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

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Abstract

Auer deference holds that when agencies interpret their own pre-existing regulations, they receive deference from reviewing courts. The doctrine serves a critical function in the administrative process, obviating the need for agencies to undergo costly notice-and-comment rulemaking each time interpretation of existing regulations is necessary and guaranteeing that agencies’ good-faith exercise of interpretive discretion will be respected by courts. But for some leading scholars and jurists, this benign-sounding doctrine actually encourages agencies to promulgate vague rules in the first instance, augmenting agency power and violating core separation-of-powers norms in the process. This “perverse incentives thesis” has become increasingly influential, but it has never been tested.

This Article scrutinizes the perverse incentives thesis from both an empirical and a theoretical standpoint. 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 whether to offer specificity now or later, agencies are driven by both their inner cognitive infrastructure and by 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. Because the administrative state often relaxes formalistic prescriptions that each of the powers of government be hermetically sealed, it is easy to derive predictions about perverse incentives that result from the combination of powers. But deriving a model from first principles does not prove a claim, and this Article argues that core administrative law doctrine should not be changed on the basis of unsubstantiated theories about its behavioral effects.

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Introduction

A core concern of administrative law is constraining the discretion of agencies, given that they often operate under broad delegations of authority in statutes that contain vague standards and aspirations. As 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 core administrative law doctrine known as Auer deference as an existential threat to this project, and even an affront to fundamental constitutional separation-of-powers norms. Auer deference (also 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.” This principle serves a crucial purpose in the larger framework of administrative law, allowing agencies to avoid the impractical (and potentially debilitating) need to make every slight adjustment in regulatory understanding of existing rules through cumbersome formal amendment of written rules. With Auer deference available, agencies can instead issue guidance documents or policy

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3 See 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”); Reuel E. Schiller, Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 53 Admin. L. Rev. 1139, 1150 (2001) (noting that a shift from ad hoc adjudication to rulemaking and policy statements was the “most common recommendation of all the critics who examined the administrative state at the end of the 1950s and beginning of the 1960s”); Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 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”).

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 section II.A.


6 See infra note 96 and accompanying text. Technically, as long as there is a gap in the meaning of an existing regulatory text, an agency can interpret that gap in non-binding fashion without resorting to notice and comment rulemaking whether it receives deference or not. 5 U.S.C. § 553(b)(A)(2012) (providing
statements that merely interpret gaps in existing rules in ways that achieve regulatory goals. However, the argument against Auer deference posits that if agencies know that they will win most cases involving their 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 be able to package more significant changes as regulatory interpretations and need only make a plausible argument that this new interpretation is loosely contemplated by the original rule’s capacious language. With such a strategy, agencies could systematically circumvent APA’s call for notice-and-comment rulemaking in favor of regulation by guidance even for the most significant policy changes.

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 sex-separate restrooms in public school buildings, but required these separate facilities to be comparable. Years later, in response to questions schools were confronting over how to accommodate transgender students within this regulatory framework, the Department issued an opinion letter that further interpreted its own exemptions from the notice and comment rulemaking requirement for non-binding interpretive rules and general statements of policy. But the promise of deference frees agencies to make that decision with less concern about being haled into court and subjected to probing review.


See, e.g., Jennifer Nou, Regulatory Textualism, 65 Duke L.J. 81, 102 (2017) (“[A]fter 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.”); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock’s Domain, 79 Geo. Wash. L. Rev. 1449, 1453 (2011) (“[B]road judicial deference to an agency’s interpretation of its own regulations may enable an agency to enact binding rules without subjecting itself either to meaningful procedural safeguards or to rigorous judicial scrutiny.”).

Kevin M. Stack, Preambles as Guidance, 84 Geo. Wash. L. Rev. 1252, 1254 (2016) (“[C]ritics contend that agencies rely on guidance documents in ways that circumvent the notice-and-comment rulemaking process. Their concern is that agencies are turning increasingly to guidance to establish norms that have significant de facto weight without the participation and accountability virtues of a notice-and-comment process.”). This general turn might feed a perceived trend away from the quasi-constitutional norms of the APA and its preference for traditional forms of agency policymaking toward less formal (and less accountable) forms of policymaking, such as guidance documents and policy statements. See Mila Sohoni, The Administrative Constitution in Exile, 57 Wm. & Mary L. Rev. 923, [PINCITE] (2016) (explanatory parenthetical); Daniel A. Farber & Anne Joseph O’Connell, The Lost World of Administrative Law, 92 Tex. L. Rev. 1137, [PINCITE] (2014) (explanatory parenthetical).


34 C.F.R. § 106.33 (2017) (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”).
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.”\textsuperscript{12} The Fourth Circuit upheld the Department’s policy, giving \textit{Auer} deference to the agency’s interpretation contained in the opinion letter because the original regulation simply did not speak to how transgender students should be accommodated.\textsuperscript{13}

Suppose that the Department of Education had been more specific in its 2000 rule, explicitly stating how it expected transgender students to be treated. Suppose further that the Department now wanted to adopt a different stance and issued an opinion letter to that effect. In a properly framed challenge to that interpretation, the agency could argue that \textit{Auer} deference should apply to its new interpretation, but there are limits to how far specific regulatory language can be stretched before the interpretation is “plainly inconsistent” with it. By speaking with specificity about transgender students in the original rule, it would have substantially limited its own flexibility down the road, and the Department may very well have decided to pursue its presently preferred change by going through the full notice-and-comment rulemaking process.

Return now to what actually happened. Whether the Department actually intended it or not at the time, leaving out any mention of transgender students in the original rule gave the Department of Education interpretive flexibility it otherwise would not have had, and \textit{Auer} deference guaranteed that the exercise of this flexibility would not be substantially curtailed by reviewing courts. If agencies see similar scenarios often enough, they may come to realize that there are potential benefits to making their rules more amenable to capacious interpretation in the first place. For instance, perhaps on reflection the Department would realize that it could have even more discretion in the Title IX domain were it to write something like “schools should not discriminate on the basis of sex except when it is reasonable to fulfill the purposes of Title IX.” Such a construction would only give more flexibility to agencies at a later time to pivot in and out of various approaches to protecting (or not protecting) transgender students. Critics of \textit{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 decide to issue informal opinion letters or other guidance documents interpreting those regulations as they please.\textsuperscript{14}

This argument, which might be called the “perverse incentives thesis,” is powerful because it cuts straight through normatively contested debates about whether any deference to administrative action is desirable as a policy matter and posits that, at least in this case, deference inexorably leads to agencies expanding the scope of their own discretion through a kind of regulatory sandbagging (\textit{e.g.}, intentionally promulgating indeterminate regulations that can be informally amended through interpretive moves at a later time). The core purpose of \textit{Auer} is to give agencies greater flexibility to operate within the scope of existing rules without having to go through the stringent public processes


\textsuperscript{13} Id. at 723.

\textsuperscript{14} See infra section II.A.
attached to notice-and-comment rulemaking.\textsuperscript{15} Reasonable people can disagree about whether agencies should or should not have this authority to avoid notice-and-comment rulemaking when they make any particular change to existing regulations, and they can likewise disagree whether \textit{Auer} strikes precisely the right balance between flexibility and fair notice when agencies seek to flesh out rules on the back end of the administrative process.\textsuperscript{16} But it is much harder to disagree that a doctrine that causes agencies to literally augment their own authority—and to purposefully withhold their understanding of the law from those who bear its burdens—is flawed, both pragmatically and constitutionally.

This is the theory behind the growing assault on \textit{Auer}, but does it have any basis in reality? This Article scrutinizes the perverse incentives thesis from both an empirical and a theoretical perspective. I first test the thesis empirically by analyzing linguistically an original and extensive dataset of federal rules from 1982–2016.\textsuperscript{17} My analysis reveals that agencies did not measurably increase the vagueness of their writing in response to \textit{Auer}. If anything, rule writing arguably became more specific over time despite \textit{Auer}'s increasing prominence.\textsuperscript{18} The lack of empirical evidence of an “\textit{Auer} effect” on rule writing is actually not surprising, given what we know about agencies as boundedly rational, incrementalist organizations.\textsuperscript{19} Agencies have limited bandwidth to address all the considerations that might affect tradeoffs between providing specificity now or later, and the fact that agencies are boundedly rational means that incentives that operate in the short run are more


\textsuperscript{16} Clarke, supra note 15, at 191 (noting that the question with regard to the propriety of deference doctrines is “always relative: what’s the best way to strike the pragmatic balance”).

\textsuperscript{17} This range of years was selected based on data availability. The White House Office of Information and Regulatory Affairs’ list of economically significant rules—the list from which the sample was generated—extended from 1981 to the present. It appeared that the records from 1981 were incomplete, so that year was excluded. Likewise, 2017 was excluded because data only covered part of the year. The 1982–2016 range also makes for a roughly symmetric set of years before and after the decision in \textit{Auer v. Robbins}.

\textsuperscript{18} See infra section III.C–E.

\textsuperscript{19} See infra section IV.A–B.
salient to agencies as they engage in the task of rule writing. 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. 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. 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.

Recognizing the limits of the perverse incentives thesis points to the importance of an evidence-based understanding of how administrative law doctrine shapes agency behavior on the ground. Claims about the behavioral effects of administrative law are both pervasive and fundamental to the field, but they are too infrequently addressed empirically by administrative law scholarship. Moreover, 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 the American constitutional framework. Formalist separation-of-powers theory resists many aspects of the administrative state because, as the theory goes, the administrative state often involves the breakdown of hard lines demarcating the constitutionally prescribed allocation of powers, which in turn creates dangerous combinations of powers that misalign incentives in a manner inconsistent with republican government. Auer is hardly the only case. These kinds of combinations—and the opportunities they create for the “arrogation of power”—are ubiquitous in the modern administrative state. But if agencies are

20 See infra section IV.A.
21 See infra section IV.B.
22 See infra section IV.C.
23 See infra section IV.C.
25 See infra Part V.
26 See infra Part V.
28 See generally Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1248 (1994) (noting that “[a]dministrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body); id. at 1248-49 (describing the Federal Trade Commission’s enforcement cycle as including the power to “promulgate substantive rules of conduct,” to
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 formalist story of breakdown loses much of its force. One contribution of the Article is to show that, in at least one context, formalist theory leads one astray. The broader implication, though, is that this error may be pervasive in separation-of-powers jurisprudence and scholarship, as it is exceedingly easy to generate hypotheses about the incentives that agencies have in a structural framework. In short, a failure to check whether theory accords with reality can leave us with a grossly distorted understanding of the constraints on administrative power.

