congress delegated to the agency (otherwise the agency's position would fail *Chevron* deference). Moreover, the field of administrative law has worked out a variety of political and judicial oversight mechanisms to maintain a delicate balance of power among the branches of government. When an agency

[62] *Id*. at 1220-21 (Thomas, J., concurring in the judgment).

[63] 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part).

[64] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1998).

[65] 133 S. Ct. at 1341.

action is questioned as possibly erroneously interpreting a regulation, all of those mechanisms would apply in the same way as they usually do in the case of other administrative actions.

Despite these background factors, Justice Scalia and Professor Manning argue that a separation of powers problem *comes into existence* when law-writing and law-applying are entrusted to the same hands – even though administrative agencies (and other bodies such as city councils) have routinely performed both functions for countless years. They support this contention by referring to a variety of ways in which the framers of the Constitution (and the theorists on whose work the framers relied, such as Montesquieu and Blackstone) decided to divide up the powers of government so that each branch could check the others. Of course, nobody questions that the structure of the Constitution contains a number of such divisions of responsibility. Yet none of the antecedents that furnish the support for this argument is directly comparable to the relationship between an administrative agency and a reviewing court. Analogies to the lines of separation between the legislative and executive branches, or between the legislative and judicial branches, furnish only imperfect comparisons. A salient distinction is that an agency's interpretation of its regulation is not nearly as insulated from a judicial check as the many other relationships that, according to Justice Scalia's argument, are subject to "separation" under the Constitution. As I pointed out above, the agency interpretation is "controlling" under *Auer* only if it is not "plainly erroneous or inconsistent with the regulation," and reviewing courts have more than a little freedom to determine whether those predicate conditions are met.

My reservation about the separation of powers critique, then, is not that it is necessarily mistaken, but rather that it is indeterminate. Since none of the restrictions specifically written into the constitutional structure is directly applicable, the argument has to depend heavily on what one takes to be the spirit of the Constitution's separation of powers model. And, as Justice Anthony Kennedy once wrote in a different context, "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."[66]

In this connection it is important to recognize that when Professor Manning relies on the constitutional policy of separating law-writing and law-executing, the conclusion he draws is that agency interpretations of their own regulations should be subject to the *Skidmore* standard;[67] but Justice Scalia uses that policy to support a much more drastic step, namely the elimination of all judicial deference in reviewing such interpretations. That extension may raise countervailing separation of powers concerns of its own. It brings to mind the reasoning of the *Chevron* opinion, in which Justice Stevens cautioned the courts against being too quick to substitute their judgments for those of politically accountable administrators:

> Judges … are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is

[66] Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in judgment).

[67] Manning, 96 Colum. L. Rev. at 686-90.

> entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do.[68]

On the basis of this language, Professor Manning views *Chevron* as a "constitutionally inspired canon of construction."[69] If he is right, the separation of powers implications of Justice Scalia's quite transformative proposal would seem to cut two ways.

In short, although I would be reluctant to say that the separation of powers theme in Justice Scalia's recent opinions on this subject is untenable, it does strike me as inconclusive. To my mind, therefore, a more fruitful approach is to consider the concrete, practical objections to *Auer* deference on their own terms, without unnecessarily clothing them in the rhetorical frame of constitutional law. I now turn to that level of the discussion.

D. The incentives argument

The main policy argument that underlies the current challenge to *Auer* deference is the thesis that the deference prescribed in the case gives agencies an incentive to write regulations vaguely, so that they will then be able to adopt interpretations that have not undergone the rigors of the notice and comment process but will nevertheless receive the benefit of strong judicial deference. Justice Alito alluded to this possibility in his opinion for the Court in *Christopher*,[70] and I have met many administrative lawyers who take it seriously, even if they find little appeal in the constitutional arguments that Justice Scalia has used in promoting it.

A problem with the incentives argument, however, is that there is no good evidence showing that this incentive often has the effect that the theorists ascribe to it – if it ever has. In a speech delivered in 2009, Justice Scalia himself noted the uncertainty that surrounds an assessment of this kind:

> [In my dissent in *United States v. Mead Corp*., 533 U.S. 218, 246 (2001),] I … predicted that the Court's decision would create a perverse incentive for agencies to adopt bare-bones regulations, because acting by regulation showed that you were acting pursuant to congressional delegation. The agency could, with the benefit of substantial judicial deference, later interpret or clarify those regulations, by adjudication or even by simple agency pronouncement, without any bothersome procedural formality. The initial regulation having been adopted via notice-and-comment would earn *Chevron* deference, and the subsequent agency clarification would earn the so-called *Auer* deference. …

[68] *Chevron*, 467 U.S. at 865-66.

