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## ARTICLE

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### LEGISLATING IN THE SHADOWS

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*Federal agencies are deeply involved in both the foreground and shadows of legislative drafting. In the foreground, agencies draft the substantive legislation the Administration desires to submit to Congress. In the shadows, agencies provide confidential “technical drafting assistance” on legislation that originates with congressional staffers. This technical drafting assistance provides Congress with agency expertise on the subject matter, which helps Congress avoid considering legislation that would unnecessarily disrupt the current statutory scheme. It also allows the agency to play an active—yet opaque—role in drafting legislation from the very early stages. In fact, the empirical findings presented in this Article, based on extensive interviews and surveys at some twenty federal agencies, suggest that agencies provide technical drafting assistance on the vast majority of proposed legislation that directly affects them and on most legislation that gets enacted.*

*The underexplored yet widespread practice of legislating in the shadows has important implications for administrative law theory and doctrine, as well as the conventional principal–agent bureaucratic model. On one hand, this phenomenon*

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*perhaps supports the growing scholarly call that agencies should be allowed to engage in more purposivist interpretation (than their judicial counterparts) because of their expertise in legislative history and purpose as well as their role in statutory drafting. On the other, this phenomenon may cast some doubt on the foundations for judicial deference to agency statutory interpretations. Agencies are usually intimately involved in drafting legislation that ultimately delegates—to themselves—the authority to interpret that very legislation. In other words, many of the criticisms of agency self-delegation raised against Auer deference could apply with some force to Chevron deference as well. At the very least, scholars should consider more closely the administrative state’s role in drafting legislation—especially drafting legislation in the shadows—when evaluating the level of deference courts should give to agency statutory interpretations. Such reconsideration is particularly warranted given the lack of transparency implicated by legislating in the shadows.*

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## INTRODUCTION

Federal agencies help draft statutes. They are involved in the foreground of the legislative process when, in coordination with the White House, they propose substantive legislation to Congress that advances agency and Administration objectives, and when they weigh in substantively with agency and Administration policy positions on pending legislation. Federal agencies also help draft statutes in the background by providing “technical drafting

assistance” on legislation that originates from congressional staffers. Such drafting assistance is often provided confidentially—without White House oversight, much less public notice and comment—and continues to be provided throughout the legislative process. By sharing their subject matter expertise, the agency conducts technical drafting assistance that helps Congress avoid pursuing legislation that would unnecessarily disrupt the current statutory and regulatory scheme. But it also allows the agency to play an active, nonpublic role in drafting legislation from the very early stages.

In fact, the empirical findings presented in this Article, based on extensive interviews and surveys at some twenty federal agencies, suggest that agencies provide technical drafting assistance on the vast majority of the proposed legislation that directly affects them and on most legislation that gets enacted.<sup>1</sup> It turns out that the vast majority of legislative drafting conducted by federal agencies today is not agency-initiated substantive legislation, but “legislating in the shadows” through confidential agency responses to congressional requests for technical drafting assistance.

This underexplored but widespread practice of legislating in the shadows is yet another departure from the “lost world of administrative law,” further revealing “an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation.”<sup>2</sup> This phenomenon also complicates the bureaucratic principal–agent model that positive political theorists have developed over decades,<sup>3</sup> especially in the context of agency statutory interpretation and judicial review thereof.<sup>4</sup>

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<sup>1</sup> Many findings discussed in this Article were first reported by the author in an independent report commissioned by the Administrative Conference of the United States (ACUS). See generally Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting*, ADMIN. CONF. U.S. (2015), <https://ssrn.com/abstract=2826146> [<https://perma.cc/V3B6-88J4>] [hereinafter Walker, *Federal Agencies in the Legislative Process*]. See also Adoption of Recommendations, 80 Fed. Reg. 78,161 (Dec. 16, 2015) (summarizing ACUS’s findings and recommending that federal agencies should “endeavor to provide Congress with technical drafting assistance when asked”).

<sup>2</sup> Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014).

<sup>3</sup> See, e.g., Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 765–72 (1984) (applying principal–agent theory to the administrative state and detailing asymmetries and other complications); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1043 (2006) (“The basic principal–agent dilemma, of which legislative delegation is a subspecies, involves a tradeoff between the principal’s desire to exploit the agent’s informational advantages and the principal’s concern that the agent will pursue divergent goals.”). See generally Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203 (2005) (reviewing political science literature on the evolution of the principal–agency theory regarding the administrative state).

<sup>4</sup> For a literature review of the application of positive political theory to agency statutory interpretation, see Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285 (Daniel A. Farber & Anne Joseph

After Part I of the Article presents the findings from the study based on interviews and surveys of agency officials, Part II focuses on two implications of legislating in the shadows for administrative law theory and doctrine.

First, this phenomenon generally lends support to the growing scholarly call that agencies should be allowed to engage in more purposivist interpretation (than their judicial counterparts) because of their expertise in legislative history and their substantial role in statutory drafting.<sup>5</sup> In other words, agencies' extensive involvement in the legislative process—often from the very outset and then through enactment—better equips those same agencies to understand the purpose of the legislation than the more generalist federal courts. Thus, agencies should have more flexibility to take into account such statutory purpose.

Second, and conversely, legislating in the shadows may cast further doubt on the foundations for judicial deference to agency statutory interpretations. As the findings in this Article underscore, agencies are intimately involved in drafting legislation that ultimately delegates the authority to interpret that legislation to the same agencies. It might therefore be more appropriate to set the interpretive presumption against *Chevron* deference<sup>6</sup> and, instead, accord only *Skidmore* weight based on the agency's "power to persuade."<sup>7</sup> After all, many of the agency self-delegation criticisms raised against *Auer* deference<sup>8</sup> could apply with some force to agency statutory interpretation and *Chevron* deference as well. Concerns of "administrative collusion" are amplified when one considers the agency's substantial role in providing confidential technical

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O'Connell eds., 2010). To be sure, the bureaucratic principal-agent model was already complex. For instance, federal agencies have at least two principals, namely Congress and the President. *See, e.g.*, Miller, *supra* note 3, at 211-12 (discussing Congress and the President as "jealous" principals in the context of the principal-agent model); Moe, *supra* note 3, at 768-69 (noting that agencies have multiple principals because they are overseen by both the President and congressional committees). Moreover, empirical evidence suggests that even this dual-principal model is overly simplistic. *See, e.g.*, Brigham Daniels, *Agency As Principal*, 48 GA. L. REV. 335, 341 (2014) (noting that the relationship between "administrative agencies and the elected branches . . . is a good deal more complicated than the conventional understanding assumes"); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1491-1501 (2015) (arguing that the dominant notion of Congress delegating power to the executive is complicated by the concept of the "collective Congress").

<sup>5</sup> *See infra* Section II.A (reviewing the relevant literature).

<sup>6</sup> *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (instructing courts to defer to an agency's reasonable interpretation of an ambiguous statute the agency administers).

<sup>7</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>8</sup> *See, e.g.*, *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (criticizing *Auer* deference because "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases"); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (asserting that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation").

drafting assistance.<sup>9</sup> This additional concern over agency self-dealing may be the last straw for *Chevron*'s demise in light of the constitutional, normative, and administrability concerns already being discussed in the literature, on Capitol Hill, and at the Supreme Court.<sup>10</sup> At the very least, this phenomenon could lend further support for Chief Justice Roberts's narrower, context-specific approach to *Chevron* deference as articulated in his dissent in *City of Arlington v. FCC*<sup>11</sup> and his opinion for the Court in *King v. Burwell*.<sup>12</sup>

In light of the current practice of legislating in the shadows, open-government concerns might heighten the need to revisit judicial review of agency statutory interpretation. After all, transparency is a core value in administrative law. Yet, as documented in Part I, the provision of agency technical drafting assistance generally takes place in secret, often before the bill is even introduced, and with an expectation that the congressional request and agency response will remain confidential. Indeed, the Office of Management and Budget (OMB) does not require preclearance of technical drafting assistance, and OMB is seldom kept in the loop (though the political appointees in the agency's legislative affairs office are almost always involved in the process). To advance administrative law's critical values of public transparency and open governance, one could argue that the technical drafting assistance process should take place in the sunshine—just like most other agency actions. As discussed in Part III, however, the costs of such transparency are arguably too great. Such transparency would likely discourage Congress from even consulting with agency experts at an early stage in the legislative process, when the legislation is more easily reworked and thus where input from agency subject matter experts is most valuable.

Instead, this Article concludes that the better solution to address these transparency concerns may be to rework the level of deference under which courts review agency statutory interpretations. Put differently, since agencies help legislate in the shadows, perhaps the grand compromise needed to recalibrate the modern administrative state is for courts to allow agencies to continue to provide technical drafting assistance to Congress and engage in

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<sup>9</sup> See Rao, *supra* note 4, at 1504 (“By fracturing the collective Congress and empowering individual members, delegation also promotes collusion between members of Congress and administrative agencies.”).

<sup>10</sup> See *infra* Section II.B (reviewing relevant literature on criticisms of the *Chevron* doctrine).

<sup>11</sup> See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880-81 (2013) (Roberts, C.J., dissenting) (arguing that when determining “whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue,” the Court should “ask[] whether Congress had ‘delegat[ed] authority to the agency to elucidate [the] *specific provision* of the statute by regulation’”).

<sup>12</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (“Whether those credits are available on Federal Exchanges is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.” (internal quotation marks omitted)).

more purposivist statutory interpretation, yet to review such interpretations without the highly deferential *Chevron* standard. Or, at least, for courts to only apply *Chevron* deference—as the Chief Justice would prefer—when the reviewing court is satisfied that Congress as a whole intended to delegate to the agency interpretive authority regarding the particular statutory provision. Such technical drafting assistance would continue to take place in the shadows to encourage congressional drafters to leverage agency expertise, but agencies would have fewer incentives for self-dealing in the absence of highly deferential judicial review of subsequent agency statutory interpretations.

## I. STUDY OF AGENCY TECHNICAL DRAFTING ASSISTANCE

### A. Background and Relevant Literature

Despite the administrative state's substantial role in the legislative process, we know very little about how agencies actually interact with Congress in the legislative process. We have barely begun to incorporate empirical realities into our theories of agency statutory interpretation and administrative governance.<sup>13</sup> To be sure, many have recognized over the years that the administrative state plays an expansive role in drafting legislation.<sup>14</sup> For instance, Justice Felix

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<sup>13</sup> Studies by Jarrod Shobe and Ganesh Sitaraman are two notable and recent exceptions. In 2014, Shobe conducted a fifty-five-question survey of fifty-four agency staffers involved in legislative matters at fourteen executive departments and eleven independent agencies. Jarrod Shobe, *Agencies As Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 460-67 (2017). The Shobe study explored the role of federal agencies in the legislative process, including some exploration of their role in providing technical drafting assistance. *Id.* at 467-82. Similarly, the Sitaraman article details the legislative process generally—including some discussion of the role of federal agencies in providing substantive and technical drafting assistance. Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 124-43 (2015). His article is “derived in part from [his] experiences serving as senior counsel to Senator Elizabeth Warren.” *Id.* at 79 n.\*.

<sup>14</sup> See, e.g., JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 221 (2012) (noting that “Congress often depended upon the departments to draft major legislation” in the 1800s, and even the legislation creating the Department of the Interior was drafted by Treasury at the request of the Ways and Means Committee); Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 582 (2009) (discussing agency involvement in drafting legislation, how an agency shares its interpretation with legislative staff, and how Congress relies on agencies when enacting legislation); Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 656-61 (2012) (discussing the role of federal agencies in the legislative process and asserting that “[a]gency sensitivity to Congress's workways reflects an often-intimate involvement in the legislative process”); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 340-41 (2013) (discussing the role of federal agencies in preparing bills, appearing at committee hearings, and helping to develop bills' legislative histories); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 347-49 (1990) [hereinafter Strauss, *Agency Interpretation*] (discussing the significance of an agency's relationship to Congress in understanding legislative histories).

Frankfurter observed back in 1942 that “[f]rom the very beginning of our government in 1789, federal legislation like that now under review has usually not only been sponsored but actually drafted by the appropriate executive agency.”<sup>15</sup> In 1961, James Craig Peacock echoed Justice Frankfurter’s observation:

For it cannot be overlooked that, in Washington, at least, the extent to which the spade work in the actual drafting of important legislation has been shifted all the way back to the agency level, is a major phenomenon of present day government . . . . Indeed, the executive branch of the Government is no longer even expected to confine itself to the mere making of recommendations or proposals. It is practically expected to implement them in the form of already drafted bills.<sup>16</sup>

In other words, “[b]ecause agencies have day-to-day experience with the legal, political, and operational aspects of the laws,” as Clinton Brass of the Congressional Research Service has explained, “[i]t is not surprising that a fair proportion of the legislation that is considered in the legislative process tends to have been drafted or influenced at some point by executive branch employees, including both career civil servants and political appointees.”<sup>17</sup>

Recent empirical work has provided additional insight into the role of federal agencies in the legislative process. For instance, Lisa Bressman and Abbe Gluck have surveyed over one hundred congressional staffers and reported that “25% and 34% of our respondents told us that first drafts are typically written by, respectively, the White House and agencies, or policy experts and outside groups, like lobbyists”; however, “[e]mpirical work is lacking for the details of this account . . . .”<sup>18</sup> In another article, the author

<sup>15</sup> *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 177 (1942) (Frankfurter, J., dissenting).

<sup>16</sup> JAMES CRAIG PEACOCK, *NOTES ON LEGISLATIVE DRAFTING* 2-3 (1961); accord DONALD HIRSCH, *DEP’T OF HEALTH & HUMAN SERVS., DRAFTING FEDERAL LAW* 1 (1980) (“Virtually all major programs of federal financial assistance, and most of the significant regulatory statutes, have in their ancestries a proposal made to Congress by an executive agency, customarily in the form of a draft bill. Generally speaking, these proposals are developed with greater formality than bills written within Congress.”).

<sup>17</sup> Clinton T. Brass, *Working in, and Working with, the Executive Branch*, in *LEGISLATIVE DRAFTER’S DESKBOOK: A PRACTICAL GUIDE* 271, 275 (Tobias A. Dorsey ed., 2006); accord JACK DAVIES, *LEGISLATIVE LAW AND PROCESS IN A NUTSHELL* § 25-3 (3d ed. 2007) (noting that “[g]overnment agencies bring many bills to every legislature”); Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 *COLUM. L. REV.* 1143, 1146 (2012) [hereinafter Strauss, “*Deference*” *Is Too Confusing*] (observing that for most legislation “[t]he agency may have helped to draft the statutory language, and was likely present and attentive throughout its legislative consideration”).

<sup>18</sup> Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 *STAN. L. REV.* 725, 758 (2014) [hereinafter Bressman & Gluck, *Part II*]; see also 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, 998-1010 (2013) [hereinafter Gluck & Bressman, *Part I*].

similarly surveyed over one hundred federal agency *rule* drafters (not agency legislative drafters), and their responses reinforce that federal agencies play an important and substantial role in the legislative process.<sup>19</sup> According to the author's survey, about four in five (78%) agency rule drafters indicated that their agency always or often participates in a technical drafting role for statutes their agency administers (and another 15% indicated "sometimes"); roughly three in five (59%) reported that their agency always or often participates in a policy or substantive drafting role for the statutes they administer (and another 27% indicated "sometimes").<sup>20</sup> In other words, recent empirical work confirms what has long been noted anecdotally in the literature and what anyone who has participated in the legislative process has no doubt observed firsthand: federal agencies are involved regularly and extensively in the legislative process.<sup>21</sup>

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(detailing survey findings of congressional drafters on agency involvement in legislative process); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600 (2002) (discussing responses from a case study of legislative drafting in the Senate Judiciary Committee about the role of agency officials in drafting statutes and conducting legal research). And Judge Richard Posner has recently joined Professors Bressman and Gluck in calling for more empirical investigation into the role of federal agencies in the legislative process. See RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 102 n.33 (2016) ("An interesting subject of further study would be the legislative drafters in federal agencies and in lobbyist firms.").

<sup>19</sup> See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1036-38 (2015) [hereinafter Walker, *Inside Agency Statutory Interpretation*] (detailing findings from a survey of 128 agency rule drafters that found "agencies play a significant role in the technical and substantive drafting of statutes and even some role in the creation of legislative history").

<sup>20</sup> *Id.* at 1037 & fig.6. These responses are no doubt conservative estimates of agency involvement with Congress, as the agency officials surveyed were regulatory personnel, not necessarily agency officials who are actively involved in the legislative process. See *id.* (noting lower rates of personal participation in the legislative process from the agency rule drafters surveyed). Moreover, about one in four (24%) respondents indicated that their agency participates "in drafting legislative history (e.g., floor statements, committee reports, conference reports, hearing testimony and questions, etc.) of statutes the agency administers." *Id.* at 1037-38.