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 in the 1990s, and more recently has come under assault by some in the judiciary and the academy. 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.” The debate over Auer has reached an impasse because neither proponents nor critics have treated this as what it is: a testable empirical hypothesis. Part III presents the core of the Article: an empirical linguistic 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 how boundedly rational agencies are likely to process the tradeoff between specifying meaning now versus later in an environment of task complexity. Part IV also explain why the short-run incentive of surviving hard look review only heightens a general tendency to front-load specificity. Finally, Part V concludes with implications of the analysis presented here for the ongoing assault on Auer and for larger debates about the legitimacy of bureaucracy in a separation-of-powers framework.

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29 For a recent example of a court being persuaded by an argument that agency structure violated separations-of-powers principles, 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 concentrates power in the one Director).

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.’”\(^{31}\) 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.\(^{32}\) Auer is thus sometimes compared to its more familiar doctrinal cousin, step two of Chevron deference,\(^{33}\) and in some ways the comparison is apt—all the more so now that several empirical studies have shown that the government’s win rate in Auer cases is consistent with that in Chevron cases.\(^{34}\) Auer deference, like Chevron deference, has been justified on a number of grounds, including

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\(^{31}\) Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). In recent years, the Court has delineated several circumstances when Auer does not apply. See Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (holding that Auer is not to be afforded “when there is reason to suspect that the agency’s interpretation does not reflect the agency’s fair and considered judgment”); Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (holding that Auer does not apply when the rule’s text “parrots,” or mimics, the legislative ambiguity that justified Chevron deference in the first place—something widely known as the “anti-parroting” principle or canon). Together, these caveats have prompted some to consider whether there is an emerging “step zero” in Auer doctrine. Clarke, supra note 15, at 189 (“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.’”).

\(^{32}\) Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 613 (2013) (“It is well established that an agency’s interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.”).

\(^{33}\) 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 Seminole Rock, Geo. J. L. & Pub. Pol’y, at 5 (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993473 (noting that Auer is often viewed as “a kind of Baby Chevron doctrine”).

\(^{34}\) Barmore, supra note 30, at 815 (“[C]ourts of appeals have responded to the Court’s recent Auer decisions by narrowing their application of the doctrine, leading to a steady decline from 2011 to 2014 in the rate at which courts grant Auer deference.”); Richard J. Pierce Jr. & Joshua Weiss, An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Admin. L. Rev. 515, 519 (2011) (finding a 76 percent validation rate for a set of cases decided by lower courts); William M. Yeatman, An Empirical Defense of Auer Step Zero (Aug. 29, 2016), https://ssrn.com/abstract=2831651. 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
that interpretive deference broadly accords with notions of agencies as the most expert and most accountable body to implement statutory programs.\(^35\)

The difference between *Chevron* and *Auer*—and the impetus for the bulk of the skepticism of *Auer* deference—lies in the source of the interpretive discretion. With *Chevron*, the discretion, if it exists, comes from Congress’s statutory delegation of authority, express or implied.\(^36\) With *Auer*, the discretion comes from lingering ambiguities in the agency’s own previously promulgated regulatory text.\(^37\) When *Auer* comes up in litigation, it is most often because an agency has issued a guidance, a policy statement, an advisory letter, or a manual (i.e., a nonlegislative rule) that clarifies a legislative rule\(^38\) previously promulgated through notice-and-comment rulemaking under Section 553 of the APA.\(^39\) 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

\(\text{“super deference,” see Daniel Mensher, \textit{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.

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\(^{35}\) Stephenson & Pogoriler, supra note 8, at 1460 (describing a host of “pragmatic arguments” for *Auer*, including “expertise, efficiency, flexibility, and accountability”); Clarke, supra note 15, at 175 (describing the evolution of justifications of *Auer*).


\(^{37}\) *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”).

\(^{38}\) 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)).

\(^{39}\) 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 38, 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, [PINCITE] (D.C. Cir. 1995) (outlining the “ascertainable certainty” requirement for fair notice in the enforcement realm).
A document can be accomplished more quickly because the strictures of Section 553 do not apply.\textsuperscript{40} In effect, \textit{Auer} blesses some procedural corner-cutting in the name of administrative efficiency.\textsuperscript{41}

\textit{Auer} is not as widely cited as \textit{Chevron},\textsuperscript{42} but it has become an established feature of litigation involving federal administrative agencies.\textsuperscript{43} It was not always so. The next section chronicles the rise of \textit{Auer} from its humble origins in \textit{Bowles v. Seminole Rock Sand} to its unquestioned endorsement in the late 1990s. It then turns to more recent years, which have seen both an increasing embrace of \textit{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 \textit{Seminole Rock} to \textit{Auer}

Although the Supreme Court decided \textit{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.\textsuperscript{44} In \textit{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.”\textsuperscript{45} 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.\textsuperscript{46} 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 be made only if there had been no delivery in the month of March, which was not the case.\textsuperscript{47} In fact, at the same time it issued the General Maximum

\begin{itemize}
\item \textsuperscript{40} William Funk, Saving Auer, JOTWELL (June 23, 2016), http://adlaw.jotwell.com/saving-auer/ (reviewing Sunstein & Vermeule, Unbearable Rightness, supra note 30) (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”).
\item \textsuperscript{41} See infra notes 92–99 and accompanying text for discussion of the advantages of policymaking by non-legislative rule.
\item \textsuperscript{42} See Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of \textit{Chevron}, 73 U. Chi. L. Rev. 823, 824 n.2 (2006) (reporting that \textit{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).
\item \textsuperscript{44} Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 411 (1945).
\item \textsuperscript{45} Id. at 413.
\item \textsuperscript{46} Id. at 415.
\item \textsuperscript{47} Id. The delivery that had been made was simply at a lower price than Seminole Rock would have preferred.
\end{itemize}
regulations, OPA had issued a “bulletin” in which it used the more precise “actually delivered” language. 48 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.” 49

Little has changed in the black letter formulation of this principle between then and now. 50 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 51 review, which then morphed over the years into a standalone deference doctrine. 52

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 occur more regularly beginning in the 1960s. During this period, courts began to demonstrate an increasing willingness to apply Seminole Rock’s deference principle outside the price-control context 53 and to interpretations that were not “official.” 54 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

48 Id. at 417.
49 Id. at 414.
50 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)).
51 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that, even when not controlling, agency decisions may be persuasive based on the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).
52 Pojanowski, supra note 33, at [PINCITE] (arguing that this evolution makes Auer “bad law” in the sense that it misstates Seminole Rock’s true meaning); see also Aditya Bamzai, Henry Hart’s Brief, Frank Murphy’s Draft, and the Seminole Rock Opinion, Yale J. on Reg. (Sept. 12, 2016), http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/ (noting that the briefing in Seminole Rock seemed geared toward application of Skidmore, not toward creation of a new deference doctrine).
54 See id. (citing Boesche v. Udall, 303 F.2d 204 (D.C. Cir. 1961), aff’d, 373 U.S. 472 (1963)).
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.”

Figure 1: Total Circuit Court Citations to *Auer* and *Seminole Rock*, 1945–2017

![Graph showing citations over time](image)

Notes: The data reported were obtained through Lexis Advance by searching for citations to the Shephard's Citations footnotes concerning the principle of deference in both *Auer* and *Seminole Rock* and aggregating the citations by type and by year. Total citations include those defined by Shepards as neutral and routine citations.

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 (1955–1965) to the period 1990–1996, just before *Auer v. Robbins* was decided in 1997, the frequency

55 Id. at 73–74.

56 380 U.S. 1 (1965).

57 Knudsen & Wildermuth, supra note 53, at 78.
of citation remained low, averaging just twenty-one 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 closely examining the doctrine.\(^{58}\)

*Seminole Rock’s* low profile changed abruptly in 1997 with the Court’s decision in *Auer v. Robbins*.\(^ {59}\) 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.\(^ {60}\) 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.\(^ {61}\) 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.\(^ {62}\) But in an amicus brief requested by the Court, the Secretary of Labor argued that its salary-basis test required a showing of “an actual practice of making such deductions or an employment policy that creates a ‘significant likelihood’ of such deductions.”\(^ {63}\) 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.\(^ {64}\) 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.\(^ {65}\) To this, the Court replied that the words “comfortably bear[] the meaning the Secretary assigns.”\(^ {66}\) Nor did the fact that


\(^{61}\) 29 C.F.R. § 541.118(a) (2017).

\(^{62}\) *Auer*, 519 U.S. at 459–60.

\(^{63}\) Id. at 461.

\(^{64}\) Id. at 461 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

\(^{65}\) Id. at 461 (citing 29 C.F.R. § 541.118(a)).

\(^{66}\) Id. at 461.
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.67

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 citations to just Seminole Rock, to just 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.’”68

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 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.

67 Id. at 462.

Figure 2: Circuit Courts’ Negative and Positive Citations to Auer and Seminole Rock, 1945–2017

Notes: The data reported were obtained through Lexis Advance by searching for citations to the Shephard’s Citations footnotes concerning the principle of deference in both Auer and Seminole Rock and aggregating the citations by type and by year.

The impetus behind this second revolution was a series of Supreme Court cases giving greater attention—sometimes sharply critical—to the doctrine. First, in early 2006, the Court decided Gonzales v. Oregon, holding that the Attorney General’s interpretive rule prohibiting the use of controlled substances in carrying out otherwise state-sanctioned assisted suicides was invalid under the terms of the Controlled Substances Act. 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.” By endorsing a new “anti-parroting principle,” the Gonzales decision suggested for the first time that there might be a “step zero” requiring that certain criteria be fulfilled before an agency’s interpretation could be

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70 Id. at 256–57.

71 Scholars often refer to a somewhat analogous “Chevron step zero,” where courts consider whether certain criteria—namely, whether Congress has expressly or impliedly delegated authority to the agency to make rules
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*” undermined the stability of the doctrine and opened the door to more concerted questioning by federal courts.\(^\text{72}\)

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.\(^\text{74}\) 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,"" 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.”\(^\text{75}\) In a concurrence, Justice Scalia agreed that the regulation controlled, but only because it was clear.\(^\text{77}\) 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 with the force of law—has occurred before even applying *Chevron*’s two steps. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L.J. 833, 836 (2001) (describing “step zero” as the “inquiry that courts should undertake before moving on to step one of *Chevron*, or turning instead to *Skidmore* (or resolving the issue de novo)"); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006) (describing the “step zero” inquiry as the “inquiry into whether the *Chevron* framework applies at all”).

\(^\text{72}\) Note, Deference to Agency Interpretive Rules, 120 Harv. L. Rev. 361, 365 (2006).

\(^\text{73}\) 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 quite fully convinced of the dangers of *Auer* the decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 274 (2009). The case involved an 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.


\(^\text{75}\) Id. at 63 (citing Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000)).

\(^\text{76}\) Id. at 63–64 (citing Auer v. Robbins, 519 U.S. at 462).

