EXAMINING Auer’S INCENTIVES: THE LIMITS OF SELF-DELEGATION

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ABSTRACT

Auer deference holds that when agencies interpret their own pre-existing regulations, they receive deference from reviewing courts. For some leading scholars and jurists, this benign-sounding doctrine actually encourages agencies to promulgate vague rules, violating core separation-of-powers norms in the process. This “perverse incentives thesis” has become increasingly influential, but it has never been tested. In this article, I scrutinize the perverse incentives thesis from both an empirical and a theoretical perspective. I first test the thesis empirically using an original and extensive dataset of federal rules from 1982-2016. My analysis reveals that agencies did not measurably increase the vagueness of their writing in response to Auer. If anything, rule writing arguably became more specific over time despite Auer’s increasing prominence. Seeking answers to why there is such a disconnect between theory and reality, I turn inward to the agencies themselves, contrasting the simple model of comprehensive rationality offered by Auer’s critics with a more realistic institutional account of agency officials as boundedly rational “satisficers.” In particular, I show that in the choice about when to offer interpretive specificity, agency officials are driven by both their inner cognitive infrastructure and core administrative law (e.g., hard look review) to front-load specificity. These findings not only caution against taking the fast-moving assault on Auer too far, but also draw attention to the need to test behavioral theories of administrative law against the empirical record.

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INTRODUCTION

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

Today, leading scholars and jurists view a longstanding administrative law doctrine known as Auer deference as an existential threat to this project, and even an affront to fundamental constitutional separation-of-powers norms. Auer deference (also known as Seminole Rock deference) holds that a court reviewing an agency’s interpretation of its own regulations should defer to the agency’s construction so long as it is not “plainly erroneous or inconsistent with the regulation.” The argument against Auer deference posits that if agencies know that they will win most cases involving their interpretation of previously promulgated rules, they have strong incentives to write relatively vague rules in the first instance. That way, it is claimed, agencies will have more discretion than they otherwise might have had, as they need only make a plausible argument that the new interpretation is loosely contemplated by the original rule’s capacious language.

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3 Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1698 (1975) (noting that a “possible response to the problems created by broad legislative delegation is to acknowledge the large discretion enjoyed by agencies and to require that it be exercised in accordance with consistently applied rules”); E. Donald Elliott, Re-Inventing Rulemaking, 41 Duke L.J. 1490, 1491-92 (1992) (noting that, “[a]t least since Kenneth Culp Davis first published his Administrative Law Treatise in 1958, most American students of administrative law have been overly enamored of the formal beauty of the notice-and-comment process” and have “deplored the rule of law firmly established by the Supreme court and reiterated unanimously over the years that agencies are free to choose between rulemaking and other forms of agency action for making policy”).

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


Agencies employing this strategy would also have greater ability to maneuver using categories of agency action that are exempted from the stringent public processes attached to notice-and-comment rulemaking. For instance, broader language in the rule being interpreted could make more plausible an agency’s argument that it is merely elaborating on a pre-existing rule in a new guidance document, policy statement, or other non-legislative rule. Consider Title IX of the Civil Rights Act, which prohibits discrimination “on the basis of sex” in public schools. In 2000, under this statutory provision, the U.S. Department of Education promulgated a rule that allowed school districts to install gender-separate restrooms in public school buildings, but required comparable facilities between the sexes. Years later, in response to questions schools were confronting over how to accommodate transgender students within this regulatory framework, the Department further interpreted its own regulation to require that when a school “elects to separate or treat students differently on the basis of sex,” it must “treat transgender students consistent with their gender identity.” That is, rather than amending its earlier regulation, the Department simply issued an opinion letter—without any public comment period—that claimed to interpret its earlier regulation to support the Department’s present position on bathroom facilities for transgender students. Citing , the Fourth Circuit upheld the Department’s policy, deferring to the agency’s interpretation contained in the opinion letter. When an agency promulgates a legislative rule through notice and comment, it can then continuously revise its interpretations without meaningful judicial notice to regulated entities and with little judicial accountability.


Critics contend that agencies rely on guidance documents in ways that circumvent the notice-and-comment rulemaking process. Their concern is that agencies are turning increasingly to guidance to establish norms that have significant de facto weight without the participation and accountability virtues of a notice-and-comment process.


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


Id.

Id. at 723.
The Department of Education could have been clearer about the treatment of transgender students in its original regulation, or it could have subsequently gone through the full process needed to amend that regulation to address the issue of bathroom facilities for these students. Instead, it chose to issue an interpretation of its own earlier, unclear regulation—and, because of Auer, there was little risk of adverse judicial review of this procedural decision. It takes only one additional logical step for an agency to realize that there might be benefits to making its rules more amenable to capacious interpretation in the first place—doing so would make it that much easier to bypass the need to amend regulations or promulgate new ones down the road. Critics of Auer thus claim that the doctrine creates perverse incentives for agencies to make their regulations unclear (or at least not worry too much if they are), knowing that the courts will back them up if they later decided to issue informal opinion letters or other guidance documents interpreting those regulations as they please.\(^\text{14}\)

In this article, I scrutinize the perverse incentives thesis from both an empirical and a theoretical perspective. I first test the thesis empirically using an original and extensive dataset of federal rules from 1982-2016. My analysis reveals that agencies did not measurably increase the vagueness of their writing in response to Auer. If anything, rule writing arguably became more specific over time despite Auer’s increasing prominence.\(^\text{15}\) The lack of empirical evidence of an “Auer effect” on rule writing is actually not surprising, given what we know about agencies as boundedly rational, incrementalist organizations.\(^\text{16}\) Agencies are exposed to numerous countervailing incentives, and the fact that agencies are boundedly rational means that incentives that operate in the short run are more salient to agencies as they engage in the task of rule writing.\(^\text{17}\) The perverse incentives thesis finds no support in the data because it ignores this key feature of agency behavior and human cognition—in particular the insight that individuals who work in administrative agencies tend to focus on immediate risks at the expense of longer-term gains.\(^\text{18}\) Moreover, core administrative law reinforces this behavioral tendency. The most immediate concern that agency rule-writers face is the threat of vacatur under “hard look” review under the APA’s arbitrary and capricious clause.\(^\text{19}\) I show that hard look review, through its imperative that agencies thoroughly justify a chosen policy over its alternatives, creates incentives for specificity in rules—precisely the opposite of what Auer allegedly encourages.\(^\text{20}\)

\(^{14}\) See infra Part II.A.

\(^{15}\) See infra Part III.C-E.

\(^{16}\) See infra Part IV.A-B.

\(^{17}\) See infra Part IV.A.

\(^{18}\) See infra Part IV.B.

\(^{19}\) See infra Part IV.C.

\(^{20}\) See infra Part IV.C.
Recognizing the limits of the perverse incentives thesis points to the importance of an evidence-based understanding of how administrative law shapes agency rule-writing. Behavioral questions pervade administrative law, but are too infrequently addressed empirically by administrative law scholarship. Reckoning with administrative law’s linkages with agency behavior is not just of importance to administrative law scholars; it also carries importance for perennial debates about the role of administrative agencies within U.S. government. Formalist separation-of-powers theory resists many aspects of the administrative state because it often involves the breakdown of hard lines demarcating the constitutionally prescribed allocation of powers.

Returning to the Department of Education’s interpretation of its own regulation in G.G. v. Gloucester County, critics see an agency partially exercising legislative power (in the form of the original rule) and partially exercising a kind of judicial power (in the form of exposition of the rule in its opinion letter). This kind of combination of powers is thought to be problematic, both in the context of Auer as well as far beyond it, because the combination of functions in the administrative state risks creating perversely aligned incentives for the aggrandizement of power in a manner inconsistent with a republican constitutional framework. But if agencies are often pulled in different directions by doctrine and the inherent complexities of their task—not to mention that they are institutionally and cognitively predisposed to systematically err in predictable ways—then this story of breakdown loses much of its force. This certainly is the case with Auer, but if true in general, this more complicated story has implications for the entire corpus of separation-of-powers jurisprudence, where arguments about behavioral consequences derived from structure are prevalent and often influential with courts.

The article proceeds as follows. Part I introduces Auer deference and describes how it evolved from an earlier principle, became a central feature of litigation in the federal courts, and more recently has come under assault by some in the judiciary. Part II then engages the critique of Auer in more detail, showing how the doctrine’s critics claim that it creates perverse incentives for rule writing by relaxing the strict separation of rule-making and rule-interpreting authority. The critics claim, as Cass Sunstein and Adrian Vermeule have characterized it, that “[a]gencies will issue vague, broad regulations, knowing full well that when the time comes, they will be able to impose the interpretation they prefer.” Part III presents the core of the article: an empirical

\[21\] See infra Part V.

\[22\] For a recent example, see PHH Corp. v. CFPB, 839 F.3d 1, 6-8 (D.C. Cir. 2016) (holding that the structure of the Consumer Financial Protection Bureau (CFPB) is unconstitutional in part because it is “an independent agency headed by a single Director and not by a multi-member commission,” which “poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency”).

\[23\] Cass R. Sunstein and Adrian Vermeule, The Unbearable Rightness of Auer, 84 U. Chi. L. Rev. 297, 308 (2017); see also Cynthia Barmore, Auer in Action: Deference After Talk America, 76 Ohio St. L.J. 813, 818 (2015) (“If Auer requires deference to an agency’s interpretation of ambiguous (but not unambiguous) regulations, agencies would maximize future flexibility and power by promulgating ambiguous regulations. An ambiguous regulation would give the agency greater discretion when deciding which enforcement actions to bring and would increase the variety of positions it could take in subsequent litigation. An
analysis of agency rule writing that shows statistically that Auer’s incentives do not translate into any measurable changes in agencies’ propensity to produce vague rules. Part IV sets out to explain why the evidence does not square with such an elegant theory. It brings attention to the limits on comprehensive rationality that inhere in the bureaucracy, focusing in particular on the short horizons of agencies in the tradeoff between specifying intent now versus later. I explain why the short-run incentive of surviving hard look review only heightens this tendency. Finally, Part V concludes with implications of the analysis presented here for larger debates about the legitimacy of bureaucracy and the separation of powers.

I. **Auer’s Origins and Ascension**

Auer stands for the principle that an agency’s interpretation of its own regulations is “controlling unless ‘plainly erroneous or inconsistent with the regulation.’” When courts apply Auer, they defer to an agency’s exercise of interpretive discretion. Reasonable interpretations are credited, even if the court might actually believe that another possible interpretation is a better one. Auer is thus sometimes compared to its much more familiar doctrinal cousin, step two of Chevron deference, and in some ways the comparison is apt—all the more so now that several agency would be free to interpret or apply the regulation in whatever (plausible) way it considers most advantageous at the time, potentially even if it has offered a different interpretation in the past. Critics worry that the incentive to promulgate vague regulations would lead to predictably more ambiguous regulations, thereby giving regulated parties less notice of prohibited or required conduct.

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24. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). In recent years the Court has delineated several circumstances when Auer does not apply. See Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (holding that Auer is not to be afforded “when there is reason to suspect that the agency’s interpretation does not reflect the agency’s fair and considered judgment”); Gonzalez v. Oregon, 546 U.S. 243, 257 (2006) (holding that Auer does not apply when the rule’s text “parrots,” or mimics, the legislative ambiguity that justified Chevron deference in the first place—something widely known as the “anti-parroting” principle or canon). Together, these caveats have prompted some to consider whether there is an emerging “step zero” in Auer doctrine. Conor Clarke, The Uneasy Case Against Auer and Seminole Rock, 33 Yale L. & Pol’y Rev. 175, 189 (2014) (“But many of these doctrinal innovations do to Auer what United States v. Mead does to Chevron: they limit the ‘domain’ of deference by adding what is often described as a ‘step zero.’”).

25. Decker v. Nw. Envt’l Def. Ctr., 133 S. Ct. 1326, 1337 (2013) (“It is well established that an agency’s interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.”).

26. Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”). See also Jeffrey A. Pojanowski, Revisiting
empirical studies have shown that the government’s win rate in Auer cases is consistent with that in Chevron cases. 27

The difference between the Chevron and Auer lies in the source of the interpretive discretion. With Chevron, the discretion, if it exists, comes from the statutory delegation of authority, express or implied. With Auer, the discretion comes from lingering ambiguities in the agency’s previously promulgated regulatory text. When Auer comes up in litigation, it is most often because an agency has issued a guidance, policy statement, advisory letter, or manual (i.e., a nonlegislative rule) that clarifies a legislative rule previously promulgated through notice-and-comment rulemaking.


27 Barmore, supra note 23, at 815 (“[C]ourts of appeals have responded to the Court’s recent Auer decisions by narrowing their application of the doctrine, leading to a steady decline from 2011 to 2014 in the rate at which courts grant Auer deference.”); William M. Yeatman, An Empirical Defense of Auer Step Zero, (Aug. 29, 2016), available at https://ssrn.com/abstract=2831651; Richard J. Pierce, Jr. & Joshua Weiss, An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Admin. L. Rev. 515, 519 (2011) (finding a 76 percent validation rate for a set of cases decided by lower courts). These findings show a noticeable drop in actual deference compared with the Supreme Court’s actual deference in the few Auer cases it decides. According to a leading empirical study, the Supreme Court applied Auer in 1.1 percent of agency interpretation cases and deferred to the agency 90.9 percent of the time it applied Auer. William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 Geo. L.J. 1083, 1099 (2008). Thus, although the language “controlling ‘unless plainly erroneous or inconsistent with the regulation’” might have suggested a kind of “super deference,” see Daniel Mensher, Seminole Rock in Environmental Law: A Window Into Weirdness, Yale J. on Reg.: Notice & Comment (Sep. 15, 2016), http://yalejreg.com/nc/seminole-rock-in-environmental-law-a-window-into-weirdness-by-daniel-mensher/ (“[W]hat I find most perplexing about Auer is that it demands courts defer to nearly any agency interpretation of its regulations, regardless of where, when, or how the agency offers that interpretation. This leads to some bizarre results.”), Auer is in practice within the normal range of the continuum of deference.


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

30 The difference between legislative rules and nonlegislative rules is that legislative rules “are designed to have binding legal effect on both the issuing agency and the public” and are therefore required to “undergo the expensive and time-consuming process known as notice-and-comment rulemaking before being promulgated.” David L. Franklin, Legislative Rules, Nonlegislative Rules, and the Perils of the Shortcut, 120 Yale L.J. 276, 278 (2010) (citing 5 U.S.C. § 553(b)-(c)). “Nonlegislative rules, by contrast, are not meant to have binding legal effect, and are exempted from notice and comment by the APA as either ‘interpretative rules’ or ‘general statements of policy.’” Id. (citing 5 U.S.C. § 553(b)(A)).
comment rulemaking under Section 553 of the APA.\footnote{Of course, if the agency adds something too new, changing the substance of the rule in a way binding the public, it risks a procedural challenge under the APA alleging that it should have gone through notice-and-comment rulemaking. See, e.g., Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), aff’d, 809 F.3d 134 (5th Cir. 2015), aff’d by an equally divided court, United States v. Texas, 136 S. Ct. 2271 (2016) (mem.) (per curiam); Franklin, supra note 30, at 287-89 (discussing the various tests that courts employ in determining whether agency action is a “legislative rule” that should have gone through notice-and-comment procedures). Likewise, in certain cases an agency’s new interpretation in an enforcement context can raise issues of fair notice that will prevent post hoc application of the interpretation. See, e.g., Gen. Elec. Co. v. U.S. EPA, 53 F.3d 1323 (D.C. Cir. 1995) (outlining the “ascertainable certainty” requirement for fair notice in the enforcement realm).} Usually, the agency could have made an identical change by amending the initial rule through a new round of notice-and-comment rulemaking, but issuing a guidance or other non-binding document can be accomplished more quickly because the strictures of Section 553 do not apply.\footnote{William Funk, Saving Auer, JOTWELL (June 23, 2016) (reviewing Sunstein & Vermeule, Unbearable Rightness, supra note 23), http://adlaw.jotwell.com/savingauer/ (arguing that “it will be infinitely faster and easier for the agency to use [interpretive rulemaking techniques]” because it would “avoid the requirements for notice-and-comment rulemaking under the APA and any requirements of the Regulatory Flexibility Act,” and “will as a practical matter avoid the requirements for regulatory review under E.O. 12866 and the requirements of the Congressional Review Act”).} In effect, Auer blesses some procedural corner-cutting in the name of administrative efficiency.

Auer is not as widely cited as Chevron,\footnote{See Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron, 73 U. Chi. L. Rev. 823, 824 n.2 (2006) (reporting that Chevron was cited a staggering 2,414 times in its first decade, 2,584 times in its next six years, and 2,235 times in the next five years).} but it has become an established feature of litigation involving federal administrative agencies.\footnote{Decker v. Nw. Envt'l Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring) (“Questions of Seminole Rock and Auer deference arise as a matter of course on a regular basis.”).} It was not always so. In the next section, I chronicle the rise of Auer from its humble origins in Bowles v. Seminole Rock Sand to its virtually unquestioned endorsement and rising appeal in the 1990s. Then, I turn to more recent years, which have seen both an increasing embrace of Auer deference across the federal judiciary as well as some growing apprehension about the doctrine among some current and former Supreme Court Justices.