<sup>21</sup> Moreover, in the 1970s several empirical studies were conducted on the role of federal agencies in drafting substantive legislative proposals. See DAVIES, *supra* note 17, § 25-3 (focusing solely on "[a]gency bill making"); HIRSCH, *supra* note 16, at vii (explaining its purpose, along with an accompanying seminar, "to train program lawyers of what used to be the Department of Health, Education, and Welfare, so that under the guidance of experienced legislative draftsmen they could help write the bills, in the areas of their counseling experience, for HEW's annual legislative program"); PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE 5-95 (Reed Dickerson ed., 1973) (exploring further agency-initiated substantive legislation); Brass, *supra* note 17, at 271-93 (focusing primarily on agency's role in substantive legislative activities); Robert S. Gilmour, *Central Legislative Clearance: A Revised Perspective*, 31 PUB. ADMIN. REV. 150, 150-58 (1971) (exploring the process within the agency that takes place prior to seeking legislative clearance from the Executive Office of the President). Perhaps the most ambitious study to date comes from the American Bar Association's Standing Committee on Legislative Drafting which, under the direction of Reed Dickerson, commissioned the editors of the *Catholic University Law Review* to conduct interviews and develop case studies on how federal agencies draft and advocate for agency-initiated

Before turning to the role of federal agencies in providing technical drafting assistance, it is helpful to situate that process within the administrative state's larger legislative role.<sup>22</sup> Federal agencies engage in two categories of legislative activities: "substantive" and "technical."

An executive agency's "substantive" legislative activities are generally governed by the OMB coordination and preclearance process under Circular A-19.<sup>23</sup> OMB considers the following to be substantive legislative activity: the agency's annual legislative program, any agency "proposed legislation," and any agency legislative "report."<sup>24</sup> "Proposed legislation" is defined broadly to include "[a] draft bill or any supporting document . . . that an agency wishes to present to Congress for its consideration" as well as "any proposal for or endorsement of Federal legislation" that the agency desires "to transmit to Congress, or to any Member or committee, officer or employee of Congress, or staff of any committee or Member, or to make available to any study group, commission, or the public."<sup>25</sup> "Report" includes "[a]ny written expression of official views prepared by an agency on a pending bill for (1) transmittal to any committee, Member, officer or employee of Congress, or staff of any committee or Member, or (2) presentation as testimony before a congressional committee."<sup>26</sup>

In other words, substantive legislative activity involves the agency expressing a policy or substantive view on legislation, including the introduction of its own proposed legislation. These activities—at least for executive agencies—generally require White House preclearance; it may also require interagency coordination.<sup>27</sup> The White House follows a similar process when soliciting agency feedback to be included in Statements of Administration Policy (SAPs) for major bills pending in Congress.<sup>28</sup>

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substantive legislation. The *Catholic University Law Review* published its nearly 200-page report in 1972. *The Catholic University Study of Federal Legislative Drafting in the Executive Branch*, 21 CATH. U. L. REV. 703 (1972). The report presented findings as to the role of the administrative state in the legislative process at seven federal agencies. *Id.* at 709-10. Like nearly all of the scholarship and empirical work done to date, these rich case studies focused almost exclusively on agency-initiated substantive legislation. *See id.* at 705-06 (explaining that the ABA-commissioned study "concentrate[d] on legislative proposals originating in about a half dozen representative agencies").

<sup>22</sup> For a more comprehensive treatment on which this summary draws, see generally Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 5-11.

<sup>23</sup> Office of Mgmt. & Budget, Exec. Office of the President, Circular A-19: Legislative Coordination and Clearance (last revised Sept. 20, 1979), [https://www.whitehouse.gov/omb/circulars\\_a019/](https://www.whitehouse.gov/omb/circulars_a019/) [<https://perma.cc/DQ4A-VEHR>] [hereinafter OMB Circular A-19].

<sup>24</sup> *Id.* §§ 6-7.

<sup>25</sup> *Id.* § 5(c).

<sup>26</sup> *Id.* § 5(e).

<sup>27</sup> *See id.* § 8 (detailing the OMB clearance process for agency proposed legislation and reports); *see also id.* § 9 (detailing the interagency consultation process).

<sup>28</sup> *See* Memorandum from the Office of Mgmt. & Budget on Legislative Coordination & Clearance to the Heads of Dep'ts & Agencies 3 (Apr. 15, 2013), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-12.pdf> [<https://perma.cc/L7RG-HT8G>] ("OMB prepares SAPs for major

Unlike substantive legislative activity, when agencies engage in technical drafting assistance they provide feedback on congressionally drafted legislation without taking an official substantive or policy position on the legislation. OMB contemplates that federal agencies will provide technical drafting assistance, but it does not require OMB preclearance for such technical feedback.<sup>29</sup> Nor does OMB define technical drafting assistance. Indeed, a proper definition has been elusive, as underscored during the interviews conducted for this study. Fortunately, Ganesh Sitaraman has provided a helpful definition:

Technical assistance refers to help from the executive branch on specific (hence technical) policy or drafting issues. For example, the head of an office at the FDA can tell congressional staff how existing provisions are being interpreted, how a suggested draft would change that interpretation, what the policy consequences would be, and how resource-intensive a new policy would be for the agency. Technical assistance can also extend to the agency drafting, editing, or commenting on legislative language.<sup>30</sup>

As the Administrative Conference of the United States (ACUS) has further explained, “Congress frequently requests technical assistance from agencies on proposed legislation. Congressional requests for technical assistance in statutory drafting can range from review of draft legislation to requests for the agency to draft legislation based on specifications provided by the Congressional requester.”<sup>31</sup> The findings from this study, summarized in Section I.B, shed unprecedented empirical light on the role of federal

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bills scheduled for House or Senate floor action in the coming week, including those to be considered by the House Rules Committee. In addition, SAPs are sometimes prepared for so-called ‘noncontroversial’ bills considered in the House under suspension of the rules. SAPs are prepared in coordination with other parts of OMB, the agency or agencies principally concerned, and other EOP units.”)

<sup>29</sup> Instead, OMB Circular A-19 merely instructs agencies to keep OMB apprised of such activities and to make clear to the congressional requester that the agency feedback does not represent the substantive views of the agency or the Administration. OMB Circular A-19, *supra* note 23, § 7(i). To do that, agencies typically provide a disclaimer along the following lines: “This technical drafting assistance is provided in response to a congressional request and is not intended to reflect the viewpoint or policies of any element of the Agency, the Department, or the Administration.” Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 9. Moreover, the findings from this study reveal that the Circular A-19 notice requirement for technical drafting assistance is routinely neither followed by agencies nor enforced by OMB—and that agency technical drafting assistance is typically done on a confidential basis.

<sup>30</sup> Sitaraman, *supra* note 13, at 107; *accord* Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,161-62 (Dec. 16, 2015) (“Rather than originating with the agency or the Administration, in the case of technical assistance, Congress originates the draft legislation and asks an agency to review and provide feedback on the draft. Circular A-19 advises agencies to keep OMB informed of their activities and to clarify that agency feedback does not reflect the views or policies of the agency or Administration.”).

<sup>31</sup> Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015).

agencies in the legislative process and suggest a number of implications for theories of agency statutory interpretation and judicial review thereof, which are further discussed in Parts II and III.

### B. Findings from the Empirical Study

Despite some prior investigation into the role of federal agencies in proposing substantive legislation for congressional consideration, virtually no work has been done until now to document the role of the administrative state in legislating in the shadows via agency technical drafting assistance.<sup>32</sup> In 2015, ACUS sought to remedy that deficiency by commissioning a study, which the author conducted, on agency technical assistance in statutory drafting. To better understand the process, the author met with agency officials at some twenty executive departments and independent agencies for over sixty hours of interviews. Ten of these agencies agreed to participate on the record: the Departments of Agriculture; Commerce; Homeland Security; Education; Energy; Health and Human Services; Housing and Urban Development; and Labor, as well as the Federal Reserve and the Pension Benefit Guaranty Corporation.<sup>33</sup> The participating agencies then responded to an anonymous follow-up survey that consisted of forty questions concerning their technical drafting assistance processes and practices.<sup>34</sup>

The findings from this study are set forth in the ninety-page final report that the author submitted to ACUS,<sup>35</sup> which also formed the basis for a set of recommendations ACUS adopted and published in the Federal Register.<sup>36</sup> Prior drafts of the report were discussed at two separate meetings of the ACUS Rulemaking Committee, circulated to the various agencies participating in the study and other interested parties for comment and review, and posted on the ACUS website for public comment.<sup>37</sup> Those findings will not be repeated in full here. Instead, this Part focuses on summarizing the findings most relevant for the purposes of this Article and depicting how technical assistance is

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<sup>32</sup> See Sitaraman, *supra* note 13, at 107, 107-08 n.155 (reviewing literature and concluding that “[d]espite its importance in the drafting process, technical assistance has hitherto only been mentioned in passing in legal scholarship—and even then, infrequently”).

<sup>33</sup> See Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 11-12 (detailing study methodology). Individual overviews of these agencies’ processes for providing technical drafting assistance are included as Appendices B–K to the ACUS report. *Id.* at 48-90.

<sup>34</sup> The survey and full responses are reproduced as Appendix A to the ACUS report. *Id.* at 43-47. In this Article, the questions (and the relevant subquestions) from the survey are cited to with a prefix “Q.”

<sup>35</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* 1.

<sup>36</sup> Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,161-63 (Dec. 16, 2015).

<sup>37</sup> For the various public drafts of the report and recommendations, meeting minutes, and other project documents posted on the ACUS website, see *Technical Assistance by Federal Agencies in the Legislative Process*, ADMIN. CONF. OF U.S., <https://www.acus.gov/research-projects/technical-assistance-federal-agencies-legislative-process> [<https://perma.cc/47LX-SCMH>].

typically requested, provided, and received—at least from the perspective of the agency officials interviewed and surveyed.

### 1. The Congressional Request

How the process begins is quite typical across agencies.<sup>38</sup> A staffer for a congressional committee or for an individual member of Congress—usually the former—reaches out to the agency and requests technical assistance on draft legislation. Sometimes, though rarely, the request comes from a member of Congress directly, but oftentimes the staffer makes the request before the member has been presented with the draft bill. The congressional staffer usually has already drafted some proposed bill language and explains what that language attempts to accomplish. The staffer expects the agency to provide general feedback—often with suggested edits and redlines to the draft language. On rare occasions, the congressional staffer has not yet drafted the bill and instead provides a set of specifications for the legislation, with the request that the agency develop the first draft.

Most of these requests for technical drafting assistance occur before the proposed legislation has been introduced in Congress, though sometimes the initial request arrives after the legislation has been introduced during, for instance, the committee markup stage. (Sometimes the agency offers technical assistance on proposed legislation without an express congressional request.) In all of these instances, the congressional requester generally expects the request and response to remain confidential. That expectation of confidentiality was repeatedly emphasized in the interviews with agency officials. Seldom does the technical drafting assistance process end with the initial response. The agency routinely remains involved in providing technical drafting assistance—often coupled with substantive legislative assistance via the OMB process—as the proposed legislation works its way through the legislative process.

The agency officials interviewed underscored that the technical drafting assistance process is quite informal and often driven by existing relationships between congressional staffers and various agency officials. One agency official, for instance, remarked, “When the real work gets done, it’s the subject matter experts at the agency and at the congressional committee that interact. I can guarantee you that they have their direct lines.”<sup>39</sup> These informal communications notwithstanding, the congressional requester’s initial formal agency contact is typically the agency’s legislative affairs office; this is the agency’s official liaison with Congress and manages all agency communications

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<sup>38</sup> The findings with respect to the congressional request process summarized here are set forth in greater detail in Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 12-16, 33-35.

<sup>39</sup> *Id.* at 13.

and interactions with the Hill.<sup>40</sup> For executive branch agencies, this office consists mainly of, or at least is directed by, political appointees.

It is important to note that although these requests are officially for “technical” drafting assistance, the agency officials interviewed repeatedly emphasized that the congressional staffer often really also wants to receive the agency’s substantive feedback on the proposed legislation. Sometimes, the agency officials explained, the congressional staffer just wants to know if the proposed legislation would make good policy. Other times, as one official explained, “the [congressional] staffer wants to sell it to the Member and being able to say that the agency says it’s okay or has worked on it” helps make that sale to the staffer’s boss.<sup>41</sup>

In sum, this technical drafting assistance process takes place confidentially, often before legislation has even been introduced in Congress, in an informal process between agency and congressional personnel with a preexisting working relationship. During this process, moreover, the congressional staffer does not want just “technical” assistance, but also “substantive” feedback—at least informally and off the record—that OMB Circular A-19 arguably contemplates should go through White House preclearance.

Indeed, even the agency officials interviewed expressed confusion about the difference between technical and substantive feedback. As one agency official put it, “The technical–substantive distinction involves a lot of judgment; it’s a smell test.”<sup>42</sup> Moreover, a comment by one agency official interviewed for the Shobe study echoes a number of comments made by agency officials interviewed for this study: “The more policy oriented it gets the more levels of bureaucracy it has to be cleared through . . . . If I want to provide policy input but don’t want to go through a bunch of layers of bureaucracy then I pick up the phone.”<sup>43</sup> These findings illustrate some of the important aspects of how legislating in the shadows takes place.

The agencies also reported that the amount of technical drafting assistance on proposed legislation is substantial. Agency officials interviewed uniformly indicated that the number of congressionally drafted bills for which they provide technical assistance is much greater than the number of agency-initiated substantive bills (those that would go through the OMB Circular A-19

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40 In the anonymous follow-up survey, the agency respondents indicated that the agency’s legislative affairs staff is either always (40%), usually (50%), or often (10%) involved in the agency’s response. *Id.* at app. A (Q3(a)).

41 *Id.* at 34. In the anonymous follow-up survey, respondents either agreed (40%) or somewhat agreed (60%) that “what congressional staffers often really want is to know the agency’s substantive position on the proposed legislation.” *Id.* at app. A (Q6(d)).

42 *Id.* at 34.

43 Shobe, *supra* note 13, at 490.

preclearance process).<sup>44</sup> There also seemed to be a general consensus among agency officials interviewed that their agency provides technical assistance during the drafting phase on nearly all of the bills that ultimately get enacted that directly affect their agency. They seemed less confident about bills that only indirectly affect their agency, and feedback was mixed among agencies about appropriations legislation.<sup>45</sup>

These findings are consistent with prior empirical work. In particular, of the fifty-four agency staffers involved in legislative matters who were surveyed in 2014 as part of the Shobe study, almost two in three indicated that their agency plays “at least some role” in 100% of the legislation that is enacted in the areas covered by the agency; and nearly all of the remaining staffers indicated that their agency plays at least some role in 75% to 99% of such enacted legislation.<sup>46</sup>

## 2. The Agency Response

How agencies respond is also quite typical across agencies.<sup>47</sup> The agency officials interviewed uniformly indicated that their agency responds to just about every congressional request for technical drafting assistance that the agency receives—regardless of the political party affiliation of the requesting member (whether a part of the minority or majority party in Congress, or whether a member of the President’s party), the effect the legislation would have on the agency’s policy objectives, the deadline the congressional requester has set for response, the resources available to the agency to respond, the likelihood of such legislation actually being enacted, or any other factor. The agency respondents’ anonymous responses in the follow-up survey generally support these interview responses.<sup>48</sup>

At first blush, this finding may be surprising. After all, one may assume that politics—or at least policy preferences—would influence whether an agency decides to help a congressional requester on proposed legislation. But the agency officials underscored a number of reasons why the settled norm is to respond to virtually every request.<sup>49</sup> First and foremost, it is critical that

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<sup>44</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 13-14.

<sup>45</sup> The anonymous follow-up survey generally confirmed these impressions. *See id.* at 13-16 & fig.1.

<sup>46</sup> Shobe, *supra* note 13, at 482-83 & fig.8; *see also id.* at 476 & fig.5 (“Forty-eight respondents (89%) said that Congress often or always requests agency review, only one respondent said rarely (2%), and no respondents said never.”).

<sup>47</sup> The findings with respect to the agency response are set forth in greater detail in Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 16-26, 30-32.

<sup>48</sup> *See id.* at 16-20 & fig.2.

<sup>49</sup> *See also* Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015) (stating that providing Congress with technical drafting assistance is worthwhile because it “assists the agency in maintaining a healthy and productive relationship with Congress, ensures the proposed legislation

federal agencies maintain a healthy and productive working relationship with Congress. Indiscriminately providing technical drafting assistance helps on that front. Moreover, providing technical drafting assistance helps ensure that the proposed legislation does not unnecessarily disrupt the existing statutory (and regulatory) scheme. In other words, agencies provide technical drafting assistance on proposed legislation that will affect them to ensure that the legislation is technically correct—even if they do not necessarily agree with all, or even much, of the proposed legislation’s substance. As one of the agency respondents in the Shobe study observed,

Sometimes there are bills we don’t like, but we still try to make it the best we can. When we give technical assistance we are trying to help the drafter make the bill the best we can even if we don’t like it. If it ultimately passes it is better that we have input than not.<sup>50</sup>

Similarly, even if the proposed legislation is unlikely to be enacted, providing technical drafting assistance helps educate the congressional staffers about the agency’s existing statutory and regulatory framework. The importance of congressional educational efforts was a recurring theme during the agency interviews and in responses to the follow-up survey. And it became one of the main recommendations that ACUS ultimately adopted: encouraging agencies to be “actively engaged in educational efforts, including in-person briefings and interactions, to educate Congressional staff about the agencies’ respective statutory and regulatory frameworks and agency technical drafting expertise.”<sup>51</sup> Finally, one agency official noted that the agency provides technical drafting assistance because it serves as “a very good source of intelligence.”<sup>52</sup> By responding to nearly all technical drafting assistance requests from members of Congress and thus encouraging congressional staffers to submit such requests on any legislation they are contemplating, the agency is better able to anticipate, monitor, and respond to potential legislative proposals that could affect the agency and its regulatory activities.

