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

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 4768, the "Separation of Powers Restoration Act of 2016"

May 17, 2016

SUMMARY

The Separation of Powers Restoration Act would prescribe "de novo" judicial review of agencies' interpretations of statutes and rules. Thus, it would seek to eliminate judicial deference with respect to those questions. Yet such deference has been recognized for many generations as serving legitimate purposes, such as taking account of agencies' familiarity with their fields of regulation and need for flexibility in administering them. An attempt to prohibit it would be unwise.

The sponsors of SOPRA take explicit aim at the *Chevron* standard for reviewing agencies' statutory interpretations, but in fact the bill would also forbid the more longstanding *Skidmore* approach. Yet I cannot foresee the sponsors revising the bill to eliminate *Chevron* and codify *Skidmore,* because such a bill would have too limited an impact to fulfill the sponsors' declared goals. Moreover, it could aggravate, not ameliorate, concerns about unpredictable results in appellate practice.

Even if I could agree with the sponsors that the broad authority now exercised by federal agencies is so excessive as to constitute a separation of powers problem, amendment of the scope of review standards in the Administrative Procedure Act would be an inapt cure. Over time, control of the executive branch will shift back and forth between two parties, so an amendment to permanent legislation like the Act would sometimes benefit each party's interests and sometimes harm them.

Finally, so-called *Auer* deference, governing judicial review of agencies' interpretations of their own regulations, should be preserved for essentially the same reasons as apply to the other forms of deference just discussed. I disagree with the late Justice Scalia's theory that a combination of regulation-writing and regulation-interpreting authority in agencies' hands creates a separation of powers problem. That commonplace state of affairs is very different from traditionally recognized separation of powers problems and should not be condemned without a strong policy rationale. Justice Scalia argued that such a rationale can be found in the supposed incentive that *Auer* creates to write regulations vaguely. The theory is unconvincing, however, because of the complete lack of evidence that the supposed incentive has any impact.

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

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 4768, the "Separation of Powers Restoration Act of 2016"

May 17, 2016

Chairman Marino, Ranking Member Johnson, and members of the subcommittee, thank you for the opportunity to appear today. It is a privilege to be able to participate in this hearing on H.R. 4768, known as the Separation of Powers Restoration Act of 2016 (SOPRA).

SOPRA would insert the words "de novo" into the introductory language of the scope of review provision of the Administrative Procedure Act (APA), 5 U.S.C. § 706, so that it would provide that a reviewing court shall decide "de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules." The bill is the product of a coalition of Senate and House conservatives called the Article I Project (A1P). According to policy briefs and press releases issued by members of A1P, the purpose of SOPRA is to eliminate judicial deference on issues of law.[1]

By its terms, the amendment would apply to the interpretation of constitutional provisions, statutory provisions, and rules. In this statement I will first discuss the implications of the bill for review of statutory questions, and then turn to its implications for review of questions relating to the interpretation of rules. (The bill's application to constitutional questions is not significant, because judicial review of agencies' rulings on those questions is already nondeferential.[2]) I have relied on your subcommittee's May 11, 2016, background memo in deciding what topics to emphasize.

SOPRA bears a marked resemblance to the so-called Bumpers Amendment, a proposal that received extended consideration from the House and Senate between 1975 and 1982.[3] It too would (at least as originally drafted) have inserted the words "de novo" into the introductory clause of § 706. Ultimately, the bill was never enacted, and some of the same factors that led to its demise retain their force as arguments against the current bill. I served as the consultant for

[1] See, e.g., *Senate, House Leaders Introduce Bill To Restore Regulatory Accountability Through Judicial Review*, Mar. 17, 2016, http://www.lee.senate.gov/public/index.cfm/2016/3/senate-house-leaders-introduce-bill-to-restore-regulatory-accountability-through-judicial-review; Policy Brief, *Reforming Executive Discretion, Part I: The End of* Chevron *Deference* (Article I Project, Mar. 17, 2016), http://www.lee.senate.gov/public/index.cfm/2016/3/remarks-on-separation-of-powers-restoration-act-ending-chevron-deference; *Marino joins Goodlatte and Ratcliffe to Introduce Legislation to Rein in Runaway Administrative State*, Mar. 17, 2016, https://marino.house.gov/media-center/press-releases/marino-joins-goodlatte-and-ratcliffe-introduce-legislation-rein-runaway.

[2] Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338, 342 (2016).

[3] S. 2408, 94th Cong. (1975).

the Administrative Conference of the United States (ACUS) during its consideration of the amendment, and I will draw upon some of the lessons of that controversy in my testimony.

I. JUDICIAL REVIEW OF AGENCY INTERPRETATIONS OF STATUTES

A. Doctrinal Background

In modern judicial review of agency statutory interpretations, two standards of review are most prominent. One is the formula found in the 1984 case of *Chevron U.S.A. Inc. v. NRDC*,[4] which sets forth a two-step inquiry: a reviewing court should ask "whether Congress has directly spoken to the precise question at issue" and "whether the agency's answer is based on a permissible construction of the statute."[5] In simpler terms, this means that the agency interpretation should prevail if the statute is ambiguous in relation to the issue presented, and the agency's interpretation is reasonable. The other prominent approach in the area was most famously expressed by Justice Robert Jackson in his 1944 opinion in *Skidmore v. Swift & Co.*[6]:

> We consider that the rulings, interpretations and opinions of the [Fair Labor Standards Act] Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[7]

As a rough generalization, *Chevron* review is normally used during judicial review of interpretations rendered in formal adjudications and notice-and-comment rulemaking,[8] and *Skidmore* review applies to judicial review of interpretations announced in opinion letters, policy statements, agency manuals, and enforcement guidelines.[9] I will not dwell at any length on questions as to how to sort out that distinction, because, as I will discuss, indications are that SOPRA seeks to abolish both standards of review. Thus, although the subcommittee's memo and other A1P pronouncements put more emphasis on *Chevron*, both must be analyzed here.

