

NOTE

An Empirical Defense of *Auer* Step Zero

WILLIAM YEATMAN*

TABLE OF CONTENTS

INTRODUCTION	516
I. ASSESSING THE DEBATE OVER <i>AUER</i>	522
A. ASSESSMENT OF <i>AUER</i> PROPONENTS	522
B. ASSESSMENT OF <i>AUER</i> SKEPTICS	526
C. ASSESSMENT OF REFORM SKEPTICS	528
D. ASSESSMENT OF EMPIRICAL STUDIES	530
II. METHODOLOGY	532
A. CREATING THE DATASET	532
B. VARIABLES RECORDED	536
1. Appellate Litigation Position	536
2. Nonlegislative Rules	536
3. Informal Adjudications	537
4. Nontextual Interpretations	537
5. On-the-Record Rulemaking, Preamble, and Notice-and-Comment Rules	538
6. Litigation Position Before Administrative Adjudication, Nonprecedential Adjudication, and Precedential Adjudication	539
7. Hybrid Orders	541
8. Party Briefs	543
C. CAVEATS	543

* Georgetown Law, J.D. expected 2019; University of Virginia, B.A. 2002. © 2018, William Yeatman. Thanks to *The Georgetown Law Journal* editorial staff for making the Note so much better, and to Philip Hamburger, Jeffrey Shulman, Lisa Heinzerling, Sam Kazman, Ryan Radia, Marc Scribner, and Graham Deese for their helpful comments.

III. RESULTS	545
A. DESCRIPTIVE RESULTS	547
1. <i>Auer</i> Is No Longer Super Deference	547
2. <i>Auer</i> 's Unexpected Procedural Breadth Mitigates Reform Skeptic's Concerns	548
3. The <i>Auer</i> Doctrine's Supposed Benefits to Administrative Efficiency Are Overblown	550
B. A THEORETICAL JUSTIFICATION AND EMPIRICAL DEFENSE OF <i>AUER</i> STEP ZERO	551
CONCLUSION	553

INTRODUCTION

Since 1945, the Supreme Court has given binding respect to a federal agency's interpretation of its own regulation unless the agency's construal is incorrect.¹ This principle is commonly known as either *Auer*² or *Seminole Rock*³ deference, named after the two cases most often associated with the doctrine's canonical formulation⁴—that an agency's regulatory construction is of “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁵ Although this strong form of deference has existed for more than seventy years, it has become the subject of an intense academic debate only in the last two decades and the polemics have created practical consequences. In 2013, for example, Chief Justice John Roberts announced that the Supreme Court has “some interest in reconsidering” the doctrine.⁶ In the current 115th Congress, the House of Representatives has passed legislation that would replace *Auer* deference with de novo review⁷ and the Senate is considering a bipartisan companion bill that would replace *Auer* deference with non-binding judicial respect.⁸

1. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

2. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

3. *Seminole Rock*, 325 U.S. at 414.

4. See Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 945 (2017) (“At least as it has come to be understood, *Seminole Rock* deference—also commonly called *Auer* deference—commands courts to defer to an agency's interpretation of its own ambiguous regulations.”); see also *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (“The opinion concurring in part and dissenting in part raises serious questions about the principle set forth in *Bowles v. Seminole Rock & Sand Co.* and *Auer v. Robbins*.” (citations omitted)). Throughout this Note, the author uses these terms interchangeably, as they have been used in the scholarship.

5. *Seminole Rock*, 325 U.S. at 414.

6. *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring).

7. See Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017) (as passed by the House of Representatives, Jan. 11, 2017).

8. See Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017) (as introduced in the Senate, Apr. 26, 2017).

The purpose of this study is to inform the ongoing and consequential debate over *Auer* deference with empirical data. To this end, I assessed the entire population of U.S. Courts of Appeals decisions from 1993–2013 that employed *Auer* to review an agency’s regulatory interpretation. To enrich this investigation of *Auer* with a comparative analysis, I created datasets reflecting every U.S. Court of Appeals decision from 1993–2013 that employed the other two primary forms of deference in administrative law: binding *Chevron*⁹ deference and nonbinding *Skidmore*¹⁰ respect. The intent behind conducting a controlled comparison of multiple doctrines in the same courts during the same duration is to afford greater depth of analysis and thereby allow the drawing of stronger inferences.

Part I of this Note assesses four categories of argumentation swirling about *Auer* deference, beginning with proponents who assert that *Auer* is appropriate because agencies, and not courts, are better equipped to make policy by interpreting legal texts with the force of law given agencies’ relative advantages in subject matter expertise and political accountability.¹¹ Critics counter that the *Auer* doctrine encourages poor rule drafting and procedural shortcuts by combining both rule writing and rule exposition authority in the Executive Branch.¹²

9. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). *Chevron* famously established a two-step framework to review statutory interpretations by administrative agencies. *Id.* At step one, if “the intent of Congress is clear,” both the court and the agency “must give effect to the unambiguously expressed intent of Congress.” *Id.* If, however, the statute is “silent or ambiguous,” courts proceed to step two and ask “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

10. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Though it was decided in 1944, the status of *Skidmore* deference was very much in doubt in the wake of *Chevron*, which was issued in 1984. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1237 (2007) (“With its well-known 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and its emphasis therein on mandatory deference toward reasonable agency interpretations of ambiguous statutes, the Supreme Court threw the viability of *Skidmore* into doubt.” (footnote omitted)). However, *Skidmore* was revived in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) and *United States v. Mead Corp.*, 533 U.S. 218, 227–28, 234–35 (2001), both of which identified *Skidmore* as an alternative to controlling deference. Under *Skidmore*’s familiar formulation, the weight a court gives to an administrative interpretation depends 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.” *Skidmore*, 323 U.S. at 140. The *Skidmore* principle, unlike *Auer* or *Chevron* deference, is not a reflection of inferred congressional intent; rather, it is a purely judicially made doctrine, whose purpose is to aid the process of textual interpretation. See Hickman & Krueger, *supra*, at 1239–40.

11. See *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697–98 (1991) (rooting its discussion of *Auer* deference in the same grounds as *Chevron* by inferring congressional intent for federal courts to defer to an agency’s regulatory interpretation because of the agency’s relative advantage over courts in political accountability and expertise); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 307–08 (2017) (explaining “*Auer* is right for the same reason that *Chevron* is right: where Congress has not been clear, deference to the agency, in the face of genuine ambiguity, is the best instruction to attribute to it” due to the agency’s institutional advantages in expertise and political accountability).

12. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J. concurring) (warning that the interaction between the Administrative Procedure Act’s exception for “interpretative rules” and *Auer* deference creates a paradox whereby avowedly non-binding interpretive rules can be

The third category of participants in the *Auer* debate is composed of those who warn that reforming the doctrine could lead to unintended consequences, including a decrease in participatory policymaking, less precise regulations, and unmanageable administrative burdens.¹³ The fourth perspective regarding *Auer* is provided by empirical analyses, the results of which have been inconsistent: one study suggests *Auer* is a form of super-strong deference, another claims it is no stronger than other forms of deference, and another indicates that the government's win rate under *Auer* has diminished in recent history.¹⁴

Part II explains the methodology of this study. I used database searches to identify and review the entire population of U.S. Courts of Appeals decisions from 1993–2013 that employed the *Auer* framework. Because the respective populations of 1993–2013 circuit court cases relying on *Chevron* and *Skidmore* deference were too great to practicably review for this study, I used a simple probability method to create samples from which I could draw inferences about the population as a whole. Thus, I collected an original dataset of variables attendant to 1,047 published federal courts of appeals decisions: 416 for *Auer*, 392 for *Chevron*, and 239 for *Skidmore*. Across these decisions, the U.S. Courts of Appeals reviewed 1,120 discrete textual interpretations by regulatory agencies. For each interpretation, I recorded identifying information—case name, case citation, and agency involved—and whether the government's interpretation was accepted by the court. I also assigned each interpretation to one of twelve categories of administrative procedure. This study contributes to a growing body of empirical analyses of deference regimes as applied by Article III courts,¹⁵ yet its methodology differs from its predecessors in three important

accorded binding effect by courts of law); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 647 (1996) (positing that the *Auer* doctrine encourages agencies to write vague rules so they can later interpret them through informal administrative procedures, yet still receive binding deference).

13. See Scott F. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 116–18 (2000) (arguing that reforming *Auer* could lead regulated entities to withhold their input during notice-and-comment rulemaking, thereby diminishing the rule's quality); Conor Clarke, *The Uneasy Case Against Auer and Seminole Rock*, 33 YALE L. & POL'Y REV. 175, 193 (2015) (claiming that reforming *Auer* would cast doubt on "thousands" of long-standing interpretations); Nielson, *supra* note 4, at 948–49 (explaining that diminishing deference to an agency's regulatory interpretations might lead agencies to exercise their discretion to promulgate policy by adjudication, rather than the more inclusive process of notice-and-comment rulemaking).

14. See Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 825–27 (2015) (investigating circuit court application of *Auer* deference from 2011–2014 and concluding that *Auer* is no longer the extreme form of deference it was once thought to be); 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, 1099–1100 (2008); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 519–20 (2011) (investigating circuit court application of *Auer* deference from 1999–2001 and 2005–2007 and concluding that courts uphold government interpretations roughly the same under *Auer*, *Skidmore*, and *Chevron* deference).

15. See, e.g., Barmore, *supra* note 14, at 825–27 (reviewing circuit court application of *Auer* deference from 2011–2014); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116

ways. First, this is the first analysis to systematically compare population-level statistics across multiple deference regimes as employed by U.S. Courts of Appeals.¹⁶ Second, this study covers twenty years, a longer timespan than previous studies.¹⁷ It is therefore more representative of the courts' behavior. Finally, this analysis provides a more refined investigation of administrative processes than prior empirical studies.¹⁸

Part III sets forth the results of the study and draws three significant inferences from the data regarding the ongoing debate over *Auer* deference. First, the data indicate that over the twenty-year period, *Auer* deference was indeed stronger than *Chevron*. From 1993–2013, the federal government prevailed in 74% of cases when the court invoked *Auer* and in 68% of cases when it invoked *Chevron*.¹⁹ However, the data also lend support to the thesis that the strength of *Auer* in the circuit courts has narrowed in the wake of Supreme Court decisions that constrained the doctrine.²⁰ Comparative data contradict the likelihood that the government's diminished win rate under *Auer* is part of a larger trend across all deference doctrines. After 2006, the government's win rate fell significantly when it invoked *Auer*, whereas its win rate under *Chevron* and *Skidmore*

MICH. L. REV. 1, 5–6, 28 (2017) (surveying 1558 agency statutory interpretations reviewed by circuit courts from 2003–2013 and finding that these courts upheld 71% of interpretations); Hickman & Krueger, *supra* note 10, at 1271–81 (analyzing circuit court application of *Skidmore* and finding that courts upheld 60.4% of interpretations); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 4–5, 30 (1998) (examining circuit court application of *Chevron* in 1995 and 1996, and finding that courts upheld 73% of interpretations); Pierce & Weiss, *supra* note 14, at 519–20 (investigating circuit court application of *Auer* deference from 1999–2001 and 2005–2007); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 990 (1990) (accounting government win rates in administrative law cases before and after *Chevron* in four six-month periods from 1965–1985, and one two-month period in 1988).

16. None of the studies identified above in note 15 analyzed the application of multiple deference regimes at once. To this author's knowledge, the only controlled study of multiple deference regimes considered Supreme Court decisions. See Eskridge & Baer, *supra* note 14, at 1097–1200.

17. See, e.g., Barmore, *supra* note 14, at 815–16, 827 (limiting period of analysis to 2011–2014); Pierce & Weiss, *supra* note 14, at 519 (investigating government's win rate under *Auer* between 1999–2001 and 2005–2007); Schuck & Elliott, *supra* note 15, at 989–96, 989 n.13 (examining appeals court cases involving “judicial review of federal administrative action” in four six-month periods from 1965–1985, and one two-month period in 1988).

18. Some previous studies did not record the administrative process attendant to the interpretations. See, e.g., Hickman & Krueger, *supra* note 10; Pierce & Weiss, *supra* note 14, at 519–20 (omitting discussion of administrative procedure in study design). Others did. See, e.g., Barmore, *supra* note 14, at 826 (dividing administrative processes into six categories: “agency orders,” “public issuances,” “amicus briefs,” “administrative court decisions,” “party briefs,” and “private communications”); Eskridge & Baer, *supra* note 14, at 1206 (employing three categories of administrative process: “Legislative Rule or Executive Order,” “Formal Adjudication,” and “Informal Agency Interpretation”). By comparison, this study uses twelve categories to group administrative processes. See *infra* Section II.B.

19. See *infra* Table 1.

20. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (denying *Auer* deference to agency interpretation of regulation that failed to provide proper notice to regulated entities); *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* deference is inappropriate for agency interpretation of regulation that merely repeats the statutory text).

remained flat and slightly increased, respectively.²¹ Also, at any time scale, the government's win rate when courts invoked *Auer* and *Chevron* was significantly greater than when it invoked *Skidmore*.²² This makes sense given that the former are binding doctrines, whereas the latter is nonbinding.

