RECENT DEVELOPMENTS

AGENCY INTERPRETATIONS OF EXECUTIVE ORDERS

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Executive orders are an important tool of presidential power that often rely on agencies to interpret and implement them. Moreover, agency interpretations of executive orders often arise in court. But neither courts nor commentators have developed a well-reasoned interpretive methodology for agency interpretations of executive orders. Instead, relevant case law essentially has not developed since 1965, despite landmark shifts in administrative law marked by Chevron, Auer, and their progeny. This Article proposes a new legal test that both (i) reflects modern understandings of agency interpretation and (ii) outlines when courts should defer to an agency's interpretation of an executive order.

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INTRODUCTION

We live in an era of presidential unilateralism. A key tool of presidential power is the formal presidential directive, better known as the "executive order."[1] But executive orders standing alone can accomplish little. Orders rely on the components of the Executive Branch—including agencies—to interpret and implement them. And questions about how the judiciary should evaluate these agency interpretations often arise in litigation. They have appeared in cases involving major policy concerns: the 1971 nationwide wage-

1. Other terms for formal presidential directives include "proclamation," "memorandum," "directive," and "determination." *See infra* Part I-A. For the sake of this Article's readability, I generally use "executive orders" throughout. *See infra* note 24.

price freeze, protection of national monuments, management of nuclear energy security clearances, collective bargaining at federal agencies, and deportability of foreign nationals, among others.[2]

According to the Supreme Court's 1965 opinion *Udall v. Tallman*,[3] the interpretive rule in such cases is that courts should defer to agency interpretations of executive orders if they are "reasonable."[4] But case law has not developed this rule despite landmark shifts in administrative law marked by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[5] *Auer v. Robbins*,[6] and their progeny. Nor have courts or commentators thoroughly examined how these later cases interact with the *Tallman* doctrine. So, it is perhaps unsurprising that courts inconsistently apply *Tallman*, if they do at all, and instead often strain to decide interpretation cases on alternative grounds.

A recent example of a court wrestling an agency interpretation of an executive order appears in *County of Santa Clara v. Trump*,[7] the case preliminarily enjoining President Trump's Executive Order No. 13,768. At stake in the

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2. *See* Montana Wilderness Ass'n v. Connell, 725 F.3d 988, 994 (9th Cir. 2013) (deferring to the Bureau of Land Management's interpretation of President Clinton's Proclamation No. 7398 establishing the Upper Missouri River Breaks National Monument in 2001); El-Ganayni v. U.S. Dep't of Energy, 591 F.3d 176, 183 (3d Cir. 2010) (deferring to Department of Energy's interpretation of Executive Order No. 12,968 in case challenging revocation of a security clearance); Am. Fed'n Gov't Emps. v. Fed. Labor Relations Auth., 204 F.3d 1272, 1275 (9th Cir. 2000) (holding Executive Order 12,871 did not constitute an election to bargain); Wong v. Ilchert, 998 F.2d 661, 663 (9th Cir. 1993) (allowing appellant's deportation by holding that Immigration and Naturalization Service (INS) correctly interpreted Executive Order No. 12,711 to exclude appellant as a beneficiary); Univ. of S. Cal. v. Cost of Living Council, 472 F.2d 1065, 1071 (Temp. Emer. Ct. App. 1972) (deferring to Cost of Living Council and Office of Emergency Preparedness interpretation of President Nixon's Executive Order No. 11,615, which ordered a nationwide wage-price freeze).

3. 380 U.S. 1 (1965).

4. *Id.* at 4.

5. 467 U.S. 837 (1984).

6. 519 U.S. 452 (1997); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (affirming *Auer* but "reinforc[ing] its limits").

7. 250 F. Supp. 3d 497 (N.D. Cal. 2017), *aff'd sub nom.* City & Cty. of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018). Author disclosure: Under attorney supervision, I drafted an amici curiae brief in this case at the motion for reconsideration stage. *See* Brief of Amici Curiae Administrative Law Professors in Support of Plaintiffs' Motion for Summary Judgment, Cty. of San Francisco v. Trump, 267 F. Supp. 3d 1201 (N.D. Cal. 2017) (3:17-cv-00574-WHO) (amici Anne Joseph O'Connell, David Freeman Engstrom, Daniel Farber, Peter M. Shane, and Peter L. Strauss). All thoughts and errors in this Article are my own and do not reflect information learned from representation.

case is about $1.7 billion in federal funds for Santa Clara and $1.2 billion for San Francisco.[8] By its text, Executive Order No. 13,768 directs the Attorney General and the Secretary of Homeland Security to prohibit "sanctuary jurisdictions" from receiving "[f]ederal grant money."[9] Yet the Department of Justice's (DOJ's) trial attorneys characterized the order as merely an exercise of the President's bully pulpit with no legal effect.[10] The district court rejected DOJ's interpretation as contradicted by both (i) the order's plain language and (ii) public comments by the President and Attorney General. Citing several constitutional concerns based on its reading of the order, the district court issued a nationwide preliminary injunction. In response, the Attorney General issued a two-page memorandum purportedly ratifying the DOJ's litigation position.[11] Even so, after a motion for reconsideration, the district court again rejected DOJ's interpretation as not an "accurate and credible reading" of Executive Order No. 13,768.[12] Missing from the court's discussion was a clear legal framework for the level of deference owed agency interpretations of executive orders. Instead, the court extended a case limiting governmental discretion in the First Amendment context.[13] And late last year, a divided panel of the Ninth Circuit affirmed the district court's decision, but recognized that "[i]n contrast to the many established principles for interpreting legislation, there appear to be few such principles to apply in interpreting executive orders."[14]

As this Article will show, the *County of Santa Clara* court's fruitless search for more relevant case law reveals a larger problem—the underdeveloped and outdated nature of deference doctrine for agency interpretations of executive orders. This lack of development has left several questions unanswered: Do justifications for administrative deference—i.e., furthering lawmaker intent, political accountability, and technical expertise—apply to the executive order context? How should courts weigh presidential speech that contradicts the plain language of an executive order? What degree of deference to agency interpretations of executive orders accords with the rule of law? And what is an appropriate new deference test for the modern era?