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

Although the Supreme Court decided Auer in 1997, the deference principle it represents actually stems from an unassuming case from the 1940s involving the Office of Price Administration’s (OPA) interpretation of its “General Maximum” regulations under the
Emergency Price Control Act. In Seminole Rock, the Court confronted an ambiguity in these price control regulations. OPA’s regulations provided that “each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942.” Seminole Rock & Sand Company wanted to charge customers for crushed rock at a rate that it had formally contracted for during the month of March, but which it had not yet fulfilled. OPA believed that the “highest price charged” was to be determined by reference to sales where there had been an actual delivery; reference to contracted charges could only be made only if there had been no delivery in the month of March, which was not the case. In fact, at the same time it issued the General Maximum regulations, OPA had issued a "bulletin" in which it used the more precise "actually delivered" language. Siding with OPA, the Supreme Court stated that, in interpreting an agency’s regulation, “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”

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

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36 Id. at 413.

37 Id. at 415.

38 Id. The delivery that had been made was simply at a lower price than Seminole Rock would have preferred.

39 Id. at 417.

40 Id. at 414.

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

42 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that, even when not controlling, agency decisions “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,” and that the “weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).

43 Pojanowski, supra note 26 (arguing that this evolution makes Auer “bad law” in the sense that it misstates Seminole Rock’s true meaning); see also Aditya Bamzai, Henry Hart’s Brief, Frank Murphy’s Draft, and the Seminole Rock Opinion (Sept. 12, 2016) (noting that the briefing in Seminole Rock seemed geared toward application of Skidmore, not toward creation of a new deference doctrine).
Consistent with this conclusion, *Seminole Rock* only slowly caught on in the first few decades after the decision. As Figure 1 makes clear, citations to *Seminole Rock* first ebbed through the 1950s and then began to flow more regularly beginning in the 1960s. During this period, courts began to demonstrate an increasing willingness to apply *Seminole Rock*’s deference principle outside the price control context and to interpretations that were not “official.” In addition, whereas early on courts tended to “engage[] in what looked like de novo interpretive analysis, only to cap off their decision with a reference and citation to *Seminole Rock*,” courts in the 1960s “began to articulate *Seminole Rock* as giving rise to a type of rebuttable presumption, a burden that would have to be overcome if the court were to adopt a contrary interpretation.” In the 1965 case *Udall v. Tallman*, the Supreme Court gave *Seminole Rock* some added authority as a general administrative law principle (rather than a provincial enclave of price regulation law) by “tying *Seminole Rock* to a broader body of well-accepted statutory interpretation doctrines.”

These changes cultivated a steady, but quite limited, institutionalization of *Seminole Rock* in the circuit courts through the 1970s, 1980s, and early 1990s, as Figure 1 demonstrates. While average total citations to *Seminole Rock* increased by more than 800 percent from the lowest period from 1955-1965 to the period from 1990-1996, just before *Auer v. Robbins* was decided in 1997, the frequency of citation remained low, averaging just 21 citations per year from 1970 through 1996. And while the Supreme Court occasionally cited *Seminole Rock* during the six years prior to 1997, it did so without much fanfare.49

45 See id. at 69-70 (citing *Boesche v. Udall*, 303 F.2d 204 (D.C. Cir. 1961), aff’d, 373 U.S. 472 (1963)).
46 Id. at 73-74.
Seminole Rock’s low profile changed abruptly in 1997 with the Court’s decision in Auer v. Robbins. In Auer, the question centered on the lawfulness of the Secretary of Labor’s interpretation of its “salary-basis test” regulations—a policy interpreting the Fair Labor Standards Act’s exemption from entitlement to overtime pay for “bona fide executive, administrative, or professional” employees. Part of the salary-basis test was whether the employee was subject to disciplinary reductions in salary. If employees were “subject to” such requirements, they were not salaried employees, and therefore not exempt. The petitioners wanted to be classified as non-exempt, non-salaried employees because they were, at least in theory, subject to disciplinary reductions in pay under their manual. But in an amicus brief requested by the Court, the

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52 29 C.F.R. § 541.118(a).

53 Auer, 519 U.S. at 459-60.
Secretary of Labor argued that its salary-basis test required a showing of “an actual practice of making such deductions or an employment policy that creates a ‘significant likelihood’ of such deductions.” Characterizing the “controlling unless ‘plainly erroneous or inconsistent with the regulation’” language from *Seminole Rock* as a “deferential standard,” the unanimous Court, in an opinion written by Justice Scalia, concluded that the Secretary’s interpretation was valid. The critical inquiry, in the Court’s estimation, was whether the triggering language “subject to” in the salary-basis regulations could support a more restrictive interpretation that would preclude the mere technical possibility of disciplinary reductions from preventing application of the FLSA exemption. To this, the Court replied that the words “comfortably bear[] the meaning the Secretary assigns.” Nor did the fact that the interpretation was contained only in a brief filed in the litigation sway the Court’s conclusion that *Seminole Rock* demanded deference to the Secretary’s interpretation.

With the unanimous decision in *Auer*, the Supreme Court seemed satisfied that *Seminole Rock* required substantial deference to agencies’ interpretations of their own regulations. The Secretary of Labor’s interpretation was hardly inevitable and far from a paragon of transparent reasoning, but it was nonetheless entitled to deference because it was not specifically foreclosed by the regulatory text. As can be seen in Figure 1, this strong statement about the scope of the long-standing *Seminole Rock* principle led to a substantial increase in total citations to the doctrine, whether one looks at just citations to *Seminole Rock*, to *Auer*, or to both together. Total citations to *Auer* and *Seminole Rock* rose by 330 percent in 1997; positive citations likewise rose by over 2,300 percent. After *Auer*, it became possible to describe the principle as a “full-blown and widely applied ‘axiom of judicial review.’”

An important footnote to this history is that the *Auer* decision coincided with what some see as another emerging trend: the shift toward greater agency reliance on nonlegislative rulemaking. As Todd Rakoff noted in his review of activities at the U.S. Food and Drug

54 Id. at 461.

55 Id. at 461 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

56 Id. at 461 (citing 29 C.F.R. § 541.118(a)).

57 Id. at 461.

58 Id. at 462.


60 See, e.g., Rakoff, supra note 7, at 167; Office of Management & Budget, Bulletin No. 07-02, *Final Bulletin for Agency Good Guidance Practices* (Jan. 18, 2007) (“As the scope and complexity of regulatory programs have grown, agencies have increasingly relied on guidance documents to inform the public and to provide direction to their staffs.”); Anthony, supra note 7, at 1316 (“Although the subject is complex and evidence is laborious to assemble, it is manifest that nonobservance of APA rulemaking requirements is widespread.”);
Administration (FDA), the trend appeared to begin in the 1990s, with the rate of guidance per year being “about four hundred percent greater than the rate for the 1980s.” Whether this trend carried over to other agencies is not known. When it comes to “significant guidances,” such actions appear to make up a negligible percentage of agency work and often involve technical issues. Nevertheless, in recent years agencies have sometimes accomplished some major policy changes through nonlegislative rulemaking, leading to some speculation that agencies since the 1990s have increasingly chosen to “issue guidance documents in lieu of regulations” even on the most salient regulatory matters.

B. Recent Developments—Auer’s Second Revolution

Between 1997 and 2005, citations to Auer and Seminole Rock remained stable and overwhelmingly favorable to the doctrine, with total citations averaging about 66.67 per year for the period, explicitly positive citations holding at 14.78 per year, and negative citations remaining rare, at 2.2 per year. Beginning in 2006, however, Auer/Seminole Rock deference experienced a second revolution. Total citations almost doubled on average from 2006 through 2016. Much of this increase is actually attributable to the growth of positive treatments of the doctrine: positive citations to Auer and Seminole Rock doubled over this period. But some of the change appears to be driven by growing concern about the doctrine, with the courts quadrupling the average yearly rate of explicitly negative treatments during this period.

Mendelson, supra note 7, at 399 (collecting examples and concluding that the “use of guidances dwarfs agencies’ production of notice-and-comment rules”).

61 Rakoff, supra note 7, at 168.

62 OMB, supra note 60, at 7 (defining “significant guidance document”).


65 OMB Bulletin 07-02, supra note 60, at 3.
The impetus behind this second revolution is a series of Supreme Court cases giving greater attention—sometimes sharply critical—to the doctrine. First, in early 2006, the Court decided Gonzales v. Oregon, holding that the Attorney General’s interpretive rule prohibiting the use of controlled substances in carrying out otherwise state-sanctioned assisted suicides was invalid under the terms of the Controlled Substances Act. Although the Court nominally reaffirmed the validity of the Auer doctrine, it ultimately concluded that the doctrine was “inapplicable” because “the underlying regulation [did] little more than restate the terms of the statute itself.” For the first time, the Gonzales decision suggested that there might be a “step zero” requiring that certain


67 Id. at 256-57.

68 Scholars often refer to a somewhat analogous “Chevron step one,” where courts consider whether certain criteria—namely, whether Congress has expressly or impliedly delegated authority to the agency to make rules with the force of law—has occurred before even applying Chevron’s two steps. See Cass R. Sunstein,
criteria be fulfilled before an agency’s interpretation could be afforded Auer deference. The case
drew little attention from observers at the time, but in light of subsequent developments, it is clear
that the Court’s power to “simply invent[] an exception to Auer” 69 undermined the stability of the
doctrine and opened the door to more concerted questioning by federal courts. 70

It was not until six years later, however, that any of the Justices explicitly broached the
possibility of jettisoning Auer deference. In 2011, the Court in Talk America v. Michigan Bell
Telephone Co. granted Auer deference to the Federal Communications Commission’s (FCC)
interpretation of its regulations governing what kinds of access to transmission facilities incumbent
telecommunications providers must give to competitors. 71 The majority was satisfied that there was
“no danger that deferring to the Commission would effectively ’permit the agency, under the guise
of interpreting a regulation, to create de facto a new regulation,’” 72 nor was there “any other ‘reason
to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the
matter in question.’” 73 In a concurrence, Justice Scalia agreed that the regulation controlled, but
only because it was clear. With respect to Auer deference, Justice Scalia indicated that he had
come to have second thoughts about the doctrine since his majority opinion in Auer—a change of
heart that some have observed created “widespread confusion” in the circuits. 74 Justice Scalia
argued that, upon further reflection, it is “contrary to fundamental principles of separation of


70 See Stephen M. Johnson, Bringing Deference Back (But for How Long?): Justice Alito, Chevron, Auer, and
Chenery in the Supreme Court’s 2006 Term, 57 Cath. U. L. Rev. 1, 3 (2007) (suggesting that Gonzales “seemed
to signal a shift away from Auer deference for an interpretations of its regulations,” but also noting two
other cases—Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) and Long Island Care
at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007)—that signaled vitality for the doctrine). One might add to the
list of cases that signaled the Court was still not fully convinced of the dangers of Auer the decision in Coeur
interpretation of the EPA’s regulation determining which agency, EPA or the Army Corps of Engineers,
had authority to issue a fill permit under the Clean Water Act. The Court cited Auer v. Robbins in holding
that EPA’s interpretation was acceptable.


72 Id. at 2263 (citing Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

73 Id. at 2264 (citing Auer v. Robbins, 519 U.S. at 462).

74 Kevin O. Leske, Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by
the U.S. Courts of Appeals, 66 Admin. L. Rev. 787 (2014) (describing “widespread confusion” in the
application of Auer in the circuit courts).
powers to permit the person who promulgates a law to interpret it as well,” and doing so in fact “encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”

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

The Court has had several opportunities to grant petitions for certiorari in cases that would squarely present the question of whether to overturn Auer. So far, however, the Justices in favor of revisiting Auer do not appear to have the necessary votes. First, amidst a maelstrom of speculation that the Supreme Court would grant the petition for writ of certiorari in the *United Student Aid Funds* appeal precisely to overturn Auer, the Court instead denied the petition over a

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75 *Talk America*, 131 S. Ct. at 2266 (Scalia J., concurring).


78 Id. at 2168-69.


80 Id. at 1338 (Roberts, C.J., concurring).

vigorous dissent from the denial by Justice Thomas. Then, after the Fourth Circuit ruled that a school district had to allow a transgender student to use the bathroom matching his gender identity, citing and deferring to a Department of Education guidance, the Supreme Court received a petition for certiorari squarely requesting that the Court abandon Auer. In a surprising development, the Court granted this petition, but not on the question of whether Auer should be overruled, prompting speculation that the Court would at most narrow Auer deference. Even that possibility evaporated— at least for the time being— when the Trump Administration withdrew the guidance at issue, prompting the Supreme Court to return the case to the Fourth Circuit.

The effect of this second wave of Auer cases, as the data show, has not been to stanch the flow of citations to Auer; it has seemingly been to bring Auer to new heights of popularity. At the same time, the data show that the federal judiciary is becoming deeply divided about the desirability of the doctrine, and at least some of the Justices on the Court are clearly interested in revisiting Auer in a future case. In the next part, I examine the source of the deep disagreement developing in the federal courts: a theoretical argument about Auer’s behavioral incentives.

II. Auer’s Perverse Incentives

The roughly sixty years in which Seminole Rock and, later, Auer deference went essentially unquestioned in the federal courts should not be lightly ignored. The consensus during these years reflects a longstanding consensus that the principle of deference to agency interpretations of their regulations serves a fundamental purpose in administrative law. In essence, Auer deference


83 See supra notes 11-13 and accompanying text.

84 Amy Howe, Court Adds Five New Cases, Including Transgender Bathroom Dispute, To Docket, SCOTUSBlog (Oct. 28, 2016, 4:44pm), http://www.scotusblog.com/2016/10/court-adds-five-new-cases-including-transgender-bathroom-dispute-to-docket/ (“In granting review today, the justices sidestepped the most prominent issue they had been asked to take on: whether they should overrule their decision in Auer, which has been the target of criticism by conservative lawyers and jurists.”).


86 See supra Figure 1.

Examining Auer’s Incentives

attempts to alleviate a basic tension, one that might well emerge in any system of administrative law, and certainly in one as geared toward legislative rulemaking as is the modern U.S. administrative system—namely, “accommodating the need for agency flexibility while guarding against the specter of what Justice Jackson memorably described as ‘administrative authoritarianism’—the ‘power to decide without law.’”88 The problem Auer aims to solve, in other words, is the tension between the expectation of prior notice of the rules of the game and the inescapable need for expert application of legislative rules to increasingly fine-grained, unforeseen situations that fall within the purview of the rules.89 Even the most perspicacious of rule writers cannot anticipate every circumstance that might require application of a rule.90 In theory, Auer saves the day by giving these rule writers some assurance that their good-faith application of the codified text to novel, but related, problems will be respected by the courts, and it likewise gives agencies greater freedom to avoid undergoing cumbersome notice-and-comment rulemaking whenever they seek to make these adjustments.91 It also reflects a presumption that agencies, as the entities that drafted the regulatory text in question, are hardly inexpert when it comes to determining the intended meaning and purpose of regulatory text.92

88 Clarke, supra note 24, at 178 (describing these as “two classic concerns of the modern administrative state”); see also Stephenson & Pogoriler, supra note 6, at 1453 (“[W]holesale rejection of Seminole Rock would be quite disruptive, and would likely have serious disadvantages, including loss of regulatory flexibility and efficiency.”).

89 The literature identifies two somewhat related bases for the second value in this tension: first, agencies are in the best position to resolve ambiguities according to the “regulative intent,” see Stephenson & Pogoriler, supra note 6, at 1456; Sunstein & Vermeule, Unbearable Rightness, supra note 23, at 306-07, and, second, agencies have expertise that allows them to more coherently “resolve any gaps, conflicts, or ambiguities” in the regulatory scheme, see Stephenson & Pogoriler, supra note 6, at 1456. For a general account of the unique challenges of regulatory interpretation, as opposed to statutory interpretation, see Kevin M. Stack, Interpreting Regulations, 111 Mich. L. Rev. 355 (2012).

90 Nor do they necessarily want to. See Barmore, supra note 23, at 819 (“At times, the best regulation may not be the clearest possible formulation because enhanced clarity sacrifices regulatory accessibility and congruence. An accessible rule is one that can be applied easily to concrete situations, while a congruent rule is one that produces the desired behavior. An agency could try to answer every potential interpretive question, but such clarity would increase the length and complexity of regulations until they were too opaque for regulated parties to understand.”).