\(^\text{77}\) Id. at 67–68 (Scalia, J., concurring).
that some have observed created “widespread confusion” in the circuits. Justice Scalia argued that, upon further reflection, it is “contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well,” and doing so in fact “encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”

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

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


82 Id. at 158–59.


84 Id. at 615 (Roberts, C.J., concurring).

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 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 unprecedented prominence. 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*

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86 It is not clear how the confirmation of a Justice Kavanaugh will change the math. He never had occasion to weigh in on *Auer* deference during his time as a circuit judge, but overall, he appears to be a deference skeptic. See Christopher Walker, *Judge Kavanaugh on administrative law and separation of powers (Corrected)*, SCOTUSBLOG (Jul. 26, 2018, 2:55 PM), http://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/ ("Although Kavanaugh has not addressed the propriety of *Auer* deference . . . his concerns about interpretive doctrines that turn on ambiguity, coupled with his views on separation of powers, seem to suggest he would be receptive to calls to eliminate — or at least further limit — *Auer* deference."). Even if he is inclined to question *Auer*, it is unclear whether he will support overturning or limiting *Auer* outright or will simply aggressively avoid application of *Auer* by resolving ambiguities at “step one.”


88 See supra notes 10–13 and accompanying text.

89 Amy Howe, Court Adds Five New Cases, Including Transgender Bathroom Dispute, To Docket, SCOTUSBlog (Oct. 28, 2016), http://www.scotusblog.com/2016/10/court-adds-five-new-cases-including-transgender-bathroom-dispute-to-docket/ ("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.").


91 See supra Figure 1.
in a future case. The next Part of the Article examines the source of the deep disagreement developing in the federal courts: a theoretical argument about Auer’s behavioral incentives.

II. Auer’s Perverse Incentives

The 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 an understanding that the principle of deference to agency interpretations of their regulations serves a fundamental purpose in administrative law. Whenever there is rulemaking, there is an inescapable need for expert application of those rules to increasingly fine-grained, unforeseen situations that fall within the purview of the rules—even the most perspicacious of rule writers cannot anticipate every circumstance that might require application of a rule. It is for precisely this reason that the APA provides for avenues other than notice-and-comment rulemaking, such as non-legislative rulemaking and adjudication. It would be highly inefficient to require every needed clarification or interpretation to be formulated as an amendment to a rule—even as it would increase accountability to do so—yet that is what would be encouraged by deferring to rules and not to interpretations of rules. In essence, Auer deference attempts to pragmatically balance out a classic tension in administration—namely, “accommodating the need for agency flexibility while guarding against the specter of what Justice Jackson memorably described as ‘administrative authoritarianism’—the ‘power to decide without law.’”


93 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 8, at 1456; Sunstein & Vermeule, Unbearable Rightness, supra note 30, 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 8, 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).

94 Nor do they necessarily want to. See Barmore, supra note 30, at 819 (“An agency could try to answer every potential interpretive question, but such clarity would increase the length and complexity of regulations until they were too opaque for regulated parties to understand.”).

95 See 5 U.S.C. § 553(b)(A) (2012) (non-legislative rulemaking); 5 U.S.C. § 554 (2012) (formal adjudication). See also Franklin, supra note 38, at 303–04 (highlighting the benefits of non-legislative rulemaking, including the relief it grants to resource strapped agencies that might otherwise be forced to undergo cumbersome notice-and-comment rulemaking).

96 Clarke, supra note 15, at 178 (describing these as “two classic concerns of the modern administrative state”); see also Stephenson & Pogoriler, supra note 8, at 1453 (“[W]holesale rejection of Seminole Rock would be
Auer vindicates core values of administrative flexibility and efficiency by giving rule writers some assurance that their agency’s good-faith application of the codified regulatory text to novel, but related, problems will be respected by the courts, in part because of the recognition that agencies, 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.\(^{97}\) In doing so, Auer gives agencies greater freedom to avoid undergoing cumbersome notice-and-comment rulemaking whenever they seek to make these adjustments.\(^{98}\) Some might quibble with the precise balance struck by Auer, arguing that more interpretive moves should be made in the form of notice-and-comment rulemaking.\(^{99}\) But these arguments, like arguments against the Court’s hands-off approach to the non-delegation doctrine, fail to persuade because they fail to explain why accountability must always be maximized at the expense of efficiency and flexibility.

The growing skepticism from a vocal minority in the federal judiciary detailed in section II.B thus does not rely primarily on a fruitless second guessing of the need for agency flexibility. Instead, the skeptical treatments from some Justices in cases like Talk America, Decker, Christopher, and Perez rely on a theoretical apprehension about the doctrine’s incentives for rule writing. That is, according to John Manning, who largely inspired the recent judicial questioning of the doctrine,\(^{100}\) Auer has an “untoward effect upon [the agency’s] incentive to speak precisely and transparently when it promulgates regulations.”\(^{101}\) It is that apprehension that the Article now turns to in more detail.

\(^{97}\) 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 8, at 1455 (noting the argument but noting that it has been replaced by an ascendant “pragmatic” rationale analogous to the rationale for Chevron); see also Angstreicher, supra note 92, at 92–93 (citing sources making the argument).

\(^{98}\) Barmore, supra note 30, 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 workday adjustments are quite frequently accomplished through these means. Wendy Wagner et al., Dynamic Rulemaking, 92 N.Y.U. L. Rev. 183, [PINCITE] (2017).

\(^{99}\) See infra note 117.

\(^{100}\) See Leske, supra note 78, at 11; Nielson, Beyond Seminole Rock, supra note 80, at 954.

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

Auer deference differs fundamentally from other deference doctrines in administrative law that concern statutory interpretations by agencies. With a doctrine like Chevron, the agency itself has no control over the scope of the discretion embedded in the raw statutory text, and Congress retains no power to limit the exercise of interpretive discretion after the fact except through further legislation. This institutional allocation of law-writing and law-interpreting authority means that “Congress’s incentive is to speak as clearly as possible on the matters it regards as important,” substantially limiting the scope of agencies’ interpretive authority. In contrast, with Auer, there is a fusion of legislative and expository authority within agencies. Agencies write rules in one breath and interpret or enforce those rules in another breath. Affording deference to regulatory interpretations, as Auer does, makes agencies authoritative as to the meaning of the regulatory text they have previously written.

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

102 Talk America, Inc. v. Mich. Bell. Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (“When Congress enacts an imprecise statute that it commits to the interpretation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation).”).


104 Id.

105 This argument is often cast in terms of formalist separation-of-powers logic, see Decker, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part) (arguing that there could be “no congressional implication that the agency can resolve ambiguities in its own regulations” because that “would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands”), but it is ultimately based on, and influential because of, a consequentialist claim about the dangers of self-delegation that inhere in a breakdown of the strict separation of powers.

106 Barmore, supra note 30, at 817.

107 Decker, 568 U.S. at 629 (Scalia, J., concurring in part and dissenting in part) (“[W]hen an agency interprets its own rules—that is something else. Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect.” (emphasis in original)).

108 Stephenson & Pogoriler, supra note 8, at 1461 (emphasis added).
example: Instead of bearing the cost of specifying its meaning ex ante, as it would be more likely to
do if another actor had the ultimate interpretive authority, the Department of Education would
seem to have had no incentive to specify in its rule how it would like to treat transgender students
with regard to bathroom choice. Under Auer, John Manning notes, “if an agency issues an imprecise
or vague regulation, it does so secure in the knowledge that it can insist upon an unobvious
interpretation, so long as its choice is not ‘plainly erroneous.’” In other words, it could simply leave
more discretion for itself on the front end in rule writing and specify its meaning later, when courts
applying Auer will simply defer to any plausible construction of capacious or underspecified
language.

Taken to its logical endpoint, the argument is not merely that Auer eliminates the incentive
to speak with clarity, but that it actually creates an incentive to “maximize” opacity. When agencies
consider making policy by non-legislative rule (i.e., by guidance document, policy statement, and the
like), the most important parameter to consider is how much risk there is that the interpretation
will stretch the meaning of the regulatory text too far, such that a reviewing court would reject that
interpretation. But because agencies have control over the regulatory text as well as the
interpretation, this key parameter is actually under their control. Agencies could promulgate texts
that are so vague that virtually any interpretation would be at least arguably consistent with it. The
optimal strategy, then, might be a sort of regulatory sandbagging: 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 statutory language
into vague terms, and then re-translating that translation into the agency’s preferred meaning. 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.” For Manning,
whose work largely inspired the assault against Auer, the danger of self-delegation inherent in any
breakdown of the strict separation of rule-writing and rule-interpreting authority is sufficiently

109 Manning, supra note 101, at 657 (emphasis in original).

110 Barmore, supra note 30, at 818 (“If Auer requires deference to an agency’s interpretation of ambiguous
(but not unambiguous) regulations, agencies would maximize future flexibility and power by promulgating
ambiguous regulations. . . . Critics worry that the incentive to promulgate vague regulations would lead to
predictably more ambiguous regulations . . . .”); see also Sunstein & Vermeule, Unbearable Rightness, supra
note 30, at 308 (explaining that agencies “will issue vague, broad regulations, knowing full well that when the
time comes, they will be able to impose the interpretation they prefer”).


112 Nielson, Beyond Seminole Rock, supra note 80, at 955 (“[W]hen agencies promulgate regulations that do
not tackle the hard problems, the agency does not ‘pay’ upfront, and when the agency later issues an
interpretative rule to tackle those problems—even though interpretative rules are not subject to the same
rigorous procedure—the agency does not ‘pay later’ either” (citing Stephenson & Pogoriler, supra note 8, at
1464)).

part).
serious that it justifies a constitutional presumption against any institution or doctrine with that feature.\footnote{Manning, supra note 101, at 631; see also Anthony, supra note 15, at 11–12.}

The key prediction of the perverse incentives thesis, then, is that agencies operating in a world with Auer deference will systemically underspecify the rules they write relative to a counterfactual world where Auer does not exist.\footnote{Some have also argued that agencies would have incentives to issue more non-legislative rules than they otherwise would because of the availability of Auer. See William Funk, Saving Auer, JOTWELL (June 23, 2016), https://adlaw.jotwell.com/saving-auer/. On the margins, this may be true, although it is always the case that agencies have strong incentives to cut corners around notice-and-comment rulemaking regardless of the level of deference. Whether Auer makes a difference in this calculation is an open question (and one that deserves further research), but the existing evidence is, notably, inconsistent with there being any explosion of significant guidance (relative to significant rulemaking) in recent decades. See Connor Raso, Strategic or Sincere? Analyzing Agency Use of Guidance Documents, 119 Yale L.J. 782, 813 (2010) (finding that significant guidances make up a negligible percentage of agency work and often involve technical issues).}