Even though federal agencies respond to nearly every congressional technical drafting assistance request,<sup>53</sup> this does not mean that the agencies

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is consonant with the existing statutory and regulatory scheme, helps educate Congressional staff about the agency’s statutory and regulatory framework, and keeps the agency informed of potential legislative action that could affect the agency”).

<sup>50</sup> Shobe, *supra* note 13, at 477.

<sup>51</sup> Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015).

<sup>52</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 18.

<sup>53</sup> In the Shobe study, however, at least one agency official stated that the agency was less likely to provide assistance on a bill to which the agency was opposed or which had little chance of passage. See Shobe, *supra* note 13, at 478 (“[I]f our department hates a bill, we don’t want to fix it for them because from our perspective it can’t be fixed. If we strongly oppose the bill we are not going to help them make technical changes to make it better.”); *id.* at 479 (“There are lots of bills drafted in Congress

respond the same way to each request. The various factors listed above could still affect how much time, energy, and detail are provided for a particular request. For instance, as one agency official remarked, “The agency always responds to technical comments requests; we may put more or less time or resources into requests that come from, for example, our authorizing committees versus another, more tangentially-related committee.”<sup>54</sup> Another respondent nicely summarized the majority view shared during the interviews:

We strive to accommodate all requests and do so “blind” to the chamber, to the majority or minority status of the requesting party, to the nature of the request (i.e., from committee staff or Member staff), or [to] the likelihood of action. Those elements, however, may affect the priority placed on the assistance provided. If anything, scope and timing dictate the amount of assistance provided. Rarely, do we refuse to provide assistance, and only if there is good cause to do so (e.g., the request goes to legislation that is repugnant to public policy or the interests of the United States).<sup>55</sup>

Not surprisingly, ACUS formally endorsed the distinction between whether and how to respond to congressional requests, recommending that “[f]ederal agencies should endeavor to provide Congress with technical drafting assistance when asked,” but that “[a]gencies should recognize that they need not expend the same amount of time and resources on each request.”<sup>56</sup>

The agency officials expressed less consensus with respect to the format of an agency’s response to a technical drafting assistance request.<sup>57</sup> In the interviews, many agency officials explained that the process of providing technical assistance is highly informal and that much of it takes place orally instead of in writing. One agency official’s comment during an interview is reflective of at least a half dozen other agency officials who remarked on the form of the technical assistance: “Try to avoid redlining and avoid email. . . . Sometimes we draft up talking points or comments, but almost always try to find a way to just pick up the phone.”<sup>58</sup>

The anonymous follow-up survey, however, provided conflicting responses. The agency respondents indicated that the predominant form of feedback

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that are never going to see the light of day. Those are usually in response to a specific constituent’s request and we don’t really bother looking at those.”).

<sup>54</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 19.

<sup>55</sup> *Id.*; see also Shobe, *supra* note 13, at 506 (“[M]any respondents reported different interactions with congressional staff that are not from the same party as the President. Twenty-eight respondents (52%) said their interactions are often or always different, and another fourteen respondents (26%) said their interactions are sometimes different. This is despite the fact that many respondents said that they try to offer assistance to both parties.”); *id.* at 490 & fig.11.

<sup>56</sup> Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015).

<sup>57</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 24.

<sup>58</sup> *Id.*

takes place in writing.<sup>59</sup> For instance, all respondents indicated that their agency usually (30%) or often (70%) provides “[w]ritten feedback in a form other than a redline or actual draft legislation (for example, email or memo summarizing technical feedback).”<sup>60</sup> Similarly, four in five respondents indicated that their agency usually (40%) or often (40%) transmits an “[a]gency redline of draft legislation provided by congressional staffer,” with the remainder indicating sometimes.<sup>61</sup> By contrast, only three in five respondents indicated that their agency usually (20%) or often (40%) uses “[o]ral communication of comments and suggestions” to provide technical drafting assistance, with the remainder indicating that oral communication is sometimes (30%) or rarely (10%) used.<sup>62</sup> To be sure, these options are not mutually exclusive; the agency officials indicated during interviews and in their survey responses that there is often overlap between oral and written feedback. But even so, these survey responses indicate that the idea that agencies try to avoid providing written technical feedback seems misplaced, or at least overstated.

In light of the general congressional expectation that the technical drafting assistance process remain confidential, a review of the substance of agency responses to technical assistance exceeded the scope of this study. During the interviews and follow-up surveys, however, some general themes emerged. First, as detailed in subsection II.B.2, agency officials consistently expressed concern and frustration with the lack of congressional awareness of the existing statutory and regulatory scheme, the poor quality of legislative drafting by congressional staffers, and the rapid turnover among congressional staffers.<sup>63</sup> Because congressional staffers often propose legislation that would duplicate existing law or unintentionally conflict with existing statutory (and regulatory) schemes, the agency officials explained that their agency responses are often quite extensive and detailed. However, as discussed above, the length and depth of agency responses vary based on a number of factors, including the reasonableness of the deadline to provide technical drafting assistance and the likelihood of enactment.

A number of agency officials indicated that they provide detailed technical drafting assistance—even when there is little likelihood of the legislation being enacted—as a means of educating congressional staffers on the current statutory and regulatory framework and on what the agency is presently doing to address the problem.<sup>64</sup> To further educate congressional staffers on how the proposed legislation would affect existing law, for instance, a few

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 32-33.

<sup>64</sup> *Id.* at 17.

agencies provide not just a redlined version of the proposed legislation, but also a redlined version of the existing law that shows what the proposed legislation would change.<sup>65</sup> Indeed, based on this study's findings, ACUS adopted the recommendation that, "[w]hen feasible and appropriate, agencies should provide the Congressional requester a redline draft showing how the bill would modify existing law (known as a Ramseyer/Cordon draft) as part of the technical assistance response."<sup>66</sup>

Perhaps due in part to these agency perceptions of congressional drafter ignorance or inexperience, many of the agency officials interviewed noted that a primary objective in providing technical drafting assistance is to preserve the current statutory scheme and the agency's accompanying regulatory authority.<sup>67</sup> When asked to expand on what this means, one agency official invoked the medical analogy of "first, do no harm." Indeed, a general theme emerged during the interviews that most legislative activity initiated in Congress has the potential to harm the agency's current authority, so in many circumstances the agency's primary objective is to minimize the harm and preserve the agency's existing regulatory authority.

Others noted that their goal is to preserve "flexibility" in the current statutory framework. A few mentioned that one way to do that is to ensure that proposed legislation is drafted "broadly" to maintain agency flexibility in implementing the statutory mandate. Although no agency official expressly stated that the agency's goal is to draft the statute as ambiguously as possible so that interpretive authority is delegated to the agency itself, the overall themes of "flexibility," "drafting broadly," and "preserving regulatory authority" were quite common in the agency interviews conducted for this study.

Finally, with respect to *who* at the agency is involved in providing technical drafting assistance, the agency officials reported that the main actors are typically those within the agency with expertise in the substantive subject matter in addition to those with expertise in legislative drafting.<sup>68</sup> In other words, although the legislative affairs staff may be the congressional liaison and gatekeeper, the program and policy experts and the agency's legislative counsel quickly become involved in providing comments and reviewing the proposed legislation.<sup>69</sup> For some agencies, the regulatory counsel are also involved, but that is not the case at most agencies.<sup>70</sup> That finding is discussed further in Section II.A.

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<sup>65</sup> *Id.* at 37.

<sup>66</sup> Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,163 (Dec. 16, 2015).

<sup>67</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 17.

<sup>68</sup> *Id.* at 21. For a more detailed breakdown, see *id.* at 21-23 & fig.3.

<sup>69</sup> *Id.* at 21.

<sup>70</sup> *Id.*

The agency officials also indicated that the White House is generally not involved in technical drafting assistance and that private parties, including regulated entities or other outside organizations, are rarely involved in developing the agency's response. Similarly, despite the requirement in OMB Circular A-19 that agencies provide notice to OMB of any technical drafting assistance requested or provided, the agency officials indicated that their agency generally does not provide such notice, nor does OMB request it.<sup>71</sup>

### 3. The Congressional Reply

Although the study did not endeavor to interview or survey congressional staffers on how they reply to agency technical drafting assistance, the follow-up survey of the agency officials explored which factors the agencies perceived as affecting whether the congressional requester accepted the agency's technical feedback on proposed legislation.<sup>72</sup>

Before proceeding to the findings from these follow-up survey questions, it is appropriate to note the methodological limitations of this ACUS study, which focused on presenting the perspectives of federal agencies—not congressional staffers—in the legislative process. Although the ACUS study provides a critical empirical window into technical drafting assistance, it is obviously an incomplete one. Congressional staffers may well disagree about the rate at which they request technical drafting assistance and the factors that affect whether they seek such assistance (such as whether there is divided government or whether the member of Congress is of the President's party). They may also disagree about the rate at which they accept agency technical drafting assistance. Much more empirical work needs to be done to fully understand the process.

Turning to the congressional reply, the questions in the follow-up survey build on findings from the Shobe study, where the agency officials surveyed “overwhelmingly reported that Congress accepts technical comments,” with nearly all (96%) respondents reporting that Congress does so always or often.<sup>73</sup> Similar to the responses concerning the factors affecting whether the agency decides to provide the requested technical assistance, the identity and politics of the congressional requester do not seem to matter too much.<sup>74</sup> But other factors do seem to be important.

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<sup>71</sup> The ACUS study expressly did not explore the role of OMB in the legislative process. See *id.* at 33. As noted in the report and this Article, however, agency officials volunteered many observations about how their agency interacted with OMB in providing substantive and technical drafting assistance in the legislative process. *Id.* at 33-35.

<sup>72</sup> For greater detail with respect to findings regarding the congressional reply, see *id.* at 26-28.

<sup>73</sup> Shobe, *supra* note 13, at 481 & fig.7.

<sup>74</sup> *Id.*

For instance, the stage of the legislative process at which the technical assistance is provided seems to matter. Three in five (60%) agency respondents indicated that it often appears to matter whether technical assistance was offered “prior to the legislation being introduced (as opposed to, for instance, at the committee markup stage or later).”<sup>75</sup> Another three in ten (30%) indicated this timing sometimes matters, while the remainder (10%) indicated it only rarely matters.<sup>76</sup> This is consistent with the Shobe study, where a few respondents reported that the timing of the agency’s comments mattered, with one respondent stating: “After the markup . . . if we want to raise an issue we really have to push hard because no one wants us to be bringing up issues. You have to convince them to make changes at that point.”<sup>77</sup> It similarly seems to matter whether the proposed legislation is likely to be enacted. Three in five agency respondents reported that the likelihood of enactment seems to always (10%) or often (50%) matter, while another three in ten (30%) indicated it sometimes matters and the remainder (10%) indicated it only rarely matters.<sup>78</sup>

Another theme that emerged during the agency interviews was that relationships matter. Indeed, of the eight factors included in the survey, the agency–congressional relationship received the highest composite score of 3.9 (where a score of 4.0 equals often).<sup>79</sup> Three in five respondents indicated that it usually (30%) or often (30%) seems to matter “[w]hether there is a strong working relationship between the agency officials involved and the congressional staffers requesting assistance,” while the remainder of respondents indicated that working relationships “sometimes” matter.<sup>80</sup> Agency officials indicated that another factor that matters to Congress is, somewhat surprisingly, the format of the technical assistance. Seven in ten respondents indicated that “[w]hether the technical assistance consists of suggested redlined changes to draft legislation (as opposed to more generalized feedback)” usually (10%) or often (60%) matters, with the remainder indicating it sometimes (20%) or rarely (10%) matters.<sup>81</sup> Perhaps agency perceptions that Congress is more likely to incorporate feedback delivered in writing explain why agencies provide feedback in writing, rather than just doing so orally.

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<sup>75</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 27.

<sup>76</sup> *Id.*

<sup>77</sup> Shobe, *supra* note 13, at 480 n.106.

<sup>78</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 45.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 46.

## II. IMPLICATIONS OF LEGISLATING IN THE SHADOWS

As the findings outlined in Part I suggest, this previously underexplored yet widespread practice of legislating in the shadows has important doctrinal, theoretical, and normative implications for administrative law.

Many of these implications involve a more nuanced understanding of the principal–agent relationship between Congress and the regulatory state.<sup>82</sup> The potentially terrific news is that there is a strong, ongoing relationship between members of Congress and federal agencies. The congressional principal and its bureaucratic agents communicate regularly to improve the instructions that the principal provides to its agents to implement policy, while also leveraging agency expertise in amending the law via the legislative process. Such a working relationship, especially the practice of agencies providing technical drafting assistance on proposed legislation, should be encouraged and strengthened. The less ideal news may be that the bureaucratic agents appear to have more influence over shaping the authority delegated to them by their congressional principal than previously appreciated—precisely because they can heavily influence the scope and character of their legislative mandates.<sup>83</sup> These permutations of the bureaucratic principal–agent model will be further explored in this Part.

This Article focuses on two implications of legislating in the shadows that emerge from this more nuanced understanding of the bureaucratic principal–agent model. First, this phenomenon could support the growing scholarly call that agencies should be allowed to engage in more purposivist interpretation than their judicial counterparts. Second, it may cast some doubt on the foundations for judicial deference to agency statutory interpretations, in light of federal

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<sup>82</sup> See *supra* notes 3–4 (reviewing literature on principal–agency theory in administrative law).

<sup>83</sup> Indeed, this relationship may be further complicated by the fact that numerous agency officials are detailed to Congress each year—with their agency covering the cost of such details. For instance, over 200 agency officials detailed in Congress during the 113th Congress. See S. REP. NO. 114-112, at 11-18 (2015) (listing all of the approved details by agency and congressional committee). See generally Memorandum on Detail of Law Enforcement Agents to Congressional Committees from Douglas W. Kmiec, Acting Assistant Att’y Gen., Office of Legal Counsel, to Acting Deputy Att’y Gen. (Sept. 13, 1988), <https://www.justice.gov/file/24116/download> [<https://perma.cc/ZCQ6-TSFW>] (concluding that such details are statutorily authorized, that they “do not violate the principle of separation of powers as long as the details are advisory in nature and involve functions not required by the Constitution to be performed by an ‘officer’ of the United States,” but that the agency should carefully consider conflicts that could arise); Memorandum of Department of Justice Attorneys to Congressional Committees from John M. Harmon, Acting Assistant Att’y Gen., Office of Legal Counsel, to the Dir. of the Dep’t of Justice Task Force on Criminal Code Revision (May 16, 1977), <https://www.justice.gov/file/21051/download> [<https://perma.cc/A3Z3-XXTH>] (concluding that there would be no ethical problems in a Justice Department attorney being detailed to Congress “[i]f the attorney were instead to be viewed as counsel for the Department detailed by the Attorney General to work *with*, rather than *for*, the [congressional] subcommittee”). Many thanks to Will Levy for this point on congressional details.

agencies' involvement in drafting the legislation that ultimately delegates to the same agencies the authority to interpret that legislation. Each will be addressed in turn.

A. *Implications for Agency Statutory Interpretation*

As Jerry Mashaw observed nearly a decade ago, “virtually no one has even asked, much less answered, some simple questions about agency statutory interpretation.”<sup>84</sup> For example, many assert that the role of legislative history should be the same regardless of whether an agency or judge is the interpreter or whether legislative history is deemed to reveal congressional intent or statutory meaning. Yet in his preliminary inquiry into the matter, Mashaw found “persuasive grounds for believing that legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation.”<sup>85</sup>

Indeed, nearly a quarter century ago Peter Strauss argued that “[l]egislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons who are outside government and are accustomed to considering its relevance only to actual or prospective judicial resolution of discrete disputes.”<sup>86</sup> He went on to explain the role of legislative history in agency statutory interpretation by describing the law library of a federal agency:

Alongside the statutes for which the agency is responsible, you will find shelf after shelf of their legislative history—collections that embrace not only printed materials such as might make their way to a depository library, but also transcripts of relevant hearings, correspondence, and other informal traces of the continuing interactions that go on between an agency and Capitol Hill as a statute is being shaped in the legislative process, and perhaps afterwards in [the] course of implementation.<sup>87</sup>

One of the important benefits of “[t]he enduring and multifaceted character of the agency’s relationship with Congress,” Strauss explained, is that the agency has comparative expertise “to distinguish reliably those considerations that served to shape the legislation, the legislative history wheat, from the more manipulative chaff.”<sup>88</sup> As Mashaw has noted, although not speaking in principal–agent terms, Strauss underscores that “agencies have a direct relationship with Congress that gives them insights into legislative purposes

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<sup>84</sup> Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 501-02 (2005); see also *id.* at 502 n.2 (reviewing literature).