1. Deference and its purposes

The type of review exemplified by *Skidmore* developed first. It has a long lineage in the American legal tradition, traceable back to the days of Chief Justice John Marshall (notwithstanding suggestions that deference on issues of law is incompatible with *Marbury v.*

---

[4] 467 U.S. 837 (1984).

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

[6] 323 U.S. 134 (1944).

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

[8] United States v. Mead Corp., 533 U.S. 218 (2001).

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

Madison[10]*)*. In a customs case decided six years after *Marbury*, he remarked that "[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions."[11] In subsequent decades, numerous cases affirmed the idea that courts should give weight to administrative constructions of statutes they administer. In my report to ACUS on the Bumpers Amendment, I compiled many examples and summarized them in these terms:

> [T]he courts' practice of giving weight to agency constructions [is] a complex phenomenon on which there has been extensive judicial commentary. The primary justification for this approach is that agencies tend to be familiar with, and sophisticated about, statutes that they are charged with administering. The expertise is assumed to result not only from the frequency of an agency's contacts with the statute, but also from its immersion in day-to-day administrative operations that reveal the practical consequences of one statutory interpretation as opposed to another. Hence the courts approach agency interpretations with a measure of respect that is distinct from, though not wholly divorced from, their assessment of the inherent persuasiveness of the agencies' arguments.[12]

All of this analysis predated the *Chevron* decision, which did alter the landscape, although not nearly to the extent that the A1P sponsors appear to believe. *Chevron* deference rests in part on respect for congressional delegation. It recognizes that Congress often decides to entrust policymaking authority in certain areas; when it does so, and the agency acts within the scope of that delegation as the court understands it, a court is obliged to honor the legislature's expectations by upholding a rational exercise of that authority, even where the agency reaches a conclusion that the reviewing court would not have reached. In other words, in this context "[j]udicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency."[13] That aspect of the test is straightforward.

The more controversial aspect of the test is its presumption that an ambiguity in an authorizing statute should be taken as an indication that Congress intended to delegate the matter. This presumption has elicited much criticism from commentators who point out that, although it will often correspond to reality, it often does not. Virtually all jurists and commentators agree, however, that this presumption is a legal fiction and is not intended as a descriptively accurate model of congressional expectations.[14] Rather, it is a judicially created principle of statutory interpretation, analogous to other canons of statutory construction.[15] The

---

[10] 5 U.S. (1 Cranch) 137 (1803).

[11] United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1809); *see also* Edwards' Lessee v. Darby, 25 U.S. 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to very great respect.").

[12] Ronald M. Levin, Judicial Review and the Bumpers Amendment, 1979 A.C.U.S. 565, 576, *available at* https://www.acus.gov/publication/judicial-review-and-bumpers-amendment (hereinafter *Bumpers Report*).

[13] Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983); *see* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 20-22 (1985).

[14] Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1875-76 (2015).

[15] Many such canons, inside and outside the field of administrative law, rest on judicial beliefs about the needs of a sound legal order, rather than suppositions about the most probable intent of the legislature. Familiar examples

Court created it (and has subsequently, at various times, expanded or contracted it) to serve purposes that it considers important for our legal system. It can only be understood and evaluated, therefore, in light of the policies on which it apparently rests.

What are these policies? They correspond roughly to the factors that courts deemed important prior to *Chevron*, as summarized above. The opinion itself and the post-*Chevron* commentary have particularly emphasized a few: Agencies tend to have expertise and experience in their respective fields of specialization and are politically accountable in ways that courts are not.[16] In the well-known words of Justice Stevens in *Chevron*:

> Judges … are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices. … In such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do.[17]

More generally, *Chevron* creates space for agencies to work out problems that arise in the court of administering their programs. It also promotes predictability, because citizens can put some confidence in the expectation that decisions by a centralized agency will not be readily overturned by a variety of courts in different parts of the country.[18]

2. Limitations on deference

All of this discussion sounds onesided. I should emphasize, however, that both *Skidmore* and *Chevron*, as implemented, leave considerable room for judicial creativity and assertive control. I made this point about the *Skidmore* line of cases in my ACUS report on the Bumpers Amendment:

> [T]he courts have proceeded over the years to develop criteria indicating where deference to an agency's construction of its governing statute is desirable and where it is not. Indeed, the principle of deference is not so much a "presumption" as a collection of rules of statutory construction, any of which may be applicable depending upon the circumstances of the particular case. In this fashion, the case law has yielded a set of considerations designed to assure that no agency interpretation receives more deference than it deserves.[19]

---

include the "rule of lenity," constitutional avoidance, the presumption against retroactivity, and the presumption in favor of the availability of judicial review of agency action.

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

[17] *Id*.

[18] *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).

[19] *Bumpers Report*, *supra*, at 577.