91 Id. at 819-20. It bears noting, however, that agencies are apparently quite involved in revisiting existing rules through legislative rulemaking. As Wendy Wagner and colleagues show, notwithstanding how cumbersome notice-and-comment rulemaking might be, these workaday adjustments are quite frequently accomplished through these means. Wendy Wagner et al., Dynamic Rulemaking, 92 N.Y.U. L. Rev. 183 (2017).

92 See Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144, 151-53 (1991) (“Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question.”). Indeed, some scholars have argued that agencies’ unique ability to interpret regulatory texts is a reason for making Auer deference “more robust than Chevron deference.” See Stephenson & Pogoriler, supra note 6, at 1455 (noting the argument but noting that it has
These substantial benefits and justifications notwithstanding, Auer has, as Part II.B showed, increasingly been met with skepticism by a vocal minority in the federal judiciary. The skeptical treatments by some Justices in cases like Talk America, Decker, Christopher, and Perez rely to a great extent on a theoretical apprehension about the doctrine’s behavioral effects. That is, according to John Manning, who largely inspired the recent judicial questioning of the doctrine, 93 Auer has an “untoward effect upon [the agency’s] incentive to speak precisely and transparently when it promulgates regulations.” 94 It is that apprehension that I now turn to in more detail.

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

The fundamental concern with Auer is that it allows an agency to both write the law (the regulation) and determine its application.” 95 Although Auer’s benefits track closely the benefits of Chevron, there is a critical difference from that doctrine. With Chevron, Congress, not the agencies, writes the rules subject to interpretation. An agency then acts on the delegation of interpretive discretion, but Congress remains in control of the scope of the delegation. 96 With Auer, there is an alignment of legislative and expository authority within agencies—one that, according to critics, violates a core separation-of-powers norm against the combination of various constitutionally prescribed powers in one body. 97 The complaint is not purely formalistic: it is argued that this structural difference from Chevron generates two negative consequences that complicate the pragmatic rationale for Auer.

93 See Leske, supra note 74, at 11; Nielson, supra note 76, at 954.


95 Barmore, supra note 23, at 817.

96 Talk America, Inc. v. Mich. Bell. Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia J., concurring) (“When Congress enacts an imprecise statute that it commits to the interpretation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation.”).

97 See Sunstein & Vermeule, Unbearable Rightness, supra note 23, at 310 (“Auer’s critics have a . . . fundamental objection, one that involves heavy artillery, and that also has intuitive appeal: The decision produces a constitutionally suspect combination of the power to make law with the power to interpret law.”). In his partial dissent in Decker, Justice Scalia endorsed this argument, writing that there could be “no congressional implication that the agency can resolve ambiguities in its own regulations” because that “would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.” Decker v. Northwest Env’tl Defense Center, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting).
First, with respect to choices about the form of policymaking, the alignment of legislative and expository authority might mean that agencies would choose the path of least resistance if there are asymmetrical costs associated with each policymaking form. As William Funk has argued, to the extent that Auer gives at least as much deference to regulatory interpretations as Chevron does to statutory interpretations promulgated through notice-and-comment, agencies seeking to interpret these regulations have no reason to engage in a new rulemaking which will subject them to additional procedural costs. Because of Auer, it is argued, there is “no cost associated with adopting the clarification as an interpretive rule, rather than as a legislative rule.” As the argument goes, as courts began to treat Auer deference as a rubber stamp, they not only abdicated their duty to interpret the law, but also created incentives for agencies to assume that expository duty for themselves, issuing more informal interpretations of those regulations instead of choosing to amend rules via notice-and-comment rulemaking. Call this the corner-cutting thesis.

A number of observers have pointed to a rise in guidances and other informal, nonlegislative rules at certain agencies at roughly the same time that Auer became fully institutionalized in the courts. According to Auer’s critics, deference fails to deter agencies from departing from the expectation that significant policy change will be accomplished via notice-and-comment rulemaking. They would prefer to see the Supreme Court make deference a reward for

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100 Funk, supra note 32 (arguing that “it will be infinitely faster and easier for the agency to use [interpretive rulemaking techniques]” because it would “avoid the requirements for notice-and-comment rulemaking under the APA and any requirements of the Regulatory Flexibility Act,” and “will as a practical matter avoid the requirements for regulatory review under E.O. 12866 and the requirements of the Congressional Review Act”).

101 Id.

102 Elgin Nursing & Rehab. Ctr. v. U.S. Dep’t of Health & Human Servs., 718 F.3d 488, 493 (5th Cir. 2013) (“[G]ranting deference to CMS’s interpretation of the SOM would leave no role for the courts—to its logical conclusion, it could effectively insulate agency action from judicial review. It is not within the province of the Executive Branch to determine the final meaning of a vague document interpreting a regulation any more than it would be to interpret the final meaning of a contract entered into by the Executive Branch.”).

103 See supra notes 59 through 64 and accompanying text.
having chosen procedural formality and public accountability rather than treat it as an entitlement.\textsuperscript{104}

Second, some see Auer’s violation of the principle that “[h]e who writes a law must not adjudge its violation”\textsuperscript{105} as a compromise ripe with danger of self-delegation. If an agency—or any lawmakers body, for that matter—has the authority both to make law and interpret it, there is some risk that it will lose the motivation to invest in specificity in rulemaking. Under the Auer doctrine, Manning argues, “if an agency issues an imprecise or vague regulation, it does so secure in the knowledge that it can insist upon an unobvious interpretation, so long as its choice is not ‘plainly erroneous.’”\textsuperscript{106} Manning’s argument appears to pull on a thread laid out by Justice Thomas in a dissent in Thomas Jefferson University v. Shalala. That dissent, which was barely perceptible at the time (in light of Seminole Rock’s generally low profile before Auer), argued that the regulation at issue in the case—a Department of Health and Human Services’ (HHS) regulation barring Medicare reimbursement for certain educational costs\textsuperscript{107}—was “cast in vague aspirational terms”\textsuperscript{108} and that the Court should not “permit the Secretary to transform by ‘interpretation’ what self-evidently are mere generalized expressions of intent into substantive rules of reimbursability.”\textsuperscript{109} With his concern about affording deference to “precatory” language that “reads more like a preamble than a law,”\textsuperscript{110} Justice Thomas planted a germ that would eventually flower into the full-blown perverse incentives thesis.

In its most extreme formulation, the perverse incentives thesis is not merely that Auer eliminates an incentive for clarity, but that it creates an incentive for opacity by offering the promise of aggrandizement of authority: that is, that “agencies would maximize future flexibility and power by promulgating ambiguous regulations.”\textsuperscript{111} Auer, in other words, encourages a sort of

\textsuperscript{104} The aspiration here might be to do for Auer what United States v. Mead Corp., 533 U.S. 218 (2001), did for Chevron—that is, give a higher level of deference to agencies when they choose to act via notice-and-comment rulemaking—and might also be viewed as a means of squaring Auer with Mead. See Stephenson & Pogoriler, supra note 6, at 1464 (discussing why Seminole Rock/Auer “threatens to undermine” the Mead “compromise”).


\textsuperscript{106} Manning, supra note 94, at 657 (emphasis in original).


\textsuperscript{108} Id. at 518 (Thomas, J., dissenting).

\textsuperscript{109} Id. at 519 (Thomas, J., dissenting).

\textsuperscript{110} Id. at 518-19 (Thomas, J., dissenting).

\textsuperscript{111} Barmore, supra note 23, at 818 (“If Auer requires deference to an agency’s interpretation of ambiguous (but not unambiguous) regulations, agencies would maximize future flexibility and power by promulgating ambiguous regulations. An ambiguous regulation would give the agency greater discretion when deciding which enforcement actions to bring and would increase the variety of positions it could take in subsequent
regulatory arbitrage: deliberately withhold some specificity now in order to augment flexibility down the road. Indeed, one might speculate that agencies could even subvert the statutes they are administering by first translating the statutory language into vague terms, and then re-translating that translation into the agency’s preferred meaning with little judicial oversight. As Justice Scalia argued in *Decker v. Northwest Environmental Defense Center*, if it functions in this way, *Auer* gives to agencies a “dangerous permission slip for the arrogation of power.”

This theory of Auer’s incentives for self-delegation posits something fundamentally different and far more troubling than the corner-cutting theory: i.e., that agencies can augment their own power, and can in fact do so in a way that leaves regulated parties without the benefit of fair notice of what the rules require. For Manning and others, the danger of self-delegation is sufficiently serious that it justifies a presumption against arrangements and administrative schemes that combine lawmaking and law exposition.

**B. The Defense of Auer**

Although the critique of *Auer* has been quite influential both in the courts and in the academy, a few critical voices supportive of the doctrine have emerged. Recently, Cass Sunstein and Adrian Vermeule address what they call the “heavy artillery” assumptions behind the separation-of-powers critique of *Auer*. They note that, strictly speaking, agencies are not engaged in legislating or adjudicating when they engage in rule writing and rule interpretation, respectively.

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112 Nielson, *supra* note 76, 955 (“[W]hen agencies promulgate regulations that do not tackle the hard problems, the agency does not ‘pay’ upfront, and when the agency later issues an interpretative rule to tackle those problems—even though interpretative rules are not subject to the same rigorous procedure—the agency does not ‘pay later’ either.” (citing Stephenson & Pogoriler, *supra* note 6, at 1464)).


114 Manning, *supra* note 94, at 631; see also Anthony, *supra* note 7, at 11-12.

115 Sunstein & Vermeule, *Unbearable Rightness*, *supra* note 23, at 310 (discussing the separation of powers critique—which suggests that it involves a “constitutionally suspect combination of the power to make law with the power to interpret the law”—and rejecting that critique as “both unsound and too sweeping”).
Rather, they are engaged in executing the law.\footnote{Id. at 311 (citing Jack L. Goldsmith & John F. Manning, The President’s Completion Power, 115 Yale L.J. 2280 (2006)).} This task, with its mix of legislative and expository authority, is pervasive in the administrative state. Thus, the argument critics make against Auer has far-reaching implications not just for agency rule writing, but also for the majority of what agencies do.\footnote{Adrian Vermeule, Law’s Abnegation 78 (2016) (“If the combination of lawmaking and law-interpreting functions in agencies really is constitutionally suspect as such, then there are much larger problems than Auer to discuss.”); Cass R. Sunstein & Adrian Vermeule, Auer, Now and Forever, Yale J. on Reg.: Notice & Comment (Sept. 19, 2016), http://yalejreg.com/nc/auer-now-and-forever-by-cass-r-sunstein-adrian-vermeule/ (The constitutional critique of Auer rests on generalities about the separation of lawmaking from law-execution and law-interpretation. If those generalities were applied consistently, however, they would require declaring unconstitutional dozens of major federal agencies exercising combined functions.”).} Indeed, Sunstein and Vermeule argue, such an amalgam of institutional functions is so common in the modern administrative state that those who advance a formalistic critique of Auer bear a heavy burden of explaining why Auer must go but modern administrative agencies may stay.\footnote{Id.}

Others have noted that Auer is part of a fragile equilibrium; change the ground rules, and different and potentially worse incentives might take hold. For instance, Aaron Nielson argues that one possible effect of overturning or watering down the Auer doctrine would be to discourage agencies from writing rules in the first place, instead using their prerogative under the Chenery doctrine to make policy iteratively through ad hoc adjudication.\footnote{Nielson, supra note 76.} If the concern about Auer is in part about its failure to deliver fair notice and public accountability, a world in which agencies avoid prospective rulemaking in favor of retrospective and often piecemeal adjudication would be a decidedly worse one.

The response to the self-delegation critique itself has been more muted. Responding to the perverse incentives thesis, Auer’s rehabilitators have generally thought it sufficient to point out what Manning anticipated\footnote{Manning, supra note 94, at 655-56 (“Of course, an agency may have various other reasons to draft clear, self-limiting rules, even when it possesses the right of self-interpretation. For instance, clear rules mean that it is less costly for regulated parties to inform themselves of the law’s requirements, and less expensive for an agency to prove noncompliance; enforcement costs will be lower when rules are transparent. Clear rules may also help an agency to exert centralized control over field officials, a factor particularly important where an agency has a large staff and handles numerous relatively small transactions. An agency may also wish to adopt clear rules to bind subsequent administrations; if an agency drafts a vague regulation leaving extensive discretion (rather than adopting a clear norm), a subsequent administration may exercise that discretion contrary to the agency’s current preferences. If a rule is clear, the subsequent administration must incur the cost of revising the rule in order to alter the policies set by its predecessor.”).}—that there are cross-cutting incentives that actually encourage
specificity in rule writing. Agencies gain greater assurance that regulated entities will comply with the law, as the agency understands it, when they put their understanding in a legislative rule with some specificity. Likewise, both agencies and regulated entities benefit from certainty against future changes when issues are settled in legislative rules rather than guidances or policy statements, as the former can only be changed through a legislative rule rescinding the rule.

Some commentators have also noted that there is a paucity of evidence supporting the thesis. First, there is an absence of the kind of circumstantial evidence that we would expect if the perverse incentives theory had any power. For instance, no former agency general counsel has come forward to say that rules were deliberately obfuscated in response to the incentives. Quite to the contrary, when Chris Walker asked agency rule drafters what they thought about Auer, one respondent answered, “I personally would attempt to avoid issuing ambiguous regulations that we would then have to interpret.” Indeed, as Walker further shows, agency rule writers are apparently generally unaware of the doctrine, at least relative to other administrative law doctrines, like Chevron deference. More generally, Sunstein and Vermeule argue that Auer’s critics have committed what they call the “sign fallacy”—i.e., “identify[ing] the likely sign of an effect and then . . . declar[ing] victory, without examining its magnitude” and “without asking whether it is realistic to think that the effect will be significant.”

121 Clarke, supra note 24, at 182.

122 Id.; see also Colin S. Diver, The Optimal Precision of Administrative Rules, 83 Yale L.J. 65, 72 (1983) (arguing that clarity in regulations can streamline enforcement, or perhaps even make it less necessary if regulatees can be relied on to comply).

123 Clarke, supra note 24, at 182.

124 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-levin/ (“When I refer to [the lack of] evidence, I do not mean to insist on specific case citations or empirical studies. As yet, however, the critics of Auer have not even produced any good anecdotes to support their theory. I have yet to read an account by a former regulator saying, 'why, sure, I exploited the opportunities Auer creates all the time.' Or even: ‘I remember once when I proposed a regulation, my boss responded, ‘Why bother? We can get the same deference through interpretation with much less procedural hassle.’”).


126 Id. at 1019 (reporting survey data showing that only 53 percent of agency rule drafters knew of Auer/Seminole Rock deference by name, whereas fully 94 percent knew of Chevron deference by name). The same study revealed that only 39 percent of agency rule drafters actually claimed to use Auer/Seminole Rock in shaping their drafting decisions, id. at 1020, and it was even unclear what respondents had in mind when they said they “use” the doctrine, id. at 1065. These findings are consistent with the data analyzed in Part III: not one of the preambles in the sample contained any reference to either Seminole Rock or Auer.

127 Sunstein & Vermeule, Unbearable Rightness, supra note 23, at 299-300.
In sum, the response to the self-delegation critique has been to say that there is a “palpable lack of realism” and “lack of empirical grounding” behind the perverse incentives thesis. But, notably, Auer’s rehabilitators have not offered any evidence of their own refuting the perverse incentives thesis, or showing the strength of the cross-cutting incentives they postulate. Instead, the response to the perverse incentives thesis has been to make the argument for agnosticism.

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

Despite the efforts of Auer’s rehabilitators, Auer today finds its future uncertain. At the Supreme Court, Chief Justice Roberts and Justices Alito and Thomas have expressed strong reservations about Auer, and Justice Gorsuch’s previous opinions as a circuit judge suggest some antipathy toward deference doctrines as well. In the circuit courts, Auer has still been followed by most courts, but also finds itself subjected to stern criticism. For example, Judge Jordan of the Third Circuit recently indicated that he believes Auer “deserves another look,” for it is “contrary to the roles assigned to the separate branches of government,” “embed[s] perverse incentives in the operations of government,” “spread[s] the spores of the ever-expanding administrative state,” and “require[s] us at times to lay aside fairness and our own best judgment and instead bow to the nation’s most powerful litigant, the government, for no reason other than that it is the government.”

Even when courts nominally accept the premises of Auer deference, the tenor of some analysis most recently has shifted in a less deferential direction due in part to courts’ recognition that the critique of Auer has purchase with the Supreme Court. For instance, in Perez v. Loren Cook Co., a majority of the en banc Eighth Circuit read a Department of Labor regulation requiring “machine guarding” as a means of protection from “hazards such as those created by . . . rotating parts” as not encompassing barrier guards to protect against ejection of rapidly rotating pieces of metal. As the dissenting four circuit judges noted, the majority’s “hypertechnical”

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128 Levin, Auer and the Incentives Issue, supra note 124 (“[T]he factual basis of the critique of Auer isn’t paltry. It’s one hundred percent guesswork.”); Sunstein & Vermeule, Unbearable Rightness, supra note 23, at 309 (“We do not believe that agencies often preserve ambiguity on purpose—in fact we think that that is highly unusual—but when they do, Auer is hardly ever, and possibly never, part of the picture. The critics speak abstractly of possible abuses, but present no empirical evidence to substantiate their fears.”).