<sup>85</sup> *Id.* at 504.

<sup>86</sup> Strauss, *Agency Interpretation*, *supra* note 14, at 329.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 347.

and meaning . . . . For a faithful agent to forget this content, to in some sense ignore its institutional memory, would be to divest itself of critical resources in carrying out congressional designs.”<sup>89</sup>

It is perhaps for this reason that a number of administrative law scholars—in addition to Mashaw and Strauss—have called for a more purposivist approach to agency statutory interpretation (than to judicial interpretation) based on the comparative institutional expertise—or the unique “interpretive voice”<sup>90</sup>—of federal agencies. Cass Sunstein and Adrian Vermeule, for instance, have argued that “attention to institutional considerations can show why agencies might be given the authority to abandon textualism even if courts should be denied that authority.”<sup>91</sup> Indeed, Sunstein strengthened his call for comparative expertise in a recent article aptly entitled *The Most Knowledgeable Branch*.<sup>92</sup> William Eskridge has advanced a somewhat analogous position: agencies should “read statutes broadly, in light of their purposes, and follow a quasi-legislative political process for interpretations addressing big policy questions or arenas not resolved by the statute.”<sup>93</sup> Kevin Stack and others have reached conclusions along similar comparative expertise lines.<sup>94</sup>

Sitaraman, moreover, has reached a similar conclusion that “[t]he executive’s role in legislative drafting provides additional support to the Strauss-Mashaw

<sup>89</sup> See Mashaw, *supra* note 84, at 511 (discussing Strauss, *Agency Interpretation*, *supra* note 14).

<sup>90</sup> See Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2083 (2005) (asserting that theories of interpretation should “consider[] not only the abilities and limitations of courts and administrative agencies, but also how both of these institutions express their conclusions; that is, the relationship between what they do and what they say they do”).

<sup>91</sup> Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003); accord ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 205-08 (2006) (emphasizing the strictly institutional justifications for agency deference). See generally Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952 (2003) (agreeing that there is an institutional dimension of legal interpretation but disagreeing that this is a novel insight, as scholars and judges have long considered this institutional dimension).

<sup>92</sup> Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016).

<sup>93</sup> William N. Eskridge Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 427.

<sup>94</sup> See Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 887-900 (2015) (taking the public choice argument further by asserting that Congress directs agencies to engage in purposivist statutory interpretation); see also Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91-99 (1985) (arguing that delegation of policy decisions to agencies is better than delegation to courts based on comparative accountability, responsiveness, and legitimacy); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 134-41 (2000) (arguing on public choice grounds that lawmaking delegation to agencies is comparatively better than such delegation to courts); Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 159-61 (2012) [hereinafter Walker, *Avoiding Normative Canons*] (arguing that agencies’ comparative expertise is a reason to “discontin[ue] the use of modern constitutional avoidance in the review of administrative interpretations of law”).

thesis that agency interpretive practice can and should diverge from judicial interpretive process.”<sup>95</sup>

Empirical studies provide further support for this more purposivist approach to agency statutory interpretation. In particular, over nine in ten (94%) congressional drafters in the Bressman and Gluck study indicated that a purpose of legislative history is to shape the way agencies interpret statutory ambiguities; one in five (21%) respondents volunteered that legislative history also provides an oversight role for agency implementation of a statute it administers.<sup>96</sup>

One congressional drafter explained, “We use everything from floor statements to letters to the agency—members know how to communicate with agencies and make their policy preferences known . . . .”<sup>97</sup> Moreover, over half (53%) of the congressional respondents emphasized the importance of legislative history in the appropriations context, as such legislative history specifies where the funds appropriated go within the administrative state.<sup>98</sup>

The author’s prior study of agency rule drafters provides similar support.<sup>99</sup> For instance, three in four (76%) rule drafters considered legislative history useful in interpreting statutes, and at least four in five agreed that legislative history serves to explain the purposes of a statute (93%) and the meaning of particular terms in a statute (80%).<sup>100</sup> Of over twenty interpretive principles covered in the survey, legislative history had the sixth-highest response for use in interpretation: only *Chevron* deference, the whole act rule, the ordinary meaning canon, the *Mead* doctrine, and *noscitur a sociis* were reported by more rule drafters as being used in their interpretation and rule-drafting efforts.<sup>101</sup>

Likewise, the rule drafters surveyed demonstrated, on balance, a sound understanding of how to assess the reliability of legislative history, including that committee and conference reports are usually the most reliable and that floor statements by nonsponsors are the least reliable.<sup>102</sup> Many rule drafters indicated that the timing of the legislative history matters, whereas whether a member of Congress drafted or even read or heard the legislative history does not.<sup>103</sup> These findings are consistent with those of the congressional respondents in the Bressman and Gluck study.<sup>104</sup> Moreover, the findings on agency expertise in legislative history and process seem to support the

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<sup>95</sup> Sitaraman, *supra* note 13, at 128.

<sup>96</sup> Bressman & Gluck, *Part II*, *supra* note 18, at 768.

<sup>97</sup> Gluck & Bressman, *Part I*, *supra* note 18, at 972 (internal quotation marks omitted).

<sup>98</sup> Bressman & Gluck, *Part II*, *supra* note 18, at 768.

<sup>99</sup> Walker, *Inside Agency Statutory Interpretation*, *supra* note 19.

<sup>100</sup> *Id.* at 1020 fig.2, 1041 fig.7.

<sup>101</sup> *Id.* at 1020 fig.2, 1038-39.

<sup>102</sup> *Id.* at 1043-44 & fig.8.

<sup>103</sup> *Id.* at 1043-47 & figs.8-9.

<sup>104</sup> *See id.* at 1046.

scholarly call for a more purposivist approach to agency statutory interpretation (as compared to a more textualist approach to judicial statutory interpretation).

One set of findings from the author's prior study, however, raises some questions. Nearly four in five (78%) rule drafters reported that their agencies always or often participate in a technical drafting role of statutes they administer, and three in five (59%) indicated that their agencies similarly participate in a policy or substantive drafting role.<sup>105</sup> But the rule drafters reported that their *personal* participation in the legislative process was less involved: 29% always or often participate in technical drafting (and 29% sometimes participate); 18% always or often participate in substantive drafting (and 29% sometimes participate).<sup>106</sup> In other words, the agency lawyers involved in drafting the rules are not necessarily involved in the agency's efforts to assist Congress in drafting the legislation, and thus do not have firsthand expertise in that legislative history.

The lower personal participation may be explained in part by the organizational division in many agency general counsel offices between the legislation and regulation staffs. The separation between legislative and regulatory functions within an agency's general counsel office raises a number of questions about agency statutory interpretation: Under an agency's typical structure, does the agency's legislative experience get incorporated into its rulemaking activities, such that the Congress–agency relationship Strauss detailed actually extends to agency statutory interpretation? Or do the legislative experts at the agency only get involved once there is a threat of judicial challenge? In light of the theoretical arguments that have been advanced about the distinct role legislative history—and purposivism more generally—should play in agency statutory interpretation, it is critical to better ask and answer these questions.

The findings from this study on the role federal agencies play in the legislative process shed some important light on these questions. As discussed above, federal agencies provide technical drafting assistance on the vast majority of the proposed legislation that directly affects them and most legislation that is actually enacted. The relationship that emerges from the study is perhaps not of the principal–agent variety where Congress dictates its wishes to its bureaucratic agents, but a partnership where Congress and federal agencies work together to draft legislation that affects the agencies' statutory and regulatory schemes.<sup>107</sup> Federal agencies are at the legislative table and are deeply involved in the legislative process—at the outset and then

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<sup>105</sup> *Id.* at 1037 & fig.6.

<sup>106</sup> *Id.*

<sup>107</sup> This partnership model, of course, can still be framed in principal–agent terms, just with a regulatory agent who is more involved in the congressional principal's delegation of authority to the agent than the traditional principal–agent bureaucratic model may envision.

throughout the legislative process—that results in statutes that the agencies administer. In that sense, Strauss’s anecdotal depiction of agency expertise in legislative history and process is quite accurate. And thus the scholarly call for a more purposivist approach to agency statutory interpretation seems empirically grounded.

There may be one significant wrinkle, however. Seven in ten agencies indicated that the agency’s rulemakers/regulatory counsel are rarely (60%) or never (10%) involved; few (10%) indicate that they are sometimes involved; and still few (20%) indicate that they are usually involved.<sup>108</sup> This generates a composite score of 2.6 (where a score of 2.0 indicates rarely and a score of 3.0 means sometimes).<sup>109</sup> This is somewhat surprising. At both the Department of Energy and the Department of Housing and Urban Development, for instance, the legislative and regulatory counsel are housed in the same division within the agency general counsel’s office and cross-train in both legislative and regulatory drafting.<sup>110</sup> One agency respondent commented along these lines: “Legislation/regulatory attorneys are in the same office at our agency, so regulatory staff have the same input as the agency’s legislative counsel, as appropriate for a given request.”<sup>111</sup>

But at most other agencies, these lawyers are not housed in the same division and interact far less frequently, at least with respect to legislative drafting.<sup>112</sup> One respondent noted in the comments that “[o]ur answer (never) pertains to staff who are dedicated regulation writers. Other program staff are often involved in developing regulations and in the regulatory process; they participate more frequent[ly] in developing technical assistance than [d]o dedicated regulation writers.”<sup>113</sup>

In other words, at most agencies the lawyers who draft the regulations and the lawyers who help draft the legislation do not interact in a way that would suggest that the agency’s expertise in the legislative history and process that

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<sup>108</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at app. A (Q3(d)).

<sup>109</sup> *Id.*

<sup>110</sup> *See id.* at 22.

<sup>111</sup> *Id.* at app. A (Q3 cmt.3).

<sup>112</sup> This disconnect may also cast some doubt on one of the rationales for judicial deference to agency statutory interpretations, namely “that agency officials are more knowledgeable of the legislative intent since they were direct or indirect participants in the legislative process.” CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 145 (1990); *see also id.* (further noting that this argument “can be met by exploiting empirical insufficiencies” about actual agency involvement in the legislative process). This argument is further explored in Section II.B.

<sup>113</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at app. A (Q3 cmt.2). This comment may explain the apparent discrepancy between the agency officials surveyed here and those surveyed in the Shobe study. Nearly 90% of those surveyed by Shobe indicated that “people within agencies who are tasked with day-to-day implementation and administration of agency statutes are also involved in the [drafting assistance] review process.” Shobe, *supra* note 13, at 483.

resulted in the legislation is transmitted to the lawyers who actually interpret that statute. This concern, however, is likely overstated. After all, seven in ten agency respondents indicated that agency program/policy experts either always (20%) or usually (50%) participate in providing legislative drafting assistance, with the remainder reporting that such participation only sometimes (20%) or rarely (10%) occurs.<sup>114</sup> This generates a composite score of 4.5 (where a score of 4.0 represents often, and 5.0 means usually).<sup>115</sup> This is consistent with the Shobe study, in which nearly nine in ten (89%) agency officials surveyed indicated that they “always notify affected parties within their agency of potential legislation.”<sup>116</sup> As one agency respondent in the Shobe study observed, “We are the technical drafters, but the program clients drive the policy. They are the ones carrying out the policy so they know it much better than we do.”<sup>117</sup> Accordingly, there may not be a direct link between the legislative and regulatory lawyers, but the program/policy experts likely bridge that gap by consulting with both sets of lawyers during their drafting processes. Indeed, one of the eight ACUS recommendations based on this study focuses on better leveraging agency expertise along these lines.<sup>118</sup>

In sum, these findings on the role of federal agencies in the legislative process provide additional empirical support for a more purposivist approach to agency statutory interpretation. Federal agencies are deeply involved in the legislative process from a technical assistance perspective for statutes that directly affect them and thus have a comparative expertise over courts in understanding what Congress intended when it enacted the statutes that agencies administer. The agency lawyers involved in legislative and regulatory drafting may not share that information directly at every agency, but the agency policy experts are involved in both processes and likely ensure that the rule drafters are familiar with what happened in the legislative process.

Before turning to the implications of legislating in the shadows for judicial review of agency statutory interpretations, it is worth considering one important counterargument. Because agencies are at the table and substantially involved in the drafting of legislation they ultimately interpret, one could argue for a more restrained, textualist approach to agency statutory interpretation. After

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<sup>114</sup> Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at app. A (Q3(c)).

<sup>115</sup> *Id.*

<sup>116</sup> Shobe, *supra* note 13, at 483.

<sup>117</sup> *Id.* at 484.

<sup>118</sup> See Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,163 (Dec. 16, 2015) (“Similarly, agencies should consider ways to better identify and involve the appropriate agency experts—in particular, the relevant agency policy and program personnel in addition to the legislative drafting experts—in the technical drafting assistance process. These efforts may involve, for example, establishing an internal agency distribution list for technical drafting assistance requests and maintaining an internal list of appropriate agency policy and program contacts.”).

all, the agencies already had their opportunity to attempt to clean up the statutory text and, the argument would go, should not get another, more purposivist bite at the apple. Indeed, in presenting these findings at various conferences and workshops, a recurring suggestion has been to consider incorporating contract law's *contra proferentem* doctrine to construe the ambiguous statutory language against the agency drafter.<sup>119</sup>

This appears to be a novel suggestion for administrative law, although it has been applied in the somewhat related context of government contracting. For instance, the Supreme Court has noted that “[t]his principle is appropriately accorded considerable emphasis in [the context of a government contract] because of the Government’s vast economic resources and stronger bargaining position in contract negotiations.”<sup>120</sup> As one commentator has noted in that context, this principle “is not a method by which the true intent of the parties is determined”; instead, *contra proferentem* “is simply an allocation of the burden of ambiguity in contract language on the basis of responsibility for its draftsmanship.”<sup>121</sup> Indeed, as Michelle Boardman has explained, “*Contra proferentem* is meant to give drafters an incentive to draft cleanly, by construing ambiguous language against the drafter.”<sup>122</sup>

Although this analogy may have some intuitive appeal (at least for those who bemoan the sprawl of the modern administrative state),<sup>123</sup> it seems to fail for both practical and doctrinal reasons. Practically, because technical drafting assistance occurs in the shadows, it is difficult if not impossible for a court to ascertain which parts of the statute the agency agreed with, much less actually

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<sup>119</sup> See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (reiterating “the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it”); RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).

<sup>120</sup> *United States v. Seckinger*, 397 U.S. 203, 216 (1970).

<sup>121</sup> John T. Flynn, *The Rule Contra Proferentem in the Government Contract Interpretation Process*, 11 PUB. CONT. L.J. 379, 380 (1980); accord 5 ARTHUR L. CORBIN ET AL., CORBIN ON CONTRACTS § 24.27 (2016 ed.) (“The rule is not actually one of interpretation, because its application does not assist in determining the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have assigned to the language used. It is chiefly a rule of policy, generally favoring the underdog.”).

<sup>122</sup> Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1108 (2006). For more on the normative basis for the rule, see Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 533-44 (1996).

<sup>123</sup> See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (“The administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today’s vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities. [T]he administrative state with its reams of regulations would leave them rubbing their eyes.” (internal quotation marks and citations omitted)).

helped draft. Doctrinally, the analogy seems too tenuous in light of the fact that federal agencies merely assist in drafting statutes; Congress is the party that ultimately enacts the legislation.

Perhaps another way to think about the doctrinal (and practical) flaws is to consider whether a court should similarly apply *contra proferentem* against a regulated entity if the statutory language at issue was drafted by industry lobbyists. In practice, neither the congressional nor the lobbyist drafter is likely to make public which parts of the legislation were drafted or otherwise influenced by the lobbyist. Incorporating *contra proferentem* into statutory interpretation would likely only encourage more secrecy. As for the doctrinal concerns, bicameralism and presentment make clear that the enacted text is that of Congress, not that of the many hands that may have held the pen at various times during the legislative process. It is difficult to see how punishing the agency (or the lobbyist) for the final legislative product would provide an incentive for the agency (or the lobbyist) to draft more clearly when Congress ultimately holds the pen at the end of the process. Analogizing the contract-drafting process to the legislative process, at least with respect to the policy rationales for *contra proferentem*, is thus ill advised. Moreover, as discussed in Section II.B, these concerns are better addressed by adjusting the level of deference courts owe to certain agency statutory interpretations.

