

Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines

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I. INTRODUCTION

If the rule of law is to prevail, all branches of government—including administrative agencies—must embrace it. A central tenet of the rule of law is judicial independence, which requires that the judiciary remain “distinct from both the legislative and Executive.”¹ Yet U.S. courts often defer to agencies’ interpretations of statutes or regulations using one of three deference doctrines: *Auer*, *Chevron*, or *Skidmore*. These doctrines act as an implicit delegation of courts’ authority to “say what the law is”² to administrative agencies, often depriving the courts of the opportunity to adopt the best interpretation of a statute or regulation.³ The U.S. Supreme Court has begun to question the wisdom of these doctrines.⁴ But some scholars maintain that some level of deference is inevitable and desirable to prevent judges from making

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1. THE FEDERALIST NO. 78 (Alexander Hamilton).
 2. *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803).
 3. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986) (describing the problems of *Chevron* deference and why a strict interpretation of the doctrine is improper).

4. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring) (suggesting that *Chevron* deference is unconstitutional); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring) (calling for the abandonment of *Auer* deference).

policy decisions.⁵ In this Article, we ask: do these doctrines violate the rule of law and, if so, are they worth preserving to effectuate the goals of the modern regulatory state?

As the Supreme Court has noted, the administrative state “wields vast power and touches almost every aspect of daily life.”⁶ The United States’ regulatory system is expansive. For example, in 2015 administrative agencies promulgated 3410 final rules compared to Congress’ 248 acts.⁷ Furthermore, the *Chevron* doctrine is one of the most cited and discussed Supreme Court cases of all time.⁸ Rule-of-law scholars cannot ignore administrative law in their efforts to define and conceptualize the ideal legal structure.

In this Article, we compare *Auer*, *Chevron*, and *Skidmore* to a traditional notion of the rule of law, which emphasizes separation of the adjudicator from the lawmaker. Part I outlines the basic rule-of-

5. See Kristin E. Hickman & Nicholas R. Bednar, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. (forthcoming Sept. 2017) (arguing that *Chevron* is inevitable because many statutory ambiguities cannot be resolved without resort to policymaking); Kristin E. Hickman, *Contemplating a Weaker Auer Standard*, YALE J. REG. NOTICE & COMMENT (2016) (suggesting that deference to agency interpretations of their own regulations is likely to persist in one form or another), <http://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman>; Ronald M. Levin, *Auer and the Incentives Issue*, YALE J. REG. NOTICE & COMMENT (Sept. 19, 2016) (“*Auer* deference is a venerable doctrine. . . . It reflects the courts’ sound recognition of the value of the agency’s perspective in judicial review, in light of the complexity of many regulations and the agency’s responsibility for making the overall program work.”), <http://yalejreg.com/nc/auer-and-the-incentives-issue-by-ronald-m-levin>.

6. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010).

7. *Accord* MAEVE P. CAREY, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 6 (2016), <https://fas.org/sgp/crs/misc/R43056.pdf>; *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> (last visited June 11, 2017).

8. Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U. L. REV. 551, 553 (2012) (“*Chevron*’s significance goes far beyond its utility as a statement of the standard of review, however. This is revealed by its frequency of citation in law review articles Indeed, *Chevron*’s frequency of citation in law review articles puts it in roughly the same league as *Marbury v. Madison* (8492), which is perhaps appropriate given that *Chevron* has been called the ‘counter-*Marbury*’ for the administrative state.”).

law principles. Part II begins by examining the continuum of U.S. deference doctrines before transitioning to Australia's and Ukraine's lack of deference to executive agencies. Part III applies these doctrines (or lack thereof) to the rule-of-law principles identified in Part I. This Article concludes with Part IV, in which we provide suggestions on how administrative law can evolve to better support the rule of law and judicial independence.

II. THE ESSENTIAL ROLE OF THE RULE OF LAW

The rule-of-law movement has emerged as a key metric of good governance. As the World Justice Project explains, rule-of-law principles underlie development, accountable government, and justice.⁹ More specifically, effective rule of law is said to reduce corruption, improve public health and education, alleviate poverty, and protect people from danger and injustice.¹⁰ Mark Ellis notes that “[n]o single political ideal has ever been so widely accepted and endorsed.”¹¹ At the same time, no single agreed-upon definition of the rule of law exists.¹²

Given the constraints of this Article, we leave the efforts of defining the rule of law to experts in the field. For the sake of this Article, we adopt Professor Robert Stein's identification of the components of the rule of law:

- The law must be superior. All persons are subject to the law whatever their station in life.
- There must be separation of powers in the government. The lawmakers should enact the law in general terms. It should not be the body that decides on application of the law to specific situations.
- The law must be known and predictable so that persons will know the consequences of their actions. The law must be sufficiently defined and government discretion sufficiently limited to ensure the law is applied in a non-arbitrary manner.

9. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 9 (2015), http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.

10. *See id.*

11. Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 U. PITT. L. REV. 191, 192 (2010).

12. *See id.*

- The law must be applied equally to all persons in like circumstances.
- Members of society must have the right to participate in the creation and refinement of laws that regulate their behaviors.
- The law must be just and protect the fundamental human rights of all members of society.
- Legal processes must be sufficiently robust and accessible to ensure enforcement of these protections.
- The judicial power must be exercised independently of either the executive or legislative powers, and individual judges must base their decisions solely on the laws and the facts of individual cases.¹³

We focus on five principles encapsulated within this definition: separation of powers and judicial independence (Stein's second and eighth principles), democratic participation (Stein's fifth principle), and predictability and lack of arbitrariness (Stein's third principle). Before continuing, we provide a brief description of each component.

Separation of Powers and Judicial Independence: Separation of powers means that authority is distributed, whether formally or by convention, to ensure that no one branch of government can exercise unchecked power.¹⁴ English-thinker William Paley further noted that separation of powers requires the separation of the legislative and judicial character of the government; stated differently, the law-making body must constitute a different group than the law-applying body.¹⁵ If the bodies were unified, the fear is, they could be directed toward private ends and society would be without constant, pre-established rules of adjudication.¹⁶

13. Robert A. Stein, *The Rule of Law*, in *THE RULE OF LAW IN THE 21ST CENTURY* 13 (Robert A. Stein & Richard J. Goldstone eds., 2015).

14. See WORLD JUSTICE PROJECT, *supra* note 9, at 12.

15. FRIEDRICH A. HAYEK, *The Origins of the Rule of Law*, in *THE CONSTITUTION OF LIBERTY* 258 (University of Chicago Press 2011) (quoting William Paley as stating that the principle of separation of powers constitute the "first maxim of a free state").

16. See *id.*; see also Justice Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 *CHINESE J. INT'L L.* 1, 1–3 (2003) (explaining that when the lawmaker and judge are different actors, the danger of government arbitrariness is significantly reduced).

Democratic Participation: Scholars, practitioners, and rule-of-law organizations debate whether the rule of law requires a democratic government.¹⁷ The United Nations recognizes that “the rule of law and democracy are interlinked and mutually reinforcing.”¹⁸ Although it is theoretically possible for a dictator to respect the other rule-of-law principles without public participation,¹⁹ we accept democracy as a required element of the rule of law for purposes of this Article.

Predictability and Lack of Arbitrariness: A system comporting with the rule of law excludes the existence of “wide discretionary authority” by the government.²⁰ As John Locke reasoned, wide discretion by officials or judges leads to the “irregular” and “uncertain” exercise of power.²¹ Under these circumstances, decisions may be partial and subjective rather than firmly based on applying the law to the particular facts at issue.

Arbitrary decisions also inherently create unpredictability. Lord Thomas Bingham explained that predictability is crucial to the rule of law because it allows the people to reliably base their conduct on the laws.²² If the law is unpredictable or arbitrary, by contrast, the people may not know *ex ante* what conduct is illegal versus what conduct is legal.

These five principles are critical pieces of the rule of law. Without any one of these components, the society becomes a government

17. Stein, *supra* note 13, at 14.

18. *Rule of Law and Democracy: Addressing the Gap Between Policies and Practices*, UN CHRONICLE, Dec. 2012, <https://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices>.