This Article is one of the first pieces of scholarship to propose answers to these questions, and thereby aims to inform whether and how much courts

8. *See County of Santa Clara*, 250 F. Supp. 3d at 512–13.

9. Exec. Order No. 13,768, § 9(c), 82 Fed. Reg. 8799, 8801 (Jan. 30, 2017).

10. *County of Santa Clara*, 250 F. Supp. 3d at 507–08.

11. County of Santa Clara v. Trump, 267 F. Supp. 3d 1201, 1206 (N.D. Cal. 2017).

12. *Id.* at 1209.

13. *See id.* at 1210 (applying City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 (1988) to reject the Attorney General's memorandum).

14. City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1238 (9th Cir. 2018).

should defer to agency interpretations of executive orders.[15] In breaking new ground, this Article builds on literature about executive orders and judicial deference to agency interpretations of statutes and regulations. For instance, scholars like then-Professor Elena Kagan have argued that presidential directives should play a key role in evaluating agency interpretations of statutes.[16] Erica Newland has identified that executive orders command no coherent theory of judicial interpretation, resulting in the expansion of executive power.[17] But no one has yet analyzed how agency interpretations of orders should influence judicial constructions of those orders.

My argument proceeds in four parts. Part I briefly describes the history and nature of executive orders, as well as how agency interpretations of executive orders can end up in court. Part II examines the muddled state of executive order deference doctrine, which the *Chevron* and *Auer* revolution have left behind. Part III applies general justifications for deference to agency interpretations of executive orders and analyzes whether those justifications are stronger or weaker in the executive order context. Finally, Part IV proposes a new legal test that both (i) reflects modern understandings of legal interpretation and (ii) outlines when a court should defer to an agency's interpretation of an executive order or instead give an order its best reading.

I. BACKGROUND ON EXECUTIVE ORDERS

A. Defining Executive Orders

Executive orders have a long and storied history. In 1793, George Washington issued the Neutrality Proclamation,[18] declaring the United States' neutrality in the conflict between Britain and France. And in the years since, presidents have used executive orders to purchase the Louisiana Territory, suspend habeas corpus, desegregate the military, implement affirmative action policies for federal contractors, channel proposed agency regulations

15. To my knowledge, there are two other articles, which were or will be published around the same time as this one. They are the excellent Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338466; and Lisa Marshall Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255953.

16. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001).

17. *See* Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2033 (2015).

18. *Neutrality Proclamation, 22 April 1793*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Washington/05-12-02-0371 (last visited June 11, 2019).

through White House review, halt stem cell research, and create wide-ranging intelligence programs.[19]

And yet, there is no black letter definition of what constitutes an executive order.[20] Both Congress and the Executive Branch have avoided establishing a definition, thereby leaving in place a panoply of undefined terms for presidential orders: "executive order," "proclamation," "memorandum," "directive," and "determination" among them. The Federal Register Act of 1935 mandates publication in the Federal Register for "[e]xecutive orders" and "[p]residential proclamations," if they have "general applicability and legal effect" for entities other than "[f]ederal agencies or persons in their capacity as officers, agents, or employees thereof."[21] However, the Federal Register Act of 1935 neither requires publication of other presidential actions nor defines the terms "executive orders" or "presidential proclamations."[22] In 1999, House legislation seeking to define "presidential orders" failed to advance after a subcommittee hearing. As for Executive Branch efforts: while several executive orders have instituted procedures for issuing future executive orders, none include a definition.[23] Thus, there are no requirements about the types of presidential actions that the President must take through executive order.[24] Nor does the specific labeling of a presidential action alter its legal effect.[25]

The academy has also struggled to distinguish "executive orders" from other terms for presidential orders. One attempt at characterizing "executive orders" is that they typically govern the actions of and address federal government officials.[26] But this characterization ignores that even orders directed solely at government officials can have tremendous effect on nongovernmental parties and can be intended to do so.[27]

Regardless of their exact definition, executive orders are formal actions

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19. *See* Newland, *supra* note 17, at 2033; Kagan, *supra* note 16, at 2291.

20. *See generally* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 546–47 (2005).

21. 44 U.S.C. § 1505 (2012).

22. *Id.*

23. *See, e.g.*, Executive Order No. 11,030, 27 Fed. Reg. 5847 (June 19, 1962).

24. Stack, *supra* note 20, at 546–47. Thus, my Article's analysis applies to all types of presidential instruments with legal effect, no matter their superficial label. But to avoid the wordiness of writing "presidential instruments" over and over, I generally use the term "executive order."

25. *Id.*

26. *See, e.g.*, H. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957); Stack, *supra* note 20, at 547 n.19.

27. *See* Kagan, *supra* note 16, at 2291–92.

that carry significant weight compared to other presidential actions. Many commentators agree that executive orders written in mandatory language—and drawing upon legitimate source(s) of authority—are binding on non-independent executive agencies.[28]

B. Sources of Executive Order Power

Executive orders derive their power from two sources. The first, Article II of the Constitution, implicitly authorizes the President to issue executive orders in areas (a) exclusive to presidential power and (b) of concurrent congressional-presidential authority, if the order isn't "incompatible with the express or implied will of Congress."[29] Yet because the Constitution doesn't explicitly grant the power to issue orders, presidents have essentially "invented" the power through practice.[30]

The second source of authority is congressional delegations of power through statute. In areas of concurrent congressional-presidential authority, both Congress and the courts have historically acquiesced to the expansion of presidential power. Members of Congress "are unlikely to oppose incremental increases in the relative power of presidents unless the issue in question directly harms the special interests of their constituents."[31] Empirical

28. *See, e.g.*, Sherley v. Sebelius, 689 F.3d 776, 784 (D.C. Cir. 2012) ("NIH may not simply disregard an Executive Order. To the contrary, as an agency under the direction of the executive branch, it must implement the President's policy directives to the extent permitted by law."); Am. Fed'n Gov't Emps. v. Fed. Labor Relations Auth., 204 F.3d 1272, 1274–75 (9th Cir. 2000) ("There is also no question that [Executive Order No. 12,871, which states that certain agencies 'shall' negotiate,] is mandatory and that agencies failing to obey the Order are answerable to the President."); Proposed Exec. Order Entitled "Federal Regulation," 5 Op. O.L.C. 59 (1981) (asserting the legality of Executive Order No. 12,291, which required executive agencies—but not independent agencies—to submit proposed major rules to Office of Management and Budget for cost-benefit review); *cf.* Kagan, *supra* note 16, at 2328 ("An interpretive principle presuming an undifferentiated presidential control of executive agency officials thus may reflect, more accurately than any other, the general intent and understanding of Congress.").

29. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

30. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 7 (2003).

31. Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 320 (2006) (quoting Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, *in* THE PRESIDENCY AND THE POLITICAL SYSTEM 443, 454 (Michael Nelson ed., 6th ed. 2000)).

research confirms these institutional incentives. While presidents have issued about 50,000 executive orders, Congress has overridden only a few.[32] Courts, too, have sometimes interpreted executive orders to deprive Congress and its statutes of their power.[33] Part of what drives this expansion in presidential power is the presidential practice of amalgamating several sources of law (e.g., statutes and Article II powers)—or invoking no specific authority at all—to create an amorphous body of powers that justifies an executive order.[34]

C. Process for Issuing Executive Orders

There are essentially no enforceable procedural requirements for issuing, modifying, or repealing executive orders or other presidential directives.[35] The due process rights guaranteed by the Fifth Amendment theoretically serve as some constraint, but no due process challenge to an executive order has ever succeeded.[36] And in *Franklin v. Massachusetts*,[37] the Supreme Court held that the Administrative Procedure Act (APA) doesn't apply to the President.[38]

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32. *See id.* at 321; Gerhard Peters & John T. Woolley, *Executive Orders: Washington-Obama*, THE AMERICAN PRESIDENCY PROJECT (Jan. 21, 2019), http://www.presidency.ucsb.edu/data/orders.php (compiling the number of executive orders by each president).

33. *See* HOWELL, *supra* note 30, at 178–79 ("Federal judges ruled in favor of the president (or the party defending an order he issued) in fully 83 percent of the court challenges that went to trial between 1942 and 1998."); *see also* Newland, *supra* note 17, at 2040–41, 2065–67, 2094 (illustrating this trend through 152 judicial decisions on executive orders from 1865 to 2013 in the Supreme Court and the Court of Appeals for the D.C. Circuit).

34. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 304–06 (1979) (declining to decide whether Executive Order 11,246 was "authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority" because the case could be resolved without specifying the source of the President's authority); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 273 n.5 (1974) (rooting Executive Order No. 11,491's power in both "the President's [Article II] responsibility for the efficient operation of the Executive Branch" and 5 U.S.C. § 7301); Stack, *supra* note 20, at 556–57 (discussing Dames & Moore v. Reagan, 453 U.S. 654 (1981), which upheld a presidential assertion of statutory power in the conceded absence of any particular statute authorizing the President's action).

35. Stack, *supra* note 20, at 552.

36. *Id.* at 553.

37. 505 U.S. 788 (1992).

38. *Id.* at 800–01.

But as a matter of nonbinding but codified custom, the President usually follows a three-step approval process when issuing an executive order.[39] First, a proposed order or proclamation, along with an explanation of the order's "nature, purpose, background, and effect," is submitted to the Office of Management and Budget (OMB).[40] Second, if OMB approves the order, the Attorney General will review both its "form and legality."[41] Third, if the Attorney General approves the order, the Director of the Office of the Federal Register will review it for clerical errors.[42] If either the OMB Director or the Attorney General disapproves of a proposed order, "it shall not thereafter be presented to the President unless it is accompanied by a statement of the reasons for such disapproval."[43] In all, the process generally involves extensive consultation with agencies, including agencies drafting and debating an order's text.[44]

The purpose of these procedures is twofold. First and most important, the procedures shield the President from "decisions made on the fly in informal bilateral encounters with administrative officials," encounters which could result in orders whose policy consequences and legality the President doesn't fully understand.[45] Second, by giving the Executive an opportunity to de-

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39. In comparison, agency procedures for issuing significant guidance range from being onerous to nonexistent. *See* Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, ADMIN. CONF. OF THE U.S., 169–80 (2017) (describing three models for taking public comment on guidance documents, the most onerous of which can leave guidance incomplete for years); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES 20 (2015) (finding that, historically, Department of Labor (DOL) and Health and Human Services (HHS) have had little to no written procedures for issuing significant guidance).

40. Exec. Order 11,030 § 2(a), 27 Fed. Reg. 5847 (June 19, 1962) (codified at 1 C.F.R. pt. 19).

41. *Id.* § 2(b). In practice, the Department of Justice's Office of Legal Counsel (OLC) reviews all proposed executive orders for form and legality. *See, e.g.*, Developments in the Law – Presidential Authority, 125 HARV. L. REV. 2057, 2090 (2012).

42. Exec. Order 11,030 § 2(c), 27 Fed. Reg. at 5847.

43. *Id.* § 2(e).

44. *See* Grove, *supra* note 15, at 19–27.

45. Andrew Rudalevige, *The Contemporary Presidency: Executive Orders and Presidential Unilateralism*, 42 PRESIDENTIAL STUD. Q. 138, 148 (2012); *see also* W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 826–28 (2018) (explaining the value of existing procedures that require interagency cooperation to ensure executive orders are effective and legal).

velop and publicly share policy rationales and legal justifications, the procedures promote rule of law values and political accountability.[46]

D. Agency Interpretations of Executive Orders in Court

Courts have reviewed executive orders for over 100 years,[47] and agency interpretations of executive orders have been contested in many cases.[48] Yet the justiciability of executive orders—or agency action taken under executive order—is a matter of doctrinal inconsistency. And the universe of justiciable cases is bigger than some courts and commentators suggest.