The second significant result demonstrates the unexpected breadth of administrative process associated with *Auer* deference. To date, the *Auer* debate has focused on the extent to which the doctrine encourages policymaking through informal procedures that deprive the public of notice and participation. Inherent in this controversy is an assumption, sometimes explicit, that virtually all the interpretations that benefit from *Auer* deference are found in informal issuances. In fact, the results of this study indicate that courts give *Auer* deference to interpretations falling across the continuum of administrative procedure in a surprisingly balanced manner. There are, for example, significantly more interpretations subject to *Auer* that result from formal adjudications than from nonlegislative rules.²³ Overall, federal courts of appeals applied the *Auer* framework more to interpretations resulting from administrative processes that carry the force and effect of law than to interpretations that do not.²⁴ This surprising result directly bears on the argument set forth by reform skeptics. These skeptics claim that an unintended consequence of reforming the doctrine could be to encourage agencies to exercise a form of discretion under *SEC v. Chenery Corp.*,²⁵ known commonly as "*Chenery II* discretion,"²⁶ to shift policymaking from rulemaking to adjudication.²⁷ This argument is based on the understanding that an agency's discretion to choose between adjudication and rulemaking is a substitute for *Auer*; however, the data suggest that these two doctrines are

21. See *infra* Table 1.

22. See *infra* Table 1.

23. Of the interpretations subject to *Auer* reviewed in this study, fifty-eight interpretations were contained in nonlegislative rules and seventy-two interpretations originated in precedential adjudication. See *infra* Table 2.

24. Of the cases that included interpretations subject to *Auer* deference where the government was a party reviewed in this study, 177 interpretations came in formats that carry the force and effect of law and 169 interpretations did not. This accounting omits interpretations found in regulatory preambles, which are difficult to classify in the context of *Auer* deference. On the one hand, preambles do not carry the force and effect of law. On the other hand, the preamble is arguably the optimal opportunity for agencies to interpret the rules they write. See generally Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012) (arguing that regulatory preambles, which agencies are required to produce and which must include a detailed explanation of the grounds and purposes of the regulation, are among the most reliable sources for discerning regulatory purpose). This accounting also omits party briefs where the government was not a litigant. See *infra* Section II.B.8.

25. 332 U.S. 194 (1947).

26. See Nielson, *supra* note 4, at 948 & n.25.

27. There are two primary means—rules and adjudication—by which agencies issue policy with the force and effect of law. Rules are prospective and of general applicability; adjudications, by contrast, are retrospective and usually pertain to disputes between individuals and the government. Generally, rulemaking is akin to the legislative process, while adjudication resembles the case-by-case policymaking used in the common law. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 48–49 (7th ed. 2016).

complements, which should depress the likelihood of unintended consequences resulting from reforming *Auer*.

The third significant result of this study is the quantification of the administrative burden incurred by replacing or reforming *Auer*. Using this study's dataset, it is possible to create a simple model that estimates the administrative burden of either replacing *Auer* deference with *Skidmore* respect or reserving *Auer* for interpretations stemming from administrative procedures that carry the force and effect of law.²⁸ In this manner, the study tests the claim made by *Auer*'s defenders that reforming the doctrine would unduly hinder administrative and judicial efficiency. As this study demonstrates, fully rejecting *Auer* and replacing it with residual *Skidmore* deference would have resulted in an estimated fifty-one fewer agency regulatory interpretations surviving judicial review in the circuit courts from 1993–2013,²⁹ or about one interpretation per circuit court every five years.³⁰ These results belie claims that disrupting the doctrine would lead to chaos in regulatory agencies and federal courts.

After assessing the four viewpoints in the *Auer* debate in light of the empirical data in this study, I conclude that the Supreme Court should reform *Auer*, not reject it. Virtually all criticism leveled at the doctrine would be addressed if the Court limited *Auer* deference in the same fashion it does *Chevron* deference—by limiting the judicial respect accorded to interpretations resulting from formal administrative procedures that carry the force and effect of law. For starters, such reform would address the hole in the institutional argument advanced by *Auer*'s proponents. If *Auer* is right for the same reasons that *Chevron* is right, *Auer* should be treated the same, if for no other reason than uniformity. Reforming *Auer* would also placate *Auer*'s critics by closing the loophole they allege the doctrine creates in the Administrative Procedure Act (APA).³¹ Finally, as discussed, the data deflate the concerns expressed by skeptics of *Auer* reform to the extent the data suggest that agencies' *Chenery II* discretion is a complement of, not a substitute for, *Auer*. All told, reforming *Auer* is a modest check accompanied by minimal administrative burden that would achieve doctrinal uniformity and answer unaddressed criticisms.

28. This second modeling possibility is meant to project the administrative burden of adopting a Step Zero for the *Auer* doctrine. See *infra* Section II.A.

29. This figure represents the difference between how often the government's interpretation prevailed under *Auer* versus the number of times the government would have prevailed had the courts applied residual *Skidmore* deference to those cases instead. See *infra* Part III.

30. The equation that produces this result is: $(51 \text{ interpretations} \div 20 \text{ years}) \div 13 \text{ U.S. Courts of Appeals} = 1 \text{ interpretation per circuit court about every 5 years.}$

31. 5 U.S.C. §§ 500–596 (2012).

I. ASSESSING THE DEBATE OVER *AUER*

In the modern-day parlance of social media, *Auer* deference is “trending” among scholars and practitioners of administrative law.³² Broadly speaking, this ongoing debate has engendered four categories of perspectives on *Auer*: (1) proponents, (2) skeptics, (3) reform skeptics, and (4) empiricists. The following subsections address the strengths and weaknesses of these perspectives.

A. ASSESSMENT OF *AUER* PROPONENTS

The first category is composed of proponents of the doctrine. Both the Supreme Court and prominent academics have justified *Auer* deference, like *Chevron* deference, in the relative institutional competence of regulatory agencies over courts. Proponents of this viewpoint recognize that interpreting documents with the force of law entails policymaking, and they accordingly argue that rendering policy is better performed by expert agencies tethered to a popularly elected president’s management agenda than by inept and unelected judges.

Although the Supreme Court first set forth binding deference to agency interpretations of their own regulations in 1945, it was not until 1991 that the Court explained its reasoning, and it did so in reference to the *Chevron* doctrine. The Court’s 7–1 majority opinion in *Pauley v. Bethenergy Mines, Inc.* turned on the Labor Secretary’s interpretation of regulations pursuant to the Federal Coal Mine Health and Safety Act.³³ The operative question in *Pauley* was whether the Labor Department’s black lung benefits regulations were more “restrictive” than predecessor regulations promulgated by a different agency. Although the opinion does not expressly cite *Seminole Rock*, the Court did address the matter of judicial deference to an agency’s regulatory construction. In so doing, the Court announced that deference to an agency’s regulatory interpretations is legitimated by the same factors that warrant *Chevron* deference to an agency’s statutory constructions.³⁴ Famously, the Court in *Chevron* recognized that resolving statutory ambiguity entails interstitial lawmaking and concluded that Congress intended for administrative agencies, rather than judges, to wield interpretive policymaking authority because of the former’s comparative strengths in expertise and accountability.³⁵ In turn, the *Pauley* Court referenced *Chevron* to infer that such congressional instruction is congenital to a delegation of lawmaking authority to administrative agencies through enabling statutes:

32. Consider the results of a simple Westlaw search for the term “*Auer* deference” (including quotation marks) used in law reviews and journals in 2005, 2010, and 2016. In 2005, there were four total results. In 2010, there were sixteen total results. In 2016, there were forty-four total results.

33. 501 U.S. 680, 684, 688–89 (1991).

34. *See id.* at 696.

35. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 437–38 (1995) (arguing that *Chevron* rests on the assumption that resolving ambiguity involves lawmaking).

As *Chevron* itself illustrates, the resolution of ambiguity in a statutory text is often more a question of policy than of law. When Congress, through . . . the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited. It is precisely this recognition that informs our determination that deference to the Secretary is appropriate here In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.³⁶

The Supreme Court's implicit if-*Chevron*-then-*Auer* logic is echoed by prominent academics. For example, Harvard Law School professors Cass Sunstein and Adrian Vermeule recently reasoned that "*Auer* is right for the same reason that *Chevron* is right: where Congress has not been clear, deference to the agency, in the face of genuine ambiguity, is the best instruction to attribute to it" due to the agency's institutional advantages in expertise and political accountability.³⁷

To those who argue that *Auer* is right for the same reasons that *Chevron* is right, critics of *Auer* counter by raising a question: why, despite their common basis and effect,³⁸ are the *Chevron* and *Auer* doctrines employed by Article III courts in such a dissimilar fashion with arguably ill incentives for agencies? The Supreme Court does not give *Chevron* deference to just any agency statutory interpretation. Instead, the Court reserves binding judicial respect only for those interpretations that reflect Congress's intent for the agency, and not courts, to wield interpretive policymaking authority. Known colloquially as *Chevron* Step Zero,³⁹ the Court, before granting deference, decides whether the agency's statutory interpretation represents an exercise of a congressional delegation to act with the force of law.⁴⁰ Administrative process is central to a Step Zero analysis, such that *Chevron* deference is presumptively reserved for interpretations resulting from policymaking procedures like notice-and-comment rulemaking and adjudication.⁴¹ For agency interpretations deemed unworthy of controlling deference because they are not a discharge of congressionally authorized legal

36. *Pauley*, 501 U.S. at 696–97 (internal citations omitted).

37. Sunstein & Vermeule, *supra* note 11, at 308.

38. Regulations are no less binding than statutes, *see* *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979), so resolving ambiguity in either type of document (a law or regulation) will have the same effect on the public, even if to different degrees.

39. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 *Geo. L.J.* 833, 836 (2001) (coining phrase *Chevron* "Step Zero").

40. *See id.* at 837 ("[T]he scope of the delegation of interpretational authority extends only so far as Congress has given the agency the authority to bind persons outside the agency with the force of law, and no further."). *See generally* Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 247 (2006) (discussing *Chevron* Step Zero as an inquiry that turns on "whether Congress intended to delegate law-interpreting power to agencies").

41. *See* *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.").

force, federal courts ordinarily turn to the non-binding *Skidmore* doctrine,⁴² which accords respect to agency constructions to the extent they are persuasive.⁴³ Notwithstanding the similarities between *Chevron* and *Auer* deference, the Supreme Court has not set forth a Step Zero for its *Auer* framework.

As a practical matter, the difference between the Supreme Court's interpretive frameworks for *Auer* and *Chevron* deference is evident primarily in how federal courts account for the administrative process that led to the agency interpretation at controversy. When a federal court decides whether to apply the *Chevron* framework, administrative process is a key consideration and formal procedures are favored; however, when a federal court applies the *Auer* framework, administrative process does not factor into the court's reasoning.⁴⁴ The Supreme Court has never explained the inconsistent role played by procedural formality in the two deference doctrines that are otherwise identical in principle and impact.

Critics argue that the *Auer* doctrine's blindness to administrative process creates a loophole in procedural safeguards otherwise mitigated by the *Chevron* doctrine's presumption in favor of interpretations contained in formal formats. This criticism stems from a fundamental distinction in the APA between "rules" that must undergo notice-and-comment procedures and "interpretative rules," which are exempt from such procedural rigors.⁴⁵ Although the exact boundary between rules and interpretive rules is infamously challenging to discern, the general standard is that substantive rules carry the force of law whereas interpretive rules do not.⁴⁶ The problem is that binding deference doctrines obviate this difficult distinction altogether by infusing interpretive rules with the force of law. As explained by the late Justice Antonin Scalia:

42. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see also *supra* note 10 and accompanying text.

43. See, e.g., *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1402 (2013) (finding interpretation set forth in agency memoranda to warrant neither *Chevron* deference nor *Skidmore* respect because "they lack persuasive force"); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487–88 (2004) (denying *Chevron* deference but granting *Skidmore* respect to an agency interpretation in a guidance document); see also *Hickman & Krueger, supra* note 10, at 1239 (explaining how the Supreme Court in *Mead* linked *Chevron* and *Skidmore* "so that they now function collectively as parts of a comprehensive framework for judicial review of administrative interpretations"). But see *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (denying *Chevron* deference to an agency interpretation in a notice-and-comment rule and instead deciding the case under rules of statutory interpretation).

44. The underlying holding in *Auer* is that an agency's litigation position in an appellate brief warrants controlling deference. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997). If an appellate litigation position—which is the latest an agency could possibly render its regulatory interpretation before judicial review and is therefore a decidedly informal administrative process—merits *Auer* deference without question, then it follows that deciding whether to grant *Auer* deference is unrelated to process. According to the results in this study, this is how U.S. Courts of Appeals have uniformly addressed the doctrine.

45. See 5 U.S.C. § 553(b)(3)(A) (2012) (exempting "interpretative rules" from procedures for a "rulemaking").

46. See Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547–48 (2000) ("Courts often refer to the distinction between [legislative rules and interpretative rules] as 'fuzzy,' 'tenuous,' 'blurred,' 'baffling,' and 'enshrouded in considerable smog.'" (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975))).

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 bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules Interpretive rules that command deference *do* have the force of law.⁴⁷

Thus, the interplay between the APA's exception for interpretive rules and controlling deference creates a paradox whereby avowedly nonbinding interpretive rules can be accorded binding effect by courts of law. For statutory interpretation, the *Chevron* framework's presumption in favor of formal administrative procedures defends against agency attempts to evade the burden of inclusive procedural requirements by passing off a legislative rule as an interpretive rule.⁴⁸ As explained by Professors Matthew Stephenson and Miri Pogoriler:

[A]gencies have a choice: they can use notice-and-comment proceedings to promulgate their statutory interpretations as legislative rules, in which case they will presumptively receive *Chevron* deference, or they can opt to issue these interpretations informally as interpretive rules, in which case they will have to defend their interpretations under the less deferential *Skidmore* standard. But they have to select one or the other.⁴⁹

By contrast, the *Auer* doctrine does not afford this same protection against procedural shortcuts because administrative process is not a factor that federal courts consider when reviewing agency interpretations of their own regulations.⁵⁰ According to *Auer*'s skeptics, the doctrine encourages agencies to skirt their procedural duties by publishing vague regulations that can be subsequently infused with meaning through informal interpretations, to which courts accord controlling deference.⁵¹

47. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J. concurring in the judgment).