That is, whereas under ordinary circumstances, agencies would balance various considerations to settle on some kind of “optimal” level of rule specificity,\footnote{Colin S. Diver, The Optimal Precision of Administrative Rules, 83 Yale L.J. 65 (1983).} Auer would seem to promise a greater payoff for writing a relatively vague rule, and in fact might be thought to shift baseline rule-writing styles across the board. With vague rule texts, it is far easier for agencies to cut corners around notice-and-comment rulemaking for changes to existing programs and to make major policy changes by issuing guidance documents, policy statements, opinion letters, and the like instead, as they may be more naturally inclined to do anyway.\footnote{See, e.g., James T. Hamilton & Christopher H. Schroeder, Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste, 57 L. & Contemp. Probs. 111 (1994) (theorizing that strategic agencies might choose to regulate by guidance as a means of avoiding the costs of notice-and-comment rulemaking).}

Notice-and-comment procedures can be costly and time consuming.\footnote{See Kathryn Kovacs, Getting Back to the Basics with Agency Rulemaking, The Reg. Rev. (Nov. 13, 2017), https://www.theregregreview.org/2017/11/13/kovacs-basics-agency-rulemaking/ (“Although scholars argue by why the rulemaking process is ossifying and how much it is happening, there is little debate that rulemaking is a big pain for federal agencies.”).} Indeed, by one study’s estimation, the average time to completion for notice-and-comment rulemaking is between one and three years.\footnote{Anne Joseph O’Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State, 94 Va. L. Rev. 889, 958–59 (2008) [hereinafter O’Connell, Political Cycles of Rulemaking] (“The average duration of completed rulemakings, both significant and more routine, for the ten agencies in Charts 5 and 6 ranged from 243.74 days for the DOC to 760.93 days for the HHS.”).} In contrast, agencies can, in principle, issue a non-legislative rule in a matter
of days, as there is no prescribed procedure in the APA for such actions.\textsuperscript{120} The cost savings on the back end can literally be accounted for in the decision about how specific to be on the front end.

B. The Defense of \textit{Auer}

Although the perverse incentives critique of \textit{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 the tenuous assumptions behind the separation-of-powers critique of \textit{Auer}.\textsuperscript{121} They note that, strictly speaking, agencies are not engaged in legislating or adjudicating when they engage in rule writing and rule interpretation, respectively. Rather, they are engaged in executing the law.\textsuperscript{122} This task, with its mix of legislative and expository authority, is pervasive in the administrative state.\textsuperscript{123} Thus, the perverse incentives argument critics make against \textit{Auer} has far-reaching implications not just for agency rule writing, but also for the majority of what agencies do.\textsuperscript{124} 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 \textit{Auer} bear a heavy burden of explaining why \textit{Auer} must go but modern administrative agencies may stay.\textsuperscript{125}

Others have noted that \textit{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

\begin{itemize}
  \item \textsuperscript{121} Sunstein & Vermeule, Unbearable Rightness, supra note 30, 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”).
  \item \textsuperscript{122} Id. at 311 (citing Jack L. Goldsmith & John F. Manning, The President’s Completion Power, 115 Yale L.J. 2280 (2006)).
  \item \textsuperscript{123} Lawson, supra note 28, at 1248.
  \item \textsuperscript{124} 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 \textit{Auer} to discuss.”); Cass R. Sunstein & Adrian Vermeule, \textit{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/ [hereinafter Sunstein & Vermeule, Now and Forever] (The constitutional critique of \textit{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.”).
  \item \textsuperscript{125} Sunstein & Vermeule, Now and Forever, supra note 124..
\end{itemize}
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.\textsuperscript{126} If the concern about Auer is in part about its failure to deliver fair notice and public accountability, a world in which agencies avoid prospective rulemaking in favor of retrospective and often piecemeal adjudication would be a decidedly worse one. Moreover, some have argued that the likely result of overturning Auer and handing interpretive authority to courts would be to greatly undermine clarity in the law.\textsuperscript{127} Instead of having agencies announce one authoritative (albeit ephemeral) interpretation, there would likely be circuit splits about the proper interpretation of important regulatory provisions, thereby increasing the costs of compliance for regulated entities.\textsuperscript{128} Then there is the fact that overturning Auer might throw the validity of countless existing interpretations, many of which have induced substantial reliance interests, into question.\textsuperscript{129}

These arguments, as persuasive as they might be on an abstract level, elide the central question in the debate over Auer (i.e., the perverse incentives thesis), and indeed the response to the perverse incentives thesis 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\textsuperscript{130}—that there are cross-cutting incentives that actually encourage specificity in rule writing.\textsuperscript{131} Agencies gain greater assurance that regulated entities will comply with the law, as the agency understands it,

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{126}] Nielson, Beyond Seminole Rock, supra note 80. The Chenery doctrine holds that agencies are generally free to choose to make policy either through promulgating rules or through the accretion of individual adjudications in common-law fashion. Id. at 948. Nielson argues that Auer’s infusion of back-end flexibility makes rulemaking more attractive, with attendant benefits for notice of legal obligations even if gaps remain to be interpreted. Id. But if Auer were “off the table, agencies may rely more often on Chenery” and make policy in an iterative, unpredictable fashion through adjudication. Id.
\item[\textsuperscript{127}] Derek A. Woodman, Rethinking Auer Defeference: Agency Regulations and Due Process Notice, 82 Geo. Wash. L. Rev. 1722, 1736 (2014) (noting the “disuniformity that could result if courts were to substitute the agency’s interpretation of the regulation with their own”).
\item[\textsuperscript{128}] Id.
\item[\textsuperscript{129}] Clarke, supra note 15, at 193 (noting that there are substantial reliance interests in interpretive rules and that virtually every interpretation under the APA would be effected in some way since Seminole Rock pre-dated the APA).
\item[\textsuperscript{130}] Manning, supra note 101, at 655-56 (anticipating that “an agency may have various other reasons to draft clear, self-limiting rules, even when it possesses the right of self-interpretation,” including keeping enforcement costs low, maintaining hierarchical control of agency staff, and binding future administrations).
\item[\textsuperscript{131}] Clarke, supra note 15, at 182 (noting that “precision is not the only value that agency actions must serve—and, indeed, more precision is not always better”).
\end{itemize}
\end{footnotesize}
when they put their understanding in a legislative rule with some specificity.\textsuperscript{132} Likewise, both agencies and regulated entities benefit from certainty against future changes when issues are settled in legislative rules rather than in later guidances or policy statements, as the former can be changed only through a legislative rule rescinding the rule.\textsuperscript{133}

Some commentators have also noted that there is a paucity of evidence supporting the perverse incentives 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.\textsuperscript{134} 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.”\textsuperscript{135} Such sentiments are widely shared among regulators.\textsuperscript{136} Indeed, as Walker further shows, agency rule writers are apparently generally unaware of the doctrine,\textsuperscript{137} 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., “identifying the likely sign of an effect and then . . . declaring victory, without examining its magnitude” and “without asking whether it is realistic to think that the effect will be significant.”\textsuperscript{138}

\begin{itemize}
  \item[132] Id.; see also Diver, supra note 116, at 72 (arguing that clarity in regulations can streamline enforcement, or perhaps even make it less necessary if regulatees can be relied on to comply).
  \item[133] Clarke, supra note 15, at 182 (explanatory parenthetical).
  \item[134] 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.”).
  \item[136] See, e.g., Aditi Prabhu, How Does Auer Deference Influence Agency Practices?, Admin. & Reg. L. News 11, 12 (Winter 2015) (“[A]gencies have a strong interest in writing clear regulations. Agencies can effectively enforce only clear regulations; otherwise, they risk running afoul of fair notice and due process considerations.”).
  \item[137] Walker, supra note 135, 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.
  \item[138] Sunstein & Vermeule, Unbearable Rightness, supra note 30, at 299–300.
\end{itemize}
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.”

139 Levin, supra note 134 (“[T]he factual basis of the critique of Auer isn’t paltry. It’s one hundred percent guesswork.”); Sunstein & Vermeule, Unbearable Rightness, supra note 30, 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.”).

140 Sunstein & Vermeule, Unbearable Rightness, supra note 30, 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).”).

141 See, e.g., Kathryn M. Schroeder & Jason B. Hutt, Gorsuch May Further Tip Balance Against Deference to EPA, Law 360 (Feb. 14, 2017), 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) (“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.”).

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.”

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, 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. 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 thus 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.” In what follows, the Article turns to the project of filling out our understanding of Auer’s effects on agency rule writing—particularly, examining whether 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. This Part makes an in-depth and systematic effort to assess whether Auer’s incentives do manifest in changed rule writing behavior. In examining whether Auer has changed the ways agencies write rules, I draw on several different strands of textual-analysis methods being developed in computational linguistics, psycholinguistics,

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

144 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”).

145 See Levin, supra note 134 (noting that Auer’s incentive to write vague rules “does not exist in a vacuum” and that many factors “militate toward specificity rather than vagueness”).

146 See supra note 130 and accompanying text.

political science, and regulatory studies. Public law scholars are increasingly turning to corpus linguistics methods to bring systemic empirical evidence to bear on large bodies of legal text.\footnote{See, e.g., Thomas R. Lee & Stephen C. Mouritsen, Judging Ordinary Meaning, Yale L.J. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937468.} In order to test the key predictions of the perverse incentives thesis, it is necessary to use these kinds of sophisticated linguistic measures to analyze the work product of agencies—i.e., the text of their regulations—over time.

A. Data

This section reviews the original data I collected to examine the perverse incentives thesis, including the sample of rules for analysis and the specific measures of textual vagueness that I employ.

1. Sample

Seeking to capture as broad a sample of these texts as possible, I gathered the texts of every “economically significant”\footnote{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, Congressional Research Service, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register, at 10-11 (Oct. 4, 2016), 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, 58 Fed. Reg. 51735 (Sep. 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 12,291, 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 150.} final rule reviewed by the White House Office of Information and Regulatory Affairs (OIRA) and published in the Federal Register between 1982 and 2016.\footnote{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 Office of Information and Regulatory Affairs, XML Reports, 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.} In all,
there were 1,218 such rules published by twenty-eight different departments, agencies, and boards during the observation period. These entities ranged from the familiar—e.g., the Environmental Protection Agency (EPA), the Department of Transportation (DOT), the Department of Health and Human Services (HHS), the Department of Agriculture (USDA), and the like—to the less familiar—e.g., the Architectural and Transportation Barriers Compliance Board (ATBCB) and the Emergency Oil and Gas Guaranteed Loan Board (EOGGLB).\textsuperscript{151} The textual data assembled represent a broad swath of the administrative state and capture the bulk of the important rulemaking activity conducted by it.\textsuperscript{152}

2. Measures of Vagueness

For each rule in the sample, I first partitioned the document into the preamble and the rule text.\textsuperscript{153} I then subjected each rule’s text to computer-assisted content analysis to generate a number of measures of vagueness for each text.\textsuperscript{154} Relative to human coding, computer-assisted content analysis is faster, cheaper, and orders of magnitude more reliable.\textsuperscript{155} Human coders tire and make

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I then bulk downloaded the entire text of the notice for each of the identified rules using Lexis Advance’s Federal Register Library.