I listed some of the most commonly recognized criteria and concluded:

> In summary, no matter how they may preface their opinions with praise for administrative wisdom, the courts in practice have carefully avoided treating administrative constructions of statutes as conclusive. The agency's views "are only one input in the interpretational equation," to be considered along with a number of other factors customarily used to determine Congress's intention.[20]

To this day, the general understanding is that *Skidmore* review is compatible with judicial independence, correctly understood: "'*Skidmore* weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority."[21]

In a similar though less obvious fashion, the manner in which courts apply the two step *Chevron* test is a far cry from a policy of indiscriminate deference. The opinion itself states that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, applying traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[22]

I would agree with critics who say that the opinion also contains more troubling language, but the underlying reality is that courts exercise significant control over agencies as they apply both of the two *Chevron* steps. Judicial opinions declaring that a statute "directly addresses the precise question at issue" (and thus is not ambiguous) are commonplace – sometimes when it does not seem at all obvious to external observers that the statute was actually unambiguous.[23] Moreover, the second *Chevron* step -- whether the agency's decision was reasonable – is often treated as an inquiry into whether it was *reasoned*.[24] This revised inquiry leads to an overlap with the hard look doctrine;[25] as such, it can lead to reversal even where the court is not prepared to claim the statute is clear. In addition, the developing "step zero" body of case law identifies circumstances in which the *Chevron* framework should not be applied in the first place. As I mentioned, informal actions such as agency guidance and opinion letters are in this category. So are certain "extraordinary" cases that raise a question of deep "economic and political significance," at least if *King v. Burwell*[26] is to be believed.

In short, the overall picture is that the courts do not treat *Chevron* as fixed or absolute; the circumstances in which judges may identify a basis for overriding deference are manifold. In

---

[20] *Id*. at 579.

[21] Peter L. Strauss, *Deference is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012).

[22] 467 U.S. at 843 n.9.

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

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

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

[26] 135 S. Ct. 2480, 2489 (2015).

other words, if one chooses to criticize the presumption that an ambiguity means that Congress intends a delegation, one should at least not overlook the demonstrable reality that the presumption can be overcome in a wide variety of situations. Thus, as the subcommittee undertakes to appraise the merits of SOPRA, it should not exaggerate or overstate the force of either *Skidmore* or *Chevron*. Deference gives agencies something of an edge, for a variety of reasons, many of which have been well recognized for generations; but it is not a blank check.

B. Problems with Abolishing Judicial Deference to Agency Interpretations of Statutes

Against this background, SOPRA strikes me as deeply problematic. It would sweep away two hundred years of judicial doctrine regarding the value of agency interpretations. It is radical, not conservative. The Administrative Conference's objection to the Bumpers Amendment still rings true:

> … The Conference does not believe that in the resolution of [statutory interpretation] questions the legal position taken by the administering agency is *automatically* entitled to special weight, but the Conference does believe that special weight may be justified by the circumstances surrounding the agency's adoption of or adherence to such position. These circumstances may include the fact that the agency interpretation was "a contemporaneous construction of the statute by [those] charged with the responsibility of setting its mechanism in motion," *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933); or that the agency interpretation has been asserted consistently, that it has received Congressional approval or acquiescence, that affected interests have relied on it, and that the interpretation is a direct outgrowth of the agency's experience in implementing the statute, *see Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). The Conference does not favor legislation that would require courts to disregard such circumstances in reviewing the actions of agencies for conformity with the statutes they administer.[27]

Post-*Chevron*, this critique would have to be framed in different terms, but the basic message would be about the same. The *Chevron* two-step test makes a tempting target, because its presumption about legislative intent is generally acknowledged to be a fiction, and the *Chevron* test *appears* to be inconsistent with judicial independence in statutory interpretation matters. But its awkward language should not be evaluated out of context. Fundamentally, the *Chevron* presumption resembles the canons of interpretation that underlie the *Skidmore* mode of analysis. Although they may not clearly acknowledge the extent to which they are influenced by judgments about the reliability of the agency's interpretation, courts do continue to exert significant control over dubious administrative actions through flexible applications of the two-step formula and the "step zero" exceptions, as I discussed above.

Regardless, critiques of the *Chevron* formula as awkwardly framed are really beside the point, because the SOPRA "de novo" requirement is drafted broadly enough to sweep aside not

---

[27] ACUS Recommendation 81-2, *Current Versions of the Bumpers Amendment*, 46 Fed. Reg. 62,806 (December 29, 1981); see also ACUS Recommendation No. 79-6, *Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment*, 45 Fed. Reg. 2308 (January 11, 1980) ("An across-the-board judgment that judicial deference to agency expertise or to an agency's interpretation of its statutory mandate is never warranted, would be unwise, and Congress should not enact legislation precluding such deference.").

only the specific *Chevron* test, but also the *Skidmore* brand of deference that many critics of the *Chevron* test would put in its place. In other words, as I interpret the bill, it would forbid not only deference that treats legal interpretations as binding unless (supposedly) restrictive conditions are met, but also a deference regime that treats the courts as primary interpreters but nevertheless gives weight in selected circumstances to the agency's position. Framing this bill as an attack on *Chevron* alone is misleading.

Professors Duffy and Beermann, in their testimony to your subcommittee in March, envisioned the possibility of a bill that would add "de novo" to § 706 but would *also* require or permit reviewing courts to rely on deference factors in resolving appeals from agency action. However, regardless of whether this combination of features would provide a harmonious combination of principles (as they probably would maintain) or a confusing bundle of mixed messages (as I suspect), it seems clear that SOPRA is not intended to be such a bill. Its prescription of "de novo" review stands alone; and, according to general understanding, the concept of "de novo" review "refers to an approach to judicial review in which the court does not confer any deference on the agency; the court resolves the issue before it as if the agency had never addressed the issue."[28] More importantly, the press releases, web pages, and statements of its sponsors, the A1P, contain – so far as I have been able to discover – not a hint of interest in preserving any kind of deference. Their condemnations of deference are firm and categorical.[29]

The subcommittee's memo does invite comment on the possibility of incorporating *Skidmore* standards into the bill, and I will comment on that option below. On the basis of present information, however, I am constrained to believe that the purpose of SOPRA is to abolish all deference to agencies on statutory interpretation questions. And that is what makes it, in my judgment, a very unsound legislative proposal. Members of Congress should think long and hard before continuing with this quest to overthrow the present system. It would jettison tradition, not "restore" it.