129 Sunstein & Vermeule, Unbearable Rightness, supra note 23, at 309 (refusing to press the cross-cutting incentives argument too far for fear that doing so would “commit the sign fallacy (with a different sign).”).

130 See, e.g., Kathryn M. Schroeder & Jason B. Hutt, Gorsuch May Further Tip Balance Against Deference to EPA, LAW 360 (Feb. 14, 2017), available at https://www.law360.com/articles/890417/gorsuch-may-further-tip-balance-against-deference-to-epa; see also Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“There’s an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is Chevron and Brand X permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”).

parsing of the regulation was contrary to the spirit of Auer and risked undermining the Secretary of Labor’s ability to “adjust its interpretation . . . over time.”132

The reason for the persistence and influence of the critique of Auer is that its account of strategic agencies self-delegating authority has a certain theoretical appeal. If one assumes that agencies have preferences, and that those preferences are at least in part to maximize power and discretion in a self-interested manner,133 then there is little that stands in the way of the elegant model offered by Auer’s critics. It may be that there are cross-cutting incentives that make agencies consciously pass on the opportunity for self-delegation, but this more complex story may not seem as facially plausible or nearly as concrete as the one offered by Auer’s critics. This is why John Manning, fully aware of most of these cross-cutting incentives, nevertheless argued that the perverse incentive is stronger than the benign or laudable ones.134 While Sunstein and Vermeule are right to point out the fact that the self-delegation theory commits the “sign fallacy,” intuition might suggest that Auer must matter in some way, creating some kind of structural bias. The success of the self-delegation critique of Auer boils down to the fact that it paints an intuitively plausible picture of agency self-dealing that stands so long as there is not a better theory or any evidence either way.

The main obstacle to advancing the debate is a lack of evidence. As Steve Johnson has written, we have two choices: “[A]ware of the possibility of abuse described by Manning and Scalia, we could disregard [Auer] deference entirely because of the possibility, or we could stay our hand until a convincing record has been established that the possibility turns into actuality with sufficient frequency and consequence.”135 In what follows, I turn to the project of filling out our understanding of Auer’s effects on agency rule writing—particularly, examining whether it encourages an increase in the vagueness of agency rules.

### III. Testing the Perverse Incentives Thesis

Auer’s future would seem to hinge in no small part on what the evidence actually says about the potentially perverse incentives created by the doctrine. In this Part, I make an in-depth and systematic effort to assess whether Auer’s incentives do manifest in changed rule writing behavior.

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132 Perez v. Loren Cook Co., 803 F.3d 935, 950 (8th Cir. 2015) (Melloy, J., dissenting).

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

134 See supra note 120 and accompanying text.

A. Data

In this section, I review the original data I collected to examine the perverse incentives thesis, including the sample of rules for analysis and the specific measures of vagueness that I employ. In examining whether Auer has changed the ways agencies write rules, I draw on several different strands of textual analysis methods being developed in computational linguistics, psycholinguistics, political science, and regulatory studies.

1. Sample

In order to test the key predictions of the perverse incentives thesis, it is necessary to analyze the work product of agencies—i.e., the text of their regulations—over time. Seeking to capture as broad a sample of these texts as possible, I gathered the texts of every “economically significant” final rule reviewed by the White House Office of Information and Regulatory Affairs (OIRA) and published in the Federal Register between 1982 and 2016. In all, there were 1,218 such rules published by 28 different departments, agencies, and boards during the observation period. These entities ranged from the familiar—e.g., the Environmental Protection Agency (EPA), the Department of Transportation (DOT), the Department of Health and Human

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136 Technically, economically significant rules are those identified by the agencies as having “an annual effect on the economy of $100 million or more or adversely affect[ing] in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.” See Maeve P. Carey, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register, Cong. Res. Serv. at 10-11 (Oct. 4, 2016), available at https://fas.org/sgp/crs/misc/R43056.pdf. This definition originated in Executive Order 12,866 in 1993 and was the trigger for the requirement of a full regulatory impact analysis. See Regulatory Planning and Review, Exec. Order 12,866 (Sept. 30, 1993). Before Executive Order 12,866, the trigger was a slightly broader category of “major” rules, of which one subset was what would today be considered “economically significant rules.” Steven Croley, White House Review of Agency Rulemaking, 70 U. Chi. L. Rev. 821, 825 (2003) (citing Executive Order 12291, 3 C.F.R. 128 (1981)). OIRA has logged in historical reports the reviews of “economically significant rules” back to 1981; these reports are what I use to identify a sample of rules. See infra note 137.

137 These data were assembled in a two-step process, one involving rule identification and one involving text collection and cleaning. First, rules were identified using XML reports of data on rule reviews conducted by OIRA. These data are housed on OIRA’s website Reginfo.gov and go back to 1981. See XML Reports, Office of Information and Regulatory Affairs, Reginfo.gov, https://www.reginfo.gov/public/do/XMLReportList (last accessed Aug. 30, 2017). A research assistant extracted all rules that fit certain criteria: principally, to be included, an entry had to be a final rule, listed as “economically significant,” and listed as having been published. Almost all of the rules listed in the reviews conducted in 1981 were not published, so I made the decision to exclude 1981 from the analysis. For the rest of the years available, most reviews resulted in publication, and they were therefore included. Second, using data culled from the XML reports, I was able to manually identify the Federal Register notice publishing the rule for all but a handful of the rules in the sample. I then bulk downloaded the entire text of the notice for each of the identified rules using Lexis Advance’s Federal Register Library.
Examining Auer’s Incentives

Services (HHS), the Department of Agriculture (USDA), and the like—to the less familiar—e.g., the Architectural and Transportation Barriers Compliance Board (ATBCB) and the Emergency Oil and Gas Guaranteed Loan Board (EOGGLB). The textual data assembled represent a broad swath of the administrative state and capture the bulk of the important rulemaking activity conducted by it.

2. Measures of Vagueness

For each rule in the sample, I first partitioned the document into the preamble and the rule text. I then subjected each rule’s text to computer-assisted content analysis to generate a number of measures of vagueness for each text. The concern with Auer is a concern about an agency’s propensity to promulgate what the D.C. Circuit has called “mush.” That is, the concern is with language that is cast at such a level of generality that it fails to meaningfully constrain or guide subsequent interpretation, giving agencies more room within which to operate. As the concept of “vagueness” can be conceived in different ways, I selected several measures that serve as proxies for linguistic generality. My four measures of vagueness are described as

138 This sample excludes many independent agencies, such as the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission (SEC), and the Federal Communications Commission (FCC), because they are not subject to OIRA review.

139 The process in note 137 supra actually identified 1,318 rules, but some of the Federal Register notices associated with these rules failed to provide regulatory text distinct from the preamble. As such, they were excluded from the final analysis.


142 Vagueness is generally defined as the “use [of] concepts that have indefinite application to particular cases,” Lawrence Solum, Legal Theory Lexicon: Vagueness & Ambiguity (June 28, 2015), lsolum.typepad.com/legaltheory/2015/06/legal-theory-lexicon-vagueness-ambiguity.html, and it usually is sharply distinguished from ambiguity by linguists. See, e.g., Maryellen MacDonald, The Interaction of Lexical and Syntactic Ambiguity, 32 J. of Memory & Lang. 692 (2001). Moreover, linguists often describe vagueness as having specialized classes, including soritical vagueness, combinatorial vagueness, and pragmatic vagueness. See Geert Keil & Ralf Poscher, Vagueness and Law: Philosophical and Legal Perspectives, in Vagueness and Law: Philosophical and Legal Perspectives (Keil & Poscher, eds. 2016).
follows. Each measure is scaled so that greater values equate to greater vagueness and lower values equate to greater clarity. Throughout the discussion of each of the measures of vagueness, I draw examples from a systematic validation exercise using real regulatory texts in Title 21 of the Code of Federal Regulations—governing food labeling and packaging—and human coders’ evaluations of the vagueness of those texts. More details on the validation of the measures can be found in the appendix.

Legal Vagueness. The first measure relied on is an index based on a list of commonly used legal terms that fail to convey much practical guidance. Phrases like “reasonable precautions” and “prudent investor” use terms that do not by themselves convey criteria capable of deciding concrete cases. When these kinds of expressions appear in regulations, they add little, and thus are prime candidates for identifying instances of an agency “enacting placeholder regulations and doing the real policymaking work in subsequent so-called interpretations.” In Shalala v. Guernsey Memorial Hospital, the Supreme Court dealt with vague language of this kind. The question in that case hinged on the Secretary of Health and Human Services’ interpretation of a regulation outlining “principles of cost reimbursement” in the Medicare program, and whether it permitted the Secretary to depart from “Generally Accepted Accounting Principles (GAAP)” in determining reimbursement for “reasonable costs.” The Secretary maintained that the regulations it had issued on the topic only described the recordkeeping steps providers needed to take and remained silent on whether the Secretary could depart from GAAP. The Supreme Court seized on language from the relevant regulation providing that “the methods of determining costs payable under Medicare involve making use of data available from the institution’s basis accounts, as usually maintained, to arrive at equitable and proper payment for services to beneficiaries” to conclude that the Secretary’s interpretation was correct, and that “a provider’s basic financial information is organized according to GAAP as a beginning point” from which the Secretary can make an equitable and proper reimbursement decision on other grounds than GAAP. John Manning’s influential article in fact seized on the vagueness in this regulation as a prime example of Auer’s alleged perverse incentives for rule writing.

143 Stephenson & Pogoriler, supra note 6, at 1469. Indeed, Stephenson and Pogoriler use the example of an agency “announcing that regulated entities must behave ‘appropriately’” to show how agencies might use inherently vague terms to increase their discretion. Id. The term is one of the ones included in the “vagueness” dictionary in this article. See infra note 149.


146 Guernsey Memorial Hospital, 514 U.S. at 97 (citing 42 C.F.R. § 413.20(a)).

147 Id. at 92 (citing 42 C.F.R. § 413.20(a)).

148 Manning, supra note 94, at 657-60.
While it would be difficult to capture all of the words and phrases in the law that fit this billing, I constructed a basic list of paradigmatically vague terms.\textsuperscript{149} Using the program Linguistic Inquiry and Word Count (LIWC), I then calculated the total percentage of the words in the document fitting in the dictionary. The resulting percentage serves as the measure referred to as \textit{legal vagueness} in my analysis. The measure is quite effective at distinguishing high vagueness text from low vagueness text. An example of a regulatory sentence that scored extremely high on this measure reads as follows: “Reasonable deficiencies of calories, total sugars, added sugars, total fat, saturated fat, trans fat, cholesterol, or sodium under labeled amounts are acceptable within current good manufacturing practice.”\textsuperscript{150} In contrast, the following sentence scored extremely low on the measure: “The calorie declaration for a packaged food must include the total calories present in the packaged food, regardless of whether the packaged food contains a single serving or multiple servings.”\textsuperscript{151}

\textit{Laxity.} The second measure relies on the distinction between legal terms that are inherently binding and those that are inherently lax.\textsuperscript{152} For instance, words like \textit{shall} and \textit{must} indicate a clear command; regulated parties ignore these kinds of commands at their peril. But at the same time, words like \textit{may} and \textit{should} leave regulated parties with greater uncertainty and leave law enforcers with a great deal of discretion. Capturing the balance of these kinds of opposite terms in a given legal text could reveal just how specific a regulator has been. Lest a regulator do serious damage to its programs, it will most likely not issue a stern command unless it has itself confirmed that the accompanying requirements are spelled out to capture precisely the conduct that the regulator means to capture. I construct a simple list of common permissive legal terms and a list of common compulsory legal terms and run the dictionary on the rule texts as with the measure above.\textsuperscript{153} I then subtract the percentage of compulsory terms in a text from the percentage of permissive terms in a text to generate an aggregate index, \textit{laxity}, that measures the degree to which a given text fails to give relatively binding instructions. Again, the measure of \textit{laxity} seems to

\textsuperscript{149} The complete list of words used in the \textit{legal vagueness} measure is as follows: reason*, prudent, best, available, possible*, optimal*, appropriate*, feasible*, acceptable, unreason*, careful*, proper*, undue*, unavailable, impossible*, infeasible*, unacceptable*, caution. Asterisks indicate that I included all derivatives from suffixation (e.g., appropriate*ly).

\textsuperscript{150} 21 C.F.R. § 101.9(g)(6).

\textsuperscript{151} 21 C.F.R. § 101.8(c)(2)(C).

\textsuperscript{152} To some extent, the resulting measure is related to the Mercatus Center’s \textit{RegData} measures of regulatory constraint, see Omar Al-Ubaydli & Patrick A. McLaughlin, \textit{RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997-2012}, 11 Reg. & Gov. 109 (2017), but it was necessary to construct my own measure because the \textit{RegData} are only available for all regulations that have already been promulgated and incorporated into the Code of Federal Regulations. My sample identification process thus precluded use of \textit{RegData}.

\textsuperscript{153} The complete list of words in the “compulsory” dictionary is as follows: must, shall, will, cannot, never. The complete list of words in the “permissive” dictionary is as follows: could, might, can, probably, may, should.
capture intuitive distinctions between sentences. An example of a low laxity sentence is the following: “A common fraction shall be reduced to its lowest terms; a decimal fraction shall not be carried out to more than two places.” In contrast, an example of a high laxity sentence reads: “Such representations may be made either by statements, photographs, or vignettes.”

Cognitive Complexity. For the third measure, I employ a widely used measure of cognitive complexity because regulations may be more malleable when they implicitly (or explicitly) acknowledge multiple dimensions to a problem. Indeed, this facet of vagueness seems to have been the focus of Justice Thomas’s concerns in Thomas Jefferson University v. Shalala, where he lamented that rule text that had succumbed to the perverse incentives looked more like preamble text than law proper. Preambles contain more of the justification for, and purposes behind, a rule, often highlighting competing considerations at play in the agency’s thinking, responding to various critiques of a proposed action, and seeking to build a complete record for judicial review. I theorize that cognitive complexity is well suited to capture at least this dimension of vagueness in rule texts. Rule texts that score high on cognitive complexity correlate with a tendency to “interpret events

154 21 C.F.R. § 101.7(d).


The built-in dictionaries I include, following the literature above, are as follows: causation words (e.g., because, effect, hence, and depend), insight words (e.g., think, know, and consider), discrepancy words (e.g., should, would, and could), tentativeness words (e.g., maybe, perhaps, and fairly), certainty words (e.g., always, never, and absolutely), difference words (e.g., hasn’t, but, and else), negation words (e.g., no, not, and never), and six-letter words (i.e., words with more than six letters, which are thought to be correlated with sophistication and complexity). After obtaining raw percentage scores for each of the categories theorized to relate to cognitive complexity for each text, I standardize the scores by obtaining z-scores for each category in each text. The z-score is simply \[ z = \frac{x - \mu}{\sigma} \], where \( x \) is the observed raw score, \( \mu \) is the mean score for all texts, and \( \sigma \) is the standard deviation. Finally, again following the method outlined in prior studies, see Owens & Wedeking, Justices and Legal Clarity, supra, I combine the standardized scores to create an aggregate measure of cognitive complexity for each text in the dataset.


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in multidimensional terms and to integrate a variety of evidence in arriving at decisions,"¹⁵⁸ while low cognitive complexity denotes the kind of “conceptual organization of decision relevant information” characteristic of codified legal text.¹⁵⁹ When an agency writes in a cognitively complex style, it is in effect leaving itself room to emphasize different facts or different considerations in the next round of decisionmaking. For instance, Owens and Wedeking find that measures of cognitive complexity in the opinions authored by Supreme Court justices predict ideological drift over the course of their careers.¹⁶⁰ This is precisely what critics of Auer see agencies doing—i.e., using underspecification in the first round of play to arbitrage for greater authority or discretion in future situations. In other words, cognitive complexity proxies for the capacity for plausible drift.

The expectation is that low cognitive complexity prose will appear crisp and simple, whereas high cognitive complexity will read as muddled and complicated. Indeed, an example of a high scoring sentence on the measure reads: “Fat and/or oil ingredients not present in the product may be listed if they may sometimes be used in the product.”¹⁶¹ In contrast, a low scoring example is the following: “Label serving size for ice cream cones, eggs, and breath mints of all sizes will be 1 unit.”¹⁶²

Polysemy. The final measure relates to what philosophers of language call “combinatorial vagueness,” which arises when a speaker or writer “ha[s] not formed an intention with regard to the inclusion or exclusion of certain objects.”¹⁶³ This kind of categorization problem is likely the source of the lion’s share of disputes about federal statutes, and it extends well beyond the kind of

¹⁵⁸ Tetlock, Bernzweig, & Gallant, supra note 156, at 1228. More specifically, cognitive complexity consists of two related concepts called “differentiation” and “integration.” The former “represents the degree to which an individual can see multiple perspectives or dimensions in an issue,” and the latter indicates “the degree to which a person recognizes relationships and connections among these perspectives or dimensions and integrates them into their decision or judgment.” Black, Owens, Wedeking, & Wohlfarth, supra note 152, at 44.