48. See Merrill & Hickman, *supra* note 39, at 836–37 (discussing *Chevron* Step Zero).

49. Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011). The authors refer to this dynamic as the “pay me now or pay me later” principle.” *Id.*

50. See *supra* note 44 and accompanying text.

51. See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 943–44 (2004) (positing that the APA's procedural exception for nonlegislative rules allows them to function as legislative rules without satisfying notice-and-comment procedures); Stephenson & Pogoriler, *supra* note 49, at 1461–62 (articulating “the worry that *Seminole Rock* could enable agencies to adopt legally binding norms without *either* the *ex ante* constraint of meaningful procedural safeguards *or* the *ex post* check of rigorous judicial review”); Allyson N. Ho, *Why Seminole Rock Should Be Overruled*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 19, 2016), <http://yalejreg.com/nc/2039-2/> [<https://perma.cc/WJG3-UBF2>] (echoing argument made by Stephenson and Pogoriler).

B. ASSESSMENT OF *AUER* SKEPTICS

In a highly influential 1996 article, then-Professor John F. Manning, a former law clerk to the late Justice Scalia, contended that *Auer* deference contravenes constitutional principles of divided functions by allowing agencies to interpret the rules they write.⁵² Manning argues that this combination of legislative and judicial functions in administrative agencies runs afoul of the constitutional principle of separation of powers.⁵³ In this regard, he contrasts *Auer* with *Chevron*, where lawmaking remains in the hands of Congress and interpretive power effectively rests with the agency.⁵⁴ According to Manning, the *Auer* doctrine's combination in agencies of law drafting and law exposition results in governing flaws historically associated with political structures that violate the separation of powers principle.⁵⁵ In particular, Manning warns that *Auer*'s concentration of judicial and legislative functions in administrative agencies diminishes the "incentive to enact rules that impose clear and definite limits upon governmental authority" because they might wish later to avoid procedural safeguards through interpretation or adjudication.⁵⁶

Prominent supporters of *Auer* dispute Professor Manning's thesis. For example, Professor Ronald Levin observes that there is no evidence to suggest that agencies promulgate vague rules.⁵⁷ In addition, Professors Sunstein and Vermeule make the compelling case that political management goals within administrative agencies create the opposite incentive, encouraging agencies to promulgate clear rules to bind future administrations.⁵⁸ To this end, consider a president in her second term. Because many years will pass between when an agency writes a rule and when an agency subsequently could request binding deference for an informal interpretation of that rule, a second-term president is unlikely to have enough time to exploit the *Auer* doctrine. If her administration sought to intentionally draft a vague rule, she would merely set up future presidential administrations to shape the regulation through informal interpretations. Of course, her successor might not share her political priorities, so it does not make much sense for her administration to publish vague rules in this context. Rather, her administration's incentive would be to publish detailed rules to ensure her policies have a lasting effect.

52. See Manning, *supra* note 12, at 648. According to Westlaw, Manning's article has been cited in nineteen U.S. Courts of Appeals decisions and in five Supreme Court decisions.

53. See *id.*

54. See *id.* at 638–39.

55. See *id.* at 631.

56. *Id.* at 647.

57. See 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/B5NS-K79L>].

58. See Sunstein & Vermeule, *supra* note 11, at 309. Professor Manning acknowledged this possibility in his constitutional critique of the *Auer* doctrine. See Manning, *supra* note 12, at 656 & n.210.

It stands to reason that Professors Sunstein and Vermeule are correct and, as suggested by *Auer's* critics,⁵⁹ the incentive for clear rules lessens or even nullifies the incentive for vague rules. Although this argument is well taken, it is nonetheless irrelevant because the criticism to which it responds is immaterial. That is, all parties to the ongoing debate over *Auer* are laboring under the misapprehension that vague rules are a necessary precondition for subsequent informal interpretations that skirt procedural safeguards.⁶⁰ As a practical matter, incentives for clear or vague rules have a weak relationship to an agency's opportunity to take subsequent procedural shortcuts. Regardless of how hard drafters strive for clarity, the richness of the English language makes it relatively easy for a determined agency to find ambiguity in virtually any non-quantitative regulatory text. Evidence abounds of the near limitless linguistic possibilities with which to engineer interpretational uncertainty in laws and regulations. It is, for example, routine for Supreme Court Justices to disagree on whether the plain meaning of a word or phrase is ambiguous.⁶¹ Similarly, the Department of Justice (DOJ) demonstrates the fluidity of language when it argues, as it often does, that a statutory provision has an unambiguous plain meaning or, in the alternative, the agency's interpretation receives controlling deference.⁶² A final example suggesting the near impossibility of avoiding

59. See Manning, *supra* note 12, at 655 (“The right of self-interpretation under *Seminole Rock* removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.”); Stephenson & Pogoriler, *supra* note 49, at 1464 (“Even if the legislative rule has to go through notice and comment, the agency could deliberately draft this legislative rule broadly and vaguely, and then later resolve all the controversial points by issuing interpretive rules.”); Ho, *supra* note 51 (“The agency then promulgates an ambiguous rule that, although preceded by notice and comment, does not address many critical issues. The agency then uses interpretive rules—issued without public feedback—to provide the only meaningful guidance on those issues—guidance that under *Auer* and *Seminole Rock* generally binds courts.”).

60. Opponents of the doctrine uniformly assume that vague rules are a precondition for the subsequent opportunity to circumvent procedural safeguards. See *supra* note 51 and accompanying text. Proponents of *Auer* deference have also operated under this assumption. See, e.g., Sunstein & Vermeule, *supra* note 11, at 308–10.

61. See, e.g., *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 219–20, 230, 237 (2009) (Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Alito, and Breyer understood the term “best technology available” in the Clean Water Act to be ambiguous; Justices Stevens, Souter, and Ginsburg believed the term's meaning to be unambiguous); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228, 241–42 (1994) (Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and Ginsburg determined that the word “modify” as used in the Communications Act was unambiguous; Justices Stevens, Blackmun, and Souter believed the word had many possible meanings); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 41, 43 (1990) (Justices Brennan, Marshall, Blackmun, Stevens, O'Connor, Scalia, and Kennedy concluded that the phrases “information collection request” and “collection of information” in the Paperwork Reduction Act have a plain meaning; Chief Justice Rehnquist and Justice White found the phrase to be ambiguous).

62. See, e.g., Brief for Appellee at 14–15, 24–25, *Wells Fargo Bank, N.A. v. Fed. Deposit Ins. Corp.*, 367 F.3d 953 (D.C. Cir. 2004) (No. 03-5198) (arguing that the Funds Act unambiguously required FDIC to calculate a one-time assessment on member banks in a certain manner, but, if not, then FDIC's interpretation of the Deposit Insurance Funds Act of 1996 controls); Brief for Respondent at 20–23, *Ala. Power Co. v. FERC*, 160 F.3d 7 (D.C. Cir. 1998) (No. 97-1725) (contending the plain meaning of the Federal Power Act requires

textual ambiguities is the common scenario whereby each party to a controversy claims that its interpretation of the same term reflects the plain meaning of the statute, despite each interpretation directly contradicting the other.⁶³

In this manner, the drafter's intentions are unrelated to subsequent incentives and opportunities for agencies to bypass procedural safeguards by effectuating substantive policy through informal interpretations of the underlying rule. Put differently, the problem with *Auer* deference is not the agency's incentives; rather, the problem is that the doctrine provides agencies with the opportunity to engineer textual ambiguity and thereby skirt procedural safeguards. Again, *Chevron* deference guards against this possibility with its presumption in favor of processes that carry the force and effect of law. *Auer* deference does not. So, the criticism remains: Why doesn't the *Auer* doctrine provide the same sorts of procedural assurances as the *Chevron* doctrine given that the two principles share a common justification and effect?

C. ASSESSMENT OF REFORM SKEPTICS

One contingent in the debate over *Auer* warns the doctrine's skeptics to be careful what they wish for. This intellectual camp believes that reforming *Auer* deference would entail unintended consequences that could be worse than any of the doctrine's alleged ills.

For example, Professor Aaron Nielson argues that diminishing deference to agency interpretations of their own rules might encourage agencies to render more policymaking by adjudication or adjudicative-like procedures.⁶⁴ In light of an agency's *Chenery II* latitude to choose between rulemaking and adjudication as a means of policymaking,⁶⁵ Professor Nielson's concern is that an unintended consequence of narrowing *Auer* would be to give agencies an incentive to eschew rulemaking for adjudication, which would be a worse outcome because adjudication is less inclusive and provide less notice than notice-and-comment rulemaking.⁶⁶ He observes:

[I]f the Supreme Court were to overrule *Seminole Rock*, what would happen? The intended consequence would be clearer regulations, as agencies would have one less reason to promulgate ambiguous rules. But isn't there also an unintended consequence lurking in the background? Might agencies not

utilities to obtain federal regulatory approval prior to changing their depreciation rates for accounting purposes, but, if not, then FERC's statutory construction deserves *Chevron* deference).

63. See, e.g., *Int'l Swaps & Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n*, 887 F. Supp. 2d 259, 266 (D.D.C. 2012) ("This case largely turns on whether the CFTC, in promulgating the Position Limits Rule, correctly interpreted Section 6a as amended by Dodd-Frank. Although both sides forcefully argue that the statute is clear and unambiguous, their respective interpretations lead to two very different results . . .").

64. See Nielson, *supra* note 4, at 948-49.

65. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

66. See Nielson, *supra* note 4, at 986-88 (explaining notice and participatory deficiencies of adjudications relative to rulemakings).

promulgate *clearer* regulations, but instead promulgate *fewer* regulations? In particular, if *Seminole Rock* were gone, agencies might respond at the margins by retreating from rulemaking in favor of their power under *Chenery II* to enforce the statutes they administer through retroactive adjudication⁶⁷

Professor Manning responds to Professor Nielson's caution by noting that "[a]gencies are not institutionally indifferent to the choice between rulemaking and adjudication" due to "practical [and] legal concerns."⁶⁸ From a practical perspective, "a typical adjudication is not well suited to broad-gauged policymaking."⁶⁹ From a legal perspective, Professor Manning observed that Congress often cabins an agency's discretion to choose between rulemaking and adjudication to make policy.⁷⁰ The Clean Air Act, for example, includes a section on procedure that lists twenty regulatory actions that must be subject to the notice-and-comment process.⁷¹ Professor Nielson acknowledges these criticisms by conceding that *Chenery II* and *Auer* deference are "imperfect substitutes," but that they are substitutes nonetheless.⁷²

A different warning about the unintended consequences of reforming *Auer* is set forth by Scott Angstreich.⁷³ In the absence of binding *Auer* deference, Angstreich argues that regulated entities would be reluctant to bring up textual ambiguities during rulemaking because of their fear that the agency would not agree with their position.⁷⁴ Instead, Angstreich contends that in a world without *Auer* deference, regulated parties would be "in a much better position" to press their preferred interpretation in court because the agency's interpretation would not receive controlling deference.⁷⁵ As compared to this hypothetical alternative, Angstreich believes that the existing *Auer* framework motivates regulated entities to participate in rulemaking so that they can push for greater regulatory certainty, and, as a result, the *Auer* doctrine actually leads to greater precision in regulatory texts.⁷⁶

Angstreich's thesis has gone unaddressed in the literature, but, in this author's viewpoint, his argument raises fairness concerns by placing the onus for regulatory clarity on the regulated entity rather than on the agency. Between the agency and regulated entities, it is the former that possesses lawmaking author-

67. Aaron Nielson, *Beyond Seminole Rock—Or Why What We Think We Know About Administrative Deference May Be Wrong*, YALE J. ON REG.: NOTICE & COMMENT (Aug. 11, 2016), <http://yalejreg.com/nc/beyond-seminole-rock-or-why-what-we-think-we-know-about-administrative-deference-may-be-wrong> [<https://perma.cc/T8WY-96JP>].

68. Manning, *supra* note 12, at 665.

69. *Id.* at 666.

70. *See id.* at 667.

71. *See* 42 U.S.C. § 7607(d)(1) (2012).

72. *See* Nielson, *supra* note 4, at 949.

73. *See* Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 116–18 (2000).

74. *See id.* at 117–18, 118 n.336.

75. *Id.* at 118.

76. *See id.* at 114–18.

ity, drafts the rule, and employs the vast resources of the federal government. Given this gross power imbalance, can it really be incumbent on the regulated entity to achieve regulatory clarity?