19. Robert Stein, *Rule of Law: What Does it Mean?*, 18 MINN. J. INT’L L. 293, 300 (2009) (“It might be possible to imagine a benevolent dictator who would provide all of these virtues for a society, but none can be identified in human history. Our experience supports the conclusion that a government in which the citizens participate in developing the rules by which they are bound is an essential element of the rule of law.”).

20. See ALBERT V. DICEY, *The Rule of Law*, in INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 120 (1915).

21. HAYEK, *supra* note 15, at 253 (citing the theories of John Locke).

22. Thomas Bingham, Rt. Hon. Lord, House of Lords, Sixth Sir David Williams Lecture: The Rule of Law 6 (Nov. 2006), <https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf>.

of men, not of laws.²³ Each principle is implicated by judicial deference to agency decision-making, as we explain below.

III. AGENCY DEFERENCE DOCTRINES

Often, an administrative agency acts as creator, interpreter, and executor of law. When an agency's decision-making is challenged before a court, several possibilities exist regarding how much deference the court should give the agency. The court could give full deference to the agency, taking its decision-making as authoritative and determinative. At the other end of the spectrum, the court could refuse to give the agency's determination any deference and instead rely on its own independent judgment, reviewing the challenged law *de novo*.

Having surveyed the rule of law generally, we turn to administrative deference doctrines in three different countries. Section A examines deference doctrines in the United States, ranging from strong to weak. Section B looks at Ukraine's deference doctrine, which actively opposes judicial deference to executive interpretations of parliamentary-made law. Finally, Section C analyzes Australia, which scoffs at the idea of the United States' strong deference doctrines.

A. *Why Defer?*

Before examining the deference doctrines of the United States, Ukraine, and Australia, it helps to understand the benefits of such doctrines. Deference doctrines effectuate two policy goals: democratic accountability and uniformity.

Deference furthers democratic accountability by giving weight to the interpretation of the more accountable governmental body. Choosing between two permissible interpretations of a statute is an act of policymaking.²⁴ For example, when the Board of Immigration Appeals narrowly interprets the statutory requirements for asylum applications, it is making a conscious decision to exclude certain classes of refugees.²⁵ Administrative agencies are more politically accountable

23. See HAYEK, *supra* note 15, at 243 (attributing to Aristotle the phrase "government by laws and not by men," commonly used to describe the rule of law).

24. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 861 (2001).

25. See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014).

than judges, and there is a generally-held belief that judges should not engage in policymaking.²⁶ As the *Chevron* Court noted,

Judges . . . are not part of either political branch of government. . . . In contrast, an agency to which Congress has delegated policymaking responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices²⁷

Of course, courts cannot always avoid making policy decisions.²⁸ Yet deference doctrines discourage judges from overruling the agency's policy decision in favor of their own preferences.

In addition, deference doctrines promote uniformity by helping to ensure that circuit courts adopt the same interpretations of agency-administered statutes. Prior to *Chevron*, circuit splits plagued the regulatory regimes Congress charged agencies with administering.²⁹ The Supreme Court cannot be expected to resolve all of these circuit splits.³⁰ Following the adoption of *Chevron*, remands and reversals due to flawed agency statutory interpretation fell by thirty-nine percent.³¹ Deference doctrines facilitate consistent interpretation of agency-administered statutes. Consistent interpretation is important

26. See Merrill & Hickman, *supra* note 24.

27. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

28. See 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 142–44 (4th ed. 2002). For example, the Court shaped American economic policy and anti-trust law through its interpretation of the Sherman Antitrust Act. *Id.* at 143–44.

29. *Id.* at 147.

30. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

31. See Peter H. Shuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1031–33.

for two reasons: nationwide uniformity ensures agencies need not cater to the specific interpretations of circuit courts and it ensures equal treatment of regulated parties nationwide.³²

B. *United States Agency Deference Doctrines*

In the United States, courts defer substantially to agency interpretations of statutes and regulations. Congress may delegate legislative power to an administrative agency so long as Congress provides an intelligible principle to which the agency's action must conform.³³ Once Congress has delegated authority to an agency, the agency promulgates regulations and conducts adjudicative proceedings—in accordance with the governing statute and the Administrative Procedure Act—to effectuate congressional intent. These regulations and adjudications bind regulated parties.

For example, the Endangered Species Act forbids a person to “take,” which the Act defines as “harm,”³⁴ an endangered species within the United States.³⁵ The Act, however, does not define “harm.” Using the power delegated to him by Congress, the Secretary of the Interior may promulgate regulations interpreting “harm” to include “significant habitat modification.”³⁶

32. See *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (“[The agency’s position] creates for us a tension between our traditional respect for Circuit precedent . . . and our . . . concern to avoid disparate treatment of similarly situated aliens under the immigration laws [We have] concluded that the interests of nationwide uniformity outweigh our adherence to circuit precedent in this case.”).

33. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“So long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’” (citing *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))). The intelligible principle is “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

34. See 16 U.S.C. § 1532(19) (2012) (“The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”).

35. See 16 U.S.C. § 1538(a)(1)(B) (2012).

36. 50 C.F.R. § 17.3 (1994). This fact pattern is premised on the Supreme Court’s decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Ore-*

But suppose a land developer suspects that these regulations exceed the Secretary's authority under the Endangered Species Act and brings the issue to the attention of a court. In determining whether to defer to the agency's interpretation, the reviewing court employs a different doctrine depending on (1) what is being interpreted (i.e., a statute or a regulation) and (2) the procedures used by the agency in issuing this interpretation. We divide this Section into two parts. First, we examine the doctrines courts use when examining an agency's interpretation of a statute that the agency has authority to interpret (i.e., *Chevron* and *Skidmore*). Second, we examine the doctrine courts use when examining an agency's interpretation of its own regulations (i.e., *Auer*). We briefly outline each doctrine, its application,³⁷ and the frequency with which the Supreme Court defers to the agency according to William Eskridge and Lauren Baer's 2008 study.³⁸

1. When an Agency Interprets a Statute

One of two doctrines may apply when an agency interprets a statute it is charged with administering: *Chevron* (strong deference)³⁹ or *Skidmore* (weak deference).⁴⁰ Before analyzing the agency's interpretation under either of these doctrines, the court must first determine which applies. *United States v. Mead Corp.* is the Supreme Court's

gon, 515 U.S. 687 (1995). The Court held that the Secretary of the Interior's regulations were a reasonable interpretation of the Endangered Species Act. *Babbitt*, 515 U.S. at 707–08.

37. We acknowledge that *Chevron* and *Skidmore* are not as clear-cut as we present them here. Simply put, *Chevron* is a mess. See Merrill & Hickman, *supra* note 24. Many scholars have labelled *Mead* as “‘unfortunate,’ ‘flawed,’ and ‘incoherent’; a ‘mess,’ ‘complicated,’ ‘unclear,’ and ‘prone to results-oriented manipulation.’” Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 528 (2014) (citations omitted). Some scholars have even posited that *Chevron* has only one step, not the two steps prescribed by the Court. See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009). We acknowledge the validity of these criticisms but do not engage with them here. For our analysis, it is enough to describe *Chevron* and *Skidmore* as abstract ideals.

38. See 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 (2008).

39. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

40. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

most authoritative statement of whether *Chevron* or *Skidmore* applies.⁴¹ The *Mead* analysis encompasses two questions: First, did Congress give the agency in question the authority to bind regulated parties with the force of law?⁴² Second, “[did] the agency . . . exercise such authority in adopting the interpretation at issue?”⁴³ If the answer to both of these questions is “yes,” *Chevron* applies. If the answer to either of these questions is “no,” *Skidmore* applies.

Agency procedure is not determinative of “force of law,” but “it is fair to assume generally that congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”⁴⁴ For example, courts often apply *Chevron* when an agency adopts regulations through notice-and-comment rulemaking.⁴⁵ Generally, agency interpretations of statutes contained “in policy statements, agency manuals, and enforcement guidelines” do not carry the force of law⁴⁶ but may be analyzed under *Skidmore*.⁴⁷

41. *United States v. Mead Corp.*, 533 U.S. 218, 226–227 (2001). What forms of agency action carry the “force of law” is subject to judicial and scholarly dispute. *See, e.g.*, Hickman, *The Three Phases of Mead*, *supra* note 37, at 532–34. Courts and administrative law scholars debate the proper formulation of the *Mead* analysis. For our purposes, we adopt “the decision tree model” first described by Professor Kristin Hickman. *See id.* at 537–41.