C. Responses to Separation of Powers Objections to Deference

As the title of SOPRA suggests, the sponsors of the bill promote it as a cure for various derangements in our nation's system of separation of powers. There is more than a little ambiguity about the sense or senses in which they believe this would be true. I believe this position is primarily a *policy* argument that the distribution of powers among the branches has gotten out of balance and that SOPRA would bring about a better balance.

Before I respond directly to that thesis, however, I will address the memo's assertion that *Chevron* is unlawful because the APA "states unequivocally" that the reviewing court shall decide all relevant questions of law. If this really were true, one would have to wonder how the proponents of the legislation could think that SOPRA could accomplish anything. A statute that

---

[28] Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 83 (2011). *See also* 5 U.S.C. § 706(2)(F) (2012) (clause of the APA providing for de novo trial of the *facts*).

[29] See *The End of* Chevron *Deference*, *supra* ("[The bill] would require courts to review challenges to agency interpretations of statutes or regulations 'de novo' – that is, starting fresh from the text of the law or regulation itself, rather than preemptively deferring to the agency's lawyers. … [F]ederal judges will be able to begin fresh and weigh agency rules and decisions against the text of the law or the regulation itself – not an arbitrary and extra-constitutional standard of deference.")

is already unequivocal cannot need clarification. However, I do not believe that § 706 is actually as unambiguous as has been claimed. On its face, it merely says that a court shall "decide" questions of law. It says nothing about what kinds of interpretive principles the court may use in reaching its decision.[30]

Moreover, if one is going to look to historical sources, I believe the better reading of § 706 would be the one stated in the well-respected *Attorney General's Manual on the APA*: the section "restates the present law as to the scope of judicial review."[31] The background law at the time of the APA's enactment included precedents such as *NLRB v. Hearst Publications, Inc.*,[32] which had said that a reviewing court's role should be "limited" when it reviews an agency's "specific application of a broad statutory term," and *Bowles v. Seminole Rock & Sand Co.*,[33] the direct antecedent of what is now called *Auer* deference. If the drafters of the APA had intended to disapprove these contemporaneous precedents (decided in 1944 and 1945, respectively), they presumably would have found a more conspicuous method of doing so than relying on the vague introductory clause of § 706 – a clause that actually seems to have elicited relatively little attention in the legislative history.

More fundamentally, this focus on the alleged original meaning of § 706 strikes me as misdirected. In order to keep up with the evolving needs of the administrative law system, this section of the APA has repeatedly been construed in ways that are dramatically at odds with the expectations of its authors. The original meaning of the "arbitrary and capricious" clause, § 706(2)(A), was that it was equivalent to the extremely deferential test by which the constitutionality of economic legislation is determined, but it has blossomed into the modern "hard look" doctrine. The authors of the Act never expected that the reference to a "record" in the last sentence of § 706 would be construed to require judicial review on an "administrative record" in informal proceedings such as notice-and-comment rulemaking, but now that requirement is firmly established. Correspondingly, the language in § 706(2)(F), providing for "trial de novo" by the reviewing court, was originally expected to be used broadly, but in modern times it has been virtually construed out of existence. Nobody denies that these changes were departures from the original scheme, yet there is no discernible movement to reverse them. Thus, the modern understanding of § 706 is that, while it did recognize the law as it stood in the 1940s, it does not foreclose case law development over time.

As I said above, I gather that when the A1P members seek to "restore separation of powers" with this bill, they primarily mean to express a policy judgment that the executive branch has acquired too much power in recent years. Many people, including myself, would disagree with this premise. A government for a complex society of three hundred million

---

[30] Even less convincing is the suggestion (offered by Professor Duffy in his testimony in March) that § 558(b) of the APA mandates nondeferential judicial review of agency actions. That subsection merely provides that "[a] sanction may not be imposed or a rule or order issued except within jurisdiction delegated to the agency and as authorized by law." It is silent about the standard of review by which a court should determine the scope of the agency's jurisdiction or authority. Indeed, the provision is addressed to agencies, not to courts. Nor does it say that the jurisdiction or authority must be conferred expressly rather than implicitly. I cannot ever recall seeing a case that has suggested that § 558(b) is relevant to the issue of judicial deference.

[31] Attorney General's Manual on the Administrative Procedure Act 108 (1947).

[32] 322 U.S. 111 (1944).

[33] 325 U.S. 410 (1945).

inhabitants could not survive without a significant administrative apparatus. No advanced nation does. Congress cannot make more than a small fraction of the decisions that such a society needs, even when it is operating at top efficiency (a description that few people would apply to the experience of the last few years[34]). More particularly, society benefits greatly from regulation that protects public health, safety, sound transportation and communications systems, and the environment. Moreover, many of the actions that courts regularly review under the APA do not easily fit the rhetorical framework of "overregulation" that the A1P sponsors so frequently invoke. Many appeals, for example, involve the provision of benefits, such as Social Security, Medicare, and veterans' benefits, which are much less controversial and politically charged. This political debate over the proper scope of regulation is familiar to everyone, and particularly to members of this subcommittee, so I will not elaborate on it in this statement.

Instead, I want to emphasize a different point. Even people who agree with the anti-government premises of the sponsors should recognize that a change in the APA standard of review is an inapt tool for advancing that agenda. It is shortsighted, because it ignores the fact that, over time, political administrations change. Sometimes the administration in office will generally be in favor of *deregulation*, and in these circumstances a more intrusive standard of judicial review would tend to undercut that administration's policies just as surely as it may tend to undercut a more progressive administration's policies when the latter holds power. The APA applies equally to affirmative regulation and to deregulation.