\textsuperscript{151} This sample excludes 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.

\textsuperscript{152} One might object that economically significant rules are critically different from other rules, and that focusing only on these rules risks introducing sampling bias insofar as the goal is to say something about rule making writ large. This concern is addressed in section III.F.2.

\textsuperscript{153} The process in note 150 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.

\textsuperscript{154} For three of the following four measures, I used the program Linguistic Inquiry and Word Count (LIWC), which allows the user to apply both built-in and user-provided dictionaries to selected texts, counting the instances of each dictionary term and generating statistics on the percentage of the document composed of terms in the dictionary. See Yla R. Tausczik & James W. Pennebaker, The Psychological Meaning of Words: LIWC and Computerized Text Analysis Methods, 29 J. Lang. & Soc. Psych. 24, 25 (2010); see also James W. Pennebaker et al., The Development of Psychometric Properties of LIWC2015 (University of Texas at Austin, 2015), https://repositories.lib.utexas.edu/bitstream/handle/2152/31333/LIWC2015_LanguageManual.pdf. For the final measure, I used Python to analyze the textual data. Python, http://www.python.org (last accessed Aug. 30, 2017).

computational mistakes; computers do not.\textsuperscript{156} Thus, with over 1,200 rules and over 19 million words, computer-assisted content analysis is easily the best approach to capturing the vagueness of texts, although substantial care has to be taken to ensure that what the computer is measuring captures what we mean when we say that a regulatory text is vague.\textsuperscript{157}

The concern with \textit{Auer} is a concern about an agency’s propensity to promulgate what the D.C. Circuit has called “mush.”\textsuperscript{158} 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,\textsuperscript{159} I selected several measures that serve as proxies for linguistic generality. My four measures of vagueness are described as 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 validation exercise using real regulatory texts in Title 21 of the \textit{Code of Federal Regulations}—governing food labeling and packaging—and human coders’ evaluations of the vagueness of those texts.\textsuperscript{160}

\textit{Legal Vagueness.} The first measure is an index based on a list of commonly used legal terms that fail to convey much practical guidance. Phrases like “reasonable precautions” and “prudent investor” use terms that do not by themselves convey criteria capable of deciding concrete cases.

\textsuperscript{156} Id.

\textsuperscript{157} See infra note 159 and accompanying text.

\textsuperscript{158} \textit{Paralyzed Veterans of Am. v. D.C. Arena L.P.}, 117 F.3d 579, 584 (D.C. Cir. 1997).

\textsuperscript{159} Vagueness is generally defined as the “use [of] concepts that have indefinite application to particular cases,” Lawrence Solum, \textit{Legal Theory Lexicon: Vagueness & Ambiguity}, Legal Theory Blog (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, \textit{The Interaction of Lexical and Syntactic Ambiguity}, 32 J. 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, \textit{Vagueness and Law: Philosophical and Legal Perspectives}, in \textit{Vagueness and Law: Philosophical and Legal Perspectives} (Geert Keil & Ralf Poscher eds., 2016).

\textsuperscript{160} I tested the validity of the measures by sampling sentences from Title 21, subchapter B, identifying the sentences that registered as extreme (both high and low) on each of my four measures, and giving those sentences to twelve human coders to rate on a seven-point Likert Scale for overall vagueness. A statistical analysis showed that raters were able to systematically distinguish between high-scoring sentences and low-scoring sentences, which in turn suggests that the measures are capturing much of what human readers consider to be vagueness. In addition, the fact that preambles scored significantly higher on average than the associated rule texts for three of the four measures (and is basically identical in the fourth) reinforces the validity findings. After all, in Justice Thomas’s formulation of the perverse incentives thesis, the problem is that rule texts affected by the incentives read more like preambles than rules. See \textit{Thomas Jefferson Univ. v. Shalala}, 512 U.S. 504, 518–19 (1994) (Thomas, J., dissenting) (outlining his concern about affording deference to “precatory” language that “reads more like a preamble than a law”).
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.”161 In Shalala v. Guernsey Memorial Hospital, the Supreme Court dealt with vague language of this kind.162 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.”163 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.164 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”165 to conclude that the Secretary’s interpretation was correct, and that “a provider’s basic financial information is organized according to GAAP as a beginning point” from which the Secretary can make an equitable and proper reimbursement decision on grounds other than GAAP. John Manning’s influential article in fact highlighted the vagueness in this regulation as a prime example of Auer’s alleged perverse incentives for rule writing.166

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.167 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 is the measure referred to as 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

161 Stephenson & Pogoriler, supra note 8, 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 167.


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

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

166 Manning, supra note 101, at 657-60.

167 The complete list of words used in the legal vagueness measure is as follows: reason*, prudent, best, available, possible*, optimal*, appropriate*, feasible*, acceptable, unreasonable*, careful*, proper*, undue*, unavailable, impossible*, infeasible*, unacceptable*, caution. Asterisks indicate that I included all derivatives from suffixation (e.g., appropriate*ly).
fat, trans fat, cholesterol, or sodium under labeled amounts are acceptable within current good manufacturing practice.” 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.”

Laxity. The second measure relies on the distinction between legal terms that are inherently binding and those that are inherently lax. For instance, words like shall and must indicate a clear command; regulated parties ignore these kinds of commands at their peril. But at the same time, words like may and should leave regulated parties with greater uncertainty and leave law enforcers with a great deal of discretion. Capturing the balance of these two categories of 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. 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, laxity, that measures the degree to which a given text fails to give relatively binding instructions. Again, the measure of laxity seems to capture intuitive distinctions between sentences. An example of a high laxity sentence reads: “Such representations may be made either by statements, photographs, or vignettes.” By contrast, 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.”

Cognitive Complexity. Psychologists have argued that writing can be scaled in terms of the degree of “cognitive complexity,” or conceptual multi-dimensionality, it displays. For the third

\[\text{Cognitive Complexity} = \text{Cognitive Complexity Index}\]

\[\text{Cognitive Complexity Index} = \frac{\text{Total Cognitive Complexity}}{\text{Total Words}}\]


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

171 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.


173 21 C.F.R. § 101.7(d) (2017).

174 Tausczik & Pennebaker, supra note 154, at 35 (“Cognitive complexity can be thought of as a richness of two components of reasoning: the extent to which someone differentiates between multiple competing solutions and the extent to which someone integrates among solutions.”).
measure, I employ a widely used measure of cognitive complexity on the assumption that regulations may be more malleable when they implicitly (or explicitly) acknowledge different layers of a policy problem. These layers might provide the policy justification for an interpretive change at a later time. Indeed, 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

\[ z = \frac{x - \mu}{\sigma} \]

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 sum the standardized scores that lead to greater cognitive complexity and subtract the standardized scores associated with simplicity (i.e., certainty and negation words) to create an aggregate measure of cognitive complexity for each text in the dataset.


events in multidimensional terms and to integrate a variety of evidence in arriving at decisions, while low cognitive complexity denotes the kind of “conceptual organization of decision relevant information” characteristic of codified legal text. 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. This is precisely what critics of Auer see agencies doing—i.e., using underspecification in the first round of play to sandbag for greater authority or discretion in future situations. In other words, cognitive complexity proxies for the capacity for plausible drift.

The expectation is that 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.” 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.”

Polysemy. The final measure relates to what philosophers of language call “combinatorial vagueness,” which arises when a speaker or writer “has not formed an intention with regard to the inclusion or exclusion of certain objects.” This kind of categorization problem is likely the source of the lion’s share of disputes about federal statutes, and it extends well beyond the kind of paradigmatic legal vagueness discussed above. For instance, courts have had to grapple with such

177 Tetlock, Bernzweig, & Gallant, supra note 175, at 1228. More specifically, cognitive complexity consists of two related concepts called “differentiation” and “integration.” The former “represents the degree to which an individual can see multiple perspectives or dimensions in an issue,” and the latter indicates “the degree to which a person recognizes relationships and connections among these perspectives or dimensions and integrates them into their decision or judgment.” Black et al., supra note 175, at 44.


179 Owens & Wedeking, Predicting Drift, supra note 175, at [PINCITE].


183 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.”).
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. These concepts, when applied to the words that are actually used in a text, capture 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 associated with the words in a text is relatively large (i.e., the words actually used are hypernyms of a relatively high number of hyponyms), 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, the count of hypernyms could be associated with vagueness because a large number of superordinate concepts would require the reader to differentiate the word’s true subordinate relationship from those distinct concepts. Of course, hypernymy is also associated with specificity, as the agency could have used a more overarching term. The end goal is to use the concepts of hypernymy and hyponymy to place each word in a hierarchy of more general terms to more specific terms. In essence, the higher a word is in hierarchy—and the greater the number of distinct words below it—the more potentially vague the word is.

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187 Id.

Using a lexical database called WordNet,\textsuperscript{189} 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.\textsuperscript{190} The result generates two measures of possible vagueness—non-distinction of subordinate concepts (i.e., average rate of hyponyms for the words in a given text) and non-distinction of entirely different word senses, or lexical ambiguity (i.e., average rate of hypernyms for a given text), 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.”\textsuperscript{191} 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.”\textsuperscript{192}

B. Aggregate Trends

My starting point for testing whether Auer’s incentives translate into effects on agency behavior was to look at simple aggregate trends on the core measures of linguistic “mush” described in section 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 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.

\begin{itemize}
  \item \textsuperscript{190} WordNet uses a Directed Acyclic Graph (DAG) to hierarchically graph the links between words in terms of hypernymy and hyponymy.
  \item \textsuperscript{191} 21 C.F.R. § 101.9(b)(7)(ii) (2017).
  \item \textsuperscript{192} 21 C.F.R. § 101.14(a)(2) (2017).
\end{itemize}
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 other two measures, agencies have been static in terms of the specificity of their writing over a nearly forty-year period that saw the rise of *Auer* deference. Second, none of the four measures of vagueness show any statistically significant trend when looking only at rules published in 1997 or later. Two measures—*cognitive complexity* and *polysemy*—show increases in the propensity for vagueness but fall far short of statistical significance (p>|t| = .587 & .926, respectively) during this period. The other two measures—*legal vagueness* and *laxity*—indicate decreases in vagueness since 1997, even though those changes 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 at a statistically significant rate.

193 See supra section II.A & fig.1.
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>4.40</td>
</tr>
<tr>
<td>Difference in Means</td>
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<td>.141</td>
<td>.313</td>
<td>-.23</td>
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<tr>
<td>P-Value</td>
<td>.014*</td>
<td>.000***</td>
<td>.158</td>
<td>.000***</td>
</tr>
<tr>
<td>N</td>
<td>1218</td>
<td>1218</td>
<td>1218</td>
<td>1218</td>
</tr>
</tbody>
</table>

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

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. 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 had an effect, it could only really have been to slow down or exacerbate a pre-existing trend.194 Auer is no inflection point.