[69] Manning, 96 Colum. L. Rev. at 623-27.

[70] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012).

> Well, it's hard to confirm or to refute this particular prediction. I really don't know if agency rules have in fact become less detailed and more ambiguous since the Court's decision in *Mead*. I'm not even sure how one would measure that or how one would control for the various other factors that undoubtedly bear upon a regulation's clarity.[71]

Justice Scalia wrote these words before he announced a change of heart about *Auer*, but he has not distanced himself from this particular observation. Nor has he claimed, in any of his separate opinions in the line of decisions running from *TalkAmerica* through *Mortgage Bankers*, that the specific regulations underlying those cases were, in fact, examples of rules in which the incentive to be vague had played any part. Indeed, I have never seen, in the judicial or academic literature, *any* good evidence of a situation in which an agency has actually yielded to the incentive about which Justice Scalia has been warning.[72]

I do not mean to suggest that the incentive does not exist at all. It presumably does – but it surely does not exist in a vacuum. A myriad of factors may influence agencies in their decisions about how broadly or narrowly to write a given regulation. Some of those factors can militate toward specificity rather than vagueness. A good reason to be specific, for example, is to nail down a concrete application of the regulation, instead of leaving the question to be resolved through all the contingencies and delays that may accompany the implementation and enforcement process.[73] One can only conjecture about how these influences net out in the regulatory process.

As a practical matter, a court would have no good way to decide in a given case whether the agency had or had not yielded to the incentive that *Auer* deference is said to create. In the abstract, virtually any regulation could be written to be more specific than it actually was, but agencies often have very good reasons to refrain from trying to settle too much by regulation. It is largely for this reason that the federal courts have essentially abandoned any effort to force agencies to engage in rulemaking as opposed to adjudication.[74] The potential variables are far

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[71] Remarks by the Honorable Antonin Scalia for the 25th Anniversary of *Chevron v. NRDC* (April 2009), *in* 66 Admin. L. Rev. 243, 245 (2014).

[72] An arguable exception is the Medicare regulation at issue in *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994). Justice Thomas, in dissent, charged that "the Secretary has merely replaced statutory ambiguity with regulatory ambiguity. 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." *Id*. at 525 (Thomas, J., dissenting). The difficulty with the example, however, is that the majority opinion (written by Justice Kennedy and joined by Justice Scalia, among others) read the regulation differently: "[T]he language in question speaks not in vague generalities but in precise terms about the conditions under which reimbursement is, and is not, available. Whatever vagueness may be found in the community support language that precedes it, the anti-redistribution clause lays down a bright line. …" *Id*. at 517 (opinion of the Court). Thus, the example is at best contested rather than clear-cut.

[73] According to one agency lawyer, "agencies 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 [as well as APA procedural challenges]." Aditi Prabhu, *How Does Auer Deference Influence Agency Practices?*, Admin. & Reg. L. News, Winter 2015, at 11, 12-13.

[74] NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (holding that choice between rulemaking and adjudication lies within agency discretion). Exceptions to this principle are all but nonexistent in federal court case law.

too elusive for a court to weigh knowledgeably.[75]

Thus, if the courts are going to overrule or modify *Auer* in order to counteract the incentive to write vague regulations that the doctrine is said to create, they will presumably have to do so on an across-the-board, or at least very broad, basis. The inevitable result would be to remove or at least diminish judicial deference in numerous situations in which the incentive to be vague played no actual role in the agency's calculus.