#### B. Implications for Judicial Review

Whereas the findings of this study regarding the role of federal agencies in the legislative process provide strong support for a more purposivist approach to agency statutory interpretation, the same findings are more mixed with respect to their implications for *Chevron* deference—the doctrine that a reviewing court must defer to an agency’s reasonable interpretation of an ambiguous statute that the agency administers.<sup>124</sup>

On the one hand, judicial deference due to agency expertise—a common justification for *Chevron* deference—may be bolstered by the fact that agencies often play a critical role in legislative drafting. On the other, specifically *because* agencies help draft statutes, often in the shadows, courts should not defer to every reasonable agency interpretation of ambiguities that the agency itself may have helped create; instead, perhaps they should apply the less-deferential *Skidmore* standard based on the agency’s power to persuade.<sup>125</sup> Or, at the very least, the Supreme Court should abandon the broad, bright-line *Chevron* standard reaffirmed by Justice Scalia’s opinion for the Court in *City*

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<sup>124</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>125</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

of *Arlington v. FCC*,<sup>126</sup> and move toward the provision-by-provision approach Chief Justice Roberts advocated for in his *City of Arlington* dissent<sup>127</sup> and in his opinion for the Court in *King v. Burwell*.<sup>128</sup>

Each of these three alternatives will be addressed in turn.

### 1. The Case for *Chevron* Deference

The case for *Chevron* deference in light of legislating in the shadows will be made briefly here, as it is similar to the case for a more purposivist approach to agency statutory interpretation set forth in Section II.A. Because agency officials are often substantially involved in legislative drafting, they have special expertise and knowledge concerning what Congress intends when it leaves an ambiguity in a statute that the agency administers—or even whether Congress intended to speak on the policy question at issue. In other words, as Sitaraman argues, the agency may well “have special insight into what the goals and intentions behind the legislation actually were, what the political and practical compromises were, and how [the members of Congress] thought about specific problems throughout the legislative process.”<sup>129</sup>

Alongside political accountability and uniformity of federal administrative law, agency expertise is considered one of the bedrock rationales for *Chevron* deference and for why Congress delegates primary interpretive authority to federal agencies (as opposed to courts).<sup>130</sup> Indeed, the *Chevron* Court itself emphasized agency expertise as grounds for deference, noting that Congress perhaps “consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.”<sup>131</sup> Congress delegates interpretive authority to agencies, instead of generalist courts, at least in part because those agencies are experts in the subject matter.

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<sup>126</sup> 133 S. Ct. 1864, 1874-75 (2013).

<sup>127</sup> *Id.* at 1881 (Roberts, C.J., dissenting).

<sup>128</sup> 135 S. Ct. 2480, 2488-89 (2015).

<sup>129</sup> Sitaraman, *supra* note 13, at 128.

<sup>130</sup> See, e.g., Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1286-88 (2008) (“Administrative agencies’ superior experience and expertise in particular regulatory fields offers a second popular justification for *Chevron* deference.”); see also Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 737 (2002) (arguing that “the expertise rationale provides a stronger justification for giving deference to agency work product than does the implied delegation theory”); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 866 (2001) (“[*Chevron*] argues that agencies typically have greater expertise about technical and specialized subjects than do courts.”); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2086 (1990) (“[T]he *Chevron* approach might well be defended on the ground that the resolution of ambiguities in statutes is sometimes a question of policy as much as it is one of law, narrowly understood, and that agencies are uniquely well situated to make the relevant policy decisions.”).

<sup>131</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

To be sure, *Chevron*'s expertise justification centered on the agency's policy or technical expertise, not necessarily the agency's expertise in legislative history or statutory drafting. But that is not true of the case law more generally. As Justice Scalia noted decades ago, "The cases, old and new, that accept administrative interpretations, often refer to the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, [and] their practical knowledge of what will best effectuate those purposes."<sup>132</sup> Justice Breyer has expanded on this "better understanding of congressional will" rationale for judicial deference:

The agency that enforces the statute may have had a hand in drafting its provisions. It may possess an internal history in the form of documents or "handed-down oral tradition" that casts light on the meaning of a difficult phrase or provision. Regardless, its staff, in close contact with relevant legislators and staffs, likely understands *current* congressional views, which, in turn, may, through institutional history, reflect prior understandings. At a minimum, the agency staff understands the sorts of interpretations needed to "make the statute work."<sup>133</sup>

If agency expertise is the touchstone for *Chevron* deference, the fact that agencies play such a substantial role in the legislative process certainly bolsters the deference argument. Indeed, Sitaraman argues that, "at least in some situations, courts should grant greater deference to agencies" based on their involvement in the legislative process.<sup>134</sup> That said, agency expertise is not the only rationale for judicial deference to agency statutory interpretations. There are, moreover, additional constitutional and normative concerns against such delegation of interpretive authority. Those counterarguments are addressed in subsection II.B.2.

## 2. The Case Against *Chevron* Deference

Discontent about *Chevron* deference has surfaced in the administrative law literature.<sup>135</sup> Such discontent reached the Supreme Court in 2015 in

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<sup>132</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514.

<sup>133</sup> Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986).

<sup>134</sup> Sitaraman, *supra* note 13, at 129.

<sup>135</sup> See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 315-17 (2014) (arguing that the courts' grant of deference to agency interpretations amounts to "abandonment of judicial office"); Professor Michael Herz et al., Remarks at The New *Chevron* Skeptics Panel at the Federalist Society's 18th Annual Faculty Conference (Jan. 8, 2016), <http://www.fed-soc.org/multimedia/detail/the-new-chevron-skeptics-event-audiovideo> [<https://perma.cc/KLP3-4W9S>] (exploring skepticism of *Chevron* deference). Of course, criticisms of *Chevron* deference are not necessarily new. Jack Beermann,

*Michigan v. EPA*.<sup>136</sup> In his concurring opinion, Justice Thomas argued that the EPA's "request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."<sup>137</sup> Those constitutional concerns, Justice Thomas explained, involve the transfer of interpretive authority from courts to federal agencies—"a transfer [that] is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies."<sup>138</sup>

In light of the findings presented in this Article, however, another opinion from 2015 may be of even greater importance to the future of *Chevron* deference. In *Perez v. Mortgage Bankers Ass'n*, Justices Thomas and Alito joined Justice Scalia's prior call for the Court to reconsider *Auer* deference.<sup>139</sup> *Auer* deference, which is also referred to as *Seminole Rock* deference, instructs courts that an agency's interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>140</sup>

With John Manning leading the way, a number of scholars have called for the Court to eliminate this deference doctrine and "replace *Seminole Rock* with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning."<sup>141</sup> Manning's foundational critique was based on separation-of-powers concerns, and he drew on legal principles set

for instance, has long called for its demise because of, among other things, concerns of judicial administrability and manipulation. See Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 *FORDHAM L. REV.* 731, 750-51 (2014) (arguing for the *Chevron* doctrine to be "jettisoned"); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 *CONN. L. REV.* 779, 850-51 (2010) (arguing that *Chevron* is "inconsistent with the APA," "has not accomplished its goals," and has "spawned an increasingly complicated regime").

<sup>136</sup> 135 S. Ct. 2699 (2015). Moreover, Chief Justice Roberts cut back on the breadth of *Chevron* in his opinion for the Court in *King v. Burwell*, holding that *Chevron* deference does not apply to questions of "deep economic and political significance." 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted). See Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 *PEPP. L. REV.* 33, 39-46 (2015) (arguing that the major questions doctrine developed in *King v. Burwell* "is a major blow to a bright-line, rule-based approach to *Chevron* deference").

<sup>137</sup> *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring).

<sup>138</sup> *Id.*

<sup>139</sup> See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring in the judgment) ("By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."); accord *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect.").

<sup>140</sup> *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); see also *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

<sup>141</sup> John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *COLUM. L. REV.* 612, 617 (1996); see also Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 *ADMIN. L.J. AM. U.* 1, 12 (1996) (asserting that *Auer* deference encourages agency rule drafters to be "vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures").

forth long ago by Blackstone, Locke, and Montesquieu concerning the dangerous consolidation of lawmaking and law-execution powers in the same government actor.

To support this proposition, Manning cites Montesquieu's warning that "[w]hen legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."<sup>142</sup> Manning also relied on Locke's *Second Treatise of Government*, pointing to Locke's proposition that it is "too great a temptation to human frailty, apt to grasp at power for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they exempt themselves from obedience to the laws they make."<sup>143</sup> Or, as Blackstone put it, "where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject."<sup>144</sup>

To address these concerns, Manning argued that courts should abandon *Auer* deference and instead apply the less-deferential *Skidmore* standard, which gives weight to an agency's interpretation by "the thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control."<sup>145</sup> As will become clearer when alternatives to *Chevron* deference are considered later in this Article, it is worth noting that Matthew Stephenson and Miri Pogoriler have argued in favor of "reserv[ing] *Seminole Rock* deference for regulatory interpretations contained in formal orders (granting *Skidmore* respect to more informal interpretations)."<sup>146</sup>

Perhaps motivated by Manning's critique, Justice Scalia in recent years joined the scholarly call to revisit *Auer* deference, observing that "[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean."<sup>147</sup> In his concurrence in *Talk America, Inc. v. Michigan Bell*

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<sup>142</sup> *Id.* (citing MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne Cohler et al. eds. & trans., 1968) (1768)).

<sup>143</sup> *Id.* at 646 (quoting JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶ 143, at 76 (C.B. MacPherson ed., 1980) (1690)).

<sup>144</sup> *Id.* at 648 (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*142).

<sup>145</sup> *Id.* at 681, 687 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>146</sup> Matthew Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 *GEO. WASH. L. REV.* 1449, 1504 (2011); *see also id.* at 1460 (noting that "Professor Manning persuasively argues that this combination of law-making and law-interpreting functions is actually a reason for serious concern, one that makes *Seminole Rock* deference problematic even if one endorses *Chevron*").

<sup>147</sup> *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part).

*Telephone Co.*, Justice Scalia explained his basic concerns with *Auer* deference, distinguishing those concerns from *Chevron*'s foundation,

On the surface, [*Auer* deference] seems to be a natural corollary—indeed, an *a fortiori* application—of the rule [announced in *Chevron*] that we will defer to an agency's interpretation of the statute it is charged with implementing. But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.<sup>148</sup>

Justice Scalia went on to flesh out the perverse agency incentives created by *Auer* deference that he posited are not present with respect to *Chevron* deference. In particular, he argued that “[d]eferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive.”<sup>149</sup> On the other hand, he also argued, “deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.”<sup>150</sup>

After Justices Alito and Thomas joined Justice Scalia in expressing interest in reconsidering *Auer* deference in the 2015 *Mortgage Bankers* decision, it seemed only a matter of time before such reconsideration would occur. Judge Easterbrook identified one petition pending before the Court this Term as a suitable vehicle for reconsideration of *Auer*.<sup>151</sup> And scholars, including most recently Sunstein and Vermeule, have come to *Auer*'s defense.<sup>152</sup> Justice

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<sup>148</sup> 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (internal citations omitted).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc) (“I do not think that it would be a prudent use of this court's resources to have all nine judges consider how *Auer* applies to rehabilitation agreements, when *Auer* may not be long for this world. The positions taken by the three members of the panel show that this is one of those situations in which the precise nature of deference (if any) to an agency's views may well control the outcome.”), *cert. denied*, 136 S. Ct. 1607 (2016).

<sup>152</sup> See generally Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. (forthcoming 2017), <http://ssrn.com/abstract=2716737> [<https://perma.cc/32AZ-7E7B>]. See also Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 816-17

Scalia's passing potentially changed the direction of the Court with respect to *Auer*, at least for now.<sup>153</sup> Indeed, last year the Court denied review of the petition Judge Easterbrook had recommended, with only Justice Thomas dissenting from the denial of certiorari.<sup>154</sup> That said, Justice Neil Gorsuch, whom the Senate recently confirmed to fill Justice Scalia's vacancy on the Supreme Court, has expressed his own constitutional concerns with *Chevron* deference,<sup>155</sup> and he may well have similar concerns about *Auer* deference.

Regardless whether the Court reconsiders *Auer* deference, the findings in this Article on legislating in the shadows potentially extend the arguments against *Auer* to implicate *Chevron* deference as well. Let's start with the oversimplified analogy between *Auer* and *Chevron*. If the agency is indeed a partner with Congress in legislative drafting, Justice Scalia's concern about an agency legislating and executing the law should apply with some force to legislative drafting. The executive and legislative functions are, in essence, combined via legislating in the shadows. The agency often is involved in drafting—and may be the drafter of—the legislative ambiguities that delegate interpretive authority to the agency that administers the statute.

This type of agency self-delegation—or agency self-dealing—likewise raises serious concerns. As Sitaraman has observed, “As is the concern with *Seminole Rock*, the agency might be creating opportunities to give itself discretion it can

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(2015) (“Overruling *Auer* would accomplish little beyond removing a useful tool that facilitates judicial review, increases the predictability of regulatory action, and maintains political accountability in agency decision-making.”).

<sup>153</sup> Christopher Walker, *Courts Regulating the Regulators*, REG. REV. (Apr. 25, 2016), <https://www.theregreview.org/2016/04/25/walker-courts-regulating-the-regulators> [https://perma.cc/V2Y8-VTR2].

<sup>154</sup> See *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608-09 (2016) (Thomas, J., dissenting from the denial of certiorari) (“This is the appropriate case in which to reevaluate *Seminole Rock* and *Auer*. But the Court chooses to sit idly by, content to let ‘[h]e who writes a law’ also ‘adjudge its violation.’”). Similarly, when the Court decided to grant review last October in *Gloucester County School Board v. G.G.*, it expressly refused to grant review on the question of whether to eliminate *Auer* deference. See *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369, 369 (2016) (“Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted limited to Questions 2 and 3 presented by the petition.”), *vacated and remanded* 2017 WL 855755 (U.S. Mar. 6, 2017).

<sup>155</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”); see also Press Release, U.S. Senator Orrin Hatch, Hatch Questions Gorsuch on Holding Federal Bureaucracy Accountable to the Law (Mar. 23, 2017), <http://www.hatch.senate.gov/public/index.cfm?p=releases&id=4A30B354-85E8-4726-A5D2-61D282AF10EB> [https://perma.cc/8RQA-9VVG] (quoting and linking to Judge Gorsuch’s Senate Judiciary Committee hearing testimony on *Chevron* deference).

abuse.”<sup>156</sup> Indeed, because the agency is involved at the outset in drafting the legislation, Congress’s ability to regulate the bounds of agency delegation is hindered. Put in principal–agent terms, “If the principal (Congress) cannot be trusted to provide metes and bounds and to legislate against a background rule of delegation, an administrative law enterprise built on those foundations becomes suspect.”<sup>157</sup>

Moreover, contrary to Justice Scalia’s intuition, the perverse incentives he identified with respect to judicial deference to agency interpretations of their own regulations may be similarly present in the legislative process. *Chevron* deference “to an agency’s interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes.”<sup>158</sup> But it could encourage agencies to draft vague statutes. Indeed, as noted in Part I, a number of agency officials indicated during the interviews that they often suggest that legislation be drafted in “broad” or “flexible” terms—in other words, that terms be left ambiguous—to preserve or enlarge agency discretion to implement the statute. To rephrase Justice Scalia’s concern, “deferring to an agency’s interpretation of [a statute it has helped draft] encourages the agency to [draft] vague [statutes] which give it the power, in future [regulatory efforts], to do what it pleases.”

To be sure, this is an overly simplistic analogy. Just like the objections discussed in Section II.A regarding the extension of contract law’s *contra proferentem* doctrine to constrain agency statutory interpretation, there are obvious counterarguments to extending the *Auer* deference objections to *Chevron* deference. First and foremost, any separation-of-power concerns are much more attenuated. The agencies, after all, do not actually make the law. Congress retains all legislative power, and the “collective Congress”<sup>159</sup> enacts the legislation in the way it deems appropriate—incorporating the agency’s suggested language or not. The same is true of legislative language suggested by lobbyists, interest groups, and other organizations involved in the legislative process. In other words, the Blackstone-Locke-Montesquieu structural concerns that Manning (and Justice Scalia) marshaled to attack *Auer* deference seem to have little force, at least as a formal constitutional

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<sup>156</sup> Sitaraman, *supra* note 13, at 126-27. Aaron Nielson makes a similar argument in the context of *Chevron* deference to statutory interpretations advanced in agency adjudications. See Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. (forthcoming 2017), <https://ssrn.com/abstract=2821341> [<https://perma.cc/7HS3-ZTL4>].

<sup>157</sup> Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 503 (2015) (footnote omitted); *see id.* at 503-04 (arguing that if Congress cannot effectively patrol lawmaking delegations to federal agencies, “administrative law may require a fundamental rethinking”).

<sup>158</sup> *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

<sup>159</sup> This term is borrowed from Rao, *supra* note 4, at 1465 (“The Constitution creates what I term the ‘collective Congress’—the people’s representatives may exercise legislative power only collectively.”).

matter, in the context of *Chevron* deference and the legislative process. Legislating via bicameralism and presentment arguably washes away any constitutional impurities created by agency legislating in the shadows (and subsequently interpreting that legislation).