Courts group cases involving executive orders into two categories. The first category comprises cases brought to "*prevent* enforcement" of an order.[49] *Youngstown Sheet & Tube Co. v. Sawyer*[50] is paradigmatic. The *Youngstown* Court invalidated President Truman's Executive Order 10,340, which "authorized and directed" the Secretary of Commerce to seize steel mills under strike.[51] And Justice Jackson's famous concurrence outlined three levels of judicial deference to presidential action, with the courts providing the "widest latitude of judicial interpretation" when the "President acts pursuant to an express or implied authorization of Congress," but "scrutin[y] with caution" when "the President takes measures incompatible with the express or implied will of Congress."[52] To obtain judicial review, plaintiffs seeking to enjoin an order echo *Youngstown* by alleging constitutional or statutory violations; the mere fact that agency action is under a presidential directive doesn't shield it from judicial review.[53] *County of Santa Clara v. Trump* is an example of a case in this first category.[54]

The second category comprises cases brought to "*enforce* rights created by executive order," rather than to prevent implementation of an order.[55] In these cases, justiciability is considerably more muddled. It often turns on

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46. *See* Eggleston & Elbogen, *supra* note 45, at 828–29; Recent Social Media Posts, *Tweets on Transgender Military Servicemembers*, 131 HARV. L. REV. 934, 941–43 (2018).

47. Newland, *supra* note 17, at 2094.

48. *See supra* note 2 and accompanying text discussing history of Executive Order jurisprudence.

49. Newland, *supra* note 17, at 2091.

50. 343 U.S. 579 (1952).

51. Exec. Order 10,340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952).

52. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); *see also* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (adopting Justice Jackson's concurrence as a general framework).

53. *See, e.g.*, El-Ganayni v. U.S. Dep't of Energy, 591 F.3d 176, 183 (3d Cir. 2010); Chamber of Commerce v. Reich, 74 F.3d 1322, 1326–32, 1338 (D.C.C. 1996).

54. *See e.g.*, County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

55. Newland, *supra* note 17, at 2091.

whether the President intends the executive order at issue to create a justiciable right.[56] Orders thus usually aren't justiciable, because the text of a modern executive order expressly states in its final section that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."[57]

That said, the universe of justiciable cases is larger than many argue (or believe) because the rule of nonjusticiability isn't uniformly applied, particularly in the context of agency action inconsistent with an executive order. In the 2012 D.C. Circuit case *Sherley v. Sebelius*,[58] neither the majority opinion nor the two concurring opinions even mentioned the order's express attempt to preclude review.[59] Instead, the court implicitly assumed justiciability and stated: "NIH may not simply disregard an Executive Order. To the contrary . . . it must implement the President's policy directives to the extent permitted by law."[60] The district court opinion affirmed by the court of appeals made the same point: "'An executive order is, for many purposes, a form of presidential law.' A regulation that is inconsistent with an executive order that authorizes its promulgation is unlawful."[61]

At first glance, *Sherley* is inconsistent with the D.C. Circuit's *Manhattan-Bronx Postal Union v. Gronouski*,[62] a foundational case repeatedly relied on to

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56. *See, e.g.*, Meyer v. Bush, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993) ("The Executive Order carefully stated that its purpose was only for internal management and that it created no private rights. As such, it is doubtful that it had any legal significance."); *In re* Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980) ("[E]xecutive orders without specific foundation in congressional action are not judicially enforceable in private civil suits."); Legal Aid Soc'y v. Brennan, 608 F.2d 1319, 1330 & n.14 (9th Cir. 1979) (reviewing an executive order and its implementing regulations because "[n]othing in Executive Order 11246 precludes judicial review," nor is the order "a housekeeping measure rather than [issued] pursuant to constitutional or statutory authority"); *see also* Defs. of Wildlife v. Perciasepe, 714 F.3d 1317, 1324 n.6 (D.C. Cir. 2013) (stating that Executive Order 13,563 doesn't create a procedural right that could establish standing because the order contains standard language precluding judicial review).

57. *See, e.g.*, Exec. Order 13,768, § 18(c), 82 Fed. Reg. 8799, 8803 (Jan. 25, 2017).

58. 689 F.3d 776 (D.C. Cir. 2012).

59. *See id.*

60. *Id.* at 784.

61. Sherley v. Sebelius, 776 F. Supp. 2d 1, 22 (D.D.C. 2011) (internal quotation marks omitted) (quoting Meyer v. Bush, 981 F.2d 1288, 1303 n.6 (D.C. Cir. 1993), *aff'd*, 689 F.3d 776 (D.C. Cir. 2012).

62. 350 F.2d 451 (D.C. Cir. 1965).

decline review of agency action allegedly inconsistent with executive orders.[63] But two parts of *Manhattan-Bronx* show it doesn't categorically preclude judicial enforcement of executive orders.[64] First, the court found that the agency in question—the Postal Service—wasn't even in conflict with the executive order.[65] So the court's comments that judicial review would be inappropriate were dicta.[66] Second, in *prudentially* declining to hear the case, the court reserved the right of review on "compelling" occasions.[67]

In sum, whether cases brought to enforce an order are nonjusticiable is inconsistent both within and across circuits. While neither the district court nor the court of appeals cited *Manhattan-Bronx* or its progeny in *Sherley*, we can view *Sherley* as (i) a step back from *Manhattan-Bronx*'s expansive dicta, or (ii) a "compelling" situation of political and ethical salience (e.g., stem cell research). And *Sherley* tracks the law in the Third Circuit, which is that "[a]dministrative action pursuant to an Executive Order is invalid and subject to judicial review if beyond the scope of the Executive Order."[68]

II. CURRENT DOCTRINE ON AGENCY INTERPRETATIONS OF EXECUTIVE ORDERS

A. Supreme Court Precedent: Udall v. Tallman

Given the power of executive orders and the frequency with which they

63. *See, e.g.*, *In re* Surface Min. Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980).