42. *Id.* at 537.

43. *Id.*

44. *Mead Corp.*, 533 U.S. at 230–31. “[A] very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in rule-making or adjudication process that produces the regulations or rulings for which deference is claimed.” *Id.* at 229.

45. When an agency promulgates a regulation through notice-and-comment rulemaking, the agency provides notice to the public and gives “interested persons an opportunity to participate in the rule making through submission of comments.” 5 U.S.C. § 553(b)–(c) (2012).

46. *Mead Corp.*, 533 U.S. at 220 (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)). *But see* *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (containing dicta from Justice Breyer suggesting that *Chevron* may still extend to agency interpretations contained in documents listed above, if it is the longstanding interpretation of the agency).

47. *Mead Corp.*, 533 U.S. at 228.

When Congress grants an agency the authority to bind regulated parties with the force of law and the agency acts pursuant to that authority, *Chevron's* two-step standard of review applies. At Step One, the court asks "whether Congress has directly spoken to the precise question at issue."⁴⁸ If so, the court and the agency "must give effect to the unambiguously expressed intent of Congress."⁴⁹ Traditional methods of statutory interpretation, including text, context, statutory structure, textual canons, and legislative history, are applicable at Step One.⁵⁰ "[I]f the statute is silent or ambiguous with respect to the specific issue,"⁵¹ then at Step Two the court considers "whether the agency's answer is based on a permissible construction of the statute."⁵² If the agency's interpretation is reasonable and not otherwise "arbitrary, capricious, or manifestly contrary to the statute," then the agency's interpretation is given "controlling weight."⁵³

Chevron is a mandatory deference doctrine. When the Supreme Court employs *Chevron*, the agency wins 76.2% of the time.⁵⁴ A 1998 study by Orin Kerr demonstrated that when circuit courts employ *Chevron*, the agency wins 73% of the time.⁵⁵ The Supreme Court has even held that agency interpretations trump precedential appellate court decisions, so long as the statute remains ambiguous and the agency's interpretation is reasonable.⁵⁶

Unlike *Chevron*, *Skidmore* is not a mandatory form of deference. In *Skidmore v. Swift & Co.*, the Supreme Court deferred to an agency's interpretation of the Fair Labor Standards Act.⁵⁷ To reach

48. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

49. *Id.* at 842–43.

50. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring) (citing *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 (1987)).

51. *Chevron*, 467 U.S. at 843.

52. *Id.*

53. *Id.* at 844.

54. *Eskridge & Baer*, *supra* note 38, at 1122.

55. *See Orin S. Kerr, Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 *YALE J. ON REG.* 1, 30 (1998).

56. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

57. 323 U.S. 134 (1944).

this conclusion, the Court analyzed a group of factors, now commonly known as the *Skidmore* factors:

The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁵⁸

Skidmore affords the reviewing court more leeway in deciding to defer to or reject the agency's interpretation.

Because the court preserves its interpretive authority, *Skidmore* is a weaker form of deference than *Chevron*. When the Supreme Court applies *Skidmore*, it defers to the agency 73.5% of the time.⁵⁹ An empirical study by Kristin Hickman and Matthew Krueger suggests circuit courts defer under *Skidmore* only 60.4% of the time.⁶⁰ Yet *Skidmore* is not without its critics. Justice Scalia repeatedly referred to *Skidmore* as an "anachronism," rejected the Supreme Court's revival of *Skidmore* in *Mead*, and believed *Chevron* to be the only doctrine of agency deference when evaluating an agency's interpretation of a statute.⁶¹

58. *Id.* at 140.

59. Eskridge & Baer, *supra* note 38, at 1099. The fact that *Skidmore*'s rate of deference is not much lower than the rate in *Chevron* may be due to the fact that, as Eskridge and Baer note, the Solicitor General's office does a good job screening and then arguing cases, appealing only strong cases and then writing excellent briefs. *Id.* at 1119.

60. See Kristin E. Hickman & Matthew Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1275 (2007).

61. See *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring in part and concurring in the judgment); see also *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("[T]he majority's approach compounds the confusion it creates by breathing new life into the anachronism of *Skidmore*, which sets forth a sliding scale of deference owed an agency's interpretation that is dependent [upon the *Skidmore* factors] . . ."); *Christensen v. Harris Cty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment) ("*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') authoritative effect." (citation omitted)).

2. When an Agency Interprets Its Own Regulations

Courts invoke the *Auer* doctrine, also known as *Seminole Rock*, when an agency interprets its own regulations.⁶² In *Bowles v. Seminole Rock & Sand Co.*, the Supreme Court reviewed an agency's interpretation of a price control regulation promulgated under the Emergency Price Control Act of 1942.⁶³ The Supreme Court deferred to the agency's interpretation, concluding that an agency's interpretation of its own regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."⁶⁴ Over fifty years later, the Court revisited *Seminole Rock* in *Auer v. Robbins*.⁶⁵ In *Auer*, the Supreme Court upheld the Secretary of Labor's interpretation of its own regulations first pronounced in a legal brief.⁶⁶ Justice Scalia concluded "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."⁶⁷

Of the three standards of review analyzed in this Article, *Auer* is by far the strongest. When the Supreme Court invokes *Auer*, it defers to the agency 90.9% of the time.⁶⁸ According to Eskridge and Baer, *Auer* "recognizes the practical reality that an agency interpretation of its own (valid-under-the-statute) concept or complex web of regulations should be followed by judges unless there is a strong statutory reason to reject it."⁶⁹

C. Ukrainian Agency Deference Doctrines

Ukraine, on the other hand, exemplifies the dangers of not allowing deference in the administrative process. Ukraine is systemi-

62. To avoid confusion, we refer to this form of deference as *Auer* throughout.

63. 325 U.S. 410, 411–14 (1945).

64. *Id.* at 414.

65. 519 U.S. 452, 461–62 (1997).

66. *Id.* at 461.

67. *Id.* at 462.

68. See Eskridge & Baer, *supra* note 38, at 1099.

69. *Id.* at 1103.

cally different from the United States. As a republic with a semi-presidential government,⁷⁰ the system does have separate legislative, executive, and judicial branches.⁷¹ The legislature, a unicameral parliament (called the *Verkhovna Rada*), has the primary responsibility for forming part of the executive branch, the cabinet of ministers.⁷²

Scholar Howard N. Fenton provides a uniquely thorough analysis of Ukrainian administrative law.⁷³ As Fenton notes, until the final years of the USSR, judges played essentially no role in the administrative justice system.⁷⁴ Thus, Ukraine created an administrative justice system basically from scratch when it gained independence in 1991 after the break-up of the Soviet Union,⁷⁵ particularly with respect to the role of the judiciary in this newly created system. Further, the administrative agencies that Ukraine inherited were severely understaffed and underfunded, their employees were undertrained, and the relationships among the agencies were not defined.⁷⁶ However, the development has been slow: Ukraine has yet to enact an administrative procedure law and in just 2005 created administrative courts and adopted a law of judicial review.⁷⁷

70. Ukraine has both a president (head of state) and a prime minister (head of government). See *Ukraine*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Ukraine#Government_and_politics (last updated Apr. 28, 2015).

71. See CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, ANSWERS TO THE QUESTIONNAIRE FOR THE PREPARATION OF CCJE OPINION NO. 18: “THE INDEPENDENCE OF THE JUDICIARY AND ITS RELATIONS WITH THE OTHER POWERS IN A MODERN DEMOCRATIC LIFE” (Jan. 31, 2015), http://www.coe.int/t/dghl/cooperation/ccje/textes/OP18_Ukraine.pdf (noting that while Ukraine has gone through a few constitutional reforms in the past decade, none of them addressed the separation-of-powers framework).

72. See *Ukraine*, *supra* note 70.

73. Howard N. Fenton, *Where Too Little Deference Can Impair the Administrative Process: The Case of Ukraine*, in *COMPARATIVE ADMINISTRATIVE LAW* 482 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

74. *Id.*

75. Olga Burlyuk, *The Introduction and Consolidation of the Rule of Law in Ukraine*, 7 HAGUE J. RULE L. 1, 6 (2015).

76. Alexander Motyl, *State, Nation, and Elites in Independent Ukraine*, in *CONTEMPORARY UKRAINE: DYNAMICS OF POST-SOVIET TRANSITION UKRAINE* 4 (Taras Kuzio ed., 2015).