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,195 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 than twenty economically significant final rules during the period of observation. That means the rest of the twenty-three 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.

194 I explore this possibility in greater detail in sections III.D and III.E.

USDA—that produced the greatest number of economically significant final rules. The measures are standardized (adjusted so that they all have means of zero and standard deviations of one) for ease of presentation. As Figure 4 makes clear, the agencies vary significantly in terms of the vagueness of their rules, and the patterns do not necessarily correspond to the aggregate trends in section III.B.

This heterogeneity is both a feature and a problem from the standpoint of studying Auer’s incentives and effects. On the positive side, it is possible to see a more nuanced picture of how individual agencies might have responded to Auer. For instance, Figure 4 shows that, on the whole, EPA and HHS have more or less steadily increased the clarity of their rule texts over time. In contrast, 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 negative 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 used 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 prediction of what would have occurred without any change in agency behavior, and the observed post-*Auer* trend. This approach has been used to address treatment effects in a wide range of legal and policy fields, from criminal justice to education.

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196 Most empirical research on administrative behavior thus includes fixed effects at the agency level. See O'Connell, Political Cycles of Rulemaking, supra note 119, at 932, 940. Fixed effects allow one to “control for all stable characteristics of the [entities] in the study,” even without measuring these characteristics, “by completely ignor[ing] the between-[entity] variation and focus[ing] only on the within-[entity] variation. Paul D. Allison, Fixed Effects Regression Methods for Longitudinal Data Using SAS 3–4 (2005). Thus, each agency serves as its own control.

197 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)) (explaining that, “[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>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
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</thead>
<tbody>
<tr>
<td><strong>Legal Vagueness</strong></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Pre-Auer Trend</td>
<td>-.006</td>
<td>-.001</td>
<td>-.000</td>
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<tr>
<td>Post-Auer Change</td>
<td>.006</td>
<td>.001</td>
<td>.000</td>
</tr>
<tr>
<td><strong>Laxity</strong></td>
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<td></td>
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<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><strong>Cog Complexity</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-Auer Trend</td>
<td>-.110^</td>
<td>-.095^</td>
<td>-.078</td>
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<tr>
<td>Post-Auer Change</td>
<td>.109</td>
<td>.086</td>
<td>.074</td>
</tr>
<tr>
<td><strong>Polysemy</strong></td>
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<tr>
<td>Pre-Auer Trend</td>
<td>.020^</td>
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<td>.016</td>
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<tr>
<td>Post-Auer Change</td>
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<td>-.011</td>
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<td>Preamble</td>
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<tr>
<td>Political Environment</td>
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</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 = ***.

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 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 used the preamble score for the corresponding measure of vagueness. If, for example, a rule on the meaning of “waters of the United States” in the Clean Water Act deals with an inherently vague subject matter, both the rule text and the preamble likely reflect that baseline subject-matter vagueness. By including the control for preambles, there is less risk that differences are driven by chance variation in the subject matter that agencies choose (or are forced) to tackle. Finally, I included standard measures about the political environment in Model 3. Agencies might adjust their rule-writing strategy in response to their perceptions about the likelihood of political oversight or the preferences of their political principals. Thus, I included measures of whether the rule was promulgated during a) divided or unified government and b) a Republican or Democratic 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, and one that is statistically significant. For the rest of the variables, the findings are not statistically significant. That is, while there are directional changes indicated—negative for polysemy and positive for legal vagueness and cognitive complexity—these findings are not statistically distinguishable from the null hypothesis of no 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 on agencies that were only observable in the first few years immediately following the decision. 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 windows, 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 evaluate the perverse incentives thesis, I tested 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, if any, of these hypotheses is correct involves applying the same methodology from section 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.
Table 3: Interrupted Time Series Models of Recent Auer-Related Supreme Court Cases

<table>
<thead>
<tr>
<th></th>
<th>Post-2005</th>
<th>Post-2011</th>
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<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
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<tr>
<td><strong>Legal Vagueness</strong></td>
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<tr>
<td>Pre-Trend</td>
<td>-.005*</td>
<td>-.002</td>
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<tr>
<td>Change in Trend</td>
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<tr>
<td><strong>Laxity</strong></td>
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<td>Pre-Trend</td>
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<td>.017***</td>
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<td>Change in Trend</td>
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<td>-.023^</td>
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<tr>
<td><strong>Cog Complexity</strong></td>
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<tr>
<td>Pre-Trend</td>
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<td>.003</td>
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<tr>
<td>Change in Trend</td>
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<td>.007</td>
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<td><strong>Polysemy</strong></td>
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<td>Pre-Trend</td>
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<tr>
<td>Political Environment</td>
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</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, 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 after the decisions, 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. The pre-decision trends for both 2005 and 2011, while both statistically significant across a variety of specifications, are for the entire 1982-decision period and the effects are carryovers from a pre-Auer trend. Thus, these findings are no evidence of any treatment effect and are in fact more consistent with the limited evidence that Auer and its progeny led to an increase in specificity.

As just mentioned, the results in Table 3 are based on the entire pre-2005 and pre-2011 trends (i.e., 1982 onward), and this is probably the appropriate baseline, given that section 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.
Table 4: Segmented Interrupted Time-Series Results

<table>
<thead>
<tr>
<th></th>
<th>Post-Gonzales</th>
<th></th>
<th>Post-Talk America</th>
<th></th>
</tr>
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<tbody>
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<td></td>
<td>(1)</td>
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<tr>
<td>Legal Vagueness</td>
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<tr>
<td>Change in Trend</td>
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<td>-.009</td>
<td>.016</td>
<td>.017</td>
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<tr>
<td>Laxity</td>
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<td></td>
</tr>
<tr>
<td>Change in Trend</td>
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<td>Cog Complexity</td>
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<td>Trend Change</td>
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<td>Polysemy</td>
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<td>.029</td>
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</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 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. Other Robustness Checks

The findings from the ITS analysis are largely, but not entirely, null. This means we have evidence that the Auer effect is statistically indistinguishable from zero, although it is not by itself sufficient to infer that the effect is truly zero. To be sure, there are limits to what can be inferred from this kind of evidence, but null results are not meaningless and ignoring them can even be problematic. This is particularly the case when other cuts at the problem also fail to find any effect. To that end, I supplement the main analysis with a number of robustness checks, and across the board the results are similar: Auer appears to be unassociated with any systematic trends in agency rule writing. If numerous efforts to identify an effect fail to yield results, we can be more confident that the null results are meaningful in their own right.

1. Alternate Treatment

One possibility is that the ITS methodology employed above fails to capture a true treatment effect—that is, fails to capture the extent to which agencies were aware of and likely to act on Auer’s...
incentives. That seems unlikely, as the data in Part II indicated that Auer only became widely cited and widely perceived in 1997, but perhaps there are reasons to believe that an agency’s “hot hand” (i.e., recent success in deploying Auer) is more likely to activate the perverse incentives than a kind of general awareness of Auer.

Using data collected by William Yeatman, I measure this hot-hand treatment by computing agency-level win rates and Auer-related litigation rates in the U.S. Courts of Appeals from 1993 through 2013. Do experiences with Auer deference in real-world litigation affect agency rule writing down the road? In order to answer this question, I estimated models of the effect of Auer case win rates, total Auer cases per year, and their interaction on the indices of rule vagueness. Since rule writing takes time and the effects of one year’s litigation successes would not likely have any effect until at the earliest the next year, I estimated the models with lags of one and two years. Table 5 reports the results.

Overall, the results showed that Auer-related litigation successes do not produce increases in rule vagueness in subsequent years, or at least not increases that are statistically distinguishable from zero effect. Only two of the measures—cognitive complexity and polysemy—show any statistically significant relationship in any of the models, and only one of these is consistent with the perverse incentives thesis’s predictions that greater exposure to Auer would trigger more vagueness. Moreover, it is notable that the interaction of the agency’s win rate and the number of cases in a given year—

| Table 5: The Effect of Auer-Related Litigation Success on Agency Rule Writing |
|---------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
|                                 | Legal Vagueness | Laxity | Cognitive Complexity | Polysemy |
| Win Rate                        | L1 | L2 | L1 | L2 | L1 | L2 | L1 | L2 | L1 | L2 |
| Win Rate X #Cases               | -.013 | -.037 | -.011 | .085 | -.387 | .649 | -.135 | .098 |
| N                               | 105 | 104 | 105 | 104 | 105 | 104 | 105 | 104 |
| R^2                             | .007 | .005 | .012 | .021 | .006 | .075 | .000 | .052 |

Notes: Estimates are Ordinary Least Squares (OLS) with robust standard errors and agency-level fixed effects. Statistical significance is denoted as follows: p<.1 = ^, p<.05 = *, p<.01 = **, p<.001 = ***.

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201 See supra figs. 1 & 2.

202 Yeatman, supra note 34. Because these data only ran for a limited subset of my data, and because many agencies never experience Auer-related litigation during this period, the total number of agencies in the models include only 15 agencies. Moreover, because there were missing years where an agency that otherwise did experience Auer-related litigation had a year without cases, the data were further limited to just those agency-year pairs where there was observable litigation.
which represents the strongest possible measure of “hot-hand” exposure to Auer’s incentives—is almost uniformly negatively signed. That is, when agencies are winning a great deal of cases, they are, if anything, writing with more specificity in the year or two after. While these findings on the interaction are not statistically significant, the sign is entirely inconsistent with the basic intuition of the perverse incentives hypothesis.

2. Sample Bias

There are major advantages to limiting the sample to economically significant rules. These are the rules that most affect business and the public, and they are perhaps more often new regulatory programs rather than amendments to existing programs. Both of these factors mean that there is greater potential for agencies to act on Auer’s perverse incentives—the agency is often writing on a blank slate in a policy arena that is almost certainly important enough that the agency will have to revisit it time and again. Beyond these substantive reasons for focusing on economically significant rules, there is also the fact that identifying and collecting the entire population of economically significant rules for several decades is a relatively manageable task, given that OIRA posts these data on its reginfo.gov website.

Nevertheless, there may be some drawbacks as well. Economically significant rules are a rather small subset of all the rules agencies promulgate every year. Moreover, they are vetted extremely carefully, relative to other significant rules, because they trigger a responsibility for the agency to produce a Regulatory Impact Analysis (RIA) quantifying, to the extent possible, the costs and benefits of the regulation and its alternatives. It is reasonable to hypothesize that economically significant rules are less likely to make it out of this process with unresolved ambiguities—the stakes are simply too high, and the scrutiny too probing, to allow agencies to act on even the strongest incentives from Auer.