¹⁶⁰ Owens & Wedeking, Predicting Drift, supra note 156.

¹⁶¹ 21 C.F.R. § 101.4(b)(14).

¹⁶² 21 C.F.R. § 101.12 tbl. 2 n.8.

paradigmatic legal vagueness discussed above.  

For instance, courts have had to grapple with such questions as whether a statute defining “motor vehicle” to include “an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails” includes airplanes, as well as with whether the Voting Rights Act’s use of the term “elected[] representative” includes judges who are elected. In essence, vagueness arises when a legal text chooses a word that is general enough to elide costly determinations about what is and what is not included.

In an effort to account for this kind of vagueness in the rules in the sample, I employ the concepts of hyponymy and hypernymy, which provide a way of hierarchically mapping the relationships between words on the dimension of specificity. A hyponym is a subordinate of a hypernym: for instance, the word orange is a hyponym of fruit, and fruit is a hypernym of food. Conversely, a hypernym is a superordinate of another word. Thus, the word fruit is a hypernym of orange, but so is color. Hyponymy captures quite cleanly at least one dimension of what concerns Auer’s critics, which is systematic evasiveness in providing the details of what triggers a legal obligation. If the count of hyponyms is relatively large, this suggests foregone specificity, because a “hyponym inherits all the features from the more generic concept and adds at least one feature that distinguishes it from its superordinate and from any other hyponyms of that superordinate.” If an agency is withholding specificity strategically, we would expect that agencies would choose more words that decline to add that additional feature specification. Likewise, hypernymy would be associated with vagueness because a large of number of superordinate concepts would require the reader to differentiate the word’s true subordinate relationship from those distinct concepts. In essence, the higher a word is in hierarchy—and the greater the number of distinct words below it—the more potentially vague the word is.

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


168 Id.

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

B. Aggregate Trends

My starting point for testing whether Auer’s incentives translate into effects on agency behavior is to look at simple aggregate trends on the core measures of linguistic “mush” described in Part III.A.1. Figure 3 presents the time series trends of the median values of each of the measures for rules from 1982 through 2016. If there is a systemic perverse effect of the doctrine on rule writing, there should be a generally positive trend on the measures of vagueness following...
Figure 3: Indices of Rule Text Vagueness, 1982-2016

Notes: The solid line represents median values for each year on the selected index across all agencies. The vertical dashed line shows the year 1997.

Auer, given that citations to Auer have continued to grow over time. At the very least, there should be some evidence that the post-Auer period has seen higher levels of vagueness than the pre-Auer period.

Even at this general level, it is clear that there are some difficulties for the perverse incentives thesis. First, for the entire sample, only two of the measures show statistically significant trends over time. Legal vagueness decreased by .004 per year from 1982 through 2016 (p > |t| = .000), while laxity increased by .005 per year over the same time period (p > |t| = .048). For the rest of these measures, agencies have either been static or have actually improved in terms of the specificity of their writing over a nearly 40-year period that saw the rise of Auer deference.

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

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

While this comparison of means offers just an initial overview of the data, it is a highly suggestive one. If Auer has an effect, it would appear to be only a muted one—merely slowing down or exacerbating a pre-existing trend. I explore this possibility in greater detail in Parts III.D and III.E.

C. Agency-Specific Trends

As informative as the aggregate trends are, condensing the data sacrifices much of the interesting variation. Although there is significant coordination between agencies in rulemaking, agencies are largely independent of one another. Consequently there are significant differences in the patterns in the data across agencies. For instance, there is great variation in the degree to which each of the agencies produced rules. Only DOL, DOT, EPA, HHS, and USDA published more

\[ \text{TABLE 1: DIFFERENCE OF MEANS, PRE- AND POST-AUER} \]

<table>
<thead>
<tr>
<th></th>
<th>Legal Vagueness</th>
<th>Laxity</th>
<th>Cognitive Complexity</th>
<th>Polysemy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean Pre-Auer</td>
<td>.277</td>
<td>-.603</td>
<td>-.208</td>
<td>4.63</td>
</tr>
<tr>
<td>Mean Post-Auer</td>
<td>.241</td>
<td>-.462</td>
<td>.105</td>
<td>4.4</td>
</tr>
<tr>
<td>Pr(T&lt;t)</td>
<td>.993</td>
<td>.000***</td>
<td>.079^</td>
<td>1.00</td>
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<tr>
<td>Pr(</td>
<td>T</td>
<td>&gt;</td>
<td>t</td>
<td>)</td>
</tr>
<tr>
<td>Pr(T&gt;t)</td>
<td>.007**</td>
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<td>.921</td>
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<tr>
<td>N</td>
<td>1218</td>
<td>1218</td>
<td>1218</td>
<td>1218</td>
</tr>
</tbody>
</table>

Notes: Statistical significance is denoted as follows: p<.1 = ^, p<.05 = *, p<.01 = **, p<.001 = ***.

\[ ^{174} \text{Jody Freeman & Jim Rossi, } \text{Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131 (2012)} \] (discussing efforts to promote coordination across government agencies)
than 20 economically significant final rules during the period of observation. That means the rest of the 23 agencies with at least one rule averaged less than one final rule per year, and often much less than that.

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

This heterogeneity is both a feature and a problem from the standpoint of studying Auer’s incentives and effects. On the positive side, it is possible to see a more nuanced picture of how individual agencies might have responded to Auer. For instance, Figure 4 shows that, on the whole, EPA and HHS have more or less steadily increased the clarity of their rule texts over time. In contrast, both DOL and USDA show more volatile patterns, with major upticks and downticks in vagueness both before and after Auer. DOT shows a more static trend across most variables. DOI, for its part, shows a highly abnormal pattern with steep declines and increases on the range of variables before Auer which have since settled into striking divergence among the measures of vagueness. Notably, only one of the agencies in Figure 4—USDA—seems to have inflected upward
in the years after Auer on any of the measures of vagueness. The only other agencies that seem to show any movement after Auer are DOL and DOT, but for them the slope is slightly lower after Auer; in other words, these agencies actually spoke with greater specificity in their rules after Auer. In the case of DOL, this is itself interesting, given that DOL, more than any other agency, would have been aware of Auer deference, given that one of its rules was central to that case. Overall, the data suggest that there may be no one-size-fits-all determinant of rule vagueness, and any statistical analysis should control for agency differences.

On the other hand, the variation in these data is a problem because the perverse incentives thesis posits a systematic effect that, in theory, should apply across the board to all agencies. If certain agencies have highly unique trends, have outlier values, or just have more rules than other agencies, statistical methods that do not take account of agency-level effects will be biased. Fortunately, it is possible to take account of this variation by exploiting the panel structure of the data. In the next two sections, I turn to statistical tests to determine whether, accounting for this agency-level heterogeneity, there is nonetheless an effect that rises above the noise.

D. Searching for a Link Between Incentives and Effect in Auer v. Robbins

In order to further test whether Auer might have had the effect of encouraging agencies to write rules more vaguely, I use a quasi-experimental method called an interrupted time series (ITS) design. An ITS design allows me to measure the pre-Auer trend, or slope, using Ordinary Least Squares (OLS) regression, and then to estimate the post-Auer trend on the same variable. The measure of interest is the difference between the pre-Auer trend, which serves as a counterfactual

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176 Andrea Cann Chandrasekher, Empirically Validating the Police Liability Insurance Claim, 130 Harv. L. Rev. Forum 233, 239-40 (2017) (responding to John Rappaport, How Private Insurers Regulate Public Police, 130 Harv. L. Rev. 1539 (2017)) ( “[w]ith interrupted time series, the researcher compares the level of some outcome variable . . . right before and right after the imposition of some policy that affects the availability (or level) of the treatment . . . ”).
TABLE 2: INTERRUPTED TIME SERIES MODELS OF THE EFFECT OF AUER ON RULE VAGUENESS

<table>
<thead>
<tr>
<th></th>
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<th>(2)</th>
<th>(3)</th>
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<tbody>
<tr>
<td>Legal Vagueness</td>
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</tr>
<tr>
<td>Pre-Auer Trend</td>
<td>-.006</td>
<td>-.001</td>
<td>-.000</td>
</tr>
<tr>
<td>Post-Auer Change</td>
<td>.006</td>
<td>.001</td>
<td>.000</td>
</tr>
<tr>
<td>Laxity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-Auer Trend</td>
<td>.026**</td>
<td>.018^</td>
<td>.014</td>
</tr>
<tr>
<td>Post-Auer Change</td>
<td>-.040***</td>
<td>-.034**</td>
<td>-.031**</td>
</tr>
<tr>
<td>Cog Complexity</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-Auer Trend</td>
<td>-.110^</td>
<td>-.095^</td>
<td>-.078</td>
</tr>
<tr>
<td>Post-Auer Change</td>
<td>.109</td>
<td>.086</td>
<td>.074</td>
</tr>
<tr>
<td>Polysemy</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-Auer Trend</td>
<td>.020^</td>
<td>.021*</td>
<td>.016</td>
</tr>
<tr>
<td>Post-Auer Change</td>
<td>-.015</td>
<td>-.015</td>
<td>-.011</td>
</tr>
<tr>
<td>Department</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Preamble</td>
<td>√</td>
<td>√</td>
<td></td>
</tr>
<tr>
<td>Political Environment</td>
<td>√</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

This approach has been used to address treatment effects in a wide range of legal and policy fields, from criminal justice to education.178

Table 2 presents the results of an ITS model using the entire time series and a single treatment period starting in 1997. For each core measure of vagueness, Table 1 presents first the prediction of what would have occurred without any change, and the observed post-Auer trend.177

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

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

As an additional robustness check, I also tested for short-term effects. I used two windows of time: one with a two-year pre-Auer observation period and two-year post-Auer observation period, and a second with a three-year pre-Auer observation period and a three-year post-Auer observation period. For these two observation windows, I estimated the same regressions in Table 2. Limiting the analysis to these cases, I found that none of the ITS estimates of post-Auer change were statistically significant. Even after accounting for a possible delayed onset by adding a one-year lag, there are no statistically significant results. Thus, even if the hypothesized effect of Auer is merely a short-term effect, there is no evidence to support it.

E. Testing the Effect of the Second Revolution

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

Teasing out which of these hypotheses is correct, if any of them are, involves applying the same methodology from Part III.D to these later treatment dates. As a first cut, and taking my cue from Figure 1, which shows spikes in total citations, positive citations, and negative citations in 2005, I analyze whether agency rule-writing trends changed appreciably relative to the pre-2005 trend. I also test whether there was any change to the pre-2011 trend after the citations to Auer rose sharply in 2011. These dates roughly correspond to the litigation in Gonzales and Talk America. Table 3 presents the results of this ITS analysis.

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

<table>
<thead>
<tr>
<th>TABLE 3: INTERRUPTED TIME SERIES MODELS OF RECENT CUT POINTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Post-2005</td>
</tr>
<tr>
<td>(1)</td>
</tr>
<tr>
<td><strong>Legal Vagueness</strong></td>
</tr>
<tr>
<td>Pre-Trend</td>
</tr>
<tr>
<td>Change in Trend</td>
</tr>
<tr>
<td><strong>Laxity</strong></td>
</tr>
<tr>
<td>Pre-Trend</td>
</tr>
<tr>
<td>Change in Trend</td>
</tr>
<tr>
<td><strong>Cog Complexity</strong></td>
</tr>
<tr>
<td>Pre-Trend</td>
</tr>
<tr>
<td>Change in Trend</td>
</tr>
<tr>
<td><strong>Polysemy</strong></td>
</tr>
<tr>
<td>Pre-Trend</td>
</tr>
<tr>
<td>Change in Trend</td>
</tr>
</tbody>
</table>

| Department | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Preamble | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Political Environment | ✓ | ✓ |

Notes: Estimates are Ordinary Least Squares (OLS) with Newey-West Standard Errors. Observations are at the department-year level (N=362). Statistical significance is denoted as follows: p<.1 = ^, p<.05 = *, p<.01 = **, p<.001 = ***.
TABLE 4: SEGMENTED INTERRUPTED TIME-SERIES RESULTS

<table>
<thead>
<tr>
<th></th>
<th>Post-Gonzales</th>
<th>Post-Talk America</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>Legal Vagueness</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change in Trend</td>
<td>-.004</td>
<td>-.009</td>
</tr>
<tr>
<td>Laxity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Change in Trend</td>
<td>-.004</td>
<td>.052</td>
</tr>
<tr>
<td>Cog Complexity</td>
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<td></td>
</tr>
<tr>
<td>Trend Change</td>
<td>.057</td>
<td>-.045</td>
</tr>
<tr>
<td>Polysemy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trend Change</td>
<td>.027</td>
<td>.029</td>
</tr>
<tr>
<td>Department</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Preamble</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Political Environment</td>
<td>✓</td>
<td></td>
</tr>
</tbody>
</table>

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

The results in Table 3 are based on the entire pre-2005 and pre-2011 trends, and this is probably the appropriate baseline, given that Part III.D found that Auer had no effect. Nevertheless, as a robustness check, Table 4 presents the results of models looking at just the segment of time between each of these salient treatment periods. That is, the models look at the effect on the pre-existing trend from 1997 up to 2005, and then at the effect on the pre-existing trend from 2005 up to 2011. The results in Table 4 provide no evidence in favor of either possible effect. On the whole, these data show that the recent flurry of cases has had no effect on agency rule writing one way or the other. This could be entirely attributable to uncertainty: agencies may be waiting for the Court to make a move before committing to any particular strategy. Or, more likely, it fits the pattern of all the other analyses reported here that agencies’ behavior falls short of the expectations of the perverse incentives thesis.

F. Summary of Empirical Findings

This Part has presented an extensive empirical analysis of the perverse incentives thesis. Taken as a whole, the evidence offers not an iota of support for the perverse incentives thesis. The effects of Auer on rule vagueness are either absent, or, at least in the case of one particular kind of vagueness (e.g., laxity), exactly the opposite of what the perverse incentives thesis would suggest. Moreover, these findings remain after looking at the data from a number of angles. The analysis started with a basic statistical breakdown of the aggregate patterns, finding that the aggregate trend appears to be toward greater specificity—a challenge, at the very least, to the notion that Auer has systematically infected agency rule writing. More nuanced empirical analyses of whether salient moments in Auer’s development were pivot points, slowing down or accelerating pre-existing trends, also showed no evidence of any perverse effect. These results should, if nothing else, shift the burden in the debate over Auer. The perverse incentives theory has played a critical role in
elevating the assault on Auer, but there simply is no evidence to support it, and there even is some evidence to refute it.

IV. PROBLEMATIZING THE PERVERSE INCENTIVES THESIS

As we have seen, at the root of the critique of Auer is the purported “obvious self-interest of the agency in interpreting its own regulations.”¹⁷⁹ That is, Auer’s critics seem to see agencies as having a self-interested motive to maximize interpretive discretion through a kind of strategic arbitrage.¹⁸⁰ In economic parlance, Auer is said to change the expected utility of writing vague rules by making the payoff from reserving interpretive specificity for later, more informal pronouncements more likely to materialize. The analysis in Part III, however, suggests that the course of action that maximizes an agency’s self-interest in this scenario might not be so obvious, at least not to the agencies themselves, for there is no evidence that Auer has perversely impacted agency rule writing.

This presents a puzzle: If the incentives are so clear, why do we not see any evidence that agencies follow through on them? This puzzle demands an explanation, and in this Part, I offer one possibility: that the perverse incentives thesis overstates the case by ignoring the limits to agencies’ ability to act on their long-run incentives.

The perverse incentives thesis offers one possible hypothesis about how agencies behave—one grounded in classical economic models of rational choice that assume comprehensive rationality and “ends-means reasoning.”¹⁸¹ The basic assumption is that “a rational agency will promote its interests by formulating a rule that comports with the agency’s objectives to the greatest extent possible without going so far as to incite the judicial or political branches to

¹⁷⁹ Knudsen & Wildermuth, supra note 44, at 48.

¹⁸⁰ A great deal of “public choice” scholarship argues that at least part of agencies’ self-interest is to augment discretion, budgets, and power. See Spence & Cross, supra note 133; Daniel A. Farber & Philip P. Frickey, Law & Public Choice: A Critical Introduction (1991); Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law (1998). Indeed, some argue that this is the sine qua non of public choice scholarship. See Jeffrey J. Rachlinski & Cynthia R. Farina, Cognitive Psychology and Optimal Government Design, 87 Cornell L. Rev. 549, 563 (2002) (“Common to all analyses labeled ‘public choice’ is the core concept, taken from economic thought, of instrumental rationality: The individual will order his behavior so as to maximize the likelihood of achieving his individually defined goals.”).

countermand it.”