77. See Fenton, *supra* note 73, at 485.

Ukraine's newly developed system gives no deference to executive decision-making.⁷⁸ The 2005 Code of Administrative Adjudication purposefully weighs judicial proceedings heavily *against* the state.⁷⁹ Three rules in particular reflect the lessened status of agencies in front of the courts. First, the Code allows individuals to seek judicial review at any point after an adverse government action without needing to exhaust their administrative remedies.⁸⁰ Second, the government bears the burden of proof in any challenge to the legality of its actions or inactions.⁸¹ The government must prove, in a *de novo* proceeding, the legitimacy of its actions, establishing the original basis for its decision regardless of any proceeding it previously held.⁸² This burden stays with the government through all three levels of judicial review, regardless of whether the agency prevailed in the court below.⁸³ Third, the Code adds inquisitorial powers to the courts to increase their role in the typical adversarial process, thereby allowing courts to more closely inspect the actions and reasoning of the government.⁸⁴ As Fenton explains, these rules, in conflict with those in most Western administrative systems, reflect the "highly diminished status" of a Ukrainian government agency before the courts.⁸⁵

Ukraine's lack of deference to agency decisions may partly be explained by its lack of a standard for government decision-making.⁸⁶ Because Ukraine lacks an administrative procedure law, courts have difficulty evaluating the regularity and legality of the proceedings the agencies use.⁸⁷ However, according to Fenton, Ukraine's total lack of

78. *See id.* at 482.

79. *See id.*

80. *Id.* at 483 (citing Articles 8 and 104 of the Code of Administrative Adjudication).

81. *Id.* (citing Article 71 of the Code of Administrative Adjudication).

82. *Id.* at 484–85.

83. *Id.* at 484.

84. *Id.* at 485 (citing Article 11 of the Code of Administrative Adjudication).

85. *Id.* at 483.

86. *Id.* at 484.

87. *See id.* at 484. The lack of clear procedural rules creates a special problem in Ukraine's especially complex state and municipal administration. *See* Burlyuk, *supra* note 75.

deference can also be explained as a reaction to Soviet authoritarianism, under which government abuses were commonplace.⁸⁸ Similarly, Ukraine's strong judicial review may be a response to the widespread corruption in the post-Soviet government.⁸⁹ In the end, Ukraine's total lack of deference to agency determinations reflects its fundamental distrust of bureaucracy.⁹⁰

C. Australian Agency Deference Doctrine

The Australian High Court adheres to a U.S. Supreme Court decision when interpreting statutes: *Marbury v. Madison*.⁹¹ Australian courts hold that the duty of the judiciary extends to "judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law."⁹² In reaching this conclusion, High Court Justice Gerard Brennan cited *Marbury*: "It is, emphatically, the province and duty of

88. Fenton, *supra* note 73, at 482.

89. *See id.* at 482. Ukraine has a serious problem with corruption. *See* WORLD JUSTICE PROJECT, *supra* note 9, at 23 (placing Ukraine in the bottom tercile in the world for corruption); *see also* Oliver Bullough, *Welcome to Ukraine, the Most Corrupt Nation in Europe*, *GUARDIAN* (Feb. 6, 2015), <http://www.theguardian.com/news/2015/feb/04/welcome-to-the-most-corrupt-nation-in-europe-ukraine> (describing egregious corruption in Ukraine's ministry of health). As Chief Judge Tunheim notes, the Ukrainian judiciary has its own problems with corruption. Chief Judge John R. Tunheim, *Challenges to Judicial Independence in Our World*, *HENNEPIN LAWYER* (July 1, 2015), http://hennepin.membershipsoftware.org/article_content.asp?article=1899 (explaining that judges play virtually no role in combating Ukraine's wide-spread corruption and the public, perhaps rightly, views judges as tools of the wealthy and powerful).

90. *See* Fenton, *supra* note 73, at 485. Corruption, low standards of public administration, and arbitrary decision-making have caused Ukrainians to be extremely distrustful of public administrative officials. SIR BRIAN NEILL & SIR HENRY BROOKE, *LORD LYNN OF HADLEY EUR. LAW FOUND., THE RULE OF LAW IN UKRAINE* 16–17 (Dec. 2008). It is noteworthy that while Ukraine's system of judicial review of agency decision-making allows for little deference, it is not clear to what extent Ukrainian judges abide by this law. Most current Ukrainian judges were trained during the Soviet era or the years soon after. *See id.* at 486. Many of these judges were taught to have a bias *towards* the government. *See id.* As Fenton notes, these "traditions of hierarchical and authoritarian deference are difficult to undo." *Id.*

91. 5 U.S. (1 Cranch) 137 (1803).

92. *Attorney-General (N.S.W.) v Quin* (1990) 170 CLR 1, ¶ 17 (Austl.) (Brennan, J., concurring).

the judicial department to say what the law is.”⁹³ Therefore, Australian courts afford no deference to agency interpretations of law.⁹⁴

High Court Justice Stephen Gageler acknowledges that the Australian High Court has never impeded the use of “*Skidmore*-type deference,”⁹⁵ where a court defers to an agency’s interpretation according to its persuasiveness. Justice Gageler notes that *Skidmore* assists courts in statutory interpretation by “providing a body of expertise and informed judgment to which courts can properly look for guidance.”⁹⁶ But *Skidmore* leaves the ultimate interpretive decision to the judiciary; the agency’s interpretation of the law is simply one possible interpretation the court may accept.

Yet the High Court explicitly rejected *Chevron* in *City of Enfield v. Development Assessment Commission*.⁹⁷ In this case, the High Court echoed U.S. Supreme Court Justice Breyer’s fear that *Chevron* would result in “a great abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective.”⁹⁸ Michael C. Tolley suggests that “[i]mplicit in the Australian approach, reiterated in *Enfield*, is the assumption that courts are responsible for all questions of law.”⁹⁹

Systemic differences between the United States and Australia may explain the absence of administrative deference in the Australian

93. See *Marbury*, 5 U.S. (1 Cranch) at 177.

94. See Robert C. Dolehide, *A Comparative “Hard Look” at Chevron: What the United Kingdom and Australia Reveal About American Administrative Law*, 88 TEX. L. REV. 1381, 1389 (2010). However, Australian courts do afford substantial deference to questions of merits that are exercised by an agency pursuant to its discretion. See *id.* at 1389–90.

95. See Stephen Gageler, *Deference*, 22 AJ ADMIN L. 151, 154 (2015).

96. *Id.* at 153.

97. *Corp. of the City of Enfield v. Dev. Assessment Comm’n* [2000] HCA 5 (Austl.).

98. *Id.* at ¶ 41 (quoting Breyer, *supra* note 3, at 381).

99. Michael C. Tolley, *Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective*, 31 POL’Y STUDS. J. 421, 428 (2003). Other scholars have, however, suggested that the issue in *Enfield* was “not ‘deference’ to administrative determinations of the law, but ‘deference to administrative findings of fact which were jurisdictional.’” See Gageler, *supra* note 95, at 155 (quoting MARK ARONSON & MATTHEW GROVES, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 191 (5th ed. 2013)).

system. Australia is a parliamentary system and therefore the distinction between the legislature and the executive is less pronounced.¹⁰⁰ The Government is charged with setting the policy agenda, proposing new laws, and administering existing laws.¹⁰¹ To remain in office, the Government “must have ‘the confidence of the House’—that is, keep the support of the majority in the House of Representatives.”¹⁰² If the Government loses the support of the Parliament and is unable to pass important legislation, it is expected to resign.¹⁰³ As the legislature and the executive agencies are always politically aligned, Australian administrative agencies are more likely to implement a statute in conformity with legislative intent. In contrast, the bifurcation of the executive and legislative powers in the United States can result in political disagreement. This encourages agencies to interpret supposedly ambiguous statutory provisions in a manner that effectuates the executive’s policy goals but undermines congressional intent.¹⁰⁴ Thus, it is less surprising that Australia rejects deference because administrative interpretations are less likely to deviate from the source material.