Similar counterarguments can be made regarding the perverse incentives for agencies to insert ambiguities in draft legislation that they will ultimately interpret. Even if the various agency officials' responses that federal agencies generally endeavor to draft legislation in broad, flexible, and ambiguous terms are representative of the regulatory state as a whole,<sup>160</sup> it is again Congress—not the agency—that ultimately legislates. Indeed, this study only explores agencies' perspectives on their role in the legislative process; congressional drafters may well view the agencies' role and influence as more limited. Members of Congress, moreover, can serve as a check on delegation via ambiguity and may well have incentives to delegate carefully. The collective Congress ultimately enacts the statute. Thus, at least in theory, any enacted statutory ambiguity is arguably one that Congress contemplated delegating to the agency to resolve.

The findings from this study cast some empirical doubt on these theoretical objections regarding incentives.<sup>161</sup> During the agency interviews and the follow-up survey conducted for this study, a consistent theme concerned the lack of congressional awareness of the existing statutory and regulatory scheme and the poor quality of legislative drafting by congressional staffers. Oftentimes these concerns were offered in tandem with a lament about the turnover among congressional staffers.<sup>162</sup> The recommendations ACUS adopted based on the study reflect this theme: "Although agencies, as a rule, strive to respond to all requests, they continue to face challenges in providing technical assistance. Congressional staff may be unfamiliar with an agency's enabling legislation and governing statutes."<sup>163</sup>

In the follow-up survey, half (50%) of the agency respondents agreed or strongly agreed, with another two in five (40%) somewhat agreeing, that "[c]ongressional staffers often are unfamiliar with the agency's governing statutes and implementing regulations"—tied for the highest composite score among

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<sup>160</sup> Cf. Sunstein & Vermeule, *supra* note 152 (manuscript at 14) ("For agencies, ambiguities are a threat at least as much as they are an opportunity. One administration might well want to ensure that its successor will not be allowed, with the aid of *Auer*, to shift from a prior position.").

<sup>161</sup> For a more thorough discussion of these findings, see Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 32-33.

<sup>162</sup> See *id.* at 33 (discussing the results of Q6(h) of the follow-up survey, in which three in ten (30%) agency respondents agreed and another two in five (40%) somewhat agreed, with the remainder (30%) disagreeing, that "[t]he turnover of staff in Congress makes it difficult for the agency to have a strong working relationship with Congress").

<sup>163</sup> Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015).

the eight challenges listed in the survey.<sup>164</sup> The agency officials reported that congressional staffers often propose legislation that would duplicate existing law or unintentionally conflict with the existing statutory (and regulatory) scheme. As an agency rule drafter respondent from the author's prior survey put it, "Congress is producing some pretty terrible stuff to work with."<sup>165</sup>

Accordingly, much of the work involved in agencies providing technical drafting assistance consists of educating congressional staffers—and, in turn, the members of Congress—about what the existing law does and how the proposed legislation would affect that. Of course, these concerns about congressional staffer turnover and the poor quality of congressional drafting are not new and have been well-documented elsewhere.<sup>166</sup> There is a reason that one of the eight recommendations ACUS adopted focuses on agency educational efforts of congressional staffers and their bosses.<sup>167</sup> If the agency perceptions are accurate regarding the quality of congressional drafting and of congressional awareness of existing law, confidence in Congress reining in legislating in the shadows to avoid agency self-dealing seems misplaced.

Putting aside the empirical challenges to the argument that Congress has the capacity to check the agency incentives implicated by legislating in the shadows, political scientists and economists have long theorized that individual members of Congress—and the congressional committees on which they serve—may have incentives to delegate by ambiguity distinct from an institutional desire to divide labor and leverage agency expertise or to otherwise minimize the costs of legislating.<sup>168</sup> As Rao has explained, the political science

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<sup>164</sup> See Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 32 (discussing Q6(g), which shows that the remainder (10%) disagreed, with no one disagreeing strongly).

<sup>165</sup> Walker, *Inside Agency Statutory Interpretation*, *supra* note 19, at 1029 n.136.

<sup>166</sup> See, e.g., Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 846 (2014) ("For example, all except for two House committees had staff retention rates below 60% in the period between 2009 and 2011, a period in which control of the House passed from Democrats to Republicans.").

<sup>167</sup> See Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015) ("To improve the quality of proposed legislation and strengthen their relations with Congress, agencies should be actively engaged in educational efforts, including in-person briefings and interactions, to educate Congressional staff about the agencies' respective statutory and regulatory frameworks and agency technical drafting expertise.").

<sup>168</sup> See generally DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999) (offering extensive literature review). As Epstein and O'Halloran observe, "Congress will delegate to the executive when the external transaction costs of doing so are less than the internal transaction costs of making policy through the normal legislative process via committees." *Id.* at 43; see also Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744 (2002) ("The ubiquity of delegation is due to the need for (a) authority and (b) division of labor, in any complex institution, whether public or private. All institutions must take direction from a person, or a small group of people, but the leader of an institution cannot possibly perform all of its tasks directly. Instead, the leader or principal delegates broad authority to agents.").

and economics literature “emphasizes the many benefits that members of Congress can realize through delegation and demonstrates the strong incentives individual legislators have to continue delegating, even though this might weaken the collective lawmaking power of Congress.”<sup>169</sup>

In addition to minimizing legislation costs, the benefits of delegating policymaking authority to federal agencies include shifting responsibility for the negative consequences of policy decisions to the agency (while still claiming responsibility for the positive outcomes that occur at the agency level); providing benefits for particular constituents in ways that may please donors and thus encourage campaign contributions; and avoiding specification where legislative compromise proves too costly.<sup>170</sup> As Rao argues, moreover, many of these incentives provide “a variety of individual benefits [to members of Congress] outside of the legislative process” in ways that may frustrate the goals of the collective Congress.<sup>171</sup>

Through *ex post* controls, members of Congress, and the congressional committees composed of members, can exercise post-delegation influence on agency policymaking—to the benefit of constituents, interest groups, and potential campaign donors in ways that may contravene the will of the collective Congress.<sup>172</sup> Based on the variety of tools that members (and committees) of Congress have to influence agency policymaking after delegation, Rao posits that this “influence and control of administration by members of Congress allows lawmakers to also serve as law interpreters, in contravention of basic separation-of-powers principles.”<sup>173</sup> This unique relationship between federal agencies and individual members of Congress can lead to what Rao has coined “administrative collusion”; “[b]y fracturing the collective Congress and empowering individual members, delegation also promotes collusion between members of Congress and administrative agencies.”<sup>174</sup>

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<sup>169</sup> Rao, *supra* note 4, at 1477 (footnote omitted).

<sup>170</sup> See EPSTEIN & O’HALLORAN, *supra* note 168, at 30-32 (describing a number of reasons Congress might have incentivizes to delegate to agencies in particular issue areas when it does not do so in others: spending increased time on constituent services; being able to intervene in the administrative process on behalf of constituents; or being able to threaten uncooperative constituents with harmful regulation if they do not contribute to the legislator’s reelection campaign).

<sup>171</sup> Rao, *supra* note 4, at 1481; *see id.* (detailing how the individual interests of members of Congress may be served by delegation—providing members an opportunity to intervene in the regulatory process on behalf of interest groups and constituents; and reducing the time and costs of legislation so members can spend more time engaging in activities that will improve their chances of reelection).

<sup>172</sup> *See id.* at 1482 (“Methods [of *ex post* controls] take a variety of official forms, including committee oversight, threats to reduce appropriations, investigations of administrative conduct, reporting requirements, and the confirmation process for high-level officials.”).

<sup>173</sup> *Id.* at 1498.

<sup>174</sup> *Id.* at 1504; *see also id.* at 1505-06 (“Delegations thus erode one of the primary mechanisms for controlling the government by undermining the structural rivalry between members of Congress and the executive. Instead of competing over delegation, they will often agree on open-ended

The unconventional principal-agent bureaucratic model that emerges—where the individual member or congressional committee and *not* the collective Congress is the principal—is further complicated by federal agencies’ provision of technical drafting assistance. As Sitaraman observes, “[i]n many cases, the executive [agency] may assist Congress in suggesting what topics are worthy of delegation, how much power to delegate, how that power might be used, and what resources are necessary to execute on the delegation.”<sup>175</sup> That the agency confers with the member of Congress in the shadows at the outset of the legislative process further facilitates this risk of administrative collusion. Not only does the federal agency have incentives to suggest legislative language that is broad, flexible, or otherwise ambiguous in order to preserve or expand the agency’s regulatory and interpretive authority, the individual member of Congress faces similar incentives. And both share incentives to collude to delegate policymaking authority to the agency through ambiguity. That the initial legislative-drafting discussions occur in secret certainly does not help to check these incentives.

In sum, the relationship between individual members of Congress (and congressional committees) and federal agencies may elevate the risk that legislating in the shadows leads to excessive delegation of interpretive and policymaking authority in ways that contravene the will of the collective Congress. In so doing, both individual members of Congress and federal agencies are able to exercise lawmaking and law-interpreting authority in ways similar to those that concerned Scalia and Manning as to *Auer* deference. One solution, which Manning (and Stephenson and Pogoriler<sup>176</sup>) suggested in the context of combatting the concerns caused by *Auer* deference, is simply to switch to the less-deferential *Skidmore* doctrine.<sup>177</sup>

Appreciating the difference between *Chevron* and *Skidmore* helps underscore how transitioning to the less-deferential *Skidmore* standard may help alleviate the concerns addressed in this Part.<sup>178</sup> Although both *Skidmore* and *Chevron* are often referred to as “deference” standards, Peter Strauss has helpfully

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delegations of authority to agencies in order to expand the discretionary power of the legislator and administrators.”).

<sup>175</sup> Sitaraman, *supra* note 13, at 125-26.

<sup>176</sup> See Stephenson & Miri Pogoriler, *supra* note 146, at 1504 (arguing to “reserve *Seminole Rock* deference for regulatory interpretations contained in formal orders (granting *Skidmore* respect to more informal interpretations”).

<sup>177</sup> See Manning, *supra* note 141, at 618 (contending that *Skidmore* constitutes an appropriate framework “for circumstances in which an agency is interpreting a legal text, but is not exercising delegated interpretive lawmaking power”).

<sup>178</sup> The following paragraphs draw from the author’s prior work. See Christopher J. Walker, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 78-79 (2013) [hereinafter Walker, *The Deference Lottery*].

reframed these standards as “*Chevron* space” and “*Skidmore* weight.”<sup>179</sup> An agency receives *Chevron* space to fill in holes in statutes it administers because Congress has delegated authority for the agency to be “the authoritative interpreter (within the limits of reason) of such statutes.”<sup>180</sup> As Strauss puts it, under *Chevron* “the natural role of courts, like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field and that the game is played according to its rules. It is not for courts themselves to play the game.”<sup>181</sup> *Chevron* space thus seems to reflect separation-of-powers values, in that “Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”<sup>182</sup>

*Skidmore* weight, by contrast, does not give agencies delegated space to be authoritative interpreters.<sup>183</sup> Strauss explains that *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.”<sup>184</sup> “[W]hile not controlling upon the courts by reason of their authority,” as the *Skidmore* Court itself explained, “[t]he weight of [a *Skidmore*-eligible agency interpretation] 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.”<sup>185</sup> In such circumstances, the court—not the agency—remains the authoritative interpreter.

The agency, however, retains the power to persuade based on its special knowledge and experience that may qualify it as an expert of statutory

<sup>179</sup> See generally Strauss, “*Deference*” Is Too Confusing, *supra* note 17 (contending that *Skidmore* and *Chevron* “weight” are terms that more accurately describe the way that the judiciary views the constraints on administrative agencies). This reformulation is grounded in terms the Court has sometimes used to describe the standards. For instance, the *Skidmore* Court itself explained that agency interpretations subject to *Skidmore*, “while not controlling upon the courts by reason of their authority,” are given “weight” based on their “power to persuade.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Similarly, Justice Scalia explained in his *Mead* dissent that ambiguities in statutes subject to *Chevron* “create a space, so to speak, for the exercise of continuing agency discretion.” *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting).

<sup>180</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

<sup>181</sup> Strauss, “*Deference*” Is Too Confusing, *supra* note 17, at 1145.

<sup>182</sup> *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996); see also Walker, *Avoiding Normative Canons*, *supra* note 94, at 173-82 (exploring in more detail *Chevron*’s separation-of-powers foundation).

<sup>183</sup> Typically there is no *Chevron* space afforded for one of two reasons: either Congress has not delegated interpretive authority to the agency; or Congress has delegated such space, but the agency has “cho[sen] not to exercise that authority, but rather to guide—to indicate desired directions without undertaking (as [it] might) to compel them.” Strauss, “*Deference*” Is Too Confusing, *supra* note 17, at 1145.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1154 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)).

meaning and purpose. As the author has noted in prior work that now takes on additional significance in light of the empirical findings in this study, “the agency may have been present during the legislative drafting (and may actually have assisted in drafting), and the agency likely has extensive, nationwide experience in implementing the statute.”<sup>186</sup> Indeed, if the persuasiveness turns on the agency’s involvement in the legislative process—be it either substantive or technical legislative assistance—the agency would be encouraged to reveal its involvement. In other words, the agency can choose to “buy” *Skidmore* weight by providing details of its legislative involvement.<sup>187</sup> As discussed in Section III.A, this increased transparency may well have independent value for administrative governance.

Strauss further elaborates additional reasons why agencies have power to persuade distinct from regular litigants:

It is not only that agencies have the credibility of their circumstances, but also that they can contribute to an efficient, predictable, and nationally uniform understanding of the law that would be disrupted by the variable results to be expected from a geographically and politically diverse judiciary encountering the hardest . . . issues with little experience with the overall scheme and its patterns.<sup>188</sup>

Put differently, the weight of an agency’s interpretation should be heavier than the ordinary litigant’s power to persuade. Indeed, *Skidmore* weight can take into account one of the common rationales for *Chevron* deference—the need for uniformity in federal administrative law.

The concerns raised by legislating in the shadows—and the recommendation to replace *Chevron* space with *Skidmore* weight—take on added significance in light of the empirical realities of agency rulemaking, as revealed in the author’s prior study on agency rule drafters. Among more than twenty interpretive tools included in the survey, *Chevron* deference was reported by most (90%) agency rule drafters as being used when interpreting statutes and drafting regulations.<sup>189</sup>

The vast majority of agency rule drafters surveyed think about judicial review when drafting statutes and understand *Chevron* and *Skidmore* and how their chances in court are better under *Chevron*. “Indeed, two in five rule drafters surveyed agreed or strongly agreed—and another two in five somewhat agreed—that a federal agency is more aggressive in its interpretive

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<sup>186</sup> Walker, *The Deference Lottery*, *supra* note 178, at 79.

<sup>187</sup> Thanks to Zach Clopton for this excellent observation.

<sup>188</sup> Strauss, “*Deference*” *Is Too Confusing*, *supra* note 17, at 1146.

<sup>189</sup> Walker, *Inside Agency Statutory Interpretation*, *supra* note 19, at 1020 fig.2.

efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies.”<sup>190</sup>

By comparison, whereas nine in ten (90%) agency rule drafters surveyed indicated that they use *Chevron* deference when interpreting statutes and drafting regulations, only about two in five (39%) indicated that they use *Auer* deference.<sup>191</sup> In other words, any concerns about perverse incentives for agency regulators caused by *Auer* deference may be much less pervasive than concerns as to the incentives caused by *Chevron* deference.<sup>192</sup>

Accordingly, agencies have incentives to draft statutes flexibly, broadly, and ambiguously to trigger *Chevron* deference—and thus engage in self-delegation of primary interpretive authority. These agencies have further incentives to be more aggressive in their agency statutory interpretations when they believe *Chevron* deference applies. This creates incentives that the *Chevron* Court and the current Court have likely never considered. Legislating in the shadows must be understood and considered when discussing to what degree courts should defer to agency statutory interpretations. It might make sense to abandon *Chevron* space altogether and turn to *Skidmore* weight, which focuses more on the agency’s expertise in the subject matter and in the legislative process leading up to the statute’s enactment. In some ways, as further discussed in Section III.C, judicial review under *Skidmore* would look a lot like judicial review of agency statutory interpretation conducted under the more purposivist approach articulated in Section II.A.

### 3. The Case for a More Limited *Chevron* Deference

Despite the suggestion in subsection II.B.2 to abandon *Chevron* deference and replace it with the less-deferential *Skidmore* standard, the Supreme Court is unlikely to abandon *Chevron* deference in its entirety any time soon.

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<sup>190</sup> *Id.* at 163; see also Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703, 721-28 (2014) (exploring these findings in greater detail).

<sup>191</sup> Walker, *Inside Agency Statutory Interpretation*, *supra* note 19, at 1061 fig.11; see also Sunstein & Vermeule, *supra* note 152 (manuscript at 13) (discussing these findings in defending *Auer* deference).