An obvious objection to this development would be that, in order to solve a supposed problem that is speculative at best, the doctrinal change would lead courts to give short shrift to the affirmative benefits of *Auer* deference – especially the value to the interpretive process of the agency's experience and responsibility for making the regulatory scheme work. Judge Richard Posner, commenting on the Scalia analysis, has reached a similar conclusion. He argues that the incentives point

> is a valid concern, but it doesn't justify a blanket refusal to grant some deference, some leeway, to agency interpretations of their own regulations. The regulation may deal with a highly technical matter that the agency understands better than a court would; its interpretation may be in the nature of explanation and clarification rather than alteration. Scalia proposes that in all cases in which an agency's interpretation of its own regulation is challenged, the reviewing court should resolve the challenge "by using the familiar tools of textual interpretation." Those tools are notably unreliable, especially when dealing with a technical regulation. In *Decker*, the regulation concerned storm water runoff from logging roads.[76]

E. Potential for changes in *Auer* deference by the courts

Even if one thinks that the case for abandoning *Auer* is strong, administrative lawyers do not seem to have developed anything close to a consensus about what should take its place. The critics of *Auer* on the Court itself seem to have deep divisions on this point. Justices Scalia and Thomas favor a regime with *no* deference; it seems unlikely that the other Justices would accept so drastic a departure from the status quo. On the other hand, Justice Scalia has repeatedly expressed his dislike for the openended, unstructured *Skidmore* standard.[77] He did join Justice Alito's opinion for the Court in *Christopher*, which applied *Skidmore* to its review of the Department of Labor's interpretation of a Fair Labor Standards Act regulation.[78] However, that holding reads as though it was limited to the circumstances at hand, and one can doubt that Justice Scalia would be prepared to embrace *Skidmore* review for any broad category of cases.

On the other hand, scholars who have criticized *Auer* do seem to coalesce around

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[75] SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947); John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 909-13 (2004) ("courts can make rough judgments about how precise a statute or regulation *is*; they have no basis for determining how precise it *should be* in order to satisfy some abstract duty to make policy through a prescribed method.").

[76] Richard A. Posner, *Can't Justice Scalia learn a little science?*, Slate, June 24, 2013.

[77] United States v. Mead Corp., 533 U.S. 209, 239-61 (2001) (Scalia, J., dissenting); Scalia 2009 speech, *supra* note 71.

[78] *Christopher*, 132 S. Ct. at 2168-69.

Skidmore as their preferred alternative. One can wonder, in light of the empirical studies discussed above, whether this development would bring about much change in substantive outcomes. It might, however, stimulate an increase in litigation, because the wide-open and therefore unpredictable nature of the *Skidmore* formula could induce at least some litigants to think that they might prevail on a challenge that they might have foregone if the courts had remained committed to *Auer* deference.

F. Possible congressional action

Even if one believes that there is a good case for substantial changes in the *Auer* regime, I doubt that Congress should undertake to impose such change by passing a statute. I mentioned above my general reservations about scope of review legislation, and those reservations appear to be fully applicable to this situation. I am not aware of any scholarly article that recommends that Congress should act in this area.

Judicial fine-tuning of the *Auer* doctrine over time is a defensible project. The Court has been taking cautious steps in that direction (although perhaps it has been not quite cautious enough[79]). Development of doctrine through a case-by-case process lends itself well to experimentation, because the courts can correct overstatements and dubious statements relatively easily. With a statute, however, imprecise language is much harder to overcome.

A good example can be found in S. 1029, the Senate version of the Regulatory Accountability Act in the last Congress. In opposing the proposal in that bill to replace the *Auer* standard, the ABA Administrative Law Section drew attention to an overbreadth problem.[80] It noted that, even if some applications of the proposed statute could be defended on the basis of the argument that *Auer* deference gives agencies an incentive to draft rules that circumvent the discipline of the notice-and-comment process, other applications could not: "Presumably, [the bill's revised scope of review provision] would also apply to regulatory interpretations that agencies develop in the course of formal adjudication, which does entail a decision making process that induces rigorous deliberation."

Another illustration would be a situation involving a regulation that was properly adopted without notice and comment because the APA exempts it from that obligation. For example, regulations relating to a military or foreign affairs function of the United States may validly be

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[79] In *Christopher* the Court declined to give *Auer* deference to the Fair Labor Standards Act regulation at issue, primarily because employers had reasonably relied on the Labor Department's longstanding failure to enforce the interpretation that it was now seeking to establish. *Id*. at 2167-68. In my view, defendants who have reasonably relied on an existing regime should be shielded from retroactive liability, and the courts have developed remedial doctrines that serve this purpose. *See, e.g*., FCC v. Fox T.V. Stations, Inc., 132 S. Ct. 2307 (2012) (due process); GE v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) (due process); Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) (abuse of discretion); *see also Mortgage Bankers*, 135 S. Ct. at 1209 & n.5. However, reliance interests should have little if anything to do with *interpretation* of a regulation, because judicial narrowing on that basis would even prevent the agency from applying a new interpretation to a future defendant who did have adequate notice of it.