In a pilot study, I used a different sampling strategy that brought so-called “other significant” rules into the fold, but the results were similar to the null results for the economically significant rules. In the study, I selected three agencies with a high guidance-to-rulemaking ratio—the Department of Health and Human Services, the Department of Labor, and the Environmental Protection Agency—and collected all significant rules and proposed rules issued from 2010 through 2016. I then tested whether these three agencies altered their rule writing in response to a series of Supreme Court cases addressing Auer deference during this period. For each of these cases, there

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203 See Carey, supra note 149, at 12 (noting that economically significant rules are generally of “higher salience and political importance”).

204 See supra note 150 and accompanying text.

205 See Carey, supra note 149, at 11–12 (comparing OIRA reviews of economically significant rules to non-economically significant reviews from 1994 through 2015).

were no statistically significant effects. Not only do these findings confirm that economically significant rules are not a grossly distorted subset of rules to look at for the main analysis, they also reinforce the findings above: That is, there is no evidence that agencies have changed rule-writing practices in response to Auer.

G. 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 discussed in Part II, at the root of the critique of Auer is the purported “obvious self-interest of the agency in interpreting its own regulations.”207 That is, Auer’s critics seem to see agencies as having a self-interested motive to maximize interpretive discretion through a kind of strategic sandbagging.208 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.

207 Knudsen & Wildermuth, supra note 53, at 48.

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.” 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 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

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212 James March & Herbert A. Simon, Organizations [PINCITE] (1958) (EP). 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 209, 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.

found that agencies often bind themselves to rules and norms that seem inexplicable from a comprehensively rational, self-interested perspective.\textsuperscript{214}

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.\textsuperscript{215} Yet that is just what the perverse incentives thesis sees agencies doing: It hypothesizes that agencies will choose to forgo 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.

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.\textsuperscript{216} Since the Supreme Court’s endorsement of so-called hard look review in \textit{Motor Vehicle Manufacturers Ass’n v. State Farm}, agencies have had every incentive to build thorough rulemaking records that yet every serious alternative and support every choice with evidence.\textsuperscript{217} A secondary effect of this incentive is the incentive to speak with precision.\textsuperscript{218} After all, it is close to impossible to be thorough in justification and explanation yet vague in prescription.\textsuperscript{219} In some instances there are even hard look cases that take issue with agencies’ failure to match rule precision with a demonstrably complex problem.\textsuperscript{220} 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

\begin{thebibliography}{99}
\bibitem{214} John O. Brehm & Scott Gates, \textit{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 Elizabeth Magill, \textit{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 \textit{generally Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry Mashaw} (Nicholas R. Parrillo ed., 2017).

\bibitem{215} See infra notes 229–232 and accompanying text.

\bibitem{216} See infra section IV.C.2.

\bibitem{217} See infra section IV.C.2.

\bibitem{218} See infra section IV.C.3.

\bibitem{219} See infra section IV.C.3.

\bibitem{220} See infra section IV.C.3.

\end{thebibliography}
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 effects’ failure to materialize is explainable in terms of these limits. Section IV.A first reviews the core insights of the bounded rationality theory, with an emphasis on how boundedly rational policymakers cope with intertemporal uncertainties. Section IV.B brings these insights to bear on the particular problem that Auer presents for agencies (and that prompted such widespread concern about Auer’s allegedly perverse incentives): the question of the timing of interpretive specificity. On this question, the presentism of bounded rationality suggests a clear answer. I then turn in section 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 Nobel laureate 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.”221 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,222 bounded rationality predicts that decision makers will often fail to maximize or optimize what might be objectively in their interest.223 Instead of maximizing their utility, decision makers “satisfice,” “choos[ing] alternatives that are ‘good enough.’”224 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.225 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.226 If a search is not activated, existing solutions, norms, and routines are usually sufficient, as they offer “simplified models that

221 Jones, Bounded Rationality, supra note 209, at 397.

222 Id. at 397–99; see also Jones, Boushey, & Workman, supra note 209, at 45 (EP).

223 Simon, supra note 211, at 270–71 (“Since the organism . . . has neither the senses nor the wits to discover an ‘optimal’ path . . . we are concerned only with finding a choice mechanism that will lead it to pursue a ‘satisficing’ path that will permit satisfaction at some specified level of all of its needs.”).

224 Jones, Bounded Rationality, supra note 209, at 399.

225 See generally Daniel Kahneman, Thinking, Fast and Slow (2013) (providing an overarching summary of research on heuristics). For applications of this research tradition to administrative law, see Rachlinski & Farina, supra note 208, at [PINCITE] (EP), and Seidenfeld, supra note 210, at [PINCITE] (EP).

226 Jones, Bounded Rationality, supra note 209, at 400.
capture the main features of a problem without capturing all its complexities.” 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.”

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. Were it consistent and predictable, hyperbolic discounting might be reconciled with comprehensive rationality, but there are many other anomalies besides hyperbolic discounting. Observing “spectacular variation” in discounting behavior, the literature has failed to “converge toward any agreed-upon average discount rate.” 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.” That is, decision makers do not perceive long-term benefits the same way that they perceive short-term benefits.

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.

227 March & Simon, supra note 212, at 169.


229 David Laibson, 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”).


231 Id. at 352.

232 Yaacov Trope & Nira Liberman, Temporal Construal, 110 Psych. Rev. 403, 403–04 (2003) (showing that “individuals form more abstract representations, or high-level construals, of distant-future events than near-future events,” with the practical effect that “the value of outcomes is discounted or diminished as temporal distance from the outcomes increases”).

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.

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,

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236 Jones, Bounded Rationality, supra note 209, at 61.

237 March, supra note 234, 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.”).

238 Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Science 1124 (1974); see also Rachlinski & Farina, supra note 208, at 555 (describing how “people rely on two primary strategies to make the most of the cognitive abilities,” namely relying on “mental shortcuts” 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”).

239 Neither is the aim to defend bounded rationality and incrementalism as a prescriptive theory. Much of the debate over Lindblom’s The Science of Muddling Through concerned whether Lindblom’s theory was defensible as a prescriptive theory, rather than a merely descriptive one. 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 98, 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”).
particularly those where complexity and uncertainty are low, agencies may be able to behave more like the archetypal *homo economicus*—specifying 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. The perverse 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 perverse 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

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240 Seidenfeld, Cognitive Loaing, supra note 210, at 488.


242 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. 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”).

243 Sunstein & Vermeule might suggest that the analysis in this section commits the sign fallacy. See Sunstein & Vermeule, Unbearable Rightness, supra note 30, at 309. If the theoretical account offered here were without the empirical analysis in Part III, this would perhaps be a problem. Part III, though, shows not only that there is no evidence to support the perverse incentives thesis, but also that on one measure of specificity, agencies have increased the specificity of their writing. This is entirely consistent with the account of bounded rationality in Part IV.
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 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, all in the face of significant public pressures to pursue particular goals.

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244 Bendor & Moe, supra note 213, at [PINCITE] (offering a dynamic model of bureaucratic goal adaptation).


246 Eric Biber, Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies, 33 Harv. Envt'1 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”).


248 Biber, supra note 246, 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).

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.\textsuperscript{250} Less radical uncertainty about overarching goals might clear the way for more strategic consideration of the timing question, but as it is, we would expect boundedly rational agencies—torn between these sometimes confusing pushes and pulls—to err on the side of what they can control and measure with certainty.\textsuperscript{251}

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 special allowances that could facilitate a future modification,”\textsuperscript{252} and “dynamic law,” which involves deliberately setting the stage for future revision,\textsuperscript{253} 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.\textsuperscript{254} 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

\textsuperscript{250} 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.”).

\textsuperscript{251} See Biber, supra note 246, 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.”); 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”);

\textsuperscript{252} Pidot, supra note 250, at 131.

\textsuperscript{253} Id.

\textsuperscript{254} See Diver, supra note 116, at 67–76 (1983) (arguing that the “optimal” specificity of rules is determined by tradeoffs between three incommensurable goals).
there will be resources to carry out these subsequent resources,\textsuperscript{255} nor that responsibility for those subsequent actions will not be given to other actors who do not share the same long-range vision. This is a particularly salient consideration for agency leaders, as the average tenure of political appointees is around two years.\textsuperscript{256} Similarly, even if the tenure of an agency leader lasts longer than this, external political circumstances may change, making it more or less difficult to do precisely what one intended to do at time \textit{A}.\textsuperscript{257} 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.\textsuperscript{258} Implementation and updating could also be blocked by interest group mobilization.\textsuperscript{259} 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.”\textsuperscript{260} 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.

Front-end specificity has its own costs, to be sure, and deferral has certain benefits that, while somewhat unpredictable, can be substantial.\textsuperscript{261} 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,

\textsuperscript{255}David L. Markell & Robert L. Glicksman, A Holistic Look at Agency Enforcement, 93 N. Ca. L. Rev. 1, 14 n.33 (2014) (noting that “lack of clarity leads to delays and increases transaction costs” when it comes to enforcement).

\textsuperscript{256}Raso, supra note 115, at 803; see also Anne Joseph O’Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. Cal. L. Rev. 913, 919, n.23 (2009) (collecting sources measuring the average tenure of political appointees).

\textsuperscript{257}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, [PINCITE] (2010) (describing the ways that incoming administrations can, with relative ease, reverse the previous administration’s enforcement policy).

\textsuperscript{258}General Electric Co. v. EPA, 53 F.3d 1324, 1333–34 (D.C. Cir. 1995).


\textsuperscript{260}Pidot, supra note 250, at 175.

\textsuperscript{261}See, e.g., Joel A. Mintz, “Running on Fumes”: The Development of New EPA Regulations in an Era of Scarcity, 46 Envtl. 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”).
it becomes critical that, on balance, “ambiguities are a threat at least as much as they are an opportunity” for agencies.\footnote{Vermeule, supra note 124, at 80.}

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.”\footnote{Jones, Boushey, & Workman, supra note 209, at 47.} That is, the possible payoff of the self-delegation strategy is hard for agencies to properly value because it is uncertain to materialize.\footnote{See Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263, [PINCITE] (1979) (EP); see also supra notes 229 through 232 and accompanying text (reviewing the literature on hyperbolic discounting and intertemporal uncertainty).} 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.\footnote{For instance, Herbert Kaufman’s classic study of the Forest Service documents one particularly strong instance of a mission orientation in a federal agency, prompted in part by Gifford Pinchot’s brilliant decision to institute an agency-wide education program to inculcate shared values. Herbert Kaufman, The Forest Ranger: A Study in Administrative Behavior 85 (1960).} 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.”\footnote{Brehm & Gates, supra note 214, at 194.} This organic development of organizational culture is generalizable as well: In an extensive survey of bureaucratic preferences, Brehm and Gates find that bureaucrats “prefer work and serving the public” over sabotage, shirking, and self-interested utility maximization.\footnote{Id. at 196.} 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.”\footnote{See, e.g., Sidney Shapiro, Elizabeth Fisher, & Wendy Wagner, The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy, 47 Wake Forest L. Rev. 463, 465 (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”); Sidney A. Shapiro & Ronald F. Wright, The Future of the Administrative Presidency: Turning Administrative Law Inside Out, 65 U. Miami L. Rev. 577, 578 (2011) (arguing that administrative law scholarship often ignores research in public}
institutionalization of professional norms in agency policymaking is that agencies “at times fixate on particular missions” when they ought to broaden their horizons.269

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.270 These requirements make it necessary to craft specific regulatory language.