<sup>192</sup> *Chevron* deference was also the interpretive tool identified as being used by the most congressional drafters in the Bressman and Gluck study. See Gluck & Bressman, *Part I*, *supra* note 18, at 993 fig.10. One could argue whether congressional drafters are well aware that *Chevron* deference—in particular, that if they leave ambiguities in statutes, agencies become the authoritative interpreters—means that Congress should be careful about leaving ambiguities in statutory language. The idea of careful drafting to avoid delegation is in tension with the political science and economic literature discussed above. On the other hand, this widespread awareness of *Chevron* deference also suggests that congressional drafters understand how to better collude with their agency counterparts while legislating in the shadows.

Congress, of course, could also act.<sup>193</sup> Indeed, the Separation of Powers Restoration Act, which passed the House in 2017, would amend the judicial review section of the Administrative Procedure Act to instruct courts to “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.”<sup>194</sup> In other words, the proposed legislation would purport to get rid of both *Chevron* and *Auer* deference.<sup>195</sup> As of May 2017, unsurprisingly, only one Democrat joined the Republicans in sponsoring the bill in the House,<sup>196</sup> and only five House Democrats voted in favor of it.<sup>197</sup> It is unlikely to be enacted, though it will be interesting to see what the Senate and new presidential administration decide to do.

There are strong arguments, moreover, that wholesale abandonment of *Chevron* deference to address legislating in the shadows is similar to using a hammer when a screwdriver would be more appropriate. This is particularly true in light of our inability to empirically assess the extent to which Congress incorporates agency technical drafting assistance and the extent to which such assistance creates statutory ambiguity in an agency self-dealing fashion. Perhaps the concerns about legislating in the shadows can be addressed more narrowly and effectively. For instance, Shobe, when considering the role of federal agencies in both substantive and technical legislative drafting, argues that courts should “be more willing to move away from *Chevron* deference, absent other indicators, in situations where the body of Congress responsible for the legislation was from a political party different than the party of the President that Congress expects to be implementing the legislation.”<sup>198</sup> Shobe bases this conclusion in part on the literature that posits that Congress is

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<sup>193</sup> Indeed, as Kent Barnett has documented, Congress has on at least one occasion—in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 regarding preemption decisions by the Office of the Comptroller of the Currency—codified *Skidmore* deference in lieu of *Chevron* deference. See Kent Barnett, *Codifying Chevron*, 90 N.Y.U. L. REV. 1, 4-5 (2015); see also Kent Barnett, *Improving Agencies’ Preemption Expertise within Chevron Codification*, 83 FORDHAM L. REV. 587, 605 (2014) (noting that Congress could codify *Chevron* deference when agencies follow certain procedures or certain contingencies occur).

<sup>194</sup> H.R. 5, 115th Cong. § 202 (2017) (as passed by House, Jan. 11, 2017); see also S. 2724, 114th Cong. § 2 (2016) (as introduced in Senate, Mar. 17, 2016) (proposing the same standard of review with similar statutory language).

<sup>195</sup> For more on the legislation, see Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1098-1105 (2016) [hereinafter Walker, *Context-Specific Chevron Deference*].

<sup>196</sup> See Cosponsors: H.R. 5—115th Congress (2017–2018), CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/5/cosponsors> [<https://perma.cc/SQ38-XBU5>] (listing the twenty-four House Republican cosponsors and single Democratic cosponsor of a bill containing the Separation of Powers Restoration Act).

<sup>197</sup> See Final Vote Results for Roll Call 45, CONGRESS.GOV, <http://clerk.house.gov/evs/2017/rollo45.xml> [<https://perma.cc/QVT2-2B5J>] (listing the 223 House Republicans that voted for the bill containing the Separation of Powers Restoration Act alongside only five House Democratic members).

<sup>198</sup> Shobe, *supra* note 13, at 510.

more likely to delegate interpretive authority to an ally (unified government) than a foe (divided government).<sup>199</sup> In circumstances of divided government, Shobe also suggests that the reviewing court should apply *Skidmore* weight instead of *Chevron* space.<sup>200</sup>

Although perhaps worth considering for other reasons, Shobe's specific proposal seems unlikely to address the perverse incentives created by legislating in the shadows discussed in Section II.B that may result from administrative collusion between a member of Congress and the agency providing the legislative-drafting assistance. That administrative collusion would likely take place in unified and divided government. But Shobe's proposal to change *Chevron* deference from a broad, bright-line rule to a context-specific one may help address these concerns.

Instead of applying *Chevron* deference to statutory ambiguity whenever Congress has delegated general rulemaking or formal adjudicatory authority to the agency (and the agency has utilized that procedure to adopt the statutory interpretation), the reviewing court could assess whether the collective Congress reasonably intended to delegate by ambiguity that particular issue to the agency. The court would inquire whether the ambiguity seems like a deliberate delegation by the collective Congress, or whether it seems more like the result of administrative collusion during the legislative process—or even just legislative inadvertence—that the collective Congress would not have intended to result in a delegation of interpretive authority to the agency. In other words, the *Chevron* Step Zero inquiry would focus not just on the formality of the agency procedure creating the interpretation but also on whether the collective Congress intended to delegate that particular substantive question to the agency.<sup>201</sup> Such an approach would also encourage

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<sup>199</sup> *Id.* at 509-12 & nn.256-64. See EPSTEIN & O'HALLORAN, *supra* note 168, at 122-62 (confirming the hypothesis that as the preferences of Congress and the President diverge, Congress will delegate less discretionary authority to agencies); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2016) (asserting that the "competition" between the legislative and executive branch "var[ies] significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party"); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1440 (2011) (discussing that "a principal is willing to delegate more discretion to an agent with expected policy preferences similar to the principal's own—a hypothesis sometimes referred to as the 'ally principal'").

<sup>200</sup> Shobe, *supra* note 13, at 511 n.265.

<sup>201</sup> For more on *Chevron* Step Zero, see Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 873-88 (2001), which delineates three operating principles that courts should follow in resolving questions about *Chevron's* domain. See also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207-11 (2006) (discussing the applicability of the *Chevron* framework and potential approaches to a *Chevron* Step Zero analysis). See generally Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 477-84 (2014) (reviewing recent literature and case law on the scope of *Chevron* deference under Step Zero).

the collective Congress to be more explicit when intending to delegate interpretive authority to a federal agency.

If this case-by-case approach to *Chevron* deference sounds familiar, it may be because Chief Justice Roberts suggested something quite similar in his dissent in *City of Arlington v. FCC*<sup>202</sup> and his opinion for the Court in *King v. Burwell*.<sup>203</sup> In 2013, the Court decided *City of Arlington v. FCC*, which held that *Chevron* deference applies to statutory ambiguity concerning the scope of an agency's regulatory authority (or jurisdiction).<sup>204</sup> In reaching this conclusion, Justice Scalia, writing for the Court, framed the inquiry of whether *Chevron* deference applies to statutory ambiguity in broad and bright-line terms: "the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the [agency] with general authority to administer the [statute] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."<sup>205</sup>

Chief Justice Roberts, joined by Justices Alito and Kennedy, dissented. The dissent bemoaned the sprawl of the modern administrative state and how "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."<sup>206</sup> To combat this administrative power, the Chief Justice argued that *Chevron* deference should not apply to every statutory ambiguity whenever Congress has granted the agency general rulemaking or adjudicatory power.<sup>207</sup> Instead, quoting the *Chevron* decision itself, the Chief Justice argued that the reviewing court should evaluate "whether Congress had 'delegat[ed] authority to the agency to elucidate a *specific provision* of the statute."<sup>208</sup> The Chief Justice then documented how the Court has "never faltered in [its] understanding of this straightforward principle, that whether a particular agency interpretation warrants *Chevron* deference turns on the court's determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue."<sup>209</sup>

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<sup>202</sup> See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1881 (2013) (Roberts, C.J., dissenting) (suggesting that courts analyze whether Congress delegated authority to the agency to elucidate a "*specific provision*" of the statute to determine whether *Chevron* deference applies).

<sup>203</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2488-99 (2015) (asserting that the application of *Chevron* deference is premised on the theory that Congress implicitly delegated authority to the agency to fill in the statutory gaps). This discussion of the Chief Justice's approach to *Chevron* deference draws substantially from, and is further explored in, the author's prior work. See Walker, *Context-Specific Chevron Deference*, *supra* note 195, at 1098-1105.

<sup>204</sup> *City of Arlington*, 133 S. Ct. at 1874-75.

<sup>205</sup> *Id.* at 1874.

<sup>206</sup> *Id.* at 1878 (Roberts, C.J., dissenting).

<sup>207</sup> *Id.* at 1879-80.

<sup>208</sup> *Id.* at 1881 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-84 (1984)).

<sup>209</sup> *Id.*; see also *id.* at 1881-83 (reviewing precedent on point).

In response, Justice Scalia sharpened the distinction between these two approaches to *Chevron* deference. Justice Scalia called the dissent's approach "a massive revision of our *Chevron* jurisprudence" because, under the dissent's "open-ended hunt for congressional intent," "even when general rulemaking authority is clear, every agency rule [would] be subjected to a *de novo* judicial determination of whether the particular issue was committed to agency discretion."<sup>210</sup> For Justice Scalia, the dissent's context-specific approach would result in "some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent."<sup>211</sup> Accordingly, he argued, "The excessive agency power that the dissent fears would be replaced by chaos."<sup>212</sup>

Not surprisingly, Justice Breyer, in his concurring opinion, agreed with the dissent's context-specific approach to *Chevron* deference.<sup>213</sup> He provided additional guidance on how to determine if Congress had intended to delegate interpretive authority to the agency by ambiguity.<sup>214</sup> Drawing on his opinion for the Court in *Barnhart v. Walton*, Justice Breyer noted that the Court has previously "assessed 'the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.'"<sup>215</sup> Justice Breyer also noted the relevance of the statutory provision's subject matter—"its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority."<sup>216</sup>

In *King v. Burwell*, Chief Justice Roberts, writing for the Court, continued to develop his context-specific approach in *City of Arlington*.<sup>217</sup> Although the Court ultimately sided with the federal government in interpreting the Affordable Care Act's tax credit provisions, it refused to accord any deference to the regulation interpreting the statute. Like he did in his *City of Arlington* dissent, the Chief Justice noted that "[i]n extraordinary cases . . . there may

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<sup>210</sup> *Id.* at 1874 (majority opinion).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1875 (Breyer, J., concurring in part and concurring in judgment).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

<sup>216</sup> *Id.* at 1875-76 (citing *Gonzales v. Oregon*, 546 U.S. 243, 265-66 (2006); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1007-10 (1999)).

<sup>217</sup> See, e.g., Hoffer & Walker, *supra* note 136, at 41 (observing that "the Chief's case-by-case approach [in *King v. Burwell*] of looking to the particular statutory subsection for congressional intent of delegation (at least for major questions) reads a lot like his dissent in *City of Arlington v. FCC*").

be reason to hesitate before concluding that Congress has intended such an implicit delegation.”<sup>218</sup> The Chief Justice went on to explain,

This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.<sup>219</sup>

The Chief Justice further observed that “[i]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”<sup>220</sup>

Similar to the Chief Justice’s dissent in *City of Arlington*, this new major questions doctrine departs from the bright-line, rule-based approach to *Chevron* deference that Justice Scalia rearticulated for the Court in *City of Arlington*. To be sure, the major questions doctrine is not new. Even Justice Scalia has invoked it, colorfully explaining that the doctrine is the presumption that Congress “does not alter the fundamental details of a regulatory scheme in vague terms of ancillary positions—it does not . . . hide elephants in mouseholes.”<sup>221</sup> Its application here, however, seems less obvious and indicative of a more general context-specific inquiry into congressional intent.<sup>222</sup>

To the extent the Chief Justice is looking for more support for a context-specific approach to *Chevron* deference, the findings from this study may well provide it. Strengthening *Chevron* Step Zero to inquire whether the collective Congress “had ‘delegat[ed] authority to the agency to elucidate a *specific provision* of the

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<sup>218</sup> *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

<sup>219</sup> *Id.* at 2489. At oral argument Justice Kennedy suggested adopting such an approach while discussing *Chevron* deference: “it seems to me a drastic step for us to say that the Department of Internal Revenue and its director can make this call one way or the other when there are, what, billions of dollars of subsidies involved here?” Transcript of Oral Argument at 74, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

<sup>220</sup> *King*, 135 S. Ct. at 2489.

<sup>221</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

<sup>222</sup> See Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147 (2017) (exploring further the origins of the new major questions doctrine in *King v. Burwell* and how that doctrine differs from prior precedent). Despite the novelty of Chief Justice’s approach to major questions in *King v. Burwell*, it does find some support from the agency rule drafters surveyed in the author’s prior study. See Walker, *Inside Agency Statutory Interpretation*, *supra* note 19, at 1053-58 & fig.10 (reporting that approximately half (56%) of the agency rule drafters surveyed—compared to about a quarter (28%) of congressional respondents in the Bressman and Gluck study—believed that Congress intends to delegate ambiguities relating to major policy questions). For a further explanation of these findings, see Walker, *Context-Specific Chevron Deference*, *supra* note 195, at 1105-14.

statute”<sup>223</sup> would help prevent administrative collusion between members of Congress and the federal agencies that together legislate in the shadows. This more limited *Chevron* doctrine would also likely encourage the collective Congress to more expressly indicate its intent to delegate by ambiguity.

Moreover, unlike abandoning *Chevron* deference entirely, as suggested in subsection II.B.2, it is more realistic that the Court will adopt a more context-specific approach to *Chevron*. Based on the opinions in *City of Arlington*, Justices Alito, Breyer, and Kennedy are already on board for the Chief Justice’s context-specific approach. Justices Ginsburg, Kagan, and Sotomayor also joined the Chief Justice’s opinion in *King v. Burwell*—though one would be wise not to read too much into their decision to join the Chief Justice’s opinion.<sup>224</sup> Additionally, Justice Thomas is now concerned that *Chevron* deference is unconstitutional and thus may be inclined to adopt a move to limit *Chevron*’s domain.<sup>225</sup> The same is true of the newest addition to the Court—Justice Gorsuch—who expressed constitutional concerns with *Chevron* deference while serving on the Tenth Circuit.<sup>226</sup>

### III. TRANSPARENCY, DEFERENCE, AND TRADEOFFS

As opposed to reworking judicial review of agency statutory interpretation, the simpler solution may be to require that agency technical drafting assistance take place in the sunshine instead of the shadows. Or perhaps to increase political accountability it should at least be more closely monitored

<sup>223</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1881 (2013) (Roberts, C.J., dissenting) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-84 (1984)).

<sup>224</sup> First, it is unclear whether the Court or lower courts will extend *King v. Burwell*’s “sweeping change in administrative law to other regulatory contexts” or whether “this new major questions doctrine may well be good for tax only.” See Hoffer & Walker, *supra* note 136, at 46. Second, the Court’s four more liberal members may have joined the Chief Justice’s opinion to uphold the Affordable Care Act but not necessarily agreed with the Chief Justice’s reasoning on *Chevron* deference. See Adam Liptak, *Right Divided, a Disciplined Left Steered the Supreme Court*, N.Y. TIMES (June 30, 2015), [https://www.nytimes.com/2015/07/01/us/supreme-court-tacks-left-with-push-from-disciplined-liberals.html?\\_r=0](https://www.nytimes.com/2015/07/01/us/supreme-court-tacks-left-with-push-from-disciplined-liberals.html?_r=0) [<https://perma.cc/PFC9-SMTU>]. Their “discipline” in voting together to achieve desired outcomes may mask disagreements on reasoning and interpretation. *Id.*

<sup>225</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (arguing that the agency’s “request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes”). Justice Thomas may be unwilling to join the Chief Justice’s context-specific approach to *Chevron* deference. However, since Thomas likely believes *Chevron* is unconstitutional, he might concur in judgment to a Roberts plurality opinion that significantly altered *Chevron*. Thomas’s fifth vote would make the Roberts plurality opinion the narrowest and thus the precedential opinion.

<sup>226</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”).

by the President through OMB preclearance and coordination—similar to the agency’s substantive legislative activities. After all, core principles of the modern administrative state include transparency, accountability, and open governance. Sections III.A and III.B briefly consider and reject these arguments. Section III.C then introduces the “double deference” problem that emerges if one accepts a more purposivist approach to agency statutory interpretation that does not eliminate, or at least narrow, *Chevron* deference.

#### A. *Against Transparency*

As outlined in Section I.B, the current norm is that the congressional requester expects the technical drafting assistance request and the agency response to remain confidential. Indeed, the D.C. Circuit, based on a somewhat odd set of facts, has held that certain agency technical drafting assistance is not subject to disclosure under the Freedom of Information Act because it is a congressional, as opposed to agency, record.<sup>227</sup> As detailed in Section II.B, moreover, this secrecy exacerbates the risk of administrative collusion in the legislative process.