[80] Letter from Anna Shavers, Chair, ABA Section of Administrative Law and Regulatory Practice, to Senators Carper and Coburn on S. 1029, the Regulatory Accountability Act of 2013, at 17, http://www.americanbar.org/content/dam/aba/administrative/administrative_law/s_1029_comments_dec_2014.authcheckdam.pdf.

issued without APA procedure.[81] It would seem that an agency that drafts such a regulation could not possibly have an incentive to write it vaguely in order to escape the burdens of notice and comment.[82] Arguably, therefore, an interpretive rule that construes such a regulation should in any event remain subject to *Auer* deference. If deference remains a case law doctrine, a court could easily carve out a special decisional principle for situations of this kind, but a statutory provision that supersedes *Auer* would presumably leave less room to make such exceptions.

Finally, the draftsmanship of a suitable standard of review to replace *Auer* could prove difficult, as the example of S. 1029 demonstrates. The relevant subsection of that bill would have provided that "[t]he weight that a court shall give an interpretation by an agency of its own rule shall depend on the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements." That phrasing would have omitted additional language that is part of the classical *Skidmore* formula: "… and all those factors which give it power to persuade, if lacking power to control."[83] In a way, the drafters' omission of this language was understandable. They may have felt that it was too vague and elastic to fit comfortably into an APA. Yet the Section was critical of that deletion: "We believe the adoption of multiple incarnations of the *Skidmore* test may prompt confusion as to whether they have independent meanings or the same meaning as the evolving interpretations of *Skidmore*. Surely the world does not need a 'rule interpretation *Skidmore*' that is different from the 'statutory interpretation *Skidmore*.'"[84]

In short, even if one agrees with the general thrust of Justice Scalia's critique of *Auer* deference, the inherent difficulty of trying to specify all the considerations that should be taken into account suggests that Congress should leave this quite narrow and specialized dialogue to the litigation process, in which the Court gradually works out answers in response to litigants' briefs and commentators' scholarship.

IV. Some constructive ideas for the future

I said at the beginning of this statement that the institutional structures by which federal courts review agency rulemaking are generally working well and are not in need of major overhaul. I have also explained why I do not endorse the two specific proposals that I was asked to address today. It may well be that regulatory reformers in Congress should, for the most part, turn their attention to aspects of administrative law practice other than judicial review. However, I do have some ideas about a few judicial review topics that, in my judgment, call for action, or at least sustained attention, from the legislative branch.

First, Congress should pass legislation to reform 28 U.S.C. § 1500. This Civil War-era statute provides that if a plaintiff files an action in the Court of Federal Claims when a suit arising out of the same set of facts is already pending in another court, the Court of Federal

[81] 5 U.S.C. § 553(a)(1).

[82] *Cf.* City of New York v. Permanent Mission of India, 618 F.3d 172 (2d Cir. 2010) (upholding, under *Chevron*, State Department rule protecting foreign missions to the United Nations from local property taxes, although the rule was validly issued without notice and comment).

[83] *Skidmore*, 323 U.S. at 140.

[84] Section letter on S. 1029, at 18.

Claims suit must be dismissed. This statutory requirement can lead to injustice, especially when jurisdictional limitations prevent plaintiffs from filing all of their related claims in a single court. For example, the litigant might have a tort claim against the United States in a local district court and a factually related contract claim in the Court of Federal Claims. There is no good reason why procedural restrictions should force a litigant to choose one cause of action and one remedy to the exclusion of another.