Ironically, the *Chevron* standard of review first became established because it appealed to *conservatives* who embraced it at a time when it would strengthen the hand of the then-incumbent President, Ronald Reagan.[35] It has now lost favor among the self-described conservatives of the A1P, who are well aware that executive power is currently being wielded by an administration of which they generally disapprove. But if an administration committed to more congenial substantive policies were to take office, one can reasonably expect that the A1P assault on deferential judicial review would come to a quick end. Suppose, for example, that a Republican president were to take office in 2017. His administration's actions would face review at the hands of courts of appeals judges, a majority of whom (at least for now) have been appointed by Democratic Presidents.[36] If SOPRA were to have been enacted by then, conservatives might soon discover (or rediscover) the appeal of Justice Stevens's observation in *Chevron* that courts, which are not politically accountable themselves, have good reasons to display deference toward agencies that do have political accountability.

---

[34] As is well known, the 112th and 113th Congresses enacted fewer laws (more than a hundred fewer) than any other Congress in at least the past seventy years. See *Résumé of Congressional Activity*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, http://library.clerk.house.gov/resume.aspx.

[35] See, e.g., Testimony of Andrew M. Grossman, *Examining the Proper Role of Judicial Review in the Regulatory Process*, Hearing Before the Senate Subcomm. on Regulatory Affairs & Federal Mgmt., Comm. on Homeland Security & Gov'tal Affairs, 114th Cong., 1st Sess. at 2 (Apr. 28, 2015) http://www.hsgac.senate.gov/hearings/examining-the-proper-role-of-judicial-review-in-the-federal-regulatory-process ("The [*Chevron*] doctrine quickly gained currency on the D.C. Circuit, particularly among Reagan appointees like then-judges Antonin Scalia and Kenneth Starr, who recognized it as a "landmark" and a "watershed," respectively, for deregulation."). Another contributing factor was aggressive promotion of *Chevron* in briefs filed by Reagan administration lawyers. *See* Thomas W. Merrill, *The Story of* Chevron: *The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399, 426 (Peter L. Strauss ed. 2006).

[36] Jeremy W. Peters, *Building Legacy, Obama Reshapes Appellate Bench*, N.Y. TIMES, Sept. 13, 2014.

In short, a change in the *permanent* law of judicial review is inherently an unsound strategy for promoting a policy agenda that depends heavily on the contingency of the philosophy of the incumbent administration. This is essentially the point that then-Professor Scalia made when the Reagan administration was about to take office: He suggested that boosters of the Bumpers Amendment should reconsider their support for that bill, because if it were enacted it would retard the pursuit of their own policy agenda:

> At a time when the GOP has gained control of the executive branch with an evident mandate for fundamental change in domestic policies, Republicans, and deregulators in general, seem to be delighting in the prospect of legislation which will make change more difficult. … It would be bad enough, from the viewpoint of an enlightened deregulator, if Bumpers merely eliminated the Reagan administration's authority to give content to relatively meaningless laws. Worse still, however, Bumpers does not eliminate that authority but merely transfers it to federal courts which, at the operative levels, will be dominated by liberal Democrats for the foreseeable future![37]

A more recent analog derives from Congress's experience with the Line Item Veto Act of 1996. The sponsors of this Act hoped that it would enable the President to take the lead in trimming allegedly wasteful spending from the federal budget (a power that many state governors possess). The Act did not work out as they had anticipated. A principal reason for their dissatisfaction was that, as matters worked out, the Act was implemented by a reelected President Bill Clinton, rather than by a presidential administration that would be more sympathetic to their political goals. Thus, when the Supreme Court held the Act unconstitutional in 1998,[38] "[e]ven some Republicans who eagerly voted for the law in 1996 breathed a sigh of relief."[39] The lesson to be learned, I submit, is that dissatisfaction with the manner in which power is exercised in the context of the political conditions of the moment is an unwise, if not self-defeating, basis for making changes in enduring structural legislation such as the APA.

D. Possible Amendment of the Bill to Incorporate *Skidmore* Standards

The subcommittee memo raises the question of whether *Skidmore* standards should be added to the bill, as suggested by Professors Beermann and Duffy in March. In my view, commingling such a provision with the "de novo" provision that SOPRA already contains would generate enormous uncertainty and confusion. "De novo" review *means* consideration without regard to what the agency said. Certainly that was the premise of Senator Bumpers's original amendment, which sought to add a "de novo" mandate in order to *overcome* the then-prevailing *Skidmore* approach. I cannot see what congressional goals could be furthered by an APA amendment that would send such mixed messages.

A more straightforward bill would emerge if the subcommittee were to omit the word "de novo" altogether and simply undertake to codify the *Skidmore* approach. In the abstract, the resulting bill would be far superior to the present bill. However, I cannot foresee any likelihood

---

[37] Antonin Scalia, *Regulatory Reform – The Game Has Changed*, REGULATION, Jan./Feb. 1981, at 13, 13.

[38] Clinton v. City of New York, 524 U.S. 417 (1998).

[39] Andrew Taylor, *Few in Congress Grieve as Justices Give Line Item Veto the Ax*, CONG. Q. WEEK. REP., June 27, 1998, at 1747, also available at http://library.cqpress.com/cqalmanac/document.php?id=cqal98-0000191043.

that the A1P sponsors would agree to rewrite the bill to endorse *Skidmore* deference, because in that event their rationale for passing it would largely evaporate. The results of the legislation (even assuming that courts would conscientiously live up to its prescription, which is a *very* uncertain assumption) would be simply too limited to fulfill the sponsors' goals and justify the congressional intervention. According to empirical studies, affirmance rates do not differ very much when courts apply *Chevron*, on the one hand, or *Skidmore*, on the other. Professor Pierce, summarizing the results of several studies, reports that agencies win between 64% and 81.3% of the time when courts of appeals apply *Chevron*, and between 55.1% and 70.9% of the time when they apply *Skidmore*.[40] This differential of about ten percent suggests that the choice of review standard may have s*ome* influence on a private party's chances of prevailing,[41] but the effect, if any, is not dramatic. At the Supreme Court level, the differential seems to be close to nonexistent: 76.2% under *Chevron* and 73.5% under *Skidmore*.[42] I seriously doubt that the A1P Senators and Representatives would embrace a bill that would have so limited an impact, scarcely qualifying as "restoring separation of powers."