It is thus no surprise that a common response to the findings presented in this Article is to suggest that technical drafting assistance should be public and on the record. C. Boyden Gray’s reaction is representative:

There should be more disclosure of what Congress does as to agency interpretation. . . . [A]ll contacts by Congress with OMB and with the agencies be logged. . . . Obviously there are incentives . . . for Congressmen and Senators to leave things vague so that they can go back in and trade a fix for it for a little campaign donation here, a little help here, a little PAC here.<sup>228</sup>

This open-governance suggestion finds some support in the administrative law literature. After all, transparency has long been recognized as a core value to promote accountability in the regulatory state. For instance, Peter Shane has

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<sup>227</sup> See *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004) (“In this circuit, whether the IRS response is subject to FOIA turns on whether Congress manifested a clear intent to control the document. Applying that standard to the circumstances of this case and balancing Congress’s authority to maintain the confidentiality of its own materials against the broad mandate of disclosure lying at the heart of FOIA, we conclude that only those portions of the IRS response that would reveal the congressional request are not subject to FOIA.”). *But see id.* at 605 (Henderson, J., dissenting) (“I believe the district court correctly analyzed the four factors set forth in *Tax Analysts* to conclude that the IRS does not have sufficient ‘control’ of its copy of its response to the Joint Committee on Taxation (JCT)’s request to make the document disclosable as an ‘agency record’ under FOIA.” (footnote omitted)).

<sup>228</sup> See C. Boyden Gray, Remarks at the Separation of Powers: Congress, Agencies, and the Court Panel at George Mason University Center for the Study of the Administrative State’s 2016 Public Policy Conference on Rethinking Judicial Deference, at 45:00 (June 2, 2016), <https://vimeo.com/169757569> [<https://perma.cc/74AD-WBZK>] (responding to an earlier draft of this Article).

noted that “the openness of agency decision making to public scrutiny—the relative transparency in terms of process—is itself a guarantee of public accountability.”<sup>229</sup> Indeed, Adrian Vermeule has aptly observed that “transparency deters officials from engaging in self-interest[ed] bargaining,”<sup>230</sup> such as, perhaps, the type of self-dealing concerns implicated by legislating in the shadows.

Although public disclosure may be the simplest solution to the problems of legislating in the shadows, the costs of such an on-the-record requirement are too great. As Frederick Schauer has explained, “Transparency is not, of course, an unalloyed good, much of contemporary popular rhetoric notwithstanding.”<sup>231</sup> Indeed, he notes, “Secrecy, privacy, anonymity, and confidentiality also have their virtues, and we can all understand why transparency is a far more desirable attribute for sunroom windows than it is for bathroom doors.”<sup>232</sup>

Here, confidentiality likely encourages congressional drafters to leverage agency expertise to draft better, more technically correct legislation. A public disclosure requirement, in contrast, would likely discourage Congress from even consulting with agencies at an early stage in the legislative process—when the legislation is more easily reworked and thus where input from agency subject-matter experts is most valuable. Such a disclosure requirement would be even more problematic if other outside drafters, such as lobbyists and

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<sup>229</sup> PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 160 (2009); accord ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 6 (2007) (noting that “[t]ransparency is necessary, at least to some degree, to any conception of accountability”); Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 364-65 (2014) (explaining why the lack of transparency poses problems for administrative governance); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1161 (2010) (arguing that “[i]ncreasing transparency regarding presidential influence on a particular agency decision . . . could facilitate a public dialogue where citizens are persuaded that the decision made . . . is still the correct decision for the country,” whereas “submerging presidential preferences undermines electoral accountability for agency decisions and reduces the chances of a public dialogue on policy”); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2259 (2016) (noting in a different regulatory context that “there are costs to the current system of opacity with respect to accountability”).

<sup>230</sup> VERMEULE, *supra* note 229, at 181.

<sup>231</sup> Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1342.

<sup>232</sup> *Id.*; see *id.* at 1346-51 (discussing aims, costs, benefits, and tradeoffs of transparency); see also Mendelson, *supra* note 229, at 1166-68 (detailing the potential concerns associated with greater public disclosure). Indeed, there is a large literature outside of law that focuses on the costs of transparency in governance. See, e.g., Amitai Etzioni, *Is Transparency the Best Disinfectant?*, 18 J. POL. PHIL. 389, 389 (2010) (“Transparency is a highly regarded value, a precept used for ideological purposes, and a subject of academic study. . . . [N]onetheless, [t]ransparency is overvalued. Moreover, its ideological usages cannot be justified, because a social science analysis shows that transparency *cannot* fulfill the functions its advocates assign to it, although it can play a limited role in their service.”); Justin Fox, *Government Transparency and Policymaking*, 131 PUB. CHOICE 23, 24 (2007) (determining the “specific conditions under which making the policy process more open can have a deleterious effect on the public’s welfare”); Justin Fox & Richard Van Weelden, *Costly Transparency*, 96 J. PUB. ECON. 142, 142 (2012) (identifying “conditions under which [transparency] can decrease the principal’s welfare”).

interest groups, could continue to provide confidential feedback. The tradeoff of less transparency for an increased likelihood that technical drafting assistance actually takes place is likely an efficient one. Indeed, ACUS appeared to conclude as much when it recommended that that “[c]ongressional committees and individual Members should aim to reach out to agencies for technical assistance early in the legislative drafting process.”<sup>233</sup>

This cost–benefit analysis in favor of confidentiality becomes even more compelling when one considers reasonable alternatives that produce somewhat similar benefits and impose substantially fewer costs. Namely, as discussed in Section II.B, we could rethink how courts review agency statutory interpretations. The elimination of *Chevron* deference—or at least its narrowing—would not discourage agencies from being substantially involved in the legislative process. But it would mitigate the perverse incentives agencies may have to legislate in the shadows in a self-dealing fashion. Moreover, such a solution would encourage members of Congress and federal agencies to maintain a rich dialogue and effective principal–agent relationship, which should lead to better legislative and regulatory outputs.

### B. *Against Presidential Preclearance*

If one remains concerned about accountability yet agrees that public disclosure would prove too costly, another option would be to increase White House review. Currently, OMB does not require preclearance of agency technical drafting assistance, only post-assistance notice.<sup>234</sup> The findings of this study, moreover, suggest that OMB is seldom kept in the loop even though Circular A-19 requires such notice.<sup>235</sup> Increased OMB review would perhaps help remedy accountability problems without requiring full public transparency. Indeed, some may well argue that the President has a constitutional duty to supervise agency legislating in the shadows, perhaps to avoid the Blackstone-Locke-Montesquieu structural separation-of-powers concerns implicated by administrative collusion in the legislative process.<sup>236</sup>

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<sup>233</sup> Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015).

<sup>234</sup> OMB Circular A-19, *supra* note 23, § 7(i).

<sup>235</sup> See Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 10 (finding “that the majority of agencies do not comply with these [post-assistance notice] instructions with respect to the run-of-the-mill technical drafting assistance requests” and that, “based on information gathered from the federal agencies, it does not appear that OMB has made any systematic effort to enforce these notice and transmittal requirements”).

<sup>236</sup> Cf. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1842 (2015) (arguing that “the Constitution embodies a duty to supervise that current doctrine has simply failed to acknowledge” and that “[a] version of the duty based on Article II demands [presidential] supervision by and within the executive branch”). To be sure, Professor Metzger has not argued that the President should supervise agency technical drafting assistance. Moreover, from her comments on an earlier draft of this Article, she does not seem to perceive a constitutional problem with agency

Conversely, there is an extensive literature setting forth the normative problems with current White House review of agency rulemaking and other regulatory activities.<sup>237</sup> Two of those problems, as Lisa Heinzerling has explored in greater detail, are particularly important here: the lack of transparency in the OMB review process and the lack of accountability for OMB decisionmaking.<sup>238</sup> Moreover, Judge Posner's criticism of another proposal for OMB to be more involved in coordinating interagency adjudication activities seems applicable here as well: "what would paralyze federal regulation would be for White House staff to attempt to regulate the relations among the agencies. It would be a bureaucratic disaster."<sup>239</sup> "The result would be to slow down enforcement and foment bickering," he continued, adding that "[b]ureaucrats would be locking horns" and "[h]igher officials in the immense White House staff would be called in to arbitrate the disputes" in a way that "would make things worse."<sup>240</sup>

In the interviews and surveying conducted for this study, agency officials raised similar criticisms of OMB's current practices to review agency legislative activities yet also seemed to universally reject the proposal for OMB preclearance or other review of technical drafting assistance.<sup>241</sup>

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legislating in the shadows—at least not based on an analogy to the Scalia–Manning *Auer* deference concerns outlined in subsection II.B.2. Perhaps most importantly, as further discussed below, the lack of White House preclearance of technical drafting assistance does not mean the President provides no supervision. Political appointees in the agency's legislative affairs office serve as gatekeepers and liaisons with Congress to control agency interactions with Congress.

<sup>237</sup> See generally Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (casting doubt on the assertion that White House involvement promotes regulatory effectiveness, at least as it relates to the EPA); Heinzerling, *supra* note 229 (describing the OIRA process as it operates in relation to the EPA); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987) (arguing for more stringent limitations on ex parte attempts by the President and his staff to influence rulemaking); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986) (suggesting that the system of OMB control "imposes costly delays that are paid for through the decreased health and safety of the American public"); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001) (exploring policy considerations that counsel against giving the President authority to dictate decisions entrusted to executive officers by statute); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012) (arguing that "centralized White House regulatory review is a primary cause of regulatory failure that the nation can well do without").

<sup>238</sup> See Heinzerling, *supra* note 229, at 364-65 (criticizing the opacity of the OIRA process).

<sup>239</sup> See POSNER, *supra* note 18, at 46 (discussing Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015)).

<sup>240</sup> *Id.*

<sup>241</sup> See Walker, *Federal Agencies in the Legislative Process*, *supra* note 1, at 33 ("These comments ranged from complaints about how slow and burdensome the OMB preclearance is, and how antiquated the current guidelines are (they have not been updated in over three decades), to how there is no clear standard to distinguish between technical and substantive legislative assistance, and how the notice and transmittal requirements for technical assistance are honored in the breach and/or should be formally abandoned. Many agency officials, however, also countered that Circular A-19

Similar to the costs of public disclosure, presidential review could also discourage congressional staffers from seeking technical drafting assistance—out of fear that the President would intervene to disrupt a legislative initiative before it had even begun. (This is not to mention that congressional staffers expect quick turnarounds on technical drafting assistance requests, and OMB review would no doubt frustrate that expectation.) Moreover, the benefits of a formalized OMB process seem to be overstated. After all, the lack of White House preclearance of technical drafting assistance does not mean the President does no supervision—at least with respect to executive branch agencies. The President’s political appointees in the agency’s legislative affairs office serve as gatekeepers and liaisons with Congress to ensure more political oversight of agency interactions with Congress.

In sum, the substantial costs of presidential review of legislating in the shadows would likely outweigh any benefits. And those benefits would likely not include reducing the incentives for agency self-dealing. To the contrary, one could imagine the White House utilizing technical drafting assistance to further shift power to the executive branch in ways that may not be possible through the political process.

### C. *Against Double Deference*

This Part considers alternatives to rethinking judicial deference doctrines in light of the phenomenon of legislating in the shadows. It is worth noting one further complication that likely merits a more extended treatment: the problem of “double deference.” As discussed in Section II.A, there has been a growing call among administrative law scholars to allow federal agencies to engage in more purposivist statutory interpretation, as compared to their judicial counterparts, given agencies’ comparative expertise in legislative history and the legislative process that resulted in the statute being enacted.<sup>242</sup> The findings presented in this Article provide some empirical support for that scholarly call.

Embracing a more purposivist approach to agency statutory interpretation without revisiting *Chevron* deference, however, could result in a double deference phenomenon that has not been previously appreciated. In other words, the reviewing court would allow an agency to have more purposivist leeway (or deference) in interpreting statutory text based on the agency’s superior understanding of congressional purpose or intent. The added deference could inform the *Chevron* Step One inquiry regarding statutory ambiguity. The

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should not be revisited as the informal agency (and OMB) processes that have developed to function around the formal Circular A-19 processes work efficiently; formal modification by OMB would likely only disrupt an informal system that seems to be functioning quite well.”).

<sup>242</sup> See *supra* notes 88–98 and accompanying text (discussing and citing relevant literature).

reviewing court would then also defer to any reasonable agency interpretation of the statute at *Chevron* Step Two. Such a double deference standard would depart from the Court's current *Chevron* doctrine approach, and in the process would provide even more incentives for agencies to self-deal while legislating in the shadows.<sup>243</sup>

To properly recalibrate agency statutory interpretation in light of agency legislating in the shadows, it might make the most sense to allow agencies to engage in more purposivist statutory interpretation, yet to review such interpretations for *Skidmore* weight instead of *Chevron* space. Indeed, there are striking similarities between purposivism and *Skidmore*: Both encourage the agency to produce and analyze evidence of statutory purpose or intent—evidence about which agencies may have comparative expertise over courts.<sup>244</sup> Both place greater weight on whether a particular interpretation furthers the objectives of the statute, focusing more on the intended effect or substance of the statute than just its plain text or form.<sup>245</sup>

Adopting the Chief Justice's context-specific approach to *Chevron* deference, by contrast, would not eliminate the risk of double deference (assuming the Court also allows for a more purposivist approach). But this narrowing of *Chevron* to examine whether the collective Congress intended to delegate interpretive authority to the agency as to the particular provision would arguably reduce much of the costs associated with legislating in the shadows. Federal agencies would continue to provide confidential technical drafting assistance to encourage congressional drafters to leverage agency expertise, but agencies would have fewer incentives for self-dealing in the absence of a more bright-line *Chevron* deference doctrine.

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243 This double deference point is reminiscent of Justice Stevens's "double reasonableness" observation regarding qualified immunity in the Fourth Amendment context. See *Anderson v. Creighton*, 483 U.S. 635, 648 (1987) (Stevens, J., dissenting) (disagreeing with the Court's decision to "approve a double standard of reasonableness—the constitutional standard already embodied in the Fourth Amendment and an even more generous standard that protects any officer who reasonably could have believed that his conduct was constitutionally reasonable"); accord *Saucier v. Katz*, 533 U.S. 194, 214 (2001) (Ginsburg, J., concurring in judgment) ("Double counting 'objective reasonableness,' the Court appears to suggest, is demanded by *Anderson*, which twice restated that qualified immunity shields the conduct of officialdom 'across the board.'" (internal citation omitted)).

244 Cf. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan.").

245 See *Hoffer & Walker*, *supra* note 136, at 35-39 (arguing that the Chief Justice's contextualist approach to interpretation in *King v. Burwell* and *NFIB v. Sebelius* favors the statute's substance over its textual form).

## CONCLUSION

As documented in this Article, federal agencies play a substantial role in the legislative process—both in the foreground by drafting the substantive legislation the Administration desires to submit to Congress and in the shadows by providing confidential technical drafting assistance on legislation that originates from congressional staffers. The latter type of statutory drafting is of vital importance to the legislative process, as it leverages the agency's expertise and vast regulatory experience in the subject matter to improve the legislative output. Accordingly, the Administrative Conference of the United States has wisely recommended that "[c]ongressional committees and individual Members should aim to reach out to agencies for technical assistance early in the legislative drafting process" and that "[f]ederal agencies should endeavor to provide Congress with technical drafting assistance when asked."<sup>246</sup>

Legislating in the shadows, however, is not without costs. It can provide incentives for a federal agency and member(s) of Congress to collude to expand the agency's regulatory authority by leaving ambiguities in proposed legislation to be later interpreted by the agency—in ways that may be contrary to the wishes of the collective Congress. Such administrative collusion allows the federal agency to impermissibly be both the law-maker and the law-interpreter. Indeed, one recurring theme from the agency interviews conducted for this study is that federal agency officials often provide technical drafting assistance that keeps the proposed statutory language broad and flexible in order to preserve (or perhaps expand) the scope of the agency's regulatory authority.

It is safe to assume that the *Chevron* Court did not consider this phenomenon when it crystalized the doctrine that a court should defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers. Nor did Justice Scalia when he reiterated a broad, bright-line *Chevron* approach in *City of Arlington*, much less when he expressed concerns with *Auer* deference yet dismissed similar concerns with *Chevron* deference. Appreciating the expansive role of federal agencies in the legislative process should encourage rethinking of how courts review agency statutory interpretations.

For some on the federal bench, in Congress, and in the legal academy, that may well mean abandoning *Chevron* deference in favor of the less-deferential *Skidmore* standard. For others, it may encourage a more limited, context-specific *Chevron* doctrine, similar to the approach the Chief Justice embraced in his dissent in *City of Arlington* and his opinion for the Court in *King v. Burwell*. Yet for others, this phenomenon may well just reinforce their current view that courts should grant great deference (indeed, perhaps double deference) to

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<sup>246</sup> Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015).

agency statutory interpretations because of the agency's deep understanding of its statutory mandate and vast experience and expertise in the subject matter. In all events, this Article only begins the conversation about the role of federal agencies in the legislative process. Much more empirical and theoretical work needs to be done.

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