64. There is a plausible third characteristic that also justifies a more permissive reading, but while it explains cases like Chamber of Commerce v. Reich, 74 F.3d 1322, 1322 (D.C. Cir. 1996), it doesn't explain *Sherley*. 689 F.3d at 785. This third characteristic is that Executive Order No. 10,988 didn't refer to any statute other than a general civil service statute, making the order "simply in furtherance of a personal policy," *Manhattan-Bronx*, 350 F.2d at 452, and thus "without specific foundation in congressional action." *In re Surface Mining Regulation Litig.*, 627 F.2d at 1357. But the order at issue in *Sherley*, Executive Order No. 13,505, doesn't refer to any statute either.

65. *Manhattan-Bronx*, 350 F.2d at 456 & n.10.

66. *See id.* at 456 n.9, 457. For a definition of dictum and an argument on why it should receive less weight, see Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256–63 (2006).

67. *Manhattan-Bronx*, 350 F.2d at 456.

68. Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 175 (3d Cir. 1971); *see also* El-Ganayni v. U.S. Dep't of Energy, 591 F.3d 176, 190 n.9 (3d Cir. 2010) ("The Executive Order is a delegation of inherently executive authority by the President to another member of the Executive Branch. *See* 3 U.S.C. § 301 (authorizing the President to delegate executive functions to the head of agencies). An agency head is bound by the terms of that delegation.").

arise in court, it isn't ideal that legal doctrine for executive orders—including how to evaluate agency interpretations of executive orders—is undertheorized and inconsistently applied.[69] That is, courts haven't clarified whether deference doctrines or APA requirements apply those interpretations. This Article focuses on judicial deference, mostly leaving the APA for another day.[70]

Only one Supreme Court case addresses how courts should handle agency interpretations of executive orders. Not only is the case dated, but also it only addresses the appropriate judicial deference standard, not the applicability of APA requirements. In the 1965 case *Udall v. Tallman*, the Court held that courts should defer to agency interpretations of executive orders if they are "reasonable."[71] Thus, the Court unanimously upheld the Secretary of the Interior's authority to issue oil and gas leases despite an alleged conflict with President Franklin D. Roosevelt's Executive Order No. 8979.

Tallman's facts were as follows. In the 1950s, D. J. Griffin and James K. Tallman filed competing applications for oil and gas leases in the Alaskan Kenai Moose Range. The Department of the Interior (DOI) granted the leases to Griffin, not Tallman.[72] Tallman sued, arguing that Executive Order No. 8979 had closed the Moose Range to leasing until a revised regulation reopened the lands on August 14, 1958—the date of Tallman's application. Executive Order No. 8979 provided:

> None of the above-described lands excepting (a described area) shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of [1926 and 1927 statutes pertaining to leasing Alaskan public lands].[73]

But in 1947, DOI had promulgated a regulation that "provided simply that such leases had to be subjected to an approved unit plan and contain a provision prohibiting drilling or prospecting without the advance consent of the Secretary."[74]

The D.C. Circuit agreed with Tallman, stating "the Executive Order clearly did remove the land involved from oil and gas leasing."[75] But the Supreme Court reversed, holding that "the Secretary's interpretation may not be the only one permitted by the language of the orders [i.e., Executive

69. *See* Newland, *supra* note 17, at 2026.

70. *See infra* note 98.

71. 380 U.S. 1, 4 (1965); *see also id.* at 19–23, 20 n.16 (discussing "reasonable[ness]" of the agency's interpretation of Executive Order 8979).

72. *Id.* at 2.

73. *Id.* at 19 (quoting Exec. Order No. 8979, 6 Fed. Reg. 6471 (Dec. 16, 1941)).

74. *Id.* at 5.

75. Tallman v. Udall, 324 F.2d 411, 414 (D.C. Cir. 1963).

Order No. 8979 and DOI's Public Land Order No. 487], but it is quite clearly a *reasonable* interpretation; courts must therefore respect it."[76] The Court hinged its reasonableness determination on three grounds. First, the text of Executive Order 8,979 barred only "'settlement, location, sale, or entry,'" on designated lands.[77] These terms all contemplate *transfer of title* to the lands in question, which an oil and gas lease doesn't effect.[78] Second, the Executive Order's reference to the 1926 and 1927 statutes, which pertained to leasing, strengthened DOI's interpretation of "other disposition" to not include leasing.[79] Third, in later executive orders, the President had delegated to the Secretary "full power to withdraw lands or to modify or revoke any existing withdrawals."[80]

Given how much deference doctrine has changed since 1965, courts are confused about the vitality of the *Tallman* standard. In the intervening fifty-two years, the Supreme Court has decided *Chevron* and its progeny,[81] and questioned *Seminole Rock/Auer* deference—the deference owed to an agency's interpretations of its own regulations.[82] The lower courts' uneven application of *Tallman*, detailed in the next section, reflects this confusion.

B. Lower Court Applications of Tallman*, and* Tallman's *Instability*

Circuits are split on how to apply *Tallman*, if they do at all. Only the Third, Ninth, and Federal Circuit Courts of Appeals, and a D.C. District Court—the district court affirmed in *Sherley*[83]—have expressly applied *Tallman*'s deference toward executive orders.[84] Of the approaches to *Tallman* deference

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76. Udall v. Tallman, 380 U.S. 1, 4 (1965) (emphasis added).

77. *Id.* at 19.

78. *Id.*

79. *Id.* at 20.

80. *Id.* at 17; *see also id.* at 20.

81. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837 (1984); *see, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

82. The Supreme Court recently affirmed *Auer*, albeit with significant limitations, in Kisor v. Wilkie, 139 S. Ct. 2400, 2410, 2414–18 (2019).

83. The D.C. Circuit panel that affirmed *Sherley* expressly declined to reach *Tallman*. *See* Sherley v. Sebelius, 689 F.3d 776, 785 (D.C Cir. 2012). The closest thing to an analysis of *Tallman* came in then-Judge Janice Rogers Brown's concurrence. Judge Brown worried that "executive power will expand at the expense of the [Administrative Procedure Act's (APA's)] regulatory scheme and judicial review will be reduced to rubberstamping preordained results," but "[left] the more technical questions of Executive Orders and deference for a later day." *Id.* at 790 (Brown, J., concurring).