However, a long line of research under the rubric of behavioral law and economics demonstrates the shortcomings of rational choice theory for predicting actual behavior, especially in complex institutional environments and where uncertainty is pervasive. Empirical scholarship on the bureaucracy—accumulated over the course of decades—demonstrates that administrative agencies are boundedly rational “satisficers,” which may help explain why administrative law scholars have found that agencies often bind themselves to rules and norms that seem inexplicable from a comprehensively rational, self-interested perspective.

Of the many insights offered by bounded rationality, and by behavioral law and economics generally, one in particular stands out as critically relevant to Auer. The theory posits that individuals and organizations have short horizons. Indeed, they have an aversion to planning long sequences of behavior. Yet that is just what the perverse incentives thesis sees agencies doing: it hypothesizes that agencies will choose to forego specificity now in order to have greater discretion to be specific later. The choices agencies make about the timing of interpretive specificity are likely to be substantially colored by the cognitive limitations of agency officials responsible for developing rules.

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184 James March & Herbert A. Simon, Organizations (1958). To be sure, the rational choice tradition does not act as if uncertainty does not exist. More recent rational choice scholarship folds uncertainty into an overall expected utility function wherein “individuals form strategic preferences probabilistically” and then “compare the probability that their most preferred outcome will occur against the possibility that their less preferred outcome will occur, and both against the cost of making a decision.” Jones, Boushey, & Workman, supra note 181, at 41. The difference with bounded rationality is simply one of degree: the theory holds that “because of human cognitive architecture, uncertainty is far more fundamental to choice than expected utility theory admits.” Id. at 45.


186 John O. Brehm & Scott Gates, Working, Shirking, and Sabotage: Bureaucratic Response to a Democratic Public 3 (1997) (finding that despite being basically unconstrained by superiors, rank-and-file bureaucrats are “for the most part hard workers, motivated principally by . . . ‘functional’ preferences, the extent to which bureaucrats feel rewarded by performing their job duties well”); see also See Elizabeth Magill, Agency Self-Regulation, 77 Geo. Wash. L. Rev. 859, 899-900 (2009) (describing the many ways that agencies take steps to constrain their discretion, and arguing that these decisions to self-regulate are potentially revealing of what makes agencies “tick”—i.e., what motivates agencies). For a wonderful volume with variations on this theme, see Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry Mashaw (Nicholas R. Parrillo, ed. 2017).

187 See infra notes 196-99 and accompanying text.
Auer’s critics have overlooked these complicating factors, and they have also overlooked the fact that other administrative law doctrine further puts its thumb on the scale in favor of front-loading specificity, reinforcing what bounded rationality already leads agencies to do. Hard look review under the APA’s “arbitrary and capricious” standard, in particular, has had far-ranging effects on how agencies write rules. Since the Supreme Court’s endorsement of so-called hard look review in Motor Vehicle Manufacturers Ass’n v. State Farm, agencies have had every incentive to build thorough rulemaking records that vet every serious alternative and support every choice with evidence. A secondary effect of this incentive is the incentive to speak with precision. After all, it is close to impossible to be thorough in justification and explanation yet vague in prescription. In some instances there are even hard look cases that take issue with agencies’ failure to match rule precision with a demonstrably complex problem. Hard look’s incentives thus stand in considerable tension with Auer’s incentives, and it should not be surprising that hard look’s more immediate incentives would tend to win out when boundedly rational agency officials confront the problem of the timing of interpretive specificity.

This Part makes the case that the perverse incentives thesis’s failure to materialize is explainable in terms of these limits. Part IV.A first reviews the core insights of the bounded rationality theory, with an emphasis on how boundedly rational policymakers cope with intertemporal uncertainties. Part IV.B brings these insights to bear on the particular problem that Auer presents for agencies (and that prompted such widespread concern about Auer’s allegedly perverse incentives): the question of the timing of interpretive specificity. On this question, the presentism documented by bounded rationality suggests a clear answer. I then turn in Part IV.C to an explanation of why hard look review creates incentives for specificity in rule writing that can be expected to overwhelm Auer’s incentives.

A. The Challenge of Bounded Rationality

The theory of bounded rationality “emerged as a critique of fully rational decision making” and was motivated by Herbert Simon’s efforts to ground a theory of choice in “scientific principles of observation and experiment rather than [on] the postulation and deduction characteristic of theoretical economics.” Acknowledging the overwhelming complexities that decision makers confront, as well as their fundamentally limited capacity to eliminate uncertainties related to these complexities and to make tradeoffs among incommensurable goods, bounded rationality predicts that decision makers will often fail to maximize or optimize what might be objectively in their interest. Instead of maximizing their utility, decision makers “satisfice,” “choos[ing]

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188 Jones, Bounded Rationality and Political Science, supra note 181, at 397.

189 Id. at 397-99; see also Jones, Boushey, & Workman, supra note 181, at 45.

190 Simon, supra note 183, at 270-71 (“Since the organism, like those of the real world, has neither the senses nor the wits to discover an ‘optimal’ path—even assuming the concept of optimal to be clearly defined—we are concerned only with finding a choice mechanism that will lead it to pursue a ‘satisficing’ path that will permit satisfication at some specified level of all of its needs.”).
alternatives that are ‘good enough.’”\textsuperscript{191} Moreover, decision makers develop heuristics, or shortcuts, that help them to process the complexities of real-world decision making, but also often lead them astray.\textsuperscript{192} We know, for instance, that decision makers filter and prioritize incoming information, selectively activate central and peripheral processing systems, and turn to previously discovered solutions before initiating a “search” for new solutions.\textsuperscript{193} If a search is not activated, existing solutions, norms, and routines are usually sufficient, as they offer “simplified models that capture the main features of a problem without capturing all its complexities.”\textsuperscript{194} These kinds of adaptive cognitive infrastructures mean that “objective” information will rarely be sufficient to predict behavior. “People must adapt not just to the objective circumstances in which they find themselves, but also to their own inner cognitive and emotive constitutions.”\textsuperscript{195}

Research in psychology and behavioral economics shows that a key challenge for decision makers is intertemporal uncertainty. Numerous studies have shown that decision makers engage in “hyperbolic discounting,” wherein the discount applied to the value of a long-term outcome grows nonlinearly as the time to reward increases.\textsuperscript{196} Were it consistent and predictable, hyperbolic discounting might be reconciled with comprehensive rationality, but there are many other anomalies besides hyperbolic discounting.\textsuperscript{197} Observing “spectacular variation” in discounting behavior, the literature has failed to “converge toward any agreed-upon average discount rate.”\textsuperscript{198} Some of the better explanations of the economic anomalies that economists have documented lie in cognition: that is, “temporal distance influences individuals’ responses to future events by systematically changing the way they construe those events.”\textsuperscript{199} That is, decision makers do not perceive long-term benefits the same way that they perceive short-term benefits.

\textsuperscript{191} Jones, \textit{Bounded Rationality and Political Science}, supra note 181, at 399.

\textsuperscript{192} Daniel Kahneman, \textit{Thinking, Fast and Slow} (2013) (providing an overarching summary of research on heuristics). For applications of this research tradition to administrative law, see Rachlinski & Farina, \textit{supra} note 172 and Seidenfeld, \textit{supra} note 182.

\textsuperscript{193} Jones, \textit{Bounded Rationality and Political Science}, supra note 181, at 400.

\textsuperscript{194} March & Simon, \textit{supra} note 184, at 169.


\textsuperscript{196} David Laibson, \textit{Golden Eggs and Hyperbolic Discounting}, 112 Q. J. Econ. 443, 445 (1997) (summarizing research on “hyperbolic discount functions” for the value of an outcome which shows that decision making is “characterized by a relatively high discount rate over short horizons and a relatively low discount rate over long horizons”).


\textsuperscript{198} Id. at 352.

\textsuperscript{199} Yaacov Trope & Nira Liberman, \textit{Temporal Construal}, 110 Psych. Rev. 403, 403-404 (2003) (showing that “individuals form more abstract representations, or high-level construals, of distant-future events than near-
Examining Auer’s Incentives

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

In sum, the theory of bounded rationality suggests that there are limits to the capacity of individuals and organizations to specify and pursue their goals, especially over the long term. Within this environment of limited capacity and scant resources to adapt, choice is structured by cognitive heuristics, professional norms, and routines, some of which are barely perceptible to the decision maker, let alone consciously chosen. Particularly when the choices involve complex tradeoffs over time, organizations, including administrative agencies, can be expected to engage in incremental decision making that, by definition, sacrifices some long-term benefits in order to secure immediate benefits.

future events,” with the practical effect that “the value of outcomes is discounted or diminished as temporal distance from the outcomes increases”.

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203 March, supra note 181, at 61.

204 March, supra note 201, at 9 (“Although decision-makers try to be rational, they are constrained by limited cognitive capacities and incomplete information, and thus their actions may be less than completely rational in spite of their best intentions and efforts.”).

205 Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Science 1124 (1974); Rachlinski & Farina, supra note 180, at 555 (describing how “people rely on two primary strategies to make the most of the cognitive abilities,” namely relying on “mental shortcuts,” or heuristics, and relying on “organizing principles,” or “schema” that “consist of a scripted set of default information and organizational themes that help people focus on the information most likely to be relevant, thereby allowing them to ignore information likely to be irrelevant”).
The point of this discussion is not to demonstrate that bounded rationality perfectly explains real-world behavior, nor to dismiss non-bounded rationality entirely. In some situations, particularly those where complexity and uncertainty are low, people and organizations may be able to behave more like the archetypal homo economicus—specificifying a goal ex ante, considering all information and all alternatives, and coming to a decision that maximizes goal attainment. Rather, the point is that the constraints of bounded rationality cannot be ignored entirely in theorizing about administrative behavior. As Mark Seidenfeld has observed, the assumption that agencies are comprehensively rational utility maximizers is “not so much wrong as incomplete”; “incentives, whether applied to an institution like an agency or to individuals, matter,” but they “are not the only things that matter.” In the next section, I show the choice agencies face in deciding whether to provide specificity now or later is one that is particularly likely to demonstrate the concept of bounded rationality and the limits of incentive-based accounts of agency behavior.

B. Bounded Rationality’s Impact on the Timing of Interpretive Specificity in Administrative Action

After Congress delegates to agencies the authority to interpret statutes and make policy, agencies must not only decide the what of policy, but also the when. Most obviously, they have to decide when to act rather than to demur. But the when also comes into play even when agencies decide to take action. That is because agencies can either take action now with the expectation that it will be their final statement, or they can save some interpretive specificity for later.

Neither is my aim to defend bounded rationality and incrementalism as a prescriptive theory. Much of the debate over Lindblom’s The Science of Muddling Through concerned whether Lindblom’s theory was defensible as a prescriptive theory, rather than a merely descriptive one. The dominant prescriptive theory in administrative law has historically been a more rational-comprehensive theory emphasizing cost-benefit analysis and other analytical methods and requirements. But, citing Lindblom, some administrative law scholars are now urging the benefits of an incrementalist approach. See Sidney A. Shapiro & Robert L. Glicksman, Risk Regulation at Risk: Restoring a Pragmatic Approach 22-27 (2003) (arguing that administrative law has shifted toward a paradigm of “comprehensive analytical rationality,” and that this framework should be rejected in favor of a pragmatic attitude characterized by incrementalist experimentation); Wagner et al., supra note 91, at 229-32 (noting that incrementalism “has fallen out of favor as a prescriptive model for policymaking in recent decades,” but that it “may nevertheless be advantageous under conditions of limited knowledge and political conflict”).

Seidenfeld, Cognitive Loafing, supra note 182, at 488.


The Chenery doctrine gives agencies broad authority to choose when to provide specificity by giving agencies the prerogative to make policy via prospective rulemaking or iterative adjudication. SEC v.
pervasive incentives thesis can be understood simply as a hypothesis that the existence of Auer deference alters the expected utility of aiming for greater specificity at time A rather than time B.

The framework of bounded rationality can help us to understand why, contrary to the expectations of the pervasive incentives thesis, there is a distinct bias toward front-loading interpretive specificity, Auer notwithstanding. Choices about the timing of interpretive specificity pose an extraordinarily complex set of questions for agencies, and consciously opting to play the long-range game introduces yet more complexity and uncertainty. If, as bounded rationality would suggest, agencies do not have the capacity comprehensively to trace out every contingency involved in deferring some questions and to optimize a strategy to maximize their utility, they are more likely to satisfice by doing the best they can at time A to pursue their goals.

As agencies navigate the choice between providing more specificity now or later, they also cannot avoid confronting a task environment of uncertainty and complexity. The major uncertainties that exist—goal ambiguity and tactical uncertainty—each increase the relevance of more immediate and concrete concerns and deter agencies from planning long sequences of behavior as part of a comprehensive strategy.

1. Goal Ambiguity

One form of uncertainty is goal or task ambiguity. Agency officials may not actually have a clear idea of what it is that they want to accomplish in the long run when they act. This kind of uncertainty is pervasive in administrative rulemaking, and can seriously affect the rulemaking task. Some of this ambiguity stems from multiple, conflicting delegations, as well as from

Chenery Corp., 332 U.S. 194, 203 (1947) (holding that “the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency”).

Sunstein & Vermeule might suggest that the analysis in this section commits the sign fallacy. See Sunstein & Vermeule, Unbearable Rightness, supra note 23, at 309. If the theoretical account offered here was without the empirical analysis in Part III, this would perhaps be a problem, but as it is, it is not.

Bendor & Moe, supra note 185 (offering a dynamic model of bureaucratic goal adaptation).


Eric Biber, Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies, 33 Harv. Envt’l L. Rev. 1, 7 (2009) (discussing the “ubiquity” of multiple-goal agencies—for example, the National Park Service, which is “required both to protect the natural resources of the parks and to develop facilities for visitors,” and the FDA, which is “charged both with ensuring that new drugs placed on the market are safe and effective . . . and with speedily granting access for doctors and patients to those new, safe, and effective drugs”).
jurisdictional overlaps and the constant pull of multiple political principals. Much of it, however, is simply inherent in the highly complex process of policymaking, in which agency officials are forced to act before they have fully formed and specified objectives.

In some sense, agency officials who are completely uncertain of their goals cannot even begin to think about acting strategically with respect to the timing of interpretive specificity. Less radical uncertainty about overarching goals might admit more strategic consideration of the timing question, but on the whole we would still expect boundedly rational agencies to err on the side of what they can control and measure with certainty. So, while on one level goal ambiguity could push agencies to favor later specification as a means of conflict avoidance, boundedly rational agencies also know that this strategy of endless deferral is dangerous. Because subsequent actions will still be dependent on previous rounds of policymaking, agency officials must worry about inadvertently limiting their options down the road by speaking with less precision at the first stage.

2. Tactical Uncertainty

Assuming that goal ambiguity is overcome and an agency has precisely determined that more discretion down the road (and less precision now) will better advance its goals, an agency still faces significant tactical complexities in executing a self-delegation strategy that will unfold over time. Many of these complexities are also captured by models of how government decision makers deal with uncertainty by choosing whether to build “dynamic” elements into their rules. Facing a choice between “static law,” which “intend[s] for the intervention to remain fixed, making no

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

215 Biber, supra note 213, at 9 (deriving insights into agency incentives from economic models of principal-agent relationships, under which agencies are forced to produce results at the principal’s pace).

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

217 See Avinash Dixit, Incentives and Organizations in the Public Sector: An Interpretive Review, 37 J. Hum. Res. 696, 715-16 (2002) (noting that “incentives will be generally weaker” in situations of multiple goals and multiple principles, and that “in their day-to-day operations, agencies will think not in terms of the multiple and vague ultimate goals, but in terms of a smaller number of immediate and measurable tasks”); Biber, supra note 212, at 12 (“These two key insights lead to the following general theory: Where an agency is faced with multiple goals, it will tend to overproduce on the goals that are complements and the goals that are easily measured, and it will tend to underproduce on the goals that are substitutes and the goals that are hard to measure.”).
special allowances that could facilitate a future modification,” and “dynamic law,” which involves deliberately setting the stage for future revision, agencies are forced to cope with the often excessive cost of planning and monitoring.

The conscious attempt to save some opportunity for specification for later is analogous to a choice about how many contingencies to account for in a rule, and it is therefore subject to many of the same costs and risks. For instance, agencies that engage in strategic deferral or self-delegation would have to commit, ex ante, to a number of subsequent actions. But there is no guarantee that there will be resources to carry out these subsequent resources, nor that responsibility for those subsequent actions will not be given to other actors in the agency who do not share the same long-range vision. Similarly, political circumstances may change, making it more or less difficult to do precisely what one intended to do at time A. Finally, there are back-end risks related to potential vetoes of subsequent enforcement actions. For instance, in certain cases courts block enforcement when there is no fair notice from the rule itself that conduct was prohibited. Implementation and updating could also be blocked by interest group mobilization. In sum, as Pidot explains, “[c]reating dynamic regulation is an inherently complex task that requires lawmakers to consider more than the immediate government action at hand.” Front-end specificity, like a decision to write “static law,” is in fact best understood as a default strategy for coping with these costs and uncertainties.