In 2012, the Administrative Conference recommended that Congress enact a substitute for section 1500.[85] The proposed legislation would provide that if two factually related claims are pending at the same time in the Court of Federal Claims and another court, the second action to be filed should presumptively be stayed pending resolution of the first-filed suit. The presumptive stay reduces the likelihood of parallel, duplicative litigation that could waste judicial and litigant resources. However, the proposal also contemplates that the court in the second-filed case should be able to overcome the presumption and proceed more expeditiously if the stay is not or ceases to be in the interest of justice. This aspect of the proposal gives judges the latitude they may need to protect the rights of claimants. In 2013, the American Bar Association endorsed the ACUS recommendation.[86]

Bills to implement the recommendation were introduced in both the House and Senate during the 113th Congress.[87] The House Judiciary Committee reported its bill favorably,[88] but no further action was taken. In my view, enactment of the bill to replace section 1500 should be a priority for the present Congress.

I also want to mention two other projects relating to judicial review that are currently working their way through the Administrative Conference. One will examine "Agency Publicity in the Internet Era."[89] Citizens who believe they have been injured by, for example, an unfavorable press release generally have no right to judicial relief.[90] One question the Conference will consider is whether that situation should be changed, a possibility that might require congressional action. The other project grows out of a request by the Social Security Administration to the Office of the Chairman of ACUS to examine ways in which that agency might reduce the number of cases remanded to it by courts and might address disparities among district courts in the procedures to which appeals in disability cases are subject.[91] Work on both of these projects is at early stages, so I am not in a position right now to make concrete suggestions for action or even to report research findings. However, I do believe the subcommittee should be cognizant of these efforts, which could well lead to more tangible proposals to Congress later.

Finally, as an alternative to altering the standard of review by which the courts examine

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[85] ACUS Recommendation 2012-6, *Reform of 28 U.S.C. § 1500*, 78 Fed. Reg. 2939 (2012).

[86] ABA Resolution 300 (Feb. 11, 2013).

[87] S. 2769, 113th Cong. (2014); H.R. 5683, 113th Cong. (2014)

[88] H.R. Rep. 113-650 (2014).

[89] ACUS, *Agency Publicity in the Internet Era*, https://www.acus.gov/research-projects/agency-publicity-internet-era.

[90] Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006).

[91] ACUS, SSA Federal Courts Analysis, https://www.acus.gov/research-projects/ssa-federal-courts-analysis.

agency interpretations, the legislative branch could improve its own ability to react to those interpretations after they have been drawn into question on judicial review. Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit has long been an enthusiastic promoter of this idea, and the Governance Institute, with which Judge Katzmann was affiliated prior to his appointment to the bench, has done much to translate it into practice.[92]

Under the system devised by the Governance Institute, judges of the courts of appeals, as well as their court clerks and staff, can notify the House and Senate leadership about judicial opinions that raise issues of potential interest to the legislative branch. In a recent article, Judge Katzmann explains:

> Statutory opinions that are appropriate for transmission include those where the court has identified possible grammatical problems that affect meaning and where the statute requires courts to fill in a gap (for example, whether Congress intended the statute to be retroactive). They also include statutes that may present ambiguities in language or ambiguities arising from having to interpret related statutes, or statutes with a perceived problem, about which a judicial opinion suggests the possibility of legislative action.[93]

He adds, however, that "[f]rom the outset … the project's creators cautioned that its principal purpose was not to produce legislative change, but rather to inform busy legislators and their staffs of possible technical problems in statutes."[94]

The system has grown up without the need for implementing legislation, but it depends for its success on informal support – which has been forthcoming. The Judicial Conference has recommended that all circuits participate, and legislative counsels and members of the House and Senate have spoken highly of it.[95] Of perhaps greatest interest for today's hearing is Judge Katzmann's observation in his article that "it may well be worth considering whether it might be useful to develop a parallel transmission process between the executive branch and Congress, whereby agency general counsels sifting through judicial opinions identify issues of relevance to Congress, perhaps with suggestions for Congress to consider. The Administrative Conference of the United States might play a useful role in examining the feasibility of this idea and its implementation."[96] I agree that this idea is worth considering and would suggest that the subcommittee take it under advisement as an idea that it might wish to endorse.

This concludes my prepared statement, and I will be happy to respond to any questions you may have. Thank you again for the invitation to testify.

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[92] *See* Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. Rev. 637, 684-93 (2012).

[93] *Id*. at 689.

[94] *Id*. at 692.

[95] *Id*. at 691 & n.267 (citing to letters from past and present leaders of the House and Senate Judiciary Committees, including current Senators Hatch, Leahy, and Sessions).

[96] *Id*. at 693.