84. *See* Yanko v. United States, 869 F.3d 1328, 1335 (Fed. Cir. 2017) (citing *Tallman* and

in those circuits, the Ninth Circuit's *Kester v. Campbell*[85] is probably the most influential, because both the Seventh Circuit and the district court in *Sherley* have cited it.[86] In *Kester*, the Ninth Circuit Court of Appeals stated: "In light of an agency's presumed expertise in interpreting executive orders charged to its administration, we review such agency interpretations with great deference . . . The agency interpretation is considered reasonable 'unless it is plainly erroneous or inconsistent with the (order).'"[87] Later Ninth Circuit cases have confirmed *Kester* to be good law.[88] And this "plainly erroneous" standard mirrors *Auer*'s (once) highly deferential standard for agencies' interpretations of their own regulations.[89] (The Supreme Court held in *Kisor v. Wilkie*, however, that the strength of "plainly erroneous" *Auer* deference is the same as "reasonableness" *Chevron* deference.[90] Whether the strength of *Kester* deference will adapt accordingly remains to be seen).

Other circuits—the Seventh, Fifth, and Fourth—have applied *Tallman* more obliquely. The Seventh Circuit, in *Dehainaut v. Pena*,[91] applied *Kester*'s deference standard without citation to *Tallman*.[92] The Fifth Circuit applied

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stating that when an executive order or other presidential directive charges Office of Personnel Management (OPM) with administering the order, "we have held that the court must accord broad deference to the agency's interpretation of the Executive Order."); *see also* El-Ganayni v. U.S. Dep't of Energy, 591 F.3d 176, 187 (3d Cir. 2010) (citing *Tallman* and stating "[i]n reviewing the DOE's actions in this case, we note that we owe 'great deference' to the DOE's interpretation of Executive Order 12,968 because the DOE has been charged with administering that Order."); *and* Kester v. Campbell, 652 F.2d 13, 15–16 (9th Cir. 1981); *and* Sherley v. Sebelius, 776 F. Supp. 2d 1, 22 (D.D.C. 2011) (citing *Kester* and *Tallman*, and stating "an agency is presumed to have special expertise in interpreting executive orders charged to its administration, and so judicial review must afford considerable deference to agency interpretations of such orders.").

85. 652 F.2d 13 (9th Cir. 1981).

86. *Id.* at 15–16. For citations of *Kester* in other circuits, *see* Dehainaut v. Pena, 32 F.3d 1066, 1073–74 (7th Cir. 1994); *see also Sherley*, 776 F. Supp. 2d at 22.

87. *Kester*, 652 F.2d at 15–16.

88. *See, e.g.*, *City & Cty. of San Francisco*, No. 17-17478, slip op. at 29 (9th Cir. Aug. 1, 2018); *see also* Montana Wilderness Ass'n v. Connell, 725 F.3d 998, 994 (9th Cir. 2013).

89. Auer v. Robbins, 519 U.S. 452, 461 (1997).

90. *Kisor*, 139 S. Ct 2400, 2414, 2416 (2019). As the *Kisor* Court noted, many courts thought *Auer* deference was stronger. *Id.*; *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099, 1103–05 (2008) (finding that *Auer* deference has been correlated with a higher agency win rate than *Chevron* whenever the Supreme Court has invoked it).

91. 32 F.3d 1066 (7th Cir. 1994).

92. *Id.* at 1073–74.

Tallman once, but in an opinion later vacated by the Supreme Court.[93] And the Fourth Circuit has cited *Tallman*'s executive order deference standard in the context of an agency's interpretation of its own *regulation*, and oddly quoted from a section of *Tallman* about *statutory* deference.[94]

No court of appeals even acknowledges the substantial deference doctrine that has accumulated since *Tallman*. In fact, before the Ninth Circuit's 2018 opinion in *City & County of San Francisco v. Trump*,[95] only one opinion—by the Court of Federal Claims—directly discussed the interaction of other deference doctrines (e.g., "*Mead* and its progeny") with *Tallman* deference. The Federal Circuit reversed on separate grounds.[96] Less directly, the Seventh Circuit has implied *Dehainaut* limits its applications of *Tallman* deference. In *Dehainaut*, the panel stated that "[a]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[97]

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93. United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 465 (5th Cir. 1977) (citing *Tallman* and stating "we give special deference to the Labor Department's interpretation of the Order [Executive Order No. 11,246] which that department was charged to administer."), *vacated*, 436 U.S. 942 (1978); *see also* United States v. Miss. Power & Light Co., 638 F.2d 899, 905 (5th Cir. 1981) (stating, without citing *Tallman*, that "[w]e thus hold fast to our previous determination [in *New Orleans Public Service*] that E.O. 11[,]246 was a proper exercise of congressionally delegated authority.").

94. *See* Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 446 n.3 (4th Cir. 2003) (responding to the opinion concurring in the judgment in part and dissenting in part of Judge Luttig by stating: "the Corps' regulatory practice reflects its interpretation"); *cf. Tallman v. Udall*, 380 U.S. 1, 17, 18 (1965) (explaining that an administrative interpretation of two Executive Orders had "long . . . been a matter of public record and discussion" and applying the "rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons.") (citation omitted).

95. 897 F.3d 1225 (9th Cir. 2018).

96. Shell Oil Co. v. United States, 108 Fed. Cl. 422, 440 n.10 (2013) (citing *Tallman* deference when the agency interpretation fails to "meet[] the standards established in *Mead* and its progeny," and refusing to give deference to the Biddle Opinion, which interpreted Executive Order No. 9001), *rev'd and remanded*, 751 F.3d 1282, 1302 (Fed. Cir. 2014) (reversing and expressly not considering the lower court's holding on Executive Order No. 9001 or executive order deference more generally).