I also would disagree with any suggestion that this hypothetical substitution of *Skidmore* for *Chevron* should be pursued in order to "clarify the law." In the first place, I am not very troubled by the common observation that the results of judicial review can be hard to predict. That is a normal state of affairs. To some extent, a disparity in results is exactly what we should hope and expect to see, because it is a sign of the very judicial independence that sponsors of SOPRA say they want. No judicial review standard leads to entirely predictable results, any more than is true of the "substantial evidence" test for review of jury verdicts, or the "clearly erroneous" test for review of district court findings. Society expects the courts to take account of broad realities such as the overall needs of the regulatory scheme.[43] Moreover, to the extent that case law doctrine is unruly, courts themselves are far better positioned to make adjustments than is a legislature. Statutory codification of scope of review standards carries a substantial risk of unintended consequences that are hard to correct subsequently.

On a narrower level of analysis, I would disagree with any suggestion that a bill that would substitute across-the-board *Skidmore* review for the present more variegated system would lead to more predictable results. Exactly the opposite is true. *Skidmore* review allows a court to consider the thoroughness, cogency, and consistency of the agency's reasoning as well as "*all* those factors which give it power to persuade." In other words, it is a vague, totality-of-circumstances test, as Justice Scalia said it is.[44] Indeed, the pre-*Chevron* regime was notorious for its inconsistencies and disorderliness. Thus, the hypothetical bill might well lead to a more predictable *review standard*, but not to more predictable *outcomes.* On the contrary, I adhere to

---

[40] Pierce, supra, at 84.

[41] Even that inference may not be correct. Possibly courts simply tend to find that interpretations rendered in the relatively formal types of actions typically reviewed under *Chevron* are more credible than interpretations rendered in the less formal types of action normally reviewed under *Skidmore*. This explanation could suggest that the rates of affirmance for these respective types of action would exist regardless of the prescribed standard of review.

[42] William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1143 (2008).

[43] Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1088-91 (1995).

[44] United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

the view that one of the *virtues* of the *Chevron* regime is that it tends to enable regulated parties to make plans on the assumption that the administering agency's opinion will usually control, whereas more openended judicial power would tend to encourage scattered tribunals across the country to reach diffuse results, resulting in splits of authority that often take years to resolve.[45]

Still, I suspect that this whole discussion of clarifying doctrine is beside the point, because I interpret SOPRA as undertaking primarily to *radically transform* judicial review practice, not merely simplify it.

II. JUDICIAL REVIEW OF AGENCY INTERPRETATIONS OF RULES

I now turn to what is now commonly known as "*Auer* deference" – the doctrine that when the meaning of a regulation is in doubt, the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." The doctrine gets its name from the 1997 case of *Auer v. Robbins*.[46] Before that time the same principle was known as "*Seminole Rock* deference," after a 1944 case, *Bowles v. Seminole Rock & Sand Co.*[47]

In big-picture terms, the policy issues regarding *Auer* deference are quite similar to those relating to *Chevron* and *Skidmore*. However, as the subcommittee memo explains, the possibility of abandoning *Auer* deference, while presumably retaining *Chevron* deference, has recently been raised by several Justices[48] and is a subject of much current debate. I will, therefore, address in some detail the distinctive issues presented by *Auer* deference. For this purpose I will draw upon testimony I presented in 2015 at a Senate subcommittee hearing devoted to that topic.[49] Presumably, however, this issue would only be relevant to SOPRA if that bill were modified considerably. If the bill were enacted as currently written, both *Chevron* and *Auer* would be overruled, and discussions about the distinctive nature of *Auer* deference would be moot.

A. The Development and Purposes of *Auer* Deference

As with statutory interpretation, judicial deference to agencies' interpretations of

---

[45] *See* Strauss, *One Hundred Fifty Cases Per Year*, *supra*.

[46] 519 U. S. 452 (1997).

[47] 325 U. S. 410 (1945).

[48] *See* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1211-13 (2015) (Scalia, J., concurring in the judgment); id. at 1213-25 (Thomas, J., concurring in the judgment); id. at 1210 (Alito, J., concurring in part and concurring in the judgment); Decker v. Northwest Envtl. Law Ctr., 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part); id. at 1339 (Roberts, J., joined by Alito, J., concurring); Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

[49] *See* Testimony of Ronald M. Levin, *Examining the Proper Role of Judicial Review in the Regulatory Process*, Hearing Before the Senate Subcomm. on Regulatory Affairs & Federal Mgmt., Comm. on Homeland Security & Gov'tal Affairs, 114th Cong., 1st Sess. (Apr. 28, 2015) http://www.hsgac.senate.gov/hearings/examining-the-proper-role-of-judicial-review-in-the-federal-regulatory-process. For an analysis that makes similar points, see Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer (forthcoming in U. CHI. L. REV.) (preliminary draft at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737.

regulations (as I will call them[50]) is a longstanding part of the administrative law tradition. Its roots can be traced back to the nineteenth century.[51] More importantly, *Seminole Rock* predated the APA itself, so it is scarcely a late-blooming development.