In addition to the arguments set forth by Professors Nielson and Angstreich, there is a third intellectual camp that is skeptical of reforming *Auer* based on an understanding that doing so would generate an unacceptable administrative burden on both agencies and the courts. Under this line of reasoning, the *Auer* doctrine “greatly simplifies”⁷⁷ the task of interpreting regulations in the following manner: reforming *Auer* would “cast[] doubt on many thousands of longstanding agency interpretations,”⁷⁸ “abandoning *Seminole Rock* . . . [would] also unsettle the meaning of almost every facially ambiguous regulation now in force,”⁷⁹ and “[a]bandoning *Auer* could cause considerable disruption” by instigating circuit splits.⁸⁰

D. ASSESSMENT OF EMPIRICAL STUDIES

Several empirical studies of *Auer* deference have been performed, and they present a muddled picture. In a 2008 study, Professors Eskridge and Baer reviewed every textual interpretation by the Supreme Court from 1984–2004 and determined that the government won significantly more cases when the Court invoked *Auer* (91%) than when it invoked *Chevron* (76%).⁸¹ This result has informed a widely held perception that *Auer* is a stronger form of deference than *Chevron*. To wit, U.S. Courts of Appeals for the First,⁸² Third,⁸³ Fifth,⁸⁴ Sixth,⁸⁵ District of Columbia,⁸⁶ and Federal⁸⁷ Circuits have claimed that *Auer* is more deferential than *Chevron*.⁸⁸

77. Sunstein & Vermeule, *supra* note 11, at 298.

78. Clarke, *supra* note 13, at 193.

79. Angstreich, *supra* note 73, at 122.

80. Ben Snowden, *Has Auer's Hour Arrived?*, 28 NAT. RESOURCES & ENV'T 31, 34 (2014).

81. See Eskridge & Baer, *supra* note 14, at 1099 tbl.1.

82. See *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 21 (1st Cir. 2012) (“We also defer to the EPA’s reasonable interpretation of the [statute]. This deference increases where the EPA interprets its own regulations . . .” (internal citation omitted)).

83. See *Abdulai v. Ashcroft*, 239 F.3d 542, 552 (3d Cir. 2001) (“[O]ur standard of review is even more deferential when an agency is interpreting a regulation rather than a statute that it administers.”).

84. See *Elgin Nursing & Rehab. Ctr. v. U.S. Dep’t of Health & Human Servs.*, 718 F.3d 488, 493 (5th Cir. 2013) (“Agencies receive even greater deference under *Seminole Rock* and *Auer* than they would under *Chevron* . . .”).

85. See *Ghazali v. Holder*, 585 F.3d 289, 293 (6th Cir. 2009) (“The first explanation is entitled to *Chevron* deference The second explanation is entitled to near-conclusive *Seminole Rock* deference” (internal citation omitted)).

86. See *Bldg. & Constr. Trades Dep’t, AFL–CIO v. Reich*, 40 F.3d 1275, 1281 (D.C. Cir. 1994) (“But Labor’s interpretation of its own regulations is entitled to deference even greater than that afforded its interpretation of the statute under *Chevron*.”).

87. See *Reizenstein v. Shinseki*, 583 F.3d 1331, 1336 (Fed. Cir. 2009) (“[*Auer*] deference ‘is broader than deference to the agency’s construction of a statute’” (quoting *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1363–64 (Fed. Cir. 2005))).

88. See Robert A. Anthony & Michael Asimow, *The Court’s Deferences—A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS, Fall 2000, at 10, 10–11 (“As worded in the *Auer* opinion, it is even more

The above results were challenged in a 2011 paper by Professors Richard Pierce and Joshua Weiss, who conducted an empirical analysis of 219 U.S. District Courts and Courts of Appeals decisions that employed *Auer* over two three-year periods (1999–2001 and 2005–2007).⁸⁹ They found that agencies won 76% of the time, which comports with the government’s win rate under *Chevron* as established by prior empirical studies.⁹⁰ They concluded that “district courts and circuit courts apply *Auer* [or] *Seminole Rock* deference in about the same manner as they and the Supreme Court apply the other deference doctrines that have been subjected to empirical study.”⁹¹ Regarding the significant difference between his and Professor Weiss’s figure (76% government win rate) and Professors Eskridge and Baer’s figure (91%), Professor Pierce concluded in a later article that the disparity was due to the small sample size (eleven cases) that formed the basis of Professors Eskridge and Baer’s results.⁹²

In a 2015 paper, Cynthia Barmore reviewed the U.S. Courts of Appeals’ application of *Auer* deference from 2011–2014 and found evidence suggesting that these courts have narrowed the doctrine in the wake of two recent Supreme Court opinions that have “given lower courts a variety of tools to reject [regulatory] interpretations that they consider unreasonable.”⁹³

The Supreme Court’s first substantive check on *Auer* deference came in 2006 with *Gonzales v. Oregon*.⁹⁴ At issue was whether DOJ could interpret its existing rules to forbid the prescription of drugs to assist suicide.⁹⁵ In denying *Auer* deference to DOJ, the Court held that controlling deference is inappropriate for interpretations of regulations that merely repeat, or “parrot,” the underlying text of the organic statute.⁹⁶ In 2012, the Supreme Court narrowed the *Auer* doctrine again in *Christopher v. SmithKline Beecham Corp.*⁹⁷ That case concerned a regulatory interpretation by the Department of Labor regarding whether pharmaceutical salespeople are exempt from the requirements of the Fair Labor Standards Act.⁹⁸ Justice Samuel Alito’s majority opinion acknowledged that *Auer* deference would normally be due to the agency’s construction, which came in the form of an appellate litigation brief.⁹⁹ Nonetheless, the Court found that *Auer* deference was inappropriate because granting controlling deference to

deferential than *Chevron* because it seems to require the courts to uphold an agency interpretation of an ambiguous regulation without regard to whether it is reasonable . . .”).

89. Pierce & Weiss, *supra* note 14, at 519.

90. *See id.* at 519–20.

91. *Id.* at 520.

92. Richard J. Pierce, Jr., *Why Empirical Examination of Seminole Rock Is Important*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 13, 2016), <http://yalejreg.com/nc/why-empirical-examination-of-seminole-rock-is-important-by-richard-j-pierce-jr> [<https://perma.cc/C28J-FHRT>].

93. Barmore, *supra* note 14, at 839.

94. 546 U.S. 243 (2006).

95. *See id.* at 248–49.

96. *See id.* at 257.

97. 132 S. Ct. 2156 (2012).

98. *See id.* at 2161.

99. *See id.* at 2166.

the agency would have exposed the respondent to “potentially massive liability . . . for conduct that occurred well before that interpretation was announced.”¹⁰⁰

Barmore posits that these two holdings, combined with other concurrences and dissents that were critical of the doctrine,¹⁰¹ have influenced U.S. Courts of Appeals such that *Auer* has become increasingly “benign” in practice.¹⁰² Accordingly, “there was a statistically significant decline from 2011 to 2014 in the rate at which courts of appeals grant[ed] *Auer* deference.”¹⁰³ Specifically, the rate fell from 82% (2011–2012) to 71% (2013–2014).¹⁰⁴

II. METHODOLOGY

In this Part, I explain how I assembled the dataset with the purpose of informing the ongoing debate over *Auer* deference with empirical data regarding how U.S. Courts of Appeals applied *Auer* in comparison to how they applied *Chevron* and *Skidmore* during the same twenty-year period (1993–2013). In statistical terms, each case in which a court reviews an agency’s textual interpretation is known as an “individual,” and the class of individuals is known as the “population.”¹⁰⁵ This study pertains to three populations: (1) the population of circuit court decisions from 1993–2013 that employed an *Auer* analysis, (2) the population of such decisions that used the *Chevron* framework, and (3) the population of decisions that applied nonbinding *Skidmore* deference.

I reviewed the entire population of *Auer* decisions. Because of the greater number of cases that addressed *Chevron* and *Skidmore*, it was impractical to review their entire populations. Instead, I used a statistical technique known as simple random sampling to create subsets from which inferences could be drawn about those populations. Ultimately, the dataset included 1,120 interpretations subject to judicial review in 1,047 decisions. For each interpretation, I recorded identifying information (case name, case citation, and agency involved), the administrative process that led to the interpretation, and whether the court accepted the government’s interpretation.

A. CREATING THE DATASET

The dataset included the entire population of published U.S. Courts of Appeals decisions that undertook an *Auer* or *Seminole Rock* analysis from

100. *Id.* at 2167.

101. *See* *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213–25 (2015) (Thomas, J. concurring in the judgment) (announcing opposition to *Auer*); *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (indicating an openness to reconsidering *Auer*); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring) (questioning the propriety of *Auer* in an argument based on his former law clerk Professor Manning’s separation of powers thesis).

102. Barmore, *supra* note 14, at 840.

103. *Id.* at 827.

104. *See id.*

105. DAVID FREEDMAN, ROBERT PISANI & ROGER PURVES, STATISTICS 333 (4th ed. 2007).

1993–2013. I chose a twenty-year period to broaden prior empirical studies on *Auer* deference, which were limited to shorter durations and, therefore, may not be representative of the courts' overall practice.¹⁰⁶ I chose to look at cases from 1993–2013 for the prosaic reason that it was the twenty-year period before the year I began reviewing opinions for this Note.¹⁰⁷ Unpublished decisions were omitted from the dataset based on the “view that the courts were likely to designate decisions as published in which they reviewed a federal agency’s statutory interpretation and that they were likely to mark decisions as unpublished when they referred to their past review of agency interpretations as circuit precedent.”¹⁰⁸ The decisions were gathered using a database search of all cases on Westlaw citing each relevant case. The *Auer* and *Seminole Rock* searches yielded 641 results.

In reviewing this population of *Auer* decisions, I narrowed the dataset by excluding unrelated holdings as well as those from distinct populations. For example, unrelated opinions that cited *Auer* for something other than deference—that is, opinions that referenced *Auer* to discuss its implications for the Eleventh Amendment jurisdictional bar¹⁰⁹—were removed for obvious reasons. I also excluded opinions that reviewed an interpretation issued by an entity other than an Article II administrative agency in the belief that interpretations rendered by different branches of government are sufficiently distinct so as to create distinct populations. The primary effect of this exclusion was to remove interpretations of the U.S. Sentencing Guidelines by the U.S. Sentencing Commission, which is an Article III agency.¹¹⁰ After distilling the dataset, there were 416 results.

Of course, it is possible for a court to give controlling deference to an agency’s construction of its own regulation without citing *Auer* or *Seminole Rock*, but instead by citing a related case that relied on *Auer* or *Seminole Rock*. If there were a significant number of such decisions rendered by U.S. Courts of Appeals from 1993–2013, then there might be grounds to question the representativeness of the population of *Auer* and *Seminole Rock* cases used for this study. To guard against this possibility, I performed a Westlaw database search for U.S. Courts of Appeals opinions that indirectly cited *Auer* or *Seminole Rock*. I limited the search to U.S. Courts of Appeals decisions from 1993–2013 and input seven Supreme Court decisions that relied on *Auer* or *Seminole Rock*.¹¹¹ I excluded all results that directly cited either *Auer* or *Seminole Rock*. The search

106. *See supra* note 15.

107. I started working on this study in September of 2014.

108. Barnett & Walker, *supra* note 15, at 24–25.

109. *See, e.g.*, *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 235 (3d Cir. 2006).

110. *See, e.g.*, *United States v. Gallo*, 195 F.3d 1278, 1281 (11th Cir. 1999) (“[Sentencing] Guideline commentary ‘must be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation”’ it interprets or contrary to federal law.” (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993))).

111. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Long Island Care at Home, Ltd. v. Coke*,

yielded only six cases.¹¹² None of these cases involved deference to an agency's regulatory interpretation. As such, I am confident the results of this study are indicative of the total population of federal courts of appeals decisions that invoke *Auer* deference from 1993–2013.

To better inform this investigation of *Auer* deference, I sought to compare the *Auer* dataset with the two populations of U.S. Courts of Appeals decisions that employed either *Chevron* or *Skidmore*. However, these two doctrines are used much more frequently by federal courts of appeals than *Auer* deference.¹¹³ As such, it would have been impractical for the purposes of this Note to study the entire population of U.S. Courts of Appeals decisions that implicate *Chevron* or *Skidmore* from 1993–2013—4,824 cases in total. Instead, I examined parts of each population, known as a “sample,” from which I drew inferences about the population.¹¹⁴

The idea behind sampling is that the value being measured in the sample—specifically, the federal government's win rate when circuit courts reviewed an agency interpretation under various deference frameworks from 1993–2013—is equivalent to the value for the population from which the sample was taken.¹¹⁵ Unintentional bias in sample selection could skew results; to guard against this possibility, I used simple random sampling without replacement to collect samples reflecting the two populations of U.S. Courts of Appeals decisions from 1993–2013 that apply *Chevron* and *Skidmore* deference.¹¹⁶ The sampling technique was sequential. First, I used a Westlaw database search to determine the total number of decisions published between January 1, 1993, and December 31, 2013 that reference *Chevron* or *Skidmore*, which generated 4,153 and 671 cases, respectively. I then used a random number calculator to create random numbers between 1 and 4,153 and 1 and 671, the respective total population

551 U.S. 158 (2007); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Christensen v. Harris Cty.*, 529 U.S. 576 (2000); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).