1. Hard Look Review Basics

Hard look review developed in the 1970s out of the Supreme Court’s interpretation of Section 706(2)(A) of the APA in Citizens to Preserve Overton Park, Inc. v. Volpe. Elaborating on the Court’s reading of the “arbitrary and capricious” standard in Overton Park,271 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

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269 Biber, supra note 246, at 17.

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

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 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.”

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276 Id. at 56–57.

277 Id. at 53–54.

278 Id. at 51–57.

279 Id. at 46–51.

280 Id. at 43.
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, meaning that agencies must make their rules hard-look proof even though most will not be thoroughly audited.

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.

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”

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283 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, [PINCITE] (2008).


has posited, the stringency of review may prompt agencies to issue fewer rules than they otherwise might. 287 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. 288 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. 289 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.” 290 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.” 291

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, and what he describes as the “team model” that agencies usually employ seems tailor made to respond to the threat of hard look review. 292

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

288 Mashaw & Harfst, supra note 287, at [PINCITE]; McGarity, Deossifying, supra note 284, at 1386; Pierce, Jr., Special Contribution, supra note 273, at [PINCITE].


290 Meazell, supra note 286, at 751.


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.” This process aims to ensure, in 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.

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

293 McGarity, Internal Structure, supra note 292, at 61.

294 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.

295 McGarity, Role of Government Attorneys, supra note 292, at 22; see also Mintz, supra note 261, 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); Rosemary O’Leary, The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency, 41 Admin. L. Rev. 549, 566 (1989) (noting that lawyers often “have the last word” in rulemaking).

296 McGarity, Internal Structure, supra note 292, at 62 (noting that enforcement professionals “are primarily concerned with the degree to which . . . regulated [entities] adhere to agency commands,” and therefore push the agency to “articulate its rules in unambiguous ways” that put regulated parties on notice and minimize their ability to “avoid compliance through interpretational loopholes”).


298 Id. at 26–27.

299 Hammond & Markell, supra note 268, at 355.
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 proxy-access rule in *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. 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 *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. 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.”

If agencies “are constantly ‘looking over their shoulders’ at the reviewing courts,” 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 through vague rules. The costs of vacatur or remand of a rule are tangible; the benefits of self-delegation are speculative. If agencies really are satisficers, and if they are listening to the voices of their legal advisors who tell them that judicial review is likely, they will focus most of their attention on addressing that risk. In addressing the risk of hard look review, agencies will of necessity seek to reduce vagueness.

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. This follows for three reasons.

300 Pidot, supra note 250, at 170.

301 Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).


304 Id. at 326.

305 McGarity, Deossifying, supra note 284, at 1412.

306 See Blake Emerson & Cheryl Blake, Plain Language in Regulatory Drafting, at 14–19 (Sept. 6, 2017), https://www.acus.gov/sites/default/files/documents/Plain%20Language%20in%20Regulatory%20Drafting_Draft%20Report_Sep%202016_FINAL.pdf (reporting interview-based evidence that agencies aim for clarity in part due to the threat of judicial review).
First, arbitrariness, or hard look, challenges sometimes come packaged as a claim that the rule text is not specific enough. In an early hard look case in 1971, Environmental Defense Fund v. Ruckelshaus, the D.C. Circuit held that “[c]ourts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.” 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

307 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.”); Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, Bureau of Land Mgmt., 273 F.3d 1229, 1251 (9th Cir. 2001) (“Based upon the lack of an articulated, rational connection between Condition 1 and the taking of species, as well as the vagueness of the condition itself, we hold that its implementation was arbitrary and capricious.”).

308 Envtl. Def. 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).

309 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).

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

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

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 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 to the brim 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

313 Id. (citing 5 U.S.C. § 706(2)(A)).

314 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.

315 Pre-enforcement challenges, notwithstanding the principle articulated in Ruckelshaus, 439 F.2d, 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.” Id.

316 See Sidney A. Shapiro & Richard W. Murphy, Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look,” 92 Notre Dame L. Rev. 331, 347 (2016) (noting that “as the judicial transformation of informal rulemaking took hold, agencies had to offer far more detailed notices and explanations for their rules, which meant that courts had a much richer set of ‘record’ materials to review”). For a thorough overview of the dynamics (and pathologies) of record building in notice and comment rulemaking, see Wagner, supra note 291.

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

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

319 Id.
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.

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.

320 Id.
322 Emerson & Blake, supra note 306, at 15.
323 Id.
324 Id.
V. Conclusion

For Supreme Court watchers, one of the surest bets one could make would be to bet against *Auer* deference. With at least four of the Justices on the record as opposing *Auer* deference or other forms of deference to agency action, and with “continuing controversy” over *Auer* raging in the academy, it seems the “Court will likely address *Auer’s* scope and propriety in coming Terms.” Yet this assault on *Auer* is unwarranted even on the terms laid out by *Auer’s* critics.

At the core of the emerging assault on *Auer* lies a claim about the doctrine’s effect on agency officials’ incentives to promulgate vague rules that expand agency discretion. Yet until now, that assertion has never been tested. Despite looking carefully for any trace of changed rule-writing behavior in the aftermath of *Auer* and other *Auer*-related cases, I 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 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 if they are to continue citing *Auer’s* perverse incentives as the basis for overturning or limiting the doctrine. As I have shown, it is not simply that *Auer’s* critics have committed the “sign fallacy,” as Sunstein and Vermeule put it, but that the perverse incentives thesis is, as far as the best available evidence goes, empirically untrue. For all its impact, the perverse incentives thesis turns out to be a false alarm.

Should the Supreme Court be asked again to revisit *Auer*, 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

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327 See supra note 140 and accompanying text.

328 See supra notes 92–101 and accompanying text.

329 See supra section II.A.
more likely to front-load specificity and clarity before the Court decided Auer.\textsuperscript{330} 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.\textsuperscript{331}

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 skewed towards vagueness 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.\textsuperscript{332} Agencies in this world—i.e., the world we live in—only have whatever amount of interpretive discretion they should have, given the difficult tradeoffs involved in determining the optimal specificity of rules in the first instance.\textsuperscript{333} There is no actual “arrogation of power,”\textsuperscript{334} and hence no serious constitutional problem. Further, the interpretations that stem from these regulations must at a minimum be reasonable (even if they need not be the only possible interpretation).\textsuperscript{335} One might counter that the mere availability of the strategy is itself a constitutional harm regardless of whether agencies actually use it. This argument proves too much: Our constitutional system is rife with opportunities for potential abuse, and the Framers’ attitude toward these potential avenues was not to eliminate them, but to design institutions that would make abuse unlikely to actually occur.\textsuperscript{336} The combination of evidence that

\textsuperscript{330} See supra sections III.B-E.

\textsuperscript{331} Cf. Nielson, Beyond Seminole Rock, supra note 80, at 950 (noting that overturning Auer would have unintended consequences, and that this “cuts in favor of stare decisis”).

\textsuperscript{332} Cf. Vermeule, supra note 124, 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.”).

\textsuperscript{333} Diver, supra note 116. As noted, they also must comply with the anti-parroting principle by adding some modicum of specificity beyond the original statutory delegation of authority. Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (establishing the anti-parroting principle).


\textsuperscript{336} The Federalist No. 51 (James Madison) (“If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”).
agencies do not engage in self-delegation and that they have at least some limits on their ability to operate within the bounds of the regulations they have written should be enough to quell any concern that the structures are failing in that task.

As this last point suggests, the research findings presented here also hold more general implications for how scholars and jurists theorize the link between structural or doctrinal incentives and agency behavior. The assault on Auer is born of formalist separation-of-powers theory and of its proponents’ tendency to deduce behavioral predictions from the breakdown of the constitutional division of authority in the administrative state. The constitutional critique of Auer, grounded as it is in the perverse incentives thesis, is a primary example, but there are many other such arguments that institutions or doctrines that relax the strict separation of powers (as the administrative state often does) promote certain undesirable behavior. These are powerful rhetorical moves, in part because they rely on intuitive models of rational behavior and hint at a relatively simple solution: restoring strict separation, or at least greatly diminishing the combination of functions in agencies, to eliminate the perverse incentives. But 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, empirical understanding of agencies as institutions may be intuitively appealing but utterly ungrounded in empirical evidence. Any realistic account of structural or doctrinal incentives must therefore grapple with what actually motivates bureaucrats, drawing support from what empirical studies reveal about the plausibility of intuitions derived from theory.

This observation carries special importance at a moment of heated debate about the future of the administrative state in our constitutional framework. As Gillian Metzger recently noted, the administrative state is currently in the midst of crisis, ensnared between attacks from insurgent “anti-administrativists” and defenses from equally impassioned “administrativists.” Auer is a primary exhibit for the kinds of attacks being levied by principled “anti-administrativists”—that is, a purported


339 See supra note 28 and accompanying text.

340 See supra Part IV.

341 Metzger, supra note 325, at [PINCITE].
example of the administrative state’s being predisposed or programmed by administrative law to “lose[] its way.” 342 *Auer* is thought to be low-hanging fruit in this regard343—so low, in fact, that the empirical basis for the perverse incentives thesis has been taken for granted, almost as a matter of intuition. But intuition in this arena needs a close look. Despite looking with the most powerful methods available and considering different possible manifestations, I have been unable to detect any effect on agency rule writing associated with *Auer* deference. Where the intuition goes wrong is a difficult question, and one that deserves more scholarly analysis. I have argued here that intuitions might have proven baseless in the case of *Auer* due to a misunderstanding about agency officials’ behavioral tendencies and the overlooking of more immediate legal concerns confronting agency decision makers, but there are undoubtedly other factors. The administrative state is an enormously complex organism, and administrative law is not the only constraint on, or facilitator of, agency discretion. 344 If it is as difficult to actually demonstrate that agencies have gone off course in other areas as it has been in the seemingly easy case of *Auer*, then the implication is that assumption about administrative law’s behavioral incentives should not be enough on their own to carry calls for reform.

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.


343 To be clear, Aaron Nielson himself does not appear to endorse all of the assault on *Auer* for reasons unrelated to the validity of the perverse incentives thesis. See Nielson, Beyond *Seminole Rock*, supra note 80.

344 Coglianese, supra note 24, at 95 (“[A]dministrative law is embedded within a complex web of politics, institutions, and organizational behavior. Within this web, law is but one factor influencing behavior in government agencies among a variety of institutional, professional, social, financial, and political factors that interact with each other, and even change over time.”).