As we have explored above, the United States, Ukraine, and Australia have vastly different doctrines for judicial deference to agency decision-making. The United States’ doctrines exemplify strong forms of deference (*Chevron* and *Auer*), as well as weaker deference (*Skidmore*). Australia and Ukraine, however, reject judicial deference to agencies altogether. Australia emphasizes the judiciary’s unique role in saying what the law is, rather than looking to other governmental branches. Ukraine goes even further, tipping the scales against agencies in judicial proceedings. We can largely explain the

100. See Dolehide, *supra* note 94, at 1392–93 (“Government is formed by the party who wins a majority in Parliament. This institutional structure, together with strong party discipline, ensures that the governing party can pass and implement legislation as it sees fit. As a result, Australia and the United Kingdom generally do not experience the significant Executive-Legislative conflicts that occur in the United States.”).

101. *Infosheet 19—The House, Government and Opposition*, PARLIAMENT OF AUSTRALIA, http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_19_-_The_House_government_and_opposition (last visited June 12, 2017).

102. *Id.*

103. AUSTRALIA, HOUSE OF REPRESENTATIVES PRACTICE 321 (6th ed. 2012)

104. *Id.* at 1395.

differences in United States, Australian, and Ukrainian deference doctrines by references to each nation's unique governmental systems and histories, as described above. Further, the doctrines employed in each country implicate several rule-of-law principles, bringing into question whether a balanced rule-of-law system can support any form of judicial deference to agencies.

IV. AGENCY DEFERENCE DOCTRINES AND THE RULE OF LAW

Part II creates a continuum of deference doctrines, ranging from mandatory deference (*Auer* and *Chevron*) to discretionary deference (*Skidmore*) to no deference (Ukraine and Australia). In this Part, we analyze each doctrine under the five relevant rule of law principles we identified in Part I: separation of powers, judicial independence, democratic participation, lack of arbitrariness, and predictability. We introduce each principle with a brief discussion of the principle itself and its relevance to U.S. administrative law. We then discuss each doctrine's adherence to that principle of the rule of law. We propose that judicial deference to agency decision-making conflicts with rule of law principles, in some cases more severely than others.

A. Separation of Powers and Judicial Independence

Though powers may overlap at the margins, the U.S. Constitution and the rule of law embody a system of separation of powers.¹⁰⁵ These checks and balances protect individuals from the arbitrary and oppressive exercise of power by any one branch of government. Yet the traditional trifurcated system envisioned by political philosophers does not account for the emerging fourth branch of government: administrative agencies.¹⁰⁶ Agencies may act unilaterally as lawmakers, interpreters, and executors. Pertinent to this Article, certain deference

105. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring) (describing the concurrent powers of the executive and legislative branches).

106. Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 23, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.9ecb09e1dceb.

doctrines may conflict with the Supreme Court's holding in *Marbury v. Madison* and the rule of law.¹⁰⁷

1. *Auer*

Of the three United States' deference doctrines, *Auer*'s violation of the separation of powers is the most egregious. In cases involving *Auer*, the agency interprets a regulation promulgated by itself, often during the course of enforcement. In this case, the agency has performed the functions of the legislature (in promulgating a regulation), the judiciary (in interpreting the regulation), and the executive (in enforcing the regulation). Because of the high level of deference, *Auer* deprives the judicial branch of the power to interpret the law.

In his concurring opinion in *Perez v. Mortgage Bankers Association*, Justice Thomas expressed concerns that *Auer* deference violates the principle of separation of powers.¹⁰⁸ Judges are meant to ensure laws created by the legislature comply with the Constitution and that the executive enforces the laws within the statute's boundaries. *Auer*, however, prevents courts from exercising "the judicial check with respect to administrative agencies."¹⁰⁹ In sum, Justice Thomas claims:

Instead, we have deferred to the executive agency that both promulgated the regulations and enforced them. Although an agency's interpretation of a regulation might be the best interpretation, it might not. When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check.¹¹⁰

107. 5 U.S. (1 Cranch) 137, 177 (1803). We note, but for the sake of brevity do not thoroughly explore, that agency rulemaking authority may also conflict with the powers of the legislative branch. See Kathryn A. Watts, *Rulemaking as Legislation*, 103 GEO. L.J. 1003 (2015).

108. See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213–25 (2015) (Thomas, J., concurring).

109. *Id.* at 1220.

110. *Id.* at 1221.

Auer “precludes judges from independently determining” the meaning of the agency regulation.¹¹¹ “Rather than judges[] applying recognized tools of interpretation to determine the best meaning of a regulation,” judges defer to agency interpretations unless the interpretation falls within the narrow exception of “plainly erroneous or inconsistent with the regulation.”¹¹² As applied, this exception is no exception at all.

2. *Chevron*

As *Chevron* is also a doctrine of mandatory deference, it raises many of the same separation-of-powers concerns as *Auer*. Several years after the Court announced its decision in *Chevron*, Justice Scalia defended *Chevron* as compatible with Justice Marshall’s decision in *Marbury v. Madison*.¹¹³ Justice Scalia, however, operated under the assumption that courts would rarely find ambiguity in statutory language under a textualist reading, resulting in a narrower range of “reasonable” agency interpretations.¹¹⁴ He remarked that, “the mealy-mouthed word ‘deference’ [does] not necessarily mean anything more than considering those views with attentiveness and profound respect, before we reject them. But to say that those views, if at least reasonable, will ever be *binding*—that is, seemingly, a striking abdication of judicial responsibility.”¹¹⁵ Yet, *Chevron*’s high rate of deference demonstrates that courts employing *Chevron* more frequently find ambiguity than not.¹¹⁶ As a result, Justice Scalia became disenchanted with *Chevron*.¹¹⁷

111. *Id.* at 1219.

112. *Id.* (citation omitted).

113. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513 (1989).

114. *Id.* at 521.

115. *Id.* at 514.

116. See *supra* notes 55–56.

117. See Justice Antonin Scalia, Remarks at the 2015 Stein Lecture (Oct. 20, 2015).

Recent Supreme Court opinions have expressed significant doubts about the vitality of *Chevron*.¹¹⁸ In a concurring opinion in *Michigan v. EPA*, Justice Thomas once again expressed concerns regarding deference to agency interpretations.¹¹⁹ According to Thomas, *Chevron* “wrests from Courts the ultimate interpretive authority to ‘say what the law is’, and hands it over to the Executive.”¹²⁰ Then-judge Neil Gorsuch has similarly declared that “the time has come to face the behemoth” that “swallows huge amounts of core judicial and legislative power and concentrate[s] federal power in a way that seems more than a little difficult to square with the Constitution of the framer’s design.”¹²¹ Relatedly, Congress recently passed the Separation of Powers Restoration Act (“SOPRA”) as part of the Regulatory Accountability Act of 2017, which would amend the Administrative Procedure Act to require de novo review of agency interpretations of statutes.¹²² While SOPRA is aimed at quashing *Chevron*, such a goal seems infeasible to some scholars.¹²³

The theoretical justifications of *Chevron*, however, may save it from some of its conflict with this rule of law principle, at least with regard to concerns about legislative authority.¹²⁴ Many commentators—including Justice Scalia—agree that *Chevron* rests on an assumption that Congress intended the agency to address certain policy

118. See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (refusing to apply *Chevron* in “extraordinary cases” (citation omitted)); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013).

119. 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring).

120. *Id.* at 2712 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Justice Thomas also charges that *Chevron* conflicts with the legislative power because “[s]tatutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.” *Id.* at 2713.

121. *Gutierrez-Brizuela v. United States*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

122. Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 202(1)(B).

123. Hickman & Bednar, *supra* note 5.

124. See Nicholas R. Bednar, *The Clear-Statement Chevron Canon*, 66 DEPAUL L. REV. (forthcoming 2017) (arguing that *Chevron* recognizes a modern understanding of the hierarchy of policymaking in the U.S. federal system).

issues.¹²⁵ If this presumption is true, “[d]eference is mandatory because Congress has commanded it,” and “[c]ourts must obey Congress when it speaks in a manner permitted by the Constitution.”¹²⁶ The Supreme Court has recognized, particularly in the administrative law context, that statutory interpretation “is often more a question of policy than law.”¹²⁷ Just as the executive and legislature should not intrude on the judiciary, courts should not interfere with the superior policy-making authority of the legislature and the executive. *Chevron* protects the U.S. policymaking scheme from judicial intrusion in cases where statutory interpretation is necessarily a policy decision—rather than a purely semantic exercise of interpretation.