As noted, the canonical verbal formula derived from *Seminole Rock* and *Auer* is that the agency's interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." The formula is commonly understood to prescribe a level of deference comparable to that of *Chevron*. However, as in the case of statutory interpretation deference, *Auer* deference does not apply across-the-board. In particular circumstances, the courts may resort to *Skidmore* review rather than *Auer* in evaluating a given interpretation. Thus, in *Christopher v. SmithKline Beecham Corp.*,[52] the Court found reasons to measure a Department of Labor interpretation of a regulation on the basis of *Skidmore*. Thus, the scope of the "domain" of *Auer* is still very unsettled, even apart from the advent of calls by individual Justices for reappraisal of this whole area.[53]

Various writers articulate the rationale for *Auer* deference in differing ways. One common justification is that the agency probably knows what the regulation was intended to say, because the agency itself wrote it. To my mind this is not the strongest argument available. It will *sometimes* correspond to reality – often enough to suggest that SOPRA's across-the-board rejection of *Auer* deference is excessive. But there will be other instances in which the actual authors of a regulation have left the agency or have new responsibilities. Moreover, the agency's current objectives may be different from the ones that prevailed when the regulation was written; its incentive is to interpret the regulation in a manner that serves the former goals, not the latter ones.

To my mind, the strongest justifications run parallel to the pragmatic justifications for *Chevron*. The Court has said, for example, that such deference is important when a "regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'"[54] Indeed, another case says, "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[55]

---

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

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

[52] 132 S. Ct. 2156, 2168 (2012).

[53] *See generally* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 GEO. WASH. L. REV. 1449 (2011).

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

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

The ABA Administrative Law Section was mindful of this reasoning when, in 2011, it opposed a provision in the House version of the Regulatory Accountability Act (RAA)[56] that would (in effect) have abolished all deference to agencies' interpretations of regulations.[57] As the Section argued, "many regulations are highly technical, and their relationship to an overall regulatory scheme may be difficult to discern. Surely, when construing such a rule, a court should have the prerogative of giving weight to the views of the agency that wrote the rule and administers it."[58]

As with the deference doctrines that apply to statutory interpretation, *Auer* deference is not a blank check for agencies. Empirical studies indicate that, at least in lower courts, agency interpretations of regulations have been upheld under *Auer* at about the same rate as with the other standards of review discussed above. One study found affirmance rates of 76%.[59] A later study, examining more recent cases decided from 2011-14, suggested that the criticism of *Auer* in Supreme Court opinions has led to a downward trend in affirmance rates, ending up at 70.6%.[60] In the Supreme Court, in contrast, the affirmance rate when *Auer* is applied has been found to be much higher — around 91%.[61] I tend to think, however, that the data for lower courts is the more meaningful aspect of these results, because the Supreme Court *chooses* what cases it will hear. Regardless, it seems clear that lower courts do not perceive the Supreme Court's behavior as imposing as much discipline as the Court's own track record might lead one to expect.

B. Separation of Powers and the *Auer* Doctrine

In this statement, following the lead of the subcommittee's memo, I will focus on the criticisms of *Auer* offered by Justice Scalia, especially in his separate opinion in *Decker v. Northwest Environmental Defense Center*.[62] That opinion, which drew on the scholarship of Professor John Manning (Justice Scalia's former law clerk),[63] rested on considerations that were

---

[56] *See* H.R. 3010, 112th Cong. (2011). The provision under discussion here was § 7 (proposing to add § 706(b)(1) to the APA). The current version of the bill, already passed in the 114th Congress, is H.R. 185.

[57] Strictly speaking, the clause in question would have provided that a court shall not defer to an agency's interpretation of a regulation unless the agency used rulemaking procedures to adopt the interpretation. As the Section's comment letter explained, however, this would mean that the agency could never receive any deference for its interpretation of the regulation, because if it did resort to the notice and comment process, "the agency would actually be issuing a new regulation – it would not be interpreting the old one." ABA Sec. of Admin. L. & Reg. Prac., *Comments on H.R.3010, the Regulatory Accountability Act of 2011*, 64 Admin. L. Rev. 619, 668 (2012).

[58] *Id*.

[59] *See* 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).

[60] Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 OHIO ST. L.J. 813, 827 (2015)

[61] Eskridge & Baer, *supra*, at 1142

[62] 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part). In my Senate testimony (*supra*, at 12-13), I also responded to criticisms of *Auer* voiced by Justice Thomas in *Mortgage Bankers*, 135 S. Ct. at 1312-25 (Thomas, J., concurring in the judgment).

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

targeted specifically at deference to agency interpretations of regulations and did not pose a direct challenge to *Chevron* deference. More specifically, Justice Scalia argued in *Decker* that the proposition

> that the agency can resolve ambiguities in its own regulations … would violate a fundamental principle of separation of powers — that the power to write a law and the power to interpret it cannot rest in the same hands. …
>
> [w]hen an agency interprets its *own* rules … the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a "flexibility" that will enable "clarification" with retroactive effect. "It is perfectly understandable" for an agency to "issue vague regulations" if doing so will "maximiz[e] agency power."[64]

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

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

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

My reservation about the separation of powers critique, then, is not that it is necessarily mistaken, but rather that it is indeterminate. Since none of the restrictions specifically written

[64] 133 S. Ct. at 1341.

into the constitutional structure is directly applicable, the argument has to depend heavily on what one takes to be the spirit of the Constitution's separation of powers model. And, as Justice Anthony Kennedy once wrote in a different context, "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."[65]

In this connection it is important to recognize that when Professor Manning relied on the constitutional policy of separating law-writing and law-executing, the conclusion he drew was that agency interpretations of their own regulations should be subject to the *Skidmore* standard.[66] Justice Scalia, however, uses that policy to support the much more drastic step envisioned by SOPRA -- namely, the elimination of all judicial deference in reviewing such interpretations. That extension may raise countervailing separation of powers concerns of its own. Professor Manning viewed *Chevron* as a "constitutionally inspired canon of construction,"[67] basing that proposition on the passage in the *Chevron* opinion in which Justice Stevens cautioned the courts against being too quick to substitute their judgments for those of politically accountable administrators. In this statement, I have not contended that *Chevron* is itself constitutionally required, but Manning's line of argument does at least suggest that the separation of powers implications of Justice Scalia's quite transformative proposal cut two ways.