112. *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1164–67 (9th Cir. 2013) (Smith, J., dissenting) (citing *Gonzales*, which includes a *Chevron* analysis, for the *Chevron* principle); *Gila River Indian Cmty. v. United States*, 697 F.3d 886, 900 (9th Cir. 2012) (Smith, J., dissenting), *withdrawn and superseded on denial of reh'g en banc*, 729 F.3d 1139 (9th Cir. 2013) (citing *Gonzales* for its implications regarding statutory interpretation in the context of federalism disputes); *Tex. All. For Home Care Servs. v. Sebelius*, 681 F.3d 402, 405 (D.C. Cir. 2012) (citing *Shalala* for background on Medicare, not for *Auer* deference); *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1228, 1233 (10th Cir. 2008) (citing *Christensen* for statutory background, not for *Auer* deference); *In re Slater Health Ctr., Inc.*, 398 F.3d 98, 100 (1st Cir. 2005) (citing *Shalala* for background on Medicare, not for *Auer* deference); *Mortenson v. Cty. of Sacramento*, 368 F.3d 1082, 1090 (9th Cir. 2004) (citing *Christensen* for the proposition that “[b]ecause the statutory language is unambiguous, we need not defer to the regulations and opinion letter”).

113. Two Westlaw searches, one for *Chevron* and one for *Skidmore*, limited to published U.S. Courts of Appeals decisions from 1993–2013, yielded 4,153 cases for *Chevron* and 671 cases for *Skidmore*. By contrast, there were 641 total *Auer* cases, which were narrowed into a final dataset of 416 cases.

114. See FREEDMAN, PISANI & PURVES, *supra* note 105, at 333.

115. See *id.* at 359.

116. See *id.* at 339–40 (explaining how choosing individuals for a sample at random reduces the possibility of selection bias).

sizes. These random numbers were used to select cases from the *Chevron* and *Skidmore* populations that had been ordered numerically from youngest to oldest.¹¹⁷

After deciding on a sampling technique to control for selection bias, the next step was to determine how many cases should be selected for each population. Deciding how many cases to include in the sample is directly related to the sample's "chance error," or the degree to which the sample estimate differs from the population value because the sample is only part of a whole.¹¹⁸ In simple terms, the chance error measures how wrong the sample estimate is likely to be. In fact, the size of the chance error is a function of the sample size, which means that determining the size of the sample is a key factor in controlling the chance error of the sample measurement.¹¹⁹ Put differently, the decision of how many individual cases to collect in a simple random sample is a determination as to how much uncertainty one is willing to accept. For this study, I chose sample sizes that corresponded to a 95% confidence level that the sample estimate is at least within five percentage points of the whole population.¹²⁰

As with the *Auer* dataset, I removed decisions that were not germane, including: a decision in which the court broaches *Chevron* deference in a descriptive fashion unrelated to a deference holding,¹²¹ a decision where the court notes that the government likely would have received *Chevron* deference had it argued for it in its brief,¹²² and a decision where the court said that the government would have merited *Skidmore* deference had the agency rendered an official interpretation.¹²³ I achieved the desired sample size—one with a 95% confidence level that the sample estimate is within at least five percentage points of the whole population—with only the germane decisions. The resultant dataset included 1,047 cases: 416 for *Auer*, 392 for *Chevron*, and 239 for *Skidmore*. Across the 1,047 decisions collected in this study, the circuit courts reviewed 1,120 interpretations. There are more interpretations than cases because courts sometimes reviewed more than one interpretation in a decision. This analysis is the largest controlled study of multiple deference regimes as employed by U.S. Courts of Appeals.

117. I selected cases in lots ranging from 25–200, on a rolling basis as I read and processed them.

118. See FREEDMAN, PISANI & PURVES, *supra* note 105, at 359–60 (setting forth the following equation: chance error for a percentage = $(\sqrt{(\text{sample size})} \times \sqrt{[(\text{percentage of sample size that is of one kind}) \times (\text{percentage of sample size that is not of that kind})] \div \text{sample size}}$).

119. *See id.*

120. *Id.* at 381 (explaining confidence intervals: "The interval 'sample percentage + 2SEs' is a 95%-confidence interval for the population percentage.").

121. *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 467 (6th Cir. 2010) (touching on *Chevron* in the course of explaining *Auer* deference).

122. *Acme Die Casting v. NLRB*, 93 F.3d 854, 857 (D.C. Cir. 1996) (suggesting the agency would have received *Chevron* had it asked for it).

123. *Hartog Foods Int'l, Inc. v. United States*, 291 F.3d 789, 791 (Fed. Cir. 2002) (noting the absence of an interpretation precludes deference of any sort).

B. VARIABLES RECORDED

From September 2014–December 2015, I reviewed 1,120 agency interpretations in 1,047 decisions by the U.S. Courts of Appeals.¹²⁴ For each interpretation, I recorded the following information: case citation, administrative agency, organic statute, administrative process, and whether the agency won or lost. Of the recorded variables, administrative process is the only one that warrants elaboration. Statutory and regulatory interpretations come in a wide variety of procedural formats. I organized each interpretation in this study into one of twelve functional types of administrative or legal procedures: (1) appellate litigation positions, (2) nonlegislative rules, (3) informal adjudications, (4) non-textual interpretations, (5) on-the-record rules, (6) preamble, (7) notice-and-comment rules, (8) litigation positions before administrative adjudications, (9) nonprecedential adjudications, (10) precedential adjudications, (11) hybrid orders, and (12) party briefs. Below, I address each of these categories in turn.

1. Appellate Litigation Position

An agency's appellate litigation position—for example, a brief defending an agency's textual interpretation under judicial review before a U.S. Court of Appeals—is arguably the most informal administrative means possible for the issuance of statutory or regulatory interpretations. Not only do litigation positions lack any public input,¹²⁵ but appellate briefs may even lack substantive input from the administrative agency.¹²⁶

2. Nonlegislative Rules

Nonlegislative rules, also known as “publication rules,”¹²⁷ are agency promulgations of general applicability that are not subject to APA rulemaking requirements because they fall under an exemption for interpretive rules.¹²⁸ Agencies issue such interpretive rules in an array of formats that include letters,¹²⁹

124. For *Auer*, the dataset included 429 interpretations in 416 cases. For *Chevron*, the dataset included 440 interpretations in 391 cases. For *Skidmore*, the dataset included 251 interpretations in 239 cases.

125. See, e.g., *Fed. Labor Relations Auth. v. U.S. Dep't of Treasury*, 884 F.2d 1446, 1455 (D.C. Cir. 1989) (“[A] position established only in litigation may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views.”).

126. See, e.g., *Keys v. Barnhart*, 347 F.3d 990, 993–94 (7th Cir. 2003) (“[A]gency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself”); *Fed. Labor Relations Auth.*, 884 F.2d at 1455 (explaining appellate counsel's interpretation may not reflect the views of the agency itself). But see Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1047–48 (2015) (describing that author's experience defending regulations at the Justice Department as involving input from “relevant agency rule drafters, the policy and legislative affairs teams, the scientists and economists where applicable, and so forth . . .”).

127. See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 804 (2001).

128. 5 U.S.C. § 553(b)(3)(A) (2012).

129. See, e.g., *Orengo Caraballo v. Reich*, 11 F.3d 186, 193 (D.C. Cir. 1993) (upholding a Department of Labor regulatory construction in a letter).

manuals,¹³⁰ memoranda,¹³¹ handbooks,¹³² program statements,¹³³ bulletins,¹³⁴ guidance documents,¹³⁵ and classifications.¹³⁶

3. Informal Adjudications

An informal adjudication is a government action that is subject to minimal procedural requirements, possesses limited precedential value, and applies narrowly.¹³⁷ Examples include the Department of Education’s refusal of South Carolina’s request for a waiver from certain requirements of the Individuals with Disabilities Education Act¹³⁸ and the Bureau of Alcohol, Tobacco, and Firearms’ denial of an arms dealer’s application to import certain types of weapons.¹³⁹ Otherwise, when informal adjudications are not at the request of a private party, they come in an assortment of formats, including investigatory findings,¹⁴⁰ contract solicitations,¹⁴¹ compliance directives,¹⁴² or seizure notices.¹⁴³

4. Nontextual Interpretations

Sometimes an agency’s interpretation of a regulation or a statute does not come in the form of a definitive text, but is instead based on nontextual

130. *See, e.g.*, *Pub. Citizen, Inc. v. U.S. Dep’t of Health & Human Servs.*, 332 F.3d 654, 660 (D.C. Cir. 2003) (invalidating provisions of a Department of Health and Human Services Peer Review Organization Manual as *ultra vires*).

131. *See, e.g.*, *Lewis v. United States*, 458 F.3d 1372, 1380–81 (Fed. Cir. 2006) (finding persuasive a Department of Defense interpretation of an enabling statute in a memorandum).

132. *See, e.g.*, *De La Mota v. U.S. Dep’t of Educ.*, 412 F.3d 71, 79 (2d Cir. 2005) (denying binding *Chevron* and non-binding *Skidmore* deference to a Department of Education statutory interpretation in a handbook).

133. *See, e.g.*, *Cunningham v. Scibana*, 259 F.3d 303, 306–07 (4th Cir. 2001) (granting persuasive deference to a Federal Bureau of Prisons statutory construction in a program statement).

134. *See, e.g.*, *U.S. Dep’t of Labor v. N.C. Growers Ass’n*, 377 F.3d 345, 355 (4th Cir. 2004) (denying persuasive deference to a Department of Labor statutory interpretation in a bulletin).

135. *See, e.g.*, *Aleman v. Glickman*, 217 F.3d 1191, 1197 (9th Cir. 2000) (rejecting controlling deference for a Department of Agriculture statutory construction issued in a guidance document).

136. *See, e.g.*, *Russ Berrie & Co. v. United States*, 381 F.3d 1334, 1338 (Fed. Cir. 2004) (denying *Skidmore* deference to U.S. Customs and Border Protection’s classification of costume jewelry imports pursuant to Harmonized Tariff Schedules of the United States).

137. Informal adjudications are subject only to the APA requirement that the agency issues a “brief statement” explaining its reasons. *See* 5 U.S.C. § 555(c) (2012).

138. *See* S.C. *Dep’t of Educ. v. Duncan*, 714 F.3d 249, 251, 254 n.2 (4th Cir. 2013).

139. *See* *Springfield, Inc. v. Buckles*, 292 F.3d 813, 818 (D.C. Cir. 2002).

140. *See, e.g.*, *Brower v. Evans*, 257 F.3d 1058, 1069 (9th Cir. 2001) (reviewing a statutory interpretation in an initial investigation by the Department of Commerce into the harm the tuna industry posed to dolphins).

141. *See, e.g.*, *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1388 (Fed. Cir. 2013) (hearing a challenge to a Department of Labor presolicitation notice for a government contract).

142. *See, e.g.*, *Student Loan Fund of Idaho, Inc. v. U.S. Dep’t of Educ.*, 272 F.3d 1155, 1165–69 (9th Cir. 2001) (reviewing a Department of Education directive ordering a loan fund company to comply with provisions of the Higher Education Act).

143. *See, e.g.*, *United States v. 29 Cartons of an Article of Food*, 987 F.2d 33, 38 (1st Cir. 1993) (denying *Chevron* deference to a Food and Drug Administration statutory interpretation in an order to seize products that had run afoul of the Federal Food, Drug, and Cosmetics Act).

mediums. For example, in *SEC v. Tambone*, the First Circuit denied *Chevron* deference to a “bricolage of agency decisions and statements,” which, according to the agency, reflected its “longstanding administrative interpretation.”¹⁴⁴ And in *Association of Civilian Technicians, Inc. v. United States*, the D.C. Circuit reviewed a statutory interpretation by the Secretary of the Army that was inferred from “policy and practice.”¹⁴⁵ As might be expected, nontextual constructions are uncommon; after on-the-record rules, they are the least represented interpretative format reviewed in this study.¹⁴⁶

5. On-the-Record Rulemaking, Preamble, and Notice-and-Comment Rules

“The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.”¹⁴⁷ To prevent such excesses, the APA requires that all agency “rules” that “prescribe law or policy” undergo either on-the-record or notice-and-comment “rulemaking” designed to incorporate public input.¹⁴⁸

On-the-record rulemakings resemble trials. They involve oral presentations of evidence, burdens of proof, and cross-examinations.¹⁴⁹ The end result is a rule based “on the record.”¹⁵⁰ Historically, on-the-record rulemakings were never common, and they became virtually extinct after *United States v. Florida East Coast Railway Co.*, a 1973 case in which the Supreme Court announced a strong presumption against “on-the-record” procedures in the rulemaking context.¹⁵¹ Today, these types of rulemakings are rarely employed¹⁵² and none of the interpretations reviewed in this study were of an on-the-record rule.

Presently, agencies promulgate rules almost exclusively through notice-and-comment rulemakings. Under this process, the rulemaking agency must publish a notice of a proposed rule in the Federal Register¹⁵³ and, in so doing, solicit public input by providing “an opportunity to participate in the rulemaking through submission of written data, views, or arguments.”¹⁵⁴ After “consideration of the relevant matter presented” by the public, the agency publishes a final rule in the Federal Register, which must be accompanied by a “concise

144. 597 F.3d 436, 449 (1st Cir. 2010).

145. 603 F.3d 989, 992 (D.C. Cir. 2010).

146. See *infra* Table 2.

147. *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950).

148. See 5 U.S.C. § 551(4)–(5) (2012).

149. See 5 U.S.C. §§ 553, 556–557 (2012) (setting out the process for on-the-record rulemaking).

150. See 5 U.S.C. § 553(c) (“When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.”).

151. 410 U.S. 224, 237–38 (1973).

152. Cf. Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 247–51 (2014) (arguing that courts, policymakers, and legal scholars should re-examine the abandonment of formal rulemaking procedures).