3. *Skidmore*

To a lesser extent, *Skidmore* raises similar separation-of-powers concerns. Acknowledging any amount of deference inherently abdicates some of the judiciary’s interpretive authority to the executive. Yet, *Skidmore* only grants deference to agency interpretations to the extent that they possess the “power to persuade.”¹²⁸ The court remains free to exercise its interpretive function. *Skidmore*’s factors simply represent that an agency is more qualified than the reviewing court to understand the statutory framework under which the agency operates because the agency possesses a certain level of “expertise.”¹²⁹ We acknowledge that we must afford the same courtesy to *Auer* and *Chevron* in recognizing that an agency is an expert when it comes to interpretation of its own statutes. The fact that *Skidmore* allows the court to substitute its own interpretation, however, protects *Skidmore* from many of the same concerns raised by the two stronger doctrines.

4. No Deference

When a court affords no special deference to agency decision-making, the court avoids separation of powers issues completely. In

125. Merrill & Hickman, *supra* note 24, at 870.

126. *Id.* at 870–71.

127. Pauly v. Bethenergy Mines, 501 U.S. 680, 696–97 (1991).

128. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

129. See *id.* at 139–40.

Australia, the courts follow closely the judicial role described in *Marbury v. Madison*.¹³⁰ In fact, the Australian High Court directly cites to *Marbury*, noting that by declining to defer to agency interpretations, the Australian courts retain their unique role of saying what the law is.¹³¹ In Australia, therefore, the judiciary's lack of deference to agencies largely complies with the separation of powers principle.

In Ukraine, the courts similarly refuse to abdicate their law-interpreting function by giving no deference to agency determinations.¹³² But Ukraine's system of judicial review arguably violates separation of powers by intruding on the *executive's* powers. By weighing judicial proceedings against the agency,¹³³ Ukraine's deference doctrine (or lack thereof) impedes the ability of the executive to operate through the administrative justice system. Neither the United States nor the Australian systems raise similar concerns. By reinforcing cultural distrust of the bureaucracy and reducing the relevance of administrative proceedings,¹³⁴ Ukraine's judiciary impinges on the role of the executive in executing the laws.

B. Democratic Participation

While administrative agencies are more democratically accountable than the courts, they are far less accountable than the legislature. Agency officials are unelected, most often subject only to presidential appointment.¹³⁵ In the United States, the Administrative Procedure Act promotes democratic participation through the use of notice-and-comment rulemaking procedures. When an agency promulgates a regulation (legislative rule) it must do so through notice-and-comment rulemaking in which the public is notified of the proposed rule and afforded the opportunity to comment on the proposed regulation.¹³⁶ The Administrative Procedure Act, however, exempts interpretive rules—rules interpreting a regulation already promulgated

130. See Dolehide, *supra* note 94 and accompanying text.

131. See Dolehide, *supra* note 94 and accompanying text.

132. See Fenton, *supra* note 73, at 485.

133. See *supra* notes 78–85 and accompanying text.

134. See *infra* Part IV.B.

135. See PIERCE, *supra* note 28, at 44–48.

136. See 5 U.S.C. § 553(b)–(c) (2012).

through notice-and-comment procedures—from this requirement.¹³⁷ Therefore, in situations where an agency interpretation occurs without notice-and-comment procedures, as is the case in the promulgation of interpretive rules or policy statements, public participation in the law-making process will be notably absent.

1. *Auer*

Auer hinders democratic participation because agency interpretations of regulations are most often contained in interpretive rules and policy statements, which are not subject to notice-and-comment procedures. The only democratic check on agencies—notice-and-comment rulemaking—does not apply to interpretive rules and policy statements.¹³⁸ Admittedly, if courts themselves interpreted regulations, public participation would also be minimal. However, the absence of *Auer* would at least allow a litigant representing the regulated public to advance arguments of a better interpretation.

Rather, *Auer* undermines democratic principles because it deems notice-and-comment proceedings. Because *Auer* affords an agency mandatory deference without substantial inquiry into the agency's interpretive methodology, *Auer* incentivizes the agency to promulgate vague legislative rules and then robustly interpret these manufactured ambiguities in interpretive rules.¹³⁹ The agency thus can avoid engaging in notice-and-comment rulemaking for politically contentious provisions, only to add these provisions back into the regulations through *post hoc* interpretations. *Auer*, therefore, deprives the public of the opportunity to meaningfully participate in the regulatory process. Without *Auer*, agencies would be forced to include these contentious provisions in the initial notice-and-comment proceedings because such robust interpretations of vaguely drafted regulations would not survive judicial review.¹⁴⁰

137. See *id.* § 553(b)(A).

138. See *supra* Part II.B.1.

139. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring).

140. See *id.*

2. *Chevron*

Of the three U.S. deference doctrines, *Chevron* protects democratic principles the most. As courts only apply *Chevron* when the agency has acted with “the force of law,” usually only in cases of notice-and-comment rulemaking or adjudication,¹⁴¹ the public has been afforded an opportunity to represent its interests in the rulemaking or adjudicative process. On the other hand, knowing that *Chevron* accords a high level of mandatory deference to agency interpretations, agencies may interpret ambiguous statutory provisions broadly to create lengthy and robust regulations. One may reasonably argue that Congress, not agencies, should create such large-scale regulatory schemes because members of Congress are directly-elected representatives of the people. However, if we accept the theory that *Chevron* is a product of congressional intent,¹⁴² the delegation of policy decisions to agencies does not deprive the public of participation. If anything, notice-and-comment procedures allow additional participation in the rulemaking process beyond the lawmaking process at the congressional level.

3. *Skidmore*

Skidmore, in its currently understood state of applying to interpretations “in policy statements, agency manuals, and enforcement guidelines,”¹⁴³ presents many of the same problems as *Auer*.¹⁴⁴ Agencies do not engage in notice-and-comment procedures when they create materials like policy statements, agency manuals, and enforcement guidelines. But because the court retains its interpretive function, *Skidmore* harms our democratic system little more than a traditional judicial proceeding. Admittedly, its balancing test swings the pendulum in favor of the agency, but since the court maintains control over ascertaining the most persuasive interpretation, we feel this democratic deprivation is negligible.

141. See *United States v. Mead Corp.*, 533 U.S. 218, 226–227 (2001).

142. See *supra* Part II.B.

143. *Mead Corp.*, 533 U.S. at 220 (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)).

144. See *supra* Part III.B.1.

4. No Deference

By not deferring to agency decision-making, Australia and Ukraine treat an agency as any other party in a typical case. Therefore, their decisions harm democratic participation no more than a typical court proceeding. Australia, nevertheless, is unique in that the legislature and executive are closely linked under the parliamentary system.¹⁴⁵ Under these circumstances, deference may actually strengthen democratic participation by giving authority to a body with greater democratic ties than the unelected judiciary. Nevertheless, deferring to agencies would result in significant costs to Australia's rule of law regime by undermining separation of powers.¹⁴⁶

In Ukraine, pervasive problems with democratic participation exist.¹⁴⁷ While the unelected judiciary does not represent the people, Ukraine's bureaucracy is considered an even larger hindrance to democracy¹⁴⁸ and offers little opportunity for public input.¹⁴⁹ In Ukraine's case, then, deferring to the agencies could arguably harm democracy. Therefore, the system's refusal to defer to the agencies does nothing to weaken democratic participation in Ukraine.

145. See *supra* notes 100–04 and accompanying text.

146. See *supra* Part III.A.

147. See Nolan Peterson, *Lessons in Democracy on Ukraine's Front Line*, NEWSWEEK (July 24, 2015), <http://www.newsweek.com/lessons-democracy-ukraines-front-line-357121> (quoting a leader of a pro-democracy group in Ukraine noting that “[m]any of Ukraine’s civil laws and local governments still operate under the rules and along the lines of the Soviet days”).

148. See Oleg Sukhov, *Uncleansed: Justice Ministry Says Bureaucracy Is Foiling Lustration*, KYIV POST (July 31, 2015), <http://www.kyivpost.com/content/kyiv-post-plus/uncleansed-394709.html>.