97. Dehainaut v. Pena, 32 F.3d 1066, 1074 (7th Cir. 1994) (quoting Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)). But it is unclear whether this particular condition on *Tallman* deference endures after *FCC v. Fox Television Stations, Inc.*, which rejected the principle that agency changes in policy require "more searching

It is also unclear whether APA requirements apply to agency interpretations of executive orders. It appears only one opinion—a Ninth Circuit opinion by Judge Gould concurring in part and dissenting in part—has suggested that the APA's requirements should apply along with *Tallman* deference.[98] At least one Justice, Elena Kagan, likely supports this view.[99]

Altogether, the case law suggests that the usual administrative law framework may not apply to agency interpretations of executive orders. At the same time, lower courts haven't simply adopted *Tallman*'s deference standard that the agency's interpretation must be upheld if it is simply "reasonable." Except for the Seventh and Ninth Circuits, lower courts have rephrased *Tallman* or selectively quoted from it to establish a vaguer deference standard that is potentially weaker.[100] And the Seventh and Ninth Circuits

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review" than initial decisions—with limited exceptions. 556 U.S. 502, 514 (2009). Whether *Dehainaut* is still good law thus depends on at least two things. First, what the Seventh Circuit meant by an agency "casually ignor[ing]" its existing policies. *Dehainaut*, 32 F.3d at 1074. And second, whether courts apply to executive orders the *Christopher v. SmithKline Beecham Corp.* line of cases—culminating most recently with *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)—that restrict changes in agency interpretations of their own *regulations*. *See* 567 U.S. 142, 155 (2012).

98. *See* Montana Wilderness Ass'n v. Connell, 725 F.3d 988, 1011 (9th Cir. 2013) (Gould, J., concurring in part and dissenting in part) (agreeing with majority that agency's interpretation of Presidential Proclamation deserves deference under *Kester*, but disagreeing the interpretation can survive APA hard look review under Motor Vehicle Mfg. Ass'n, v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

99. *See* Kagan, *supra* note 16, at 2351 ("When the challenge is to an action delegated to an agency head but directed by the President, a different situation obtains: then, the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern.").

100. *See, e.g.*, Yanko v. United States, 869 F.3d 1328, 1335 (Fed. Cir. 2017) ("broad deference"); El-Ganayni v. U.S. Dep't of Energy, 591 F.3d 176, 187 (3d Cir. 2010) ("great deference") (quoting Tallman v. Udall, 380 U.S. 1, 16 (1965), which pertains to "statutory construction," not interpretations of executive orders)); Sherley, v. Sebelius, 553 F. Supp. 2d 1, 22 (D.D.C. 2011) ("considerable deference"); *see also* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 465 (5th Cir. 1977) ("special deference"); Kentuckians for the Commonwealth Inc. v. Rivenburgh, 317 F.3d 425, 446 n.3 (4th Cir. 2003) (quoting the *Tallman* statutory construction section, and stating that the Supreme Court deferred to the Department of Interior (DOI) because of long-standing agency practice, and stating that the agency interpretation "will not be disturbed except for cogent reasons . . . .").

have imported *Auer*'s/*Seminole Rock*'s standard for "interpretation of an administrative regulation"[101] into *Tallman*'s standard for interpretation of an executive order.[102] *Seminole Rock*'s standard may be more deferential than *Tallman*'s,[103] unless we equate "plainly erroneous" with "reasonable" in executive order deference too.[104] This inconsistency in *Tallman*'s application evidences at least doctrinal confusion, if not concern, with *Tallman*'s deferential standard.

III. EXAMINING AND APPLYING JUSTIFICATIONS FOR DEFERENCE

A. The Four Goals Underlying Deference

To lay the foundation for updated doctrine, this Article starts with first principles. These are the three underlying justifications for interpretive deference to agencies or the President, plus a fourth factor constraining deference: the rule of law. First, deference may more accurately reflect the *intent* of the interpreted law at issue. In the context of *statutory* interpretation, Congress uses textual ambiguity[105] to intentionally or knowingly delegate agencies interpretive or policymaking power.[106] And even if a law doesn't intend

101. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945).

102. *See* W. Watersheds Project v. Abbey, 719 F.3d 1035, 1043 (9th Cir. 2013) ("To determine reasonableness, we adopted the standard applied for reviewing an agency's interpretation of its own regulations.").

103. While *Tallman* isn't a model of clarity, the opinion quotes *Seminole Rock*'s "plainly erroneous or inconsistent with the regulation" standard only once, and while reviewing a regulation—Public Land Order No. 487. *Tallman*, 380 U.S. at 17. In contrast, the opinion's analysis of Executive Order No. 8979 seemingly asks only whether the order was "reasonable." *Id.* at 18–23.

104. *Kisor*, 139 S. Ct. 2400, 2416 (equating the two in regulatory/*Auer* deference).

105. I use "ambiguity" throughout this paper to refer to both ambiguity and vagueness. A term is ambiguous "if it has more than one sense" (like the word "cool"), while a term is vague "if there are cases where the term might or might not apply." Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–98 (2010).

106. *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (justifying *Chevron* as an implicit delegation of interpretive power). And even if this delegation isn't the intention of ambiguity, "[c]ongress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known." Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 517 (1989); *see also* Jonathan R. Siegel, Essay, *The Constitutional Case for* Chevron

delegation, an agency may be excellent interpreters of a statute's intent/meaning, because the agency has customarily enforced the statute a certain way or has a privileged view of the statute's origins.[107] As for agency interpretations of their own *regulations*, the rationale of *Auer* is analogous:[108] that agencies are best suited to understand accurately their own actions (or those of their predecessors).[109]

Deference, 71 VAND. L. REV. 937, 963–65 (2018) (defending *Chevron*'s rationale as a court "determin[ing] that a statute's best interpretation is that the statute confers power on the agency"); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995–98 (2013) (finding that congressional staffers who draft legislation are aware of *Chevron*, but usually don't intend to delegate interpretive power through textual ambiguity).

107. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 933–38, 941–44 (2017) (arguing deference is owed to customary practice and long-standing interpretations); Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 524 (2017) (concluding that "agencies are intimately involved in originating and reviewing the statutes they are tasked with implementing . . . .").