153. See 5 U.S.C. § 553(b).

154. *Id.* § 553(c).

general statement of [its] basis and purpose.”¹⁵⁵ The rule takes effect thirty days after publication in the Federal Register.¹⁵⁶

The notice-and-comment rulemaking process can result in two types of agency interpretations that are subject to judicial review. First, the regulation itself often embodies a statutory construction in that the actual exercise of rulemaking power derives from a novel interpretation of the agency’s authority.¹⁵⁷ In addition, agencies may use the concise statement at the outset of the regulation to construe provisions of the underlying rule or statute.¹⁵⁸ In this Note, I call these two possible interpretations “notice-and-comment rule” and “preamble,” respectively.

6. Litigation Position Before Administrative Adjudication, Nonprecedential Adjudication, and Precedential Adjudication

Professor Michael Asimow defines “administrative adjudications” as “the entire system for resolving individualized disputes between private parties and government administrative agencies.”¹⁵⁹ Administrative adjudications can be either adversarial or inquisitorial. In adversarial administrative adjudications, opposing parties present evidence and try to persuade a neutral decision maker.¹⁶⁰ Typically, the government participates in a prosecutorial role by alleging that a private party violated a regulation or statute.¹⁶¹ Whereas adversarial adjudications are like trials in the United States, inquisitorial adjudications are akin to European criminal processes—the fact finder conducts an independent investiga-

155. *Id.* The D.C. Circuit interprets this to require that “[a]n agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.” *Reytblatt v. U.S. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997).

156. 5 U.S.C. § 553(d) (requiring a thirty-day period before a notice-and-comment rule takes effect, except for “a substantive rule which grants or recognizes an exemption or relieves a restriction,” “interpretative rules and statements of policy,” or “as otherwise provided by the agency for good cause found and published with the rule”).

157. Consider, for example, *Northpoint Technology, Ltd. v. FCC*, which involved the Federal Communications Commission’s (FCC) implementation of a mandate in the Rural Local Broadcast Signal Act of 1999 to provide the delivery of local television station signals to satellite subscribers, so long as the action did not engender “harmful interference” of existing markets. *See* 414 F.3d 61, 65–66 (D.C. Cir. 2005). At issue before the court was a challenge to the FCC’s rulemaking by market participants who argued the rule failed to conform with the no-harmful-interference requirement. *Id.* at 68. This challenge applies per se to the rule: The question before the court on this issue was whether the FCC’s incorporation into the rule of its existing definition of “harmful interference” was permissible. *See id.* at 68–71.

158. *See, e.g., Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 1004 (9th Cir. 2010) (granting *Auer* deference to a Department of Labor regulatory interpretation offered in the preamble).

159. Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 4 (2015).

160. *See id.* at 6–7.

161. *See, e.g., Kleiman & Hochberg, Inc., v. U.S. Dep’t of Agric.*, 497 F.3d 681, 682 (D.C. Cir. 2007) (reviewing complaint by the Department of Agriculture before an Administrative Law Judge (ALJ) to revoke a produce merchant’s license to engage in interstate commerce because he commissioned acts of bribery); *Truck Drivers & Helpers Union, Local No. 170 v. NLRB*, 993 F.2d 990, 993 (1st Cir. 1993) (reviewing a National Labor Relations Board (NLRB) decision dismissing a complaint of the NLRB’s General Counsel alleging an “unfair labor charge against an employer based on three charges it previously dismissed”).

tion in the course of a nonadversarial proceeding.¹⁶²

During an adversarial adjudication, the government may issue an interpretation of a regulation or statute through its role as a prosecutor. For example, under the Occupational Safety and Health Act, the Department of Labor enforces workplace safety regulations by initiating adversarial adjudications against violators before the Occupational Safety and Health Review Commission.¹⁶³ According to the Supreme Court, the Secretary of Labor's litigation position before the Commission is "as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard" through notice-and-comment rulemaking.¹⁶⁴

In either adversarial or inquisitorial adjudications, an agency also renders interpretations of legal texts in reviewing an initial decision by a lower tribunal.¹⁶⁵ Examples of administrative agencies that issue interpretations in the course of reviewing adversarial adjudications by a lower tribunal include the Securities and Exchange Commission,¹⁶⁶ Federal Communications Commission, Department of Health and Human Services,¹⁶⁷ and Commodities Futures Trading Commission.¹⁶⁸ The Social Security Administration (through the Appeals Council) is an example of an agency that interprets regulations or statutes in the course of reviewing an inquisitorial adjudication.¹⁶⁹

An agency's reconsideration of a ruling by a subordinate tribunal in an adversarial or inquisitorial adjudication may be either precedential or nonprecedential, depending on whether the agency's decision is binding on future adjudications. Whether a proceeding is precedential typically reflects the impor-

162. See Asimow, *supra* note 159, at 6–7. In the United States, the most familiar example of this is the Social Security Act's benefits system for disability and supplemental security income. See 20 C.F.R. § 405 (2017). Under the Social Security benefits program, a claimant may appeal an initial agency denial to an ALJ in a nonadversarial adjudication. § 405.1(b)–(c). At the hearing, the ALJ takes testimony under oath, but formal rules of evidence do not apply, and the agency is not represented, though the claimant has a right to counsel. See §§ 405.1(c)(2)–(3), 405.350(b). The ALJ may call vocational and medical experts to offer opinion evidence. § 405.315(c)(2). At the hearing, the claimant or the claimant's representative may question witnesses. § 405.301(c). If the claimant is dissatisfied with the ALJ's decision, he or she may request review by the Appeals Council, which is granted on a discretionary basis and represents the final agency decision. See §§ 405.401, 405.430.

163. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152–58 (1991).

164. *Id.* at 157.

165. Unless an agency's enabling statute stipulates otherwise, the APA empowers agencies to review "initial decisions" rendered by ALJs or some equivalent thereof. 5 U.S.C. § 557(b) (2012).

166. See, e.g., *WHX Corp. v. SEC*, 362 F.3d 854 (D.C. Cir. 2004).

167. In the context of Medicare payouts, the initial regulatory determination is rendered by a contractor, and challenges thereto are made in an adversarial adjudication before the Provider Reimbursement Review Board (PRRB). The PRRB's decision is final unless the Secretary of Health and Human Services moves to reverse or modify within sixty days. See, e.g., *Univ. of Texas M.D. Anderson Cancer Ctr. v. Sebelius*, 650 F.3d 685 (D.C. Cir. 2011) (reviewing a challenge brought by a teaching hospital against the Secretary of Health and Human Services over the agency's decision to uphold a Medicare payout determination by PRRB).

168. See, e.g., *N.Y. Currency Corp. v. Commodity Futures Trading Comm'n*, 180 F.3d 83 (2d Cir. 1999).

169. See *supra* note 162 and accompanying text.

tance of the underlying controversy and the extent of agency participation in the proceedings. Consider, for example, the Board of Immigration Appeals's review of determinations by immigration judges regarding the enforcement of immigration laws.¹⁷⁰ The Board received 36,690 appeals petitions in 2013.¹⁷¹ The majority of appeals are heard by a single Board Member and that Board Member's decision may be published or unpublished.¹⁷² Cases "not suitable for consideration by a single Board Member are adjudicated by a panel consisting of three Board Members," and those decisions may also be published or unpublished.¹⁷³ Only published decisions constitute binding precedent that binds the Board, the Immigration Courts, and Department of Homeland Security.¹⁷⁴ For this study, all published opinions stemming from administrative adjudications were presumed to be precedential and only those determinations expressly deemed by the agency to be nonprecedential were classified as such.

7. Hybrid Orders

"Hybrid orders" is a catchall category of administrative actions that is defined primarily by what it is not. A hybrid order is neither a "rule" nor an "adjudication" as defined by the APA,¹⁷⁵ but nonetheless benefits from inclusive procedures as required by the enabling statute or self-imposed by the agency. For example, in resolving disputes pertaining to licensed hydropower under the Federal Power Act, the Federal Energy Regulatory Commission's (FERC) choice whether to hold an evidentiary hearing "is generally discretionary."¹⁷⁶ Moreover, the Act states that "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter."¹⁷⁷ Despite this latitude, FERC has voluntarily adopted rules of procedure that provide for both due process for the parties and public participation.¹⁷⁸ Upon receiving a complaint, FERC provides public notice,¹⁷⁹ allows for interve-

170. Appeals of decisions by immigration judges are heard by the Board of Immigration Appeals. See U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 1 (2017).

171. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICS YEARBOOK A1, Q1 (2014).

172. See U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 170, at 3, 8.

173. *Id.* at 4, 8.

174. See *id.* at 8–9.

175. See 5 U.S.C. § 553 (2012) (setting forth procedures for promulgating rules); 5 U.S.C. §§ 554, 556–557 (setting forth procedures for adjudications).

176. *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128 (D.C. Cir. 1982); see also 16 U.S.C. § 825g(a) (2012).

177. See 16 U.S.C. § 825g(b).

178. See 18 C.F.R. §§ 385.201–385.218 (2017).

179. 18 C.F.R. § 385.206(d).

nors,¹⁸⁰ considers briefs,¹⁸¹ and provides for administrative appeals.¹⁸² At its discretion, the agency can grant an oral hearing.¹⁸³

Functionally, FERC's administrative procedures for managing licensee disputes resemble adjudications; indeed, hybrid orders that look like adjudications are frequently employed in federal regulatory programs that manage public goods through license systems that require administrative agencies to allocate public goods and also enforce the conduct of licensees.¹⁸⁴ However, other hybrid orders resemble voluntary notice-and-comment rules. Consider how the Forest Service oversees 190 million acres of national forests.¹⁸⁵ Under the National Forest Management Act, these lands are managed through "multi-use" resource plans consisting of various prescriptions and land use designations that collectively set out what type of activities (such as resource development, recreation, and preservation) may occur on the land in question.¹⁸⁶ Although the APA exempts "management" of "public property" from its rulemaking procedures,¹⁸⁷ Congress required that the Secretary of the Department of Agriculture "provide for public participation in the development, review, and revision of land management plans."¹⁸⁸ Yet the only substantive procedural requirement is for the Secretary to "mak[e] the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption."¹⁸⁹ In fulfilling the statutory directive, the Forest Service voluntarily adopted procedures to foster public involvement that mirror those provided by the APA, including notice in the Federal Register, opportunity to comment, and a decisional document that explains the plan's rationale.¹⁹⁰ Other examples of hybrid orders that resemble notice-and-comment rulemakings include the EPA's review of state implementation plans

180. *See* 18 C.F.R. § 385.214.

181. 18 C.F.R. § 385.213.

182. 18 C.F.R. § 385.713.

183. *See* 18 C.F.R. §§ 385.501–385.510.

184. The FCC issues analogous hybrid orders in managing the public airwaves spectrum pursuant to the Communications Act of 1934. As the Federal Power Act empowers FERC, 16 U.S.C. § 825(g)(a) (2012), so the Communications Act affords the FCC wide berth to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j) (2012). Within this generous statutory framework, the FCC has the discretion to decide whether to hold an evidentiary hearing. *See* 47 U.S.C. §§ 208, 409. Additionally, FCC decisions, orders, and notices are published in the FCC Record and can have precedential value. *See* 47 C.F.R. § 0.445(e) (2017).

185. *See* U.S. FOREST SERV., THE U.S. FOREST SERVICE—AN OVERVIEW (2012), https://www.fs.fed.us/documents/USFS_An_Overview_0106MJS.pdf [http://perma.cc/M3QD-8J85].

186. *See* 16 U.S.C. § 1604(d) (2012).

187. *See* 5 U.S.C. § 553(a)(2) (2012).

188. 16 U.S.C. § 1604(d).

189. *Id.*

190. *See* 36 C.F.R. §§ 219.4–219.5, 219.14 (2017) (explaining public participation procedures for National Forest land management planning).

for compliance with the Clean Air Act¹⁹¹ and the U.S. Army Corps of Engineers's process for issuing "dredge and fill" permits under the Clean Water Act.¹⁹²

In sum, the term "hybrid order" amounts to a catchall encompassing a variety of formats. Many hybrid orders resemble on-the-record administrative adjudications without evidentiary hearings. For other hybrid orders, agencies have voluntarily adopted procedures that mimic notice-and-comment rulemakings. The commonality among the interpretations that fall into this group is that they are all the byproduct of participatory administrative procedures that are associated with agency decision making that carries the force of law.

8. Party Briefs

Interpretations contained in party briefs are those that are considered by a federal court in a controversy to which a federal agency is not a litigant, but in which a party or amici will employ a textual argument based on an agency's prior interpretation and seek deference. Because this category is a function of existing textual constructions, party brief interpretations can take on any one of the eleven types of administrative processes described in this section. These interpretations are grouped separately because the administrative agency is not a participant in the case.

C. CAVEATS

This Note uses distinctions, categories, and model types present among court decisions and agency actions to investigate how deference principles work in practice. As with any endeavor in social science, these analytical concepts should not be understood to operate as perfect descriptions of reality. Indeed, judgment is inherent in even seemingly obvious matters.

For example, consider the deceptively difficult decision of whether an agency's statutory interpretation "won" under a court's *Chevron* analysis. As described above, courts perform a threshold inquiry before they accord *Chevron* deference, known as "Step Zero," which is used to determine whether the agency's interpretation is an exercise of a congressional authorization to make policy carrying the force and effect of law.¹⁹³ If a court decides against granting *Chevron* deference, it then considers the agency's interpretation with *Skidmore* deference, which is less favorable to the government.¹⁹⁴ So, what happens if the court denies *Chevron* deference but rules the interpretation is permissible under *Skidmore*? Is this a government loss or win? Should such a case be included in the dataset? There are multiple legitimate methodologies to account for *Chevron*

191. See 40 C.F.R. §§ 51.102, 51.104 (2017) (requiring notice in the Federal Register of amendments to State Implementation Plans).