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218 Pidot, supra note 216, at 131.

219 Id.

220 See Diver, supra note 122, at 67-76 (1983) (arguing that the “optimal” specificity of rules is determined by tradeoffs between three incommensurable goals).


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


225 Pidot, supra note 216, at 175.
Front-end specificity has its own costs, to be sure, and deferral has certain benefits that, while somewhat unpredictable, can be substantial. Bounded rationality does not deny that these costs and benefits are, in principle, measurable. The takeaway, though, is that the simple act of thinking through these costs and benefits is taxing, and agency officials likely do not have the resources or the time to thoroughly study each factor that might bear on the decision. Once we understand that agencies navigate the choice of the timing of interpretive specificity in a boundedly rational manner, it becomes critical that, on balance, “ambiguities are a threat at least as much as they are an opportunity” for agencies.

3. Professional Norms and Mission Focus

Agency staff may also be disinclined to take on the unnecessary risk of failure that accompanies a self-delegation strategy. This disinclination follows partly from the findings on risk-averse behavior in prospect theory: “in the domain of gains people value certain gains over possible gains.” That is, the possible payoff of the self-delegation strategy is hard for agencies to properly value because it is uncertain to materialize. Beyond this general feature of individual and organizational decisionmaking under uncertainty, a great deal of research on the bureaucracy shows that career-level bureaucrats are motivated by professional norms and the agency’s mission, which likely leads bureaucrats to overvalue the certain win gained by having promulgated a comprehensive rule. John Brehm and Scott Gates show that “organizational culture” develops, in essence, from the ground up, as "uncertain individuals look[] to fellow subordinates for appropriate responses." This organic development of organizational culture is generalizable as well: in an extensive survey of bureaucratic preferences, Brehm and Gates find that bureaucrats “prefer work and serving the public” over sabotage, shirking, and self-interested utility.

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226 See, e.g., Joel A. Mintz, “Running on Fumes”: The Development of New EPA Regulations in an Era of Scarcity, 46 Envt’l L. Rep. 10510, 10516 (2016) (discussing how program offices in the EPA display a “preference for satisfying stakeholders,” and that, as a result, they "sometimes display a ‘passion for ambiguity’" as a means to “serve a program office’s goal of playing conflicting interests against one another and avoiding outside pressures and subsequent legal challenges”).

227 Vermeule, Law’s Abnegation, supra note 117, at 80.

228 Jones, Boushey, & Workman, supra note 181, at 47.

229 Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263 (1979). See also supra notes 197 through 202 and accompanying text (reviewing the literature on hyperbolic discounting and intertemporal uncertainty).


231 Brehm & Gates, supra note 186, at 194.
maximization.\textsuperscript{232} For some, these features of the career civil service—the “neutral competence” promoted by professional commitments and the “other-regarding” motivations of bureaucrats—are part of what generates administrative legitimacy “from the inside-out.”\textsuperscript{233} On the other hand, as others have noted, one result of this institutionalization of professional norms in agency policymaking is that agencies “at times fixate on particular missions” when they ought to broaden their horizons.\textsuperscript{234}

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

C. Satisficing Rule Writers and the Shadow of State Farm

The aversion to long-term strategy in boundedly rational actors offers a sound explanation for why Auer is unlikely to have significant behavioral consequences for the rule writing task. But these tendencies are only reinforced by the weight of core administrative law doctrine. As a matter of administrative law, an agency’s primary short-term concern is crafting a legally defensible rule. This means crafting a rule that can survive hard look review in federal court, where the court will review the rule and its underlying record to ensure that the decision is thoroughly analyzed and responsive to a wide range of perspectives.\textsuperscript{235} These requirements make it necessary to craft specific regulatory language.

\textsuperscript{232} Id. at 196.

\textsuperscript{233} See, e.g., Sidney A. Shapiro & Ronald F. Wright, 65 U. Miami L. Rev. 577, 578 (2011) (arguing that administrative law scholarship often ignores research in public administration that displays the desirable capacities of career-level bureaucrats); Sidney Shapiro, Elizabeth Fisher, & Wendy Wagner, The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy, 47 Wake Forest L. Rev. 463, 465 (2012) (arguing for a move to a “deliberative-constitutive paradigm” that “embraces, rather than rejects, the professionalism of agency staff,” viewing it as a “positive attribute that helps ensure the integration of technical expertise in rulemaking and serves as a buffer against undue influence by highly interested stakeholders”); Emily Hammond & David Markell, Administrative Proxies for Judicial Review, 37 Harv. Envt’l L. Rev. 313 (2013).

\textsuperscript{234} Biber supra note 213, at 17.

\textsuperscript{235} The literature is replete with treatments of hard look review, with most focusing on whether hard look review serves to improve the regulatory process by requiring agencies to furnish reasoned analysis to support decisions. For a comprehensive overview of both the doctrine and the debates about it, see Patricia M. Wald, Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?, 67 S. Cal. L. Rev. 621 (1994).
1. Hard Look Review Basics

Hard look review developed in the 1970s out of the Supreme Court’s interpretation of Section 706(2)(A) of the APA in Citizens to Preserve Overton Park, Inc. v. Volpe. Elaborating on the Court’s reading of the “arbitrary and capricious” standard in Overton Park, Judge Harold Leventhal, of the D.C. Circuit, wrote that a court should exercise its role with “particular vigilance if it becomes aware, especially from a combination of danger signals, that the agency has not really taken a hard look at the salient problems, and has not genuinely engaged in reasoned decisionmaking.”

The precise contours of hard look are difficult to pin down, in part because it developed iteratively in the D.C. Circuit over many years, and also because it is composed of a “concert” of goals, including promoting detailed explanations from agencies, encouraging agencies to respond to salient comments and perspectives, requiring consistency over time, and requiring adequate reasons to justify an agency decision. The most definitive statement came from the Supreme Court in its decision in Motor Vehicle Manufacturers Ass’n v. State Farm. In State Farm, the Court vacated the National Highway Traffic Safety Administration’s (NHTSA) rule rescinding a previously promulgated seat belt standard applicable to new motor vehicles. NHTSA argued that it could not “reliably predict[] that the Standard would lead to any significant increased usage of restraints,” and in light of the costs of compliance, decided to change course. The Court found NHTSA’s evidence wanting. NHTSA had not explained the basis of its belief that passengers would disengage automatic seat belts, and it did not provide any analysis of an obvious alternative to requiring automatic seat belts, simply mandating the installation of airbags. In rejecting NHTSA’s reasoning, the Court articulated particularly broad contours of arbitrariness review: agency action is invalid if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an

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236 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (describing an agency’s duty under the arbitrary and capricious standard to conduct a “searching and careful” inquiry).


241 Id. at 53-54.

242 Id. at 51-57.

243 Id. at 46-51.
explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

This decision—both in terms of the standard enunciated and the “rather strict judicial scrutiny” the court actually exercised in probing the agency’s justifications—indicated the Court’s strong approval of much of the D.C. Circuit’s substantive hard look doctrine. Not surprisingly, State Farm was then followed by a number of high-profile court decisions vacating agency rules under the hard look doctrine. Today, courts subject agency decisions to extremely stringent analysis, often almost stochastically so.

2. Hard Look’s Effect on Agency Behavior

The threat of hard look review has a rippling effect on every aspect of the rule-formation process. Agencies cannot be sure of the “precise scope or intensity of that review process,” but they can loosely predict that potential challengers will search for “issues of such importance that the agency arguably should have discussed them more thoroughly or in greater detail” in order to maximize the chances of successful challenge. Agencies acting in the shadow of State Farm “will make every effort to ensure a thorough record that can withstand review the first time around” despite this substantial uncertainty. Thus, the incentive created by hard look review is clear to agencies: leave no rock unturned in the administrative record; address every argument and counterargument, however small; hew closely to statutory criteria; and, perhaps most importantly, leverage agency expertise by populating the record with substantial scientific and technical evidence.

244 Id. at 43.


247 See Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: From Politics to Expertise, 2007 Sup. Ct. Rev. 51, 53-54 (2008) (noting that, before Massachusetts v. EPA, 549 U.S. 497 (2007), “it was unclear whether discretionary decisions not to promulgate regulations were even reviewable, let alone subject to ‘hard look’ review,” and that on some readings, Massachusetts v. EPA could be “State Farm for a new generation”). At least one study has shown that arbitrariness review is often driven more by the political preferences of the reviewing panel of judges than by anything substantive. See, e.g., Thomas J. Miles & Cass R. Sunstein, The Real World of Arbitrariness Review, 75 U. Chi. L. Rev. 761 (2008).


There is no shortage of evidence that agencies took most or all of these steps in response to the growing threat of hard look review. First, as a burgeoning literature on rulemaking “ossification” has posited, the stringency of review may prompt agencies to issue fewer rules than they otherwise might. Instead of employing rulemaking as a first-best option, agencies are thought to have shifted their energies to non-rulemaking channels such as adjudications and nonlegislative rules to avoid costly vacaturs.251 The evidence of such an effect is somewhat equivocal, as a number of recent empirical studies of rulemaking activities suggest that hard look review is not responsible for any change in the volume or pace of rulemaking.252 Second, while there is, to date, no systematic empirical analysis of agencies’ record-building behavior after State Farm, “it seems a matter of common sense that agencies are mindful of the possibility of judicial review for major rulemakings and would therefore approach rulemaking more deliberately.”253 As Wendy Wagner has argued, the hard look doctrine strongly encourages agencies to “load their rule and record with details and defensive statements” to the point of “defensive overkill.”254

Agencies have therefore invested in the institutional infrastructure to facilitate a response to the prospect of judicial review. Tom McGarity, more than anybody else, has given significant attention to the way rulemaking processes are structured,255 and what he describes as the “team model” that agencies usually employ seems tailor made to respond to the threat of hard look review. Rather than allowing one rather insulated program office to draft a rule in its entirety and elevate it for final approval (what McGarity calls the “assembly line” model), agencies employing the team model seek to draw out a “bureaucratic pluralism” that “transcends the knowledge and experience of any individual person or office within the agency.”256 This process aims to ensure, in


253 Meazell, supra note 250, at 751.

254 Wendy E. Wagner, Administrative Law, Filter Failure, and Information Capture, 59 Duke L.J. 1321, 1357-59 (2010). Of course, in principle, the information-forcing role of hard look review is often cited as a positive one, notwithstanding Wagner’s cogent argument that the effects are often overkill. See Sharkey, supra note 191, at 1605 (concluding that “[t]here is little doubt that judicial review plays a significant information-forcing role”); see also Matthew C. Stephenson, A Costly Signaling Theory of “Hard Look” Judicial Review, 58 Admin. L. Rev. 753, 755-56 (2006).


256 McGarity, Internal Structure, supra note 255, at 61.
accordance with hard look’s manifest goals, that every possible angle receives some attention in the process.

Lawyers have come to play an especially important role in this process, “advising the relevant agency decisionmakers on the many aspects of the rule that might be challenged in court.” Enforcement staff, for their part, have perhaps the strongest interest in promoting clarity in the regulatory text, as it can greatly improve the enforceability of the rule down the road (with or without the benefit of Auer deference). In their role as “scrivener,” agency lawyers are critically involved in the process of “achieving clarity in the wording of the rule,” in “providing adequate references to the record in support of the agency’s resolution of major issues,” and in “maintaining a consistent line of reasoning throughout.” The stochasticity of hard look review has significantly increased this role for lawyers in the agency at the expense of program and policy offices. Indeed, Emily Hammond and David Markell recently documented lawyerly meticulousness in a context practically devoid of judicial review—EPA’s processing of petitions to withdraw states’ authority to administer environmental programs that had been delegated as part of cooperative federalism—prompting them to query “whether EPA has so internalized the expectation of judicial review that it treats even informal matters according to the norms resulting from hard-look review.”

In short, hard look review “requires federal agencies to fully explain their decisions at the outset, favoring a front-loaded decision process that culminates in a single record of decision that allows for judicial review.” A recent, and highly salient, example concerns the response of the Securities and Exchange Commission (SEC) to the D.C. Circuit’s decision striking the agency’s

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257 Id. at 90-91. These processes are a prime example of the kind of rules, norms, and processes that boundedly rational agencies employ to cope with uncertainty.

258 McGarity, Role of Government Attorneys, supra note 255, at 22; see also Rosemary O’Leary, 41 Admin. L. Rev. 549, 566 (1989) (noting that lawyers often “have the last word” in rulemaking); Mintz, supra note 218, at 10517 (noting that, within EPA, Office of General Counsel attorneys “sometimes attempt to eliminate unenforceable language in proposed regulations,” but also concluding that their concern with enforceability is not sufficient enough to eliminate all ambiguities).

259 McGarity, Internal Structure, supra note 255, at 62 (noting that enforcement professionals, who are often attorneys with significant technical training, “are primarily concerned with the degree to which . . . regulated [entities] adhere to agency commands,” and therefore push the agency to “articulate its rules in unambiguous ways that both fairly apprise regulates of conduct that is permissible and impermissible, and minimize the extent to which regulates can avoid compliance through interpretational loopholes”).


261 Id. at 26-27.

262 Hammond & Markell, supra note 233, at 355.

263 Pidot, supra note 216, at 170.
proxy-access rule in \textit{Business Roundtable v. SEC}. In that case, the court found the rule arbitrary and capricious because its analysis of the “economic consequences” of the rule was insufficiently rigorous.\footnote{\textit{Business Roundtable v. SEC}, 647 F.3d 1144, 1148 (D.C. Cir. 2011).} The decision surprised many, as the SEC had traditionally succeeded without conducting extensive cost-benefit analysis along the lines of what other agencies subject to oversight by OIRA were used to. As Bruce Kraus and Connor Raso have shown, the SEC’s response to the surprising decision in \textit{Business Roundtable} was an internal shift from a “lawyer-dominated” agency to an agency with the requisite economic expertise and capacity to conduct more formal cost-benefit analysis.\footnote{Bruce Kraus & Connor Raso, \textit{Rational Boundaries for SEC Cost-Benefit Analysis}, 30 Yale J. on Reg. 289, 324-25 (2013).} According to Kraus and Raso, SEC’s quick adjustment has already paid off: “Real economic analysis was decisive in garnering a unanimous Commission vote around the vexed question of defining swap intermediaries, a key parameter of derivatives regulation commended to the Commission’s discretion by the Dodd-Frank Act.”\footnote{\textit{Id.} at 326.}

If agencies “are constantly ‘looking over their shoulders’ at the reviewing courts,”\footnote{McGarity, \textit{Deossifying, supra} note 248, at 1412.} it stands to reason that these same agencies do not have their eyes on a very different ball: i.e., the long-range possibility of gaining strategic advantage by self-delegating by crafting vague rules. The costs of vacatur or remand of a rule are tangible; the benefits of self-delegation are speculative. If agencies really are satisficers, and if they are listening to the voices of their legal advisors who tell them that judicial review is likely, they will focus most of their attention on addressing that risk. In addressing the risk of hard look review, agencies will of necessity seek to reduce vagueness.

3. Hard Look’s Secondary Effects on Regulatory Precision

The threat of hard look review can be expected to have systemic effects on rule writing style.\footnote{See Blake Emerson & Cheryl Blake, Administrative Conference of the United States, \textit{Plain Language in Regulatory Drafting}, at 14-19 (Sept. 6, 2017), available at https://www.acus.gov/sites/default/files/documents/Plain%20Language%20in%20Regulatory%20Drafting_Draft%20Report_Sept%206_FINAL.pdf (reporting interview-based evidence that agencies aim for clarity in part due to the threat of judicial review).} This follows for three reasons.

First, arbitrariness, or hard look, challenges sometimes come packaged as a claim that the rule text is not specific enough.\footnote{Copar Pumice Co. v. Tidwell, 603 F.3d 780, 800 (10th Cir. 2010) (“We also reject Copar’s argument that by including the term ‘verifiable proof’ in the Notice of Noncompliance, the FS imposed a vague standard.”); Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, Bureau of Land Mgmt., 273 F.3d 1229,}
Ruckelshaus, the D.C. Circuit held that “[c]ourts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.”

While it is seldom featured in more recent cases, the principle in Ruckelshaus has never been rejected. More recently, the Ninth Circuit, in vacating a decision to delist the Yellowstone grizzly bear population as a threatened species under the Endangered Species Act, rejected “out of hand” the suggestion that a vague promise to relist the species if circumstances change could “operate as a reasonable justification for delisting” without the benefit of any “specific management responses” and “specific triggering criteria.”