149. H. Dmytrenko, *Modernization Strategy of Public Administration System in Ukraine in the Interests of the Majority of its Citizens*, 2014 ADVANCED SCI. J. 109, 109. Dmytrenko argues that the underlying reason for the ineffectiveness of Ukraine's current public administration system is the lack of feedback on agency actions, which has led to an enormous divide between the interests of the “administrative elite” and those of the people. *Id.* at 111.

C. Predictability and Lack of Arbitrariness

Arbitrariness in the rule of law context is defined as “wide discretionary authority”¹⁵⁰ that leads to “irregular” and “uncertain” exercises of power.¹⁵¹ The Administrative Procedure Act explicitly bars agencies from taking “arbitrary or capricious” actions.¹⁵² However, deference doctrines may give agencies unfettered discretion that results in unpredictable and, occasionally, arbitrary decision-making.

1. *Auer*

In theory, a reviewing court should not defer under *Auer* to an agency’s interpretation of its own regulation if that interpretation is “plainly erroneous or inconsistent with the regulation” or “does not reflect the agency’s fair and considered judgment.”¹⁵³ Yet, courts continue to defer to agencies under *Auer* in almost all cases.¹⁵⁴ Without any meaningful judicial checks, *Auer* incentivizes agencies to promulgate vague regulations and interpret them beyond their natural meaning.¹⁵⁵ In his concurring opinion in *Perez*, Justice Scalia suggested that *Auer* allows interpretive rules to bind regulated parties just as legislative rules would.¹⁵⁶ “[T]he agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment.”¹⁵⁷ Thus, *Auer* promotes arbitrary decision-making because the agency is afforded near unfettered discretion and need not use traditional tools of interpretation or public comments to inform its decision.

Some may defend *Auer* as predictable because it allows the agency to resolve regulatory ambiguities and ensure consistent application of those interpretations in the courts. This defense is misplaced. The purpose of predictability is to inform the public of what the law is

150. DICEY, *supra* note 20.

151. HAYEK, *supra* note 15.

152. 5 U.S.C. § 706(2)(a) (2012).

153. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012).

154. *See supra* note 68 and accompanying text.

155. *See supra* notes 108–12 and accompanying text.

156. *See Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. at 1212 (Scalia, J., concurring).

157. *Id.*

and how to abide by it. One cannot obey the law if it is not clearly written, and vague regulations have not been clearly written. Regardless of *Auer*'s existence, the agency will always need to interpret ambiguities in regulations to enforce them. Absent *Auer*, "[t]he agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct."¹⁵⁸

2. *Chevron*

A reviewing court should not defer to the agency under *Chevron*'s Step Two if the interpretation is "arbitrary, capricious, or manifestly contrary to the statute."¹⁵⁹ Many scholars interpret Step Two to require judicial oversight of the agency's interpretive methodology, mainly "whether the agency decision[-]making process has appropriately taken account of other interpretive tools—like normative canons of construction or legislative history—when resolving ambiguity in the governing statute."¹⁶⁰ Thus, *Chevron* mandates the use of traditional interpretive tools in order to avoid arbitrary decision-making.

Yet administrative agencies may interpret minor ambiguities to expand their regulatory jurisdiction. In *City of Arlington v. FCC*, the Supreme Court considered whether *Chevron* applies to agency interpretations of statutory ambiguities that concern the scope of the agency's jurisdiction.¹⁶¹ Writing for the majority, Justice Scalia held that *Chevron* applies to these jurisdictional interpretations and cautioned judges to avoid the "false dichotomy" between jurisdictional and non-jurisdictional questions.¹⁶² This scope-of-jurisdiction exception, according to Justice Scalia, would destroy *Chevron* and lead litigants to argue that every agency interpretation is jurisdictional.¹⁶³ Writing for the dissent, Chief Justice Roberts contended that allowing agencies to interpret the scope of their regulatory jurisdiction would

158. *Id.*

159. *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 844 (1984).

160. *See* Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 623 (2009) (footnotes omitted) (construing *Chevron* to require a similar test to *State Farm*).

161. *See* *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

162. *Id.* at 1872–73.

163. *Id.*

allow agencies to expand their authority beyond the statutory limits set in place by Congress.¹⁶⁴

Chevron's application to interpretations concerning the agencies' scope of jurisdiction raises two rule-of-law concerns. First, *Chevron* may allow agencies to arbitrarily expand their power. For example, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Corps interpreted the phrase "navigable waters" to include an abandoned sand and gravel pit on the basis that it was a seasonal habitat for the great blue heron.¹⁶⁵ While the Supreme Court denied the agency deference in that case, it is not unreasonable following *City of Arlington* to conclude that other seemingly absurd jurisdictional interpretations (e.g., a gravel pit qualifying as "navigable waters") may survive lower court review and expand the agency's regulatory authority. Second, in governing statutes, Congress provides boundaries within which an agency must operate. If, however, *Chevron* allows an agency to interpret ambiguities in a statute to expand those boundaries, regulated parties may be unable to ascertain whether they fall within the agency's jurisdiction.

Chevron accords agencies wide discretion in interpreting ambiguities in statutes.¹⁶⁶ *Chevron* undermines predictability to the extent that it may lead to deference to expansive regulations promulgated from relatively minor ambiguities. Unlike *Auer*, however, Congress—not the agency—drafted the statute being interpreted by the agency.¹⁶⁷ Empirical studies of congressional lawmaking suggest that Congress is aware of *Chevron* deference and that it affects "the degree of specificity they use while drafting."¹⁶⁸ Vague statutes pose just as many problems as expansive regulations with respect to predictability. Therefore, Congress should specifically draft statutes to avoid according the agency wide discretion to better promote predictable enforcement and interpretation.

164. *Id.* at 1885–86 (Roberts, C.J., dissenting).

165. 531 U.S. 159, 163–65 (2001).

166. *See supra* notes 54–56 and accompanying text.

167. *Cf. supra* Part II.A.1.

168. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995–96 (2013).

3. *Skidmore*

Under *Skidmore*, the reviewing court remains the ultimate interpreter of the statute. The court retains the authority to overrule agency decision-making that was the product of arbitrariness or unfettered discretion. Therefore, *Skidmore* renders court decisions no less arbitrary or unpredictable than a traditional judicial proceeding.

4. No Deference

As with *Skidmore*, a no-deference doctrine is no less arbitrary or unpredictable than a typical court proceeding. Further, the judiciary acts as a check against arbitrary administrative rulings, only endorsing the agency's position if the court independently comes to the same conclusion based on a reasoned application of the law to the facts of the case.¹⁶⁹ Therefore, not deferring to agency determinations may reduce arbitrariness in the government overall.¹⁷⁰

Lack of arbitrariness, in turn, leads to more predictability: the court will likely uphold reasoned, non-arbitrary governmental decisions but restore justice if the government has acted improperly. Ukraine's system, however, where substantial obstacles for the agencies exist,¹⁷¹ may undermine predictability because agency determinations could be easily overturned. Individuals would face constant uncertainty about whether administrative determinations will be enforced.¹⁷² Therefore, stacking the deck against the government in

169. See *supra* notes 20–21 and accompanying text.

170. This conclusion assumes the judiciary as a body is more likely to avoid arbitrary decision making and simply apply the law to the facts. In Australia, this is probably a safe assumption. See *infra* note 183. In Ukraine, however, the credibility of the judges is more in doubt. See *Corrupt Judges Continue To Work in Ukraine*, INTERFAX-UKRAINE (Oct. 30, 2015, 1:16 PM), <http://en.interfax.com.ua/news/general/300394.html> (noting that “corrupt judges are still on the job” after the 2014 revolution). Ukrainians have a “very low level of trust in the judiciary.” NEILL & BROOKE, *supra* note 90, at 14.

171. See *supra* notes 78–85 and accompanying text.

172. For example, a rule of law report by the Lord Slynn of Hadley European Law Foundation described how a foreign investor who had been granted a license to explore for oil in the Black Sea had his license taken away arbitrarily by an order of a court. NEILL & BROOKE, *supra* note 90, at 14–15. The investor was seemingly not given a right of redress or a right to compensation. *Id.* at 15.

Ukraine may weaken predictability, while reasoned judicial review in Australia would reduce such uncertainty.