192. See 33 C.F.R. § 325.3 (2017) (voluntarily establishing notice-and-comment procedures to inform a "public interest" review of draft dredge and fill permits by the U.S. Army Corps of Engineers).

193. See *supra* notes 39–40 and accompanying text.

194. See *id.*

Step Zero. One could treat a denial of *Chevron* deference as a loss, even if the government ultimately wins under *Skidmore*. Alternatively, one could exclude all cases that rejected *Chevron* and proceeded to *Skidmore*. For this study, I used the government's avowed position in deciding whether the case was applicable. If the government did not request *Chevron*, I deemed the case inapplicable and excluded it from the study. By contrast, if the government requested *Chevron* deference, I included the government's actual result in the data set even if the court's analysis proceeded to *Skidmore* review.¹⁹⁵

In a similar fashion, dividing all administrative processes into twelve categories entails unavoidable judgments at the margin. Consider the difficult decision of how to deal with an agency that relies on the "good cause" exception to rulemaking requirements under the APA to promulgate a direct final rule of general applicability without notice-and-comment but pursuant to a clear congressional delegation of rulemaking authority.¹⁹⁶ According to a recent report by the Government Accountability Office (GAO), administrative agencies cited the good cause exception to avoid prepublication notice-and-comment on more than one-third of all major and nonmajor rules promulgated from 2003–2010.¹⁹⁷ The GAO's findings are reflected in this study; that is, the dataset includes many interpretations contained in rules that did not undergo notice-and-comment procedures because of the good cause exception. There are a variety of plausible ways to classify good cause rules. On the one hand, these rules typically reflect a clear congressional delegation to make policy with the force and effect of law, which militates in favor of classifying them as legislative rules.¹⁹⁸ On the other, good cause exceptions forgo the notice-and-comment process, although the GAO found that the agency undertook *ex post facto* notice-and-comment procedures on 41% of major rules.¹⁹⁹ For the purposes of this study, I treated good cause exceptions as "notice-and-comment rules," even though they did not go through notice-and-comment procedures, primarily because these rules were

195. I discerned whether the government requested deference by consulting litigation briefs as available on Westlaw and PACER. Cases with no briefs available were not included in the dataset.

196. See 5 U.S.C. § 553(b)(3)(B) (2012).

197. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 8–9 (2012) [hereinafter GAO, FEDERAL RULEMAKING]. The GAO report states that 35% of major rules and 44% of nonmajor rules were sampled from 2003–2010 without having been preceded by a proposed rule. *Id.* at 36. The report further states that the "good cause" exception was cited in 77% of the major rules and 61% of the nonmajor rules. *Id.* at 37.

198. After all, the entire point of the good cause exception is that the agency would otherwise be required to undergo notice-and-comment rulemaking procedures under section 553 of the APA. See Ellen R. Jordan, *The Administrative Procedure Act's Good Cause Exemption*, 36 ADMIN. L. REV. 113, 114–15 (1984) (noting the good cause exception was included in part to avoid the time wasted by "full notice and comment" motions).

199. See GAO, FEDERAL RULEMAKING, *supra* note 197, at 25 fig.6 (noting that, of 123 major rules promulgated without publishing a notice of proposed rulemaking, agencies requested comments on 77 after issuance and responded to the comments by issuing a follow-up rule in 51 instances, or approximately 41% of the 123 major rules).

codified in the Code of Federal Regulations and because a significant percentage of the good cause rules ultimately did undergo notice-and-comment procedures.²⁰⁰ In my opinion, these factors lent these interpretations a sufficient degree of procedural formality to be included in the category of notice-and-comment rules.

III. RESULTS

The results are presented below and discussed thereafter.

Table 1. Summary Data

Deference Doctrine	Cases (#)	Interpretations (#)	Overall Gov't Win Rate (%)	Margin of Error (\pm %)	Gov't Win Rate 1993–2005 (%)	Gov't Win Rate 2006–2013 (%)
<i>Chevron</i>	392	440	68.64	4.7	68.53	68.19
<i>Auer</i>	416	429	74.36	0.2	77.78	71.42
<i>Skidmore</i>	239	251	58.57	4.5	56.52	60.29

Table 2. Administrative Process, By Doctrine

Administrative Process Component	<i>Chevron</i>			<i>Auer</i>			<i>Skidmore</i>		
	Total Cases (#)	% of Total	Gov't Win Rate (%)	Total Cases (#)	% of Total	Gov't Win Rate (%)	Total Cases (#)	% of Total	Gov't Win Rate (%)
Appellate Litigation Position	21	4.77	33.33	82	19.11	68.29	26	10.36	53.85
Non-legislative Rule	33	7.50	48.48	58	13.52	81.03	102	40.64	58.82
Informal Adjudication	14	3.18	64.29	27	6.29	74.07	12	4.78	75.00
Non-textual Interpretation	3	0.68	33.33	2	0.47	100.00	5	1.99	80.00
Formal Rule	0	0.00	n/a	0	0.00	n/a	0	0.00	n/a
Preamble	5	1.14	60.00	34	7.92	88.23	5	1.99	40.00
Notice & Comment Rule	160	36.36	71.88	8	1.86	87.50	6	2.39	66.67
Litigation Position in Administrative Adjudication	5	1.14	100.00	23	5.36	52.17	7	2.79	57.14
Non-precedential Adjudication	17	3.86	47.06	31	7.23	38.71	27	10.76	44.44
Precedential Adjudication	84	19.09	69.05	72	16.82	76.39	4	1.59	50.00

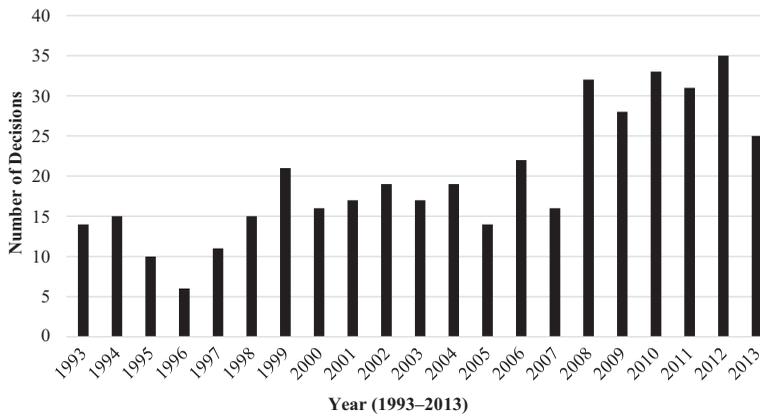
200. *See id.*

Administrative Process Component	Chevron			Auer			Skidmore		
	Total Cases (#)	% of Total	Gov't Win Rate (%)	Total Cases (#)	% of Total	Gov't Win Rate (%)	Total Cases (#)	% of Total	Gov't Win Rate (%)
Administrative Order	59	13.41	81.36	43	10.02	79.07	9	3.59	55.56
Party Brief	39	8.86	79.48	49	11.42	89.80	48	19.12	64.58

Table 3. Government Win Rate Under Auer, By Court

Circuit	Cases (#)	Gov't Win (%)
D.C.	79	75.95
Federal	35	77.14
1st	21	80.95
2d	44	81.81
3d	23	47.83
4th	25	84.00
5th	15	60.00
6th	34	73.53
7th	11	81.82
8th	29	79.31
9th	79	67.09
10th	17	88.24
11th	17	76.47

Figure 1. Annual Number of Decisions Involving Auer



A. DESCRIPTIVE RESULTS

1. *Auer* Is No Longer Super Deference

From 1993–2013, the government won 74.4% of cases when a U.S. Court of Appeals invoked *Auer*, and 68.6% when a court invoked *Chevron*.²⁰¹ Notably, this difference is greater than the 95% confidence interval established for the *Chevron* results.²⁰² This lends limited support to a prior study of deference doctrines in the Supreme Court, which found that the government won significantly more often when the Court invoked *Auer* (91%) than when it invoked *Chevron* (76%).²⁰³

Twenty years, however, is long enough to potentially mask trends in the aggregate. Cynthia Barmore posits that the Supreme Court's recent curtailment of, and dissatisfaction with, the *Auer* doctrine has caused lower courts to apply *Auer* deference more restrictively.²⁰⁴ To test this hypothesis, I divided the dataset into cases before and after January 2006. I chose that cutoff point because it is when the Supreme Court first substantively checked *Auer* in *Gonzales v. Oregon*.²⁰⁵ Before *Gonzales* was decided, the government's win rate was 77.8%; after January 2006, its win rate was 71.4%.²⁰⁶ The drop-off in the government's win rate when courts invoke *Auer* is likely not part of a larger trend because the government's win rate either stayed flat or slightly increased for both *Chevron* and *Skidmore* from 1993–2005 and 2006–2013.²⁰⁷

This result harmonizes the seemingly disparate empirical studies regarding the government's win rate under *Auer*.²⁰⁸ One study suggests *Auer* is a super deference,²⁰⁹ another suggests it is no different in power than other forms of deference,²¹⁰ and a third suggests *Auer* once was a super deference but has since narrowed such that it is akin to comparable doctrines.²¹¹ The results of this study lend credence to the third hypothesis.

At any of the observed time intervals, the government's win rate when U.S. Courts of Appeals invoked *Auer* and *Chevron* was significantly greater than when they invoked *Skidmore* deference.²¹² The evident difference in power between mandatory and nonbinding deference militates against the argument

201. See *supra* Table 1.

202. See *supra* notes 118–20 and accompanying text.

203. See Eskridge & Baer, *supra* note 14, at 1099.

204. See Barmore, *supra* note 14, at 839.

205. 546 U.S. 243, 257 (2006) (establishing the anti-parroting principle that agencies will not receive binding deference for interpretations of regulatory text that merely copies the statutory text).

206. See *supra* Table 1.

207. Under the *Chevron* framework, the government's win rate was 68.53% from 1993–2005 and 68.19% from 2006–2013. Under the *Skidmore* framework, the government's win rate during these periods was 56.52% and 60.29% respectively.

208. See *supra* Section I.D.

209. See Eskridge & Baer, *supra* note 14, at 1099.

210. See Pierce & Weiss, *supra* note 14, at 519–20.

211. See Barmore, *supra* note 14, at 839.

212. See *supra* Table 1.

that the court's choice of doctrine explains little of the variation in the government's win rate when it defends its interpretations in federal courts of appeals.²¹³

2. *Auer*'s Unexpected Procedural Breadth Mitigates Reform Skeptic's Concerns

Because the debate over *Auer* has focused on procedural shortcuts, the doctrine commonly is associated with noninclusive informal administrative formats and not on *Auer* as it relates to more formal administrative processes.²¹⁴ For example, one influential defense of *Auer* assumes that "interpretations of regulations found in formats having the force of law make up a negligible fraction of the cases in which a court must decide whether to defer under *Seminole Rock*," and that the "remainder involve interpretations set out in informal formats."²¹⁵ Other prominent critics have assumed that "[i]nterpretations of regulations are usually expressed in nonlegislative formats."²¹⁶

Contrary to this common understanding, the administrative processes associated with *Auer* deference are much more varied and balanced. Indeed, the number of *Auer* interpretations in this study that result from administrative procedures typically understood to carry the force of law (211) is greater than the number of interpretations that do not (169).²¹⁷ And the spread among the

213. For example, Richard J. Pierce, Jr. argues that the government wins cases 70% of the time regardless of whether its interpretation is reviewed with *Auer*, *Chevron*, or *Skidmore* deference. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Action Mean?*, 63 ADMIN. L. REV. 77, 85–86 (2011). But see Barnett & Walker, *supra* note 15, at 29–31 (surveying all *Chevron* cases before federal circuit courts from 2009–2013 and finding that the government wins significantly more often when courts apply the *Chevron* framework than when they apply *Skidmore*).

214. See, e.g., Stephenson & Pogoriler, *supra* note 49, at 1483 ("Perhaps surprisingly, less attention has been paid to the fact that agency interpretations of regulations may also appear in a wide variety of forms.").

215. Angstreich, *supra* note 13, at 57.

216. Anthony & Asimow, *supra* note 88, at 10.

217. See *supra* Table 2. Discerning which administrative procedures indicate that the agency is acting with a Congressional intent to make rules with the force of law entails judgment and, in so doing, I was guided by a number of precedents and theses.

In *United States v. Mead*, the Supreme Court characterized notice-and-comment rulemaking and administrative adjudication as typifying "administrative action with the effect of law." 533 U.S. 218, 229–30 (2001). Based on this precedent, I included notice-and-comment rules and adjudications (both precedential and nonprecedential).

Regarding an agency's litigation position in an administrative adjudication, the Supreme Court announced in *Martin v. Occupational Safety and Health Review Commission* that an agency's litigation position in an administrative adjudication is "as much an exercise of delegated lawmaking powers" as is the promulgation of a notice-and-comment rule. 499 U.S. 144, 157 (1991). Accordingly, I included agency litigation positions before administrative adjudications among those procedural formats that are associated with the force of law.