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

C. The Incentives Argument

The main policy argument that underlay Justice Scalia's challenge to *Auer* deference was the thesis that the deference prescribed in the case gives agencies an incentive to write regulations vaguely, so that they will then be able to adopt interpretations that have not undergone the rigors of the notice and comment process but will nevertheless receive the benefit of strong judicial deference. Justice Alito alluded to this possibility in his opinion for the Court in *Christopher*,[68] and I have met many administrative lawyers who take it seriously, even if they find little appeal in the constitutional arguments that Justice Scalia used in promoting it.

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

> [In my dissent in *United States v. Mead Corp*., 533 U.S. 218, 246 (2001),] I … predicted that the Court's decision would create a perverse incentive for agencies to adopt

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

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

[67] *Id*. at 623-27.

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

> bare-bones regulations, because acting by regulation showed that you were acting pursuant to congressional delegation. The agency could, with the benefit of substantial judicial deference, later interpret or clarify those regulations, by adjudication or even by simple agency pronouncement, without any bothersome procedural formality. The initial regulation having been adopted via notice-and-comment would earn *Chevron* deference, and the subsequent agency clarification would earn the so-called *Auer* deference. …
>
> Well, it's hard to confirm or to refute this particular prediction. I really don't know if agency rules have in fact become less detailed and more ambiguous since the Court's decision in *Mead*. I'm not even sure how one would measure that or how one would control for the various other factors that undoubtedly bear upon a regulation's clarity.[69]

Justice Scalia wrote these words before he announced a change of heart about *Auer* (which he himself had written but later disavowed), but he never distanced himself from this particular observation. Nor did he claim, in any of his separate opinions in the line of decisions running from *Talk America* through *Mortgage Bankers*, that the specific regulations underlying those cases were, in fact, examples of rules in which the incentive to be vague had played any part. Indeed, I have never seen, in the judicial or academic literature, *any* good evidence of a situation in which an agency has actually yielded to the incentive about which Justice Scalia has been warning.[70]

I do not mean to suggest that the incentive does not exist at all. It presumably does – but it surely does not exist in a vacuum. A myriad of factors may influence agencies in their decisions about how broadly or narrowly to write a given regulation. Some of those factors can militate toward specificity rather than vagueness. A good reason to be specific, for example, is to nail down a concrete application of the regulation, instead of leaving the question to be resolved through all the contingencies and delays that may accompany the implementation and enforcement process.[71] One can only conjecture about how these influences net out in the regulatory process.

As a practical matter, a court would have no good way to decide in a given case whether the agency had or had not yielded to the incentive that *Auer* deference is said to create. In the

---

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

[70] In *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994), which involved a dispute over the validity of a Medicare regulation, Justice Thomas's dissent charged that "the Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Id*. at 525 (Thomas, J., dissenting). One difficulty with using this remark to support the case against *Auer* is that the majority opinion (written by Justice Kennedy and joined by Justice Scalia, among others) read the regulation differently: "[T]he language in question speaks not in vague generalities but in precise terms about the conditions under which reimbursement is, and is not, available. Whatever vagueness may be found in the community support language that precedes it, the anti-redistribution clause lays down a bright line. …" *Id*. at 517 (opinion of the Court). Thus, on the threshold question of whether the regulation was vague at all, the example is at best contested rather than clear-cut. But even assuming it to be unduly vague, Justice Thomas provided no evidence for his suspicion about the agency's motives.

[71] According to one agency lawyer, "agencies have a strong interest in writing clear regulations. Agencies can effectively enforce only clear regulations; otherwise, they risk running afoul of fair notice and due process considerations [as well as APA procedural challenges]." Aditi Prabhu, *How Does Auer Deference Influence Agency Practices?*, ADMIN. & REG. L. NEWS, Winter 2015, at 11, 12-13.

abstract, virtually any regulation could have been written to be more specific than it actually was, but agencies often have very good reasons to refrain from trying to settle too much by regulation. It is largely for this reason that the federal courts have essentially abandoned any effort to force agencies to engage in rulemaking as opposed to adjudication.[72] The potential variables are far too elusive for a court to weigh knowledgeably.[73]

Thus, if the courts are going to overrule or modify *Auer* in order to counteract the incentive to write vague regulations that the doctrine is said to create, they will presumably have to do so on an across-the-board, or at least very broad, basis. Indeed, SOPRA as currently written does attempt to eliminate the doctrine in toto. A cost of any such sweeping action, however, would be that it inevitably would remove or at least diminish judicial deference in numerous situations in which the incentive to be vague played no actual role in the agency's calculus.

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

> is a valid concern, but it doesn't justify a blanket refusal to grant some deference, some leeway, to agency interpretations of their own regulations. The regulation may deal with a highly technical matter that the agency understands better than a court would; its interpretation may be in the nature of explanation and clarification rather than alteration. Scalia proposes that in all cases in which an agency's interpretation of its own regulation is challenged, the reviewing court should resolve the challenge "by using the familiar tools of textual interpretation." Those tools are notably unreliable, especially when dealing with a technical regulation. In *Decker*, the regulation concerned storm water runoff from logging roads.[74]

* * * * * *

In conclusion, judicial review is an important topic for the subcommittee to study, and possibly to make the subject of legislation. I believe, however, that SOPRA is seriously misconceived, and I urge the subcommittee not to proceed with it. Thank you again for the opportunity to testify, and I would be happy to respond to any questions the subcommittee may have.

---

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

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

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