V. BALANCED AGENCY DEFERENCE UNDER THE RULE OF LAW

What doctrine of deference, then, best comports with the rule of law while still effectuating the goals of the modern regulatory state? As the analysis in Part III reveals, a rule-of-law evaluation of agency deference doctrines presents a Goldilocks scenario:¹⁷³ the United States' doctrines of *Chevron* and *Auer* give too much deference; Ukraine too little; while the deference doctrines exemplified by Australia and *Skidmore* seem just right. We summarize each of these conclusions in turn in Sections A through C below.

A. *The United States: A System with Too Much Deference*

The *Chevron* and *Auer* deference doctrines, by giving strong deference to agency interpretations, undermine the rule of law in several ways. Both doctrines create significant separation-of-powers problems by allowing the agency to act as lawmaker, interpreter, and executor. Both doctrines can result in expansive and unpredictable legal interpretations. In addition, *Auer* encourages agencies to purposely promulgate vague regulations in a manner that is both undemocratic and arbitrary. At minimum, the Supreme Court must end the use of *Auer*.

We are more sympathetic towards *Chevron*. As it is rooted in congressional intent, *Chevron* allows Congress to delegate authority to expert agencies to make policy decisions. It also decreases circuit splits and “permits a nationally uniform rule without the need for the Supreme Court to settle the meaning of every law or regulation.”¹⁷⁴ Furthermore, *Chevron* offers a voice to the regulated public because it requires agencies to engage in notice-and-comment rulemaking or adjudication. We hesitate to dispose of *Chevron*'s promotion of congres-

173. Cf. JAMES MARSHALL, *GOLDILOCKS AND THE THREE BEARS* 10–11 (Puffin Books 1998) (describing three bowls of porridge, alternatively, as too hot, too cold, and just right).

174. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 7 (2004).

sional intent, efficiency, and democracy. At a minimum, *Chevron* prevents judicial interpretation of statutory ambiguities that are better left to the more politically accountable branches. Yet, we recognize that, beyond its theoretical framework, *Chevron* is hard to apply and raises numerous separation-of-powers problems. If *Chevron* persevered in the form initially envisioned by Justice Scalia, it may better comport with the rule of law.¹⁷⁵

While the United States usually scores within the top 20 countries on the World Justice Project's Rule of Law Index,¹⁷⁶ the issues associated with strong deference to administrative agencies impair its status as a rule-of-law bastion. Ultimately, the United States must abandon *Auer* and should consider shaping *Chevron* to better comply with the rule-of-law principles the United States espouses. As we suggest in Part IV.C, *Skidmore* offers a better alternative to both of these doctrines because it better comports with the principles of the rule of law.

B. *Ukraine: A System with Too Little Deference*

Ukraine's system of judicial review also violates the rule of law. Ukraine's doctrine violates separation of powers by impairing the executive from accomplishing its duty of executing the laws. Although Ukraine's doctrine does not weaken democratic participation, which is already weak in Ukraine, and may reduce arbitrary administrative actions, assuming the judges are not acting arbitrarily themselves, it creates unpredictability by delegitimizing administrative procedures and rulings. Fenton ultimately argues that the rule of law "calls for the development of a transparent, effective, and accountable administration that can earn the confidence of the population it serves."¹⁷⁷ While in this Article we will not determine whether a developed administrative system is necessary for the rule of law, Ukraine's lack of judicial deference clearly undermines rule-of-law principles.¹⁷⁸

175. See *supra* notes 113–17 and accompanying text.

176. WORLD JUSTICE PROJECT, *supra* note 9 (ranking the United States in 2015 as 19th out of 102 countries).

177. *Id.* at 486.

178. Ukraine does not rank well on the World Justice Project's Rule of Law Index, coming in 70th out of 102 countries. WORLD JUSTICE PROJECT, *supra* note 9.

Additionally, Ukraine exemplifies how too little judicial deference impairs the proper functioning of the government. As Fenton explains, Ukraine's system of judicial review of agency decisions constitutes a "[m]ajor impediment to the development of a mature administrative justice system in Ukraine."¹⁷⁹ For example, by failing to require exhaustion of administrative remedies, the Code of Administrative Adjudication robs agencies of the incentive and ability to monitor decisions and correct improper adjudications.¹⁸⁰ Similarly, by allowing petitioners access to courts at any point in the process, Ukraine also reduces the importance and relevance of the administrative process and perpetuates distrust of the agency process.¹⁸¹

Thus, on the other side of the spectrum, Ukraine's total lack of deference to administrative agencies violates the rule of law. Ukraine's no-deference doctrine hurts the country by decreasing the importance of agencies' decision-making processes and inhibiting the development of a modern administrative state.¹⁸²

C. *Australia and Skidmore: A Balanced Approach to Agency Deference*

That leaves Australia's no-deference doctrine and *Skidmore*. Australia demonstrates that a government system can operate effectively without agency deference.¹⁸³ Australia's lack of agency deference avoids separation-of-powers issues, albeit at the expense of

179. Fenton, *supra* note 73, at 482.

180. *See id.* at 486. This rule also sharply increases caseloads for the courts. *Id.*

181. *See id.* Placing the burden of proof on the agency at every level of review also reinforces this distrust. *See id.*

182. *Id.* Ukraine's administrative justice system is not doomed. Outside actors like the Folke Bernadotte Academy (FBA), the Swedish government agency for peace, security, and development, seek to help. In 2014, the FBA launched the project Local Self-Government and the Rule of Law in Ukraine, which focuses on rule-of-law challenges in administrative agencies and processes. FOLKE BERNADOTTE ACADEMY, LOCAL SELF-GOVERNMENT AND RULE OF LAW IN UKRAINE (Oct. 2014), <https://fba.se/contentassets/1c76679d653e47d9a5057d58578a1082/20141029-onepager-ukraine.pdf>.

183. Australia has also traditionally fared well in the World Justice Project's Rule of Law Index, ranking 10th out of 102 countries in 2015. WORLD JUSTICE PROJECT, *supra* note 9.

greater democratic participation, and leads to non-arbitrary, predictable determinations. The success of Australia's doctrine may be attributable to its parliamentary system: because the legislature and executive agencies are always aligned politically, administrative interpretations likely hew closely to the statutes.

In the United States, on the other hand, the executive and legislative branches are separated and can be politically at odds. Agencies, then, may sometimes be encouraged to interpret statutory provisions to effectuate the executive's goals, rather than legislative intent. Therefore, systemic differences between Australia and the United States counsel away from eliminating agency deference in the United States all together.

Instead, we propose that *Skidmore* could replace *Auer* and *Chevron* without substantial consequences. As one of us previously noted,

Skidmore would return the interpretative power to the Courts by permitting them to reject unpersuasive interpretations—as the Court would reject any defendant's unpersuasive interpretative argument. At the same time, it would preserve some level of deference for agencies acknowledging their expertise and the importance of continued predictability in a regulatory setting.¹⁸⁴

Furthermore, adopting the *Skidmore* doctrine better complies with the rule of law. *Skidmore* constitutes a better option from a separation-of-powers perspective because it allows the court to exercise its own reasonable interpretation, only deferring to the agency when it finds the agency's interpretations persuasive. While *Skidmore* implicates concerns about democratic participation, it more closely approximates a traditional court case between two equally-positioned parties.

184. Nicholas R. Bednar, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, MINN. L. REV. DE NOVO (June 24, 2015), <http://www.minnesotalawreview.org/2015/06/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association>.

In the end, adopting *Skidmore* allows the United States to salvage several rule-of-law principles while also giving room for courts to defer to agency expertise, when appropriate.

VI. CONCLUSION

With the rise of the modern administrative state in the United States and abroad, agency action increasingly makes up a large portion of government action. Rule-of-law analyses, therefore, would be remiss to ignore administrative agencies, the fourth branch of government. This Article explores one facet of the complexity that agencies introduce into the traditional tripartite governmental system: the appropriate degree of deference the judiciary ought to give agency decision-making, while still complying with the rule of law and effectuating the purposes of the modern regulatory state. Our analysis reveals that a well-balanced rule-of-law system cannot support strong deference regimes, such as *Auer* and *Chevron*, but should acknowledge longstanding agency interpretations and expertise through a flexible balancing test like *Skidmore*.