Although regulatory preambles (the "concise general statement of [a rule's] basis and purpose" required for all notice-and-comment rules by section 553(c)) do not by themselves carry the force and effect of law, they are nonetheless published concomitantly in the Federal Register with the substantive rule and, thus, emanate from the same inclusive administrative process—notice-and-comment rulemaking. Professor Kevin Leske has argued that regulatory preambles are the ideal opportunity in the administrative process for an agency to render its regulatory construction, because doing so "reinforces" the "equitable principles of fair notice and constitutional due process concerns" that underlie procedural safeguards established for notice-and-comment rulemaking. See Kevin O. Leske, *Between*

twelve categories is remarkably even—there are even eight interpretations subject to an *Auer* review that were the product of notice-and-comment rulemaking, which flies in the face of the supposed ill incentives wrought by the doctrine.²¹⁸ Excluding decisions to which the government was not a party or an amicus, the government won 74% of cases where the court applied *Auer* to informal interpretations and 71% of cases where the court applied *Auer* to formal interpretations.²¹⁹

The surprising variety of procedures associated with *Auer* has the most salience on the arguments by reform skeptics who maintain that altering the doctrine could encourage agencies to refrain from rulemaking in favor of adjudications. To recap, Professor Aaron Nielson argues that absent the benefit of *Auer*, agencies may exercise their *Chenery II* discretion to render policy by adjudication in lieu of rulemaking.²²⁰ This is seen as a potentially worse outcome because adjudications are viewed as affording less notice and participation than rulemaking.²²¹ Professor Nielson concedes that *Chenery II* is only an “imperfect substitute” for *Auer* deference because agencies are not institutionally indifferent to the choice between rulemaking and adjudication.²²² In light of the empirical results of this study, it would seem that *Chenery II* is even more of an imperfect substitute than originally thought. As a source of interpretations subject to judicial review under the *Auer* framework, adjudications (precedential and nonprecedential) were greater in number than any other category of administrative procedure.²²³ If *Auer* already applies to adjudications and influences agency behaviors accordingly, it follows that an agency has the capacity to exercise its *Chenery II* discretion and still take advantage of *Auer* deference. So although the *Chenery II* and *Auer* doctrines are “imperfect substitutes” in theory,²²⁴ they are complements in practice. It is, therefore, far from clear how reforming *Auer* would make “rulemaking less attractive,” in the words of Professor Nielson, and adjudication “more attractive,” given the prevalence

Seminole Rock and a Hard Place: A New Approach to Agency Deference, 46 CONN. L. REV. 227, 277 (2013). For these reasons, I included regulatory preambles among the interpretive documents that stemmed from administrative processes that carry the force of law.

As explained above, administrative orders mirror the participatory and notice functions of notice-and-comment rules and adjudications. Accordingly, I included administrative orders among the interpretive formats that are associated with the force of law.

Because they lack both public participation and notice, I considered the following procedures as *not* having the force of law: appellate litigation positions, nonlegislative rules, informal adjudications, and nontextual interpretations. I excluded from this list those interpretations contained in party briefs out of practicality because I did not record the underlying administrative process that led to the regulatory construction on which a private litigant relied in a party brief.

218. See *supra* Table 2.

219. See *supra* Table 2.

220. See Nielson, *supra* note 4, at 949.

221. See *id.* at 986–88.

222. See *id.* at 948–49.

223. See *supra* Table 2.

224. *Id.*

with which adjudications already benefit from the doctrine.²²⁵ This reality depresses the potential unintended consequence of an agency reacting to *Auer* reform by eschewing rulemaking for adjudication.

3. The *Auer* Doctrine's Supposed Benefits to Administrative Efficiency Are Overblown

With this dataset, it is possible to perform a simple model to approximate the administrative burden associated with either rejecting or reforming the *Auer* doctrine by replacing it with residual *Skidmore* deference or simulating an *Auer* Step Zero analysis, respectively.²²⁶ In this fashion, it is possible to test the claims made by a subset of skeptics of *Auer* reform, who argue that altering the doctrine is unwise because it would lead to unmanageable administrative burdens on the courts and regulatory agencies.²²⁷ Here, I should stress the modifier “simple.” For starters, this modelling endeavor is in no way dynamic—I am applying historical government win rates to historical data and make no attempt to capture how agencies and courts would respond in a world in which *Auer* was rejected or reformed. It is also worth emphasizing that *Auer* Step Zero is an approximation based on the formality of administrative procedures, which is only one of the possible factors—albeit the most often employed—that a court considers when it evaluates whether an interpretation has the force of law.²²⁸

The results of this simple model contradict the assertion that reforming the *Auer* doctrine would engender unwelcome administrative burdens. From 1993–2013, rejecting *Auer* wholesale in U.S. Courts of Appeals and replacing it with *Skidmore* deference would have resulted in an estimated 51 fewer agency regulatory interpretations surviving judicial review,²²⁹ or almost 2.6 interpreta-

225. See Nielson, *supra* note 4, at 949, 983.

226. A model is simply a mathematical description of a system. Here, the system is an Article III court's deference regime. For inputs, we know how many cases undergo an *Auer* analysis on average and the government's average win rate under various deference regimes. With this data, it is possible to project the effect of substituting one deference regime for another. For the purposes of this study, two such substitutions were analyzed: (1) replace *Auer* with *Skidmore*, and (2) simulate an *Auer* Step Zero by replacing the government's win rate under *Auer* with its win rate under *Skidmore* for interpretations contained in informal administrative formats.

227. See *supra* Section I.C.

228. For statutory interpretations, other factors a court considers at Step Zero include “the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [a]gency has given the question over a long period of time.” *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Nevertheless, administrative process has been the key criterion weighed by courts in a *Chevron* Step Zero analysis, based on this author's anecdotal experience.

229. This represents the difference between the government's actual win total under *Auer* across all interpretations and the number of times the government would have prevailed if it had received *Skidmore* deference for all such interpretations. Under *Auer*, the government won on 274 out of 380 interpretations subject to judicial review in cases where it was a party. See *supra* Table 2. Under *Skidmore*, where the government's win rate is 59%, the government would have won an estimated 224 times (59% of 380). See *supra* Tables 1 & 2.

tions annually,²³⁰ which works out to about one interpretation per circuit court every five years.²³¹ This difference is spread across the sixty-six administrative agencies identified in the study.²³² These results are a far cry from the claim made by *Auer*'s defenders that overhauling *Auer* deference would "cast[] doubt on many thousands of longstanding agency interpretations"²³³ or "cause considerable disruption" among the U.S. Courts of Appeals.²³⁴

B. A THEORETICAL JUSTIFICATION AND EMPIRICAL DEFENSE OF AUER STEP ZERO

Wholesale rejection of *Auer* deference is unnecessary. As is explained below, the Supreme Court could satisfy both critics and proponents of *Auer* if it treated *Auer* deference in the same manner it treats *Chevron* deference in light of their common justification and effect.

Employing *Chevron* and *Auer* in the same manner—by establishing an *Auer* Step Zero—would close the loophole created by courts giving binding *Auer* deference to agency regulatory constructions regardless of the procedural formality of the interpretation.²³⁵ Under *Chevron*, controlling deference is presumptively reserved for interpretations contained in formal formats.²³⁶ Thus, if the Court adopted an *Auer* Step Zero, it could neutralize the incentive for agencies to circumvent procedural rigors.²³⁷

Reforming *Auer* would also mitigate the doctrinal inconsistency inherent in the Supreme Court's irrational distinction between its *Auer* and *Chevron* deference applications, despite their common justification and effect.²³⁸ If for nothing else than for the sake of doctrinal simplicity, it makes more sense that Congress intended for courts to defer only to those interpretations issued pursuant to an agency's exercise of a congressional delegation to make policy with the force and effect of law, regardless of whether that interpretation emanates from a statute or a regulation.

Such a harmonization of *Chevron* and *Auer* would also assuage the constitutional concerns associated with *Auer*.²³⁹ To this author's knowledge, no scholar disputes that Congress is constitutionally empowered to decide whether administrative agencies or federal judges should resolve ambiguities in regulatory

230. This number is derived by dividing fifty-one interpretations by twenty years.

231. This number is derived by dividing fifty-one interpretations by twenty years, dividing that number (2.55) by thirteen (reflecting the thirteen United States Courts of Appeals) and then multiplying that number (0.196) by five, to arrive at the not-quite-one case per circuit, per five years.

232. As identified in this study, sixty-six agencies set forth interpretations subject to judicial review under the *Auer* framework by the United States Courts of Appeals from 1993–2013.

233. Clarke, *supra* note 13, at 193.

234. Snowden, *supra* note 80, at 34.

235. See *supra* note 59–60 and accompanying text.

236. See Merrill & Hickman, *supra* note 39, at 836.

237. The implementation of an *Auer* Step Zero is not a new idea. See, e.g., Stephenson & Pogoriler, *supra* note 49, at 1461–62.

238. See *supra* notes 37–51 and accompanying text (discussing the difference in the Supreme Court's application of the two doctrines).

239. See Manning, *supra* note 12, at 648.

texts.²⁴⁰ If the Court applied *Chevron* and *Auer* deference evenly, in accordance with their shared rationale and impact, the constitutional critique would be answered because *Auer* would comport with a plausible inference that Congress intended for all mandatory deference doctrines to be limited to interpretative policymaking carrying the force of law.

So, what is the approximate administrative burden of reforming *Auer* such that it does not apply to interpretations resulting from informal administrative procedures? Substituting *Auer*'s win percentage in noninclusive administrative procedures²⁴¹ with that of *Skidmore*'s over the twenty year period (1993–2013) across thirteen circuit courts of appeals would result in an estimated difference of twenty-five interpretations that would have failed to survive judicial review.²⁴² This is an average of 1.25 interpretations per year with a different outcome, or about one interpretation per U.S. Court of Appeals every ten years.²⁴³ To be sure, there has been an uptick in the number of *Auer* cases since 2008 from about twenty interpretations per year subject to judicial review to about thirty per year.²⁴⁴ Although it is not possible to know whether this increase in the number of *Auer* applications is part of a larger trend, even at the higher post-2008 *Auer* application rate, reforming *Auer* in the aforementioned manner would lead to an estimated difference in the government's win rate amounting to a single interpretation per U.S. Court of Appeals every eight years.²⁴⁵ These results indicate it is highly unlikely that reforming *Auer* would cause unmanageable splits among the federal circuit courts.

240. For example, two versions of the Regulatory Accountability Act of 2017 in the current Congress would replace *Auer* deference with either de novo review or *Skidmore* deference. *See supra* notes 7–8.

241. Noninclusive administrative procedures include informal adjudications, appellate litigation position, nonlegislative rules, and nontextual interpretations. *See supra* Section II.B.

242. From 1993–2013, the United States Courts of Appeals invoked *Auer* in adjudicating 169 government regulatory interpretations contained in informal formats, and the government's interpretation won 125 times. *See supra* Table 2. By applying the government's win rate of 59% under *Skidmore* deference from 1993–2013, it is possible to approximate that the government would have won approximately one hundred times under *Skidmore*. Therefore, if the federal circuit courts had adopted an *Auer* Step Zero from 1993–2013, the government would have won twenty-five fewer cases over the twenty-year period.

243. This average of one interpretation per United States Court of Appeals every ten years is calculated by first dividing the twenty-five interpretations by twenty years and then dividing that number (1.25) by the thirteen United States Courts of Appeals which results in 0.096 interpretations per year. That number (0.096) is then multiplied by ten to arrive at the average.

244. *See supra* Figure 1.

245. This figure represents the difference in the government's win rate when the force of law test is applied to twenty-eight interpretations per year across all United States Courts of Appeals, which is the average number of interpretations subject to judicial review since 2008. *See supra* Table 3. Cases in which the agency did not participate were excluded. On average, 44% of regulatory constructions subject to review were contained in noninclusive administrative formats that presumptively do not carry the force of law or are not in the preamble to a regulation. *See supra* Table 2. With this data, it is possible to estimate the difference between the government's win rate when the force of law test is applied and the government's estimated win rate when the court applies *Skidmore* to agency regulatory constructions that lack the force of law. The formula for the government's estimated win rate when the

CONCLUSION

This study seeks to inform the ongoing debate over *Auer* deference by performing a comparative analysis of the three significant deference regimes as employed by U.S. Courts of Appeals. The study results point to both descriptive and predictive findings. First, U.S. Courts of Appeals less frequently grant controlling deference to agency regulatory constructions in the aftermath of a number of Supreme Court decisions critical of the *Auer* doctrine. Second, the variety and balance of administrative processes associated with *Auer* deference is greater than is widely thought. Finally, the results of this study contradict the claims made by defenders of *Auer* deference that rejecting or otherwise reforming the doctrine would produce unacceptable administrative costs. The negligible administrative burden of reforming the *Auer* doctrine challenges the utilitarian calculation that buttresses *Auer*'s proponents in the face of legitimate and un rebutted criticisms of the doctrine.

force of law test is applied is 28 (interpretations per year) \times 0.44 (proportion of non-inclusive interpretations) \times 0.71 (government's win rate under *Auer* from 2006–2013). The formula for the government's estimated win rate when the court applies *Skidmore* to agency regulatory constructions that lack the force of law is 28 (interpretations per year) \times 0.44 (proportion of non-inclusive interpretations) \times 0.59 (the government's win rate under *Skidmore* from 1993–2013). This arithmetic results in the government winning on an estimated 1.47 fewer interpretations per year, or 0.12 interpretations per federal circuit court per year.