Litigants often pair the claim that a rule violates the arbitrary and capricious standard with a claim that the rule violates due process by being “too vague to warn the industry of the scope of prohibited conduct.” Typically, these challenges are brought after an agency attempts to enforce a vague rule, and in these cases the courts occasionally vacate agency action based either on Fifth Amendment due process grounds or on arbitrary and capricious grounds. For instance, in Pearson v. Shalala, the D.C. Circuit agreed with the challengers that “the APA requires the agency to explain why it rejects their proposed health claims,” and “do[ing] so adequately necessarily implies giving some definitional content to the phrase ‘significant scientific agreement.’” For the court, “this proposition is squarely rooted in the prohibition under the APA that an agency not engage in arbitrary and capricious action.” However, with striking frequency, these kinds of claims are also brought in pre-enforcement review of rules. These kinds of claims are surely far more numerous

1251 (9th Cir. 2001) (“Based upon the lack of an articulated, rational connection between Condition 1 and the taking of species, as well as the vagueness of the condition itself, we hold that its implementation was arbitrary and capricious.”).

Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971); but see PDK Labs. Inc. v. DEA, 438 F.3d 1184, 1194 (D.C. Cir. 2006) (holding, in the context of an agency “proceeding on a case-by-case basis” need only “pour ‘some definitional content’ into a vague statutory term” to survive an arbitrariness challenge).

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

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

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


Id. (citing 5 U.S.C. § 706(2)(A)).

A back-of-the-envelope calculation, achieved by searching Westlaw’s D.C. Circuit appellate briefs database using the search terms “rule /p vague & ‘arbitrary and capricious,’” yielded 332 briefs mentioning vagueness in close proximity to a challenge to a rule under the arbitrary and capricious standard.
than they are successful, but the claims are not frivolous enough that they do not warrant a response, which means agencies attuned to undergoing probing review by courts will presumably take few chances. The shadow of review can be as formative for agency behavior as review itself.

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

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

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

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

279 Greater Yellowstone Coalition, 665 F.3d at 1029.

280 Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (“Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms ‘substantial uncertainty’ as a justification for its actions. As previously noted, the agency must explain the evidence which is available and must offer a ‘rational connection between the facts found and the choice made.’”); see also Alliance for Nat. Health U.S. v. Sebelius, 775 F. Supp. 2d 114, 133 (D.D.C. 2011) (rejecting the kind of “arbitrariness-as-vagueness” challenge described above in part because the agency had offered evidence that it “could not ‘predict with mathematical precision how many inches or feet, for example, would be ‘adequate space’ to allow for cleaning a particular piece of equipment that could be applied to every size of facility and every operation”).
Finally, agencies actually perceive clarity as a way to reduce the risk of hard look vacatur. As part of its project on plain language in regulatory drafting, the Administrative Conference of the United States (ACUS) interviewed officials at seven agencies and specifically asked them what impact judicial review has on their incentives to use plain language in rule writing. The study reports that agency officials favored clear drafting as a means of reducing the risk of judicial reversal. As one agency official noted, the agency could “defend regulations better when we’ve developed the record and made the regulation clear and understandable to the public.” Another agency official stated, “[I]f regulations just aren’t understandable, or they can be misconstrued, you are a lot more vulnerable legally.” As the authors of the ACUS report note, agencies are aware of their audience: Article III judges who are generalists. While these judges are, by virtue of their expertise, more tolerant of complexity and more willing to “forgive certain lapses in linguistic clarity” than the general public, the judges are also skeptical of anything that seems like avoidable obfuscation.

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

V. Conclusion

At the core of the emerging assault on Auer lies a claim about the doctrine’s effect on agency officials’ incentives to promulgate vague rules that expand agency discretion. Yet until now, that assertion has never been tested. The empirical findings I have presented in this article thus contribute directly to the debate about Auer. Despite looking carefully for any trace of changed rule-writing behavior in the aftermath of Auer and other Auer-related cases, I found no empirical evidence that agencies respond to Auer’s incentives in any systematic way. Further, I uncovered some evidence that agencies have shifted toward greater clarity over the years and I have identified the pressing, short-term considerations, such as the risk of hard look vacatur, that explain why any supposed long-term incentives created by Auer would hold little sway. The research presented here undermines the perverse incentives thesis upon which the critique of Auer has been grounded. If nothing else, it clearly shifts the burden of production to Auer’s critics. As I have shown, it is not simply that Auer’s critics have committed the “sign fallacy,” as Sunstein and

281 Emerson & Blake, supra note 268, at 15.

282 Id.

283 Id.
Vermeule put it, but that the perverse incentives thesis is, as far as the available evidence goes, empirically untrue.

While it is not entirely clear whether or when the Supreme Court may decide to take a case that presents the question of whether Auer ought to be overturned or rewired to be considerably less deferential, this article’s findings would indicate that the Court should decline the invitation. Auer deference serves important purposes in administrative law—most notably, it plays a crucial role in ensuring that agencies have flexibility to clarify the law they have written. Critics of Auer believe that much of this need for ex post clarification is unnecessary if rules are written clearly in the first instance, and that agency officials operating in a world without Auer would embrace ex ante specification. The evidence amassed in this article offers a window into this counterfactual world by examining rule writing before Auer’s ascension and comparing it with rule writing afterwards. There is no evidence that agencies were any more likely to front-load specificity and clarity before the Court decided Auer. Consequently, were the Court to scale back Auer deference, it would presumably only sacrifice all of Auer’s benefits with no guarantee of any offsetting benefits.

In addition, the fact that agencies are not self-delegating en masse by increasing the vagueness of their rules puts outer boundaries on their ability to stretch the meaning of regulatory texts in a manner that would be unfair to regulated parties. If the existing rule texts being interpreted have not been systematically obscured by Auer’s incentives, and if agency officials must still be able to make a plausible argument that these rules in some way support the agency’s interpretation, there will be inherent limits on agencies’ ability to avoid accountability by couching every policy change as an interpretation of a pre-existing rule. To be sure, administrative law’s perennial can still be debated—what is the optimal size, scope, and authority of the administrative

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284 See supra note 127 and accompanying text.
285 See supra notes 87-91 and accompanying text.
286 See supra Part II.A.
287 See supra Part III.B-E.
288 Cf. Nielson, supra note 76, at 950 (noting that overturning Auer would have unintended consequences, and that this “cuts in favor of stare decisis”).
289 Cf. Vermeule, Law’s Abnegation, supra note 117, at 80 (“It is a simple confusion to suggest an agency could ever ‘delegate’ power to itself? Agencies just have whatever quantum of power they have, under relevant statutory grants of authority; whether they exercise that power through legislative rulemaking, guidances, or whatnot, the quantum of power itself is unaffected. Judges can always enforce the outer boundaries of the agency’s grant of authority, however exercised.”). If self-delegation in rulewriting is not a problem, empirically speaking, then a similar point applies to “corner-cutting” arguments: if an agency can corner cut, it is still hemmed in by the four corners of the regulatory text that, as conceded, is just as specific as we would expect it to be.
state—but these questions do not hinge on nor should they affect the Court’s consideration of the 
Auer doctrine. The assault on Auer has picked up speed because it makes a bold claim that agencies 
illegitimately augment their own authority and discretion by promulgating vague rules in the first 
instance. As I have shown, this claim has no basis in empirical evidence.

The research findings presented here also hold significant implications for how scholars 
and jurists theorize the link between structural or doctrinal incentives and agency behavior. 
Increasingly, normative perspectives about the legitimacy of the administrative state in the 
American separation-of-powers framework rely on explicit or implicit theories about the nexus 
between law and behavior. Most notably, formalist separation-of-powers theory290 often makes 
arguments about the propriety of institutional arrangements by pointing to behavioral predictions 
deduced from doctrinal structure.291 The constitutional critique of Auer, grounded as it is on the 
perverse incentives thesis, is a primary example, but there are many other issues that have been 
colored by an argument that a certain doctrinal position that relaxes the strict separation of powers 
as the administrative state often does) promotes certain undesirable behavior.292 These are 
powerful rhetorical moves, in part because they rely on intuitive models of behavior and a 
relatively simple solution of restoring strict separation, or at least greatly diminishing the 
combination of functions in agencies.

The analysis in this article reveals the dangers of relying on intuitions about the behavioral 
consequences of legal doctrine, perhaps especially in the realm of separation of powers. 
Arguments that are untethered from a bottom-up understanding of agencies as institutions may be 
intuitively appealing but utterly ungrounded in empirical evidence. At least in the case of Auer, 
what looked to some of the nation’s foremost scholars and jurists to be a clear set of incentives for 
the “arrogation of power”293 is not a demonstrable factor affecting agency behavior after all, due to 
a misunderstanding about agency officials’ behavioral tendencies as well as to the overlooking of 
more immediate legal concerns confronting agency decision makers. Any realistic account of

(describing formalism as “emphasizing that ‘[t]he Constitution sought to divide the delegated powers of the 
new Federal government into three defined categories, Legislative, Executive, and Judicial, to assure, as 
nearly as possible, that each branch of government would confined itself to its assigned responsibility” 
Interpretation, 124 Harv. L. Rev. 1939, 1958 (2011) (“Formalist theory presupposes that the constitutional 
separation of powers establishes readily ascertainable and enforceable rules of separation.”).

291 Cf. William N. Eskridge, Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 
inevitably antipodal” because both make consequentialist arguments about particular arrangements of 
institutional power).

292 See supra note 22 and accompanying text.

dissenting in part).
structural or doctrinal incentives must therefore grapple with what actually motivates bureaucrats, drawing support from what empirical studies reveal about the plausibility of intuitions derived from theory.\textsuperscript{294}

In sum, I have shown, both empirically and theoretically, that there are serious limitations to the self-delegation strategy thought to be encouraged by Auer deference. In the absence of any empirical evidence, it may have been understandable that the perverse incentives thesis caught on—especially as it paints an intuitively and seductively plausible account of the doctrinal incentives created by Auer. Now that there is extensive evidence on the table, none of it supportive of the perverse incentives thesis, the debate over Auer should shift to a more reality-based discussion—that is, if critical discussion should even continue at all with respect to Auer. More generally, the research I have reported reveals the value to be gained from a careful examination of the nexus between administrative law and agency behavior. This nexus is central to administrative law’s mission of both facilitating and constraining government action, keeping it within the bounds of constitutional and democratic expectations. As I have shown with respect to Auer, it is not enough to assume that administrative law doctrine has a particular behavioral effect. Empirically studying this linkage between doctrine and behavior is the only way to understand administrative law’s real incentives.

\textsuperscript{294} See supra Part IV.
APPENDIX

In order to test the validity of the measures of textual vagueness—legal vagueness, laxity, cognitive complexity, and polysemy—I compared the subjective evaluations of human coders to the scores generated by the measures. Because full rule texts are often too long for human coders to examine, the unit of analysis was sentences pulled from Title 21, Subchapter B of the Code of Federal Regulations. This portion of the Code of Federal Regulations governs food labeling.

From these food labeling sentences, I selected 5 sentences from the 15 highest and 15 lowest ranking sentences for each measure and coded them either high (1) or low (0). In addition, using a principal components analysis to generate a measure that captures the common dimensions of each of the four measures, I sampled the 15 highest and 15 lowest ranking sentences. Finally, I supplemented these extreme sentences with a random sample of 34 sentences. Because there was some overlap among categories, the total number questions selected for analysis was 87. This number was high enough to support statistical analysis, but low enough that each reader could read and rate all of the sentences within a reasonable amount of time.

Twelve people—all with some level of legal training—reviewed all 87 sentences and rated them using a 7-point Likert Scale, with 7 corresponding with maximal vagueness and 1 corresponding with minimal vagueness. Each respondent received the following instructions:

Your task with this survey is to rate sentences taken from actual regulations for the degree of clarity, or precision, they display. I am looking for your subjective evaluations; there are no right or wrong answers. To the extent that you can, imagine you are a lawyer advising a client about how to understand these regulatory provisions, and then rate the sentences by how clear and certain you could be in conveying what they mean.

Keep in mind that sentences are not presented in their overall context, so if sentences reference other regulatory text or seem to depend on other text not presented, you should not count that for or against the sentence’s clarity. Also, keep in mind that sentences do different things: some are prescriptive (e.g., impose a legal duty), while some are descriptive (e.g., state facts or conditions). You should take the sentences simply for what they are and just consider how clear and precise they are.

You will be asked to read 87 sentences pulled from the U.S. Food and Drug Administration’s food labeling regulations. For each sentence, you will be asked to rank the sentence on a scale of 1 to 7, with 1 being least vague (or, most clear) and 7 being most vague (or, least clear). The survey should take you around 45 minutes to an hour at most.

The survey was administered through Qualtrics, and the responses were anonymous. The survey respondent received questions in random order and could not navigate backward to adjust prior answers, ensuring that responses were impressionistic and not overly analytical.

With the responses in hand, I estimated Generalized Least Squares regressions with the dependent variable being the rater’s score. First, for sentences with extreme values on computer-generated measures, I regressed the rater’s score on a dummy variable measuring whether the sentence was a low outlier or a high outlier. Second, for the random sample and for the entire selection of sentences, I regress the rater’s score on the continuous value of the computer-
generated measure. For each model, I employed rater random effects, which controls for baseline differences across raters. That is, it does not affect the analysis that some raters might have different expectations about what clarity means—the regressions still capture correlation between the rater’s own range of opinions and the values on the computer-generated measures. I report the results of this series of models below in Tables A.1 & A.2.

**Table A.1: Raters’ Ability to Distinguish Between High and Low Vagueness Sentences in the Code of Federal Regulations**

<table>
<thead>
<tr>
<th></th>
<th>β</th>
<th>p</th>
<th>R²</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Vagueness</td>
<td>1.85***</td>
<td>0.272</td>
<td>0.32</td>
<td>120</td>
</tr>
<tr>
<td>Laxity</td>
<td>2.13***</td>
<td>0.163</td>
<td>0.342</td>
<td>132</td>
</tr>
<tr>
<td>Cognitive Complexity</td>
<td>1.5***</td>
<td>0.206</td>
<td>0.186</td>
<td>120</td>
</tr>
<tr>
<td>Polysytem</td>
<td>.97***</td>
<td>0.307</td>
<td>0.095</td>
<td>120</td>
</tr>
<tr>
<td>Principal Components</td>
<td>1.63***</td>
<td>0.183</td>
<td>0.218</td>
<td>348</td>
</tr>
</tbody>
</table>

Notes: Statistical significance is denoted as follows: p<.1 = ^, p<.05 = *, p<.01 = **, p<.001 = ***. All models include random effects for each of the 12 raters.

**Table A.2: Raters’ Ability to Predict All Levels of Vagueness in Sentences in the Code of Federal Regulations**

<table>
<thead>
<tr>
<th></th>
<th>β</th>
<th>p</th>
<th>R²</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Vagueness</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Random Sample</td>
<td>.27*</td>
<td>.145</td>
<td>.012</td>
<td>408</td>
</tr>
<tr>
<td>All Sentences</td>
<td>.17***</td>
<td>.176</td>
<td>.059</td>
<td>1,044</td>
</tr>
<tr>
<td>Laxity</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Random Sample</td>
<td>.01</td>
<td>.143</td>
<td>.000</td>
<td>408</td>
</tr>
<tr>
<td>All Sentences</td>
<td>.08***</td>
<td>.175</td>
<td>.055</td>
<td>1,044</td>
</tr>
<tr>
<td>Cognitive Complexity</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Random Sample</td>
<td>-.02</td>
<td>.143</td>
<td>.001</td>
<td>408</td>
</tr>
<tr>
<td>All Sentences</td>
<td>.08***</td>
<td>174</td>
<td>.049</td>
<td>1,044</td>
</tr>
<tr>
<td>Polysytem</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Random Sample</td>
<td>-.06^</td>
<td>.144</td>
<td>.007</td>
<td>408</td>
</tr>
<tr>
<td>All Sentences</td>
<td>.05*</td>
<td>.166</td>
<td>.005</td>
<td>1,044</td>
</tr>
</tbody>
</table>

Notes: Statistical significance is denoted as follows: p<.1 = ^, p<.05 = *, p<.01 = **, p<.001 = ***. All models include random effects for each of the 12 raters.

As the positive and highly statistically significant coefficients for each of the individual measures, as well as for the common measure derived from a principal components analysis, in Table A.1 show, raters were able to distinguish between high vagueness sentences and low vagueness sentences at an impressive clip. Turning to Table A.2, when scores are simply regressed on all of the measures for all of the 87 sentences, the continuous value of the measures is a
strongly significant predictor for rater scores. On the other hand, when the analysis is confined only to a random sample of sentences, the measures are less predictive of rater scores. Only legal vagueness is still positive and statistically significant. The more muddled results here, though, could just be attributable to the relatively small sample size and relatively small number of raters.