108. To be sure, four members of the *Kisor* Court resist any analogy between *Chevron* and *Auer*. *See Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part) ("Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. I do not regard the Court's decision today to touch upon the latter question.") (citation to *Chevron* omitted); *id.* at 2446 n.114 (Gorsuch, J., concurring in the judgment, joined by Thomas and Kavanaugh, JJ.) ("Regardless [of *Chevron*'s faults], it would be a mistake to suppose that *Auer* is in any way a 'logical corollary to *Chevron*.'") (quoting Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). But this resistance is likely based on the Court's desire to decide only one blockbuster deference case at a time. For as this Article argues, many principles underlying deference really are trans-substantive. And *Kisor*'s majority opinion practically said as much. It drew heavily upon *Chevron* to explain and narrow *Auer*. *See id.* at 2408–24 (mentioning *Chevron* six times in the opinion of the Court); *infra* note 271 (discussing how the Court imported an academic proposal about *Chevron* deference into *Kisor* and *Auer*).

109. *See, e.g.*, *Kisor*, 139 S. Ct. at 4212 ("[I]f you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that 'wrote the regulation' will often have direct insight into what that rule was intended to mean.") (quoting Mullins Coal Co. of Va. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 159 (1987)); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 629–31 (1996) (discussing *Seminole Rock*'s three underlying justifications, the most important being that at an agency is

Second, judicial deference may improve *democratic accountability*. Unlike judges who serve for life assuming "good behavior,"[110] the heads of executive agencies (and to a lesser extent independent agencies) are accountable to a democratically elected president. So, agency interpretations may more accurately reflect the will of the people. And if they don't, voters can express their disapproval through the ballot box.[111]

Third, judicial deference may lead to better policy results because the Executive Branch has more *technical expertise* than the judiciary. For instance, in *Chevron*, the Court observed that "[j]udges aren't experts" in a "regulatory scheme [that] is technical and complex." In *United States v. Curtiss-Wright Export Corp.*,[112] the Court deferred to the President on military and foreign policy because of not only his constitutional prerogatives, but also his relative expertise.[113] And in *Kisor v. Wilkie*, the Court linked expertise back to legislative intent, stating that "[a]dministrative knowledge and experience largely 'account for the presumption that Congress delegates interpretive lawmaking power to the agency.'"[114]

Counterbalanced against these three affirmative justifications is a condition for judicial deference implied by the courts and identified by scholars—that deference would accord with the rule of law. The Supreme Court implied this condition in *United States v. Mead Corp.*,[115] in which it held *Chevron* analysis applies only if Congress had delegated "force of law" authority to an agency, and the agency had acted in exercise of that authority on the interpretation at issue.[116] Factors relevant to this "force of law" determination include, among others: "the degree of the agency's care, its consistency, formality"; whether the agency action has "precedential value"; and whether the agency action is the authoritative/centralized view of the agency or merely one of many decisions "churned out at a rate of 10,000 a year at an agency's 46 scattered offices."[117] And though the Court muddied this *Chevron*

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best suited to interpret its own regulations).

110. U.S. CONST. art. III § 1.

111. Manning, *supra* note 109, at 629.

112. 299 U.S. 304 (1936).

113. *Id.* at 320.

114. *Kisor*, 139 S. Ct. at 2417 (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 153 (1991)).

115. 533 U.S. 218 (2001). Those who oppose deference doctrines often invoke the rule of law. *See, e.g.*, *Kisor*, 139 S. Ct. at 2438–39, 2441 (Gorsuch, J., concurring in the judgment).

116. *Mead*, 533 U.S. at 226–27; *see* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 225–26 (2006).

117. 533 U.S. at 228, 232–33; *see also Kisor*, 139 S. Ct. at 2416 (holding an agency's reg-

"Step Zero" analysis in *Barnhart v. Walton*[118]—by deferring to an agency interpretation that wasn't the result of a formal process—*Barnhart* emphasized "the careful consideration the Agency has given the question over a long period of time . . ."[119] and echoed *Mead*'s focus on "care" and "consistency."

B. Applying the Justifications to Executive Orders

Applying these principles to agency interpretations of executive orders shows that while the *intent* and *political accountability* justifications for deference are stronger for executive orders vis-à-vis statutes, adherence with the *rule of law* is weaker. The *technical expertise* justification is equally strong.

1. Intent

i. General Analysis: President vs. Congress

The intent rationale for deference in the presidential directive context is just as strong, if not stronger, than the rationale in the statutory context. First, presidential intent is less of a legal fiction than congressional intent. The most obvious support for this idea is that the President is an individual vested with the unilateral authority to issue and revoke executive orders, while Congress is a 535-member body that can only pass legislation through bicameralism and presentment. Thus, congressional intent may be fictional because while "Congress is a 'they,' not an 'it,'"[120] presidential intent is the will of an individual.

Second, agencies are usually very involved in the process for issuing presidential directives.[121] As Tara Grove has found through interviews with Executive officials across the political spectrum, virtually all orders go through some type of agency review, and that review takes at least several weeks.[122] This review often involves agencies both commenting on and drafting an order's text.[123] Agency officials "pore over" text and sometimes spark "heated

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ulatory interpretation "the agency's 'authoritative' or 'official position'" to receive *Auer* deference) (quoting *Mead*, 533 U.S. at 257–59 & n.6 (Scalia, J., dissenting)).

118. 535 U.S. 212 (2002).

119. *Id.* at 222.

120. *See generally* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (discussing how legislative intent is an oxymoron).

121. *See* Grove, *supra* note 15, at 19–27. Of course, agencies are involved in the legislative process too. *See* Shobe, *supra* note 107, at 467–83. It's unclear which process they're more influential in.

122. Grove, *supra* note 15, at 27.

123. *Id.* at 3, 19–22.

arguments over the use of a particular word."[124] The order that results often reflects an agency's preferences more than the president's ideal policy preferences.[125] So agencies likely know the purposes behind an order directed at them.[126]

Third, as an individual with unilateral authority, the President can more easily correct or endorse erroneous agency interpretations than Congress. While Congress does have many oversight tools for disapproving of agency actions (e.g., calling burdensome public hearings; inserting instructions into the legislative history of appropriations bills),[127] there is only one binding oversight tool available to Congress: legislation.[128] Perhaps the next-closest thing to a binding mechanism is legislative history in appropriations bills, which is usually inserted by the committee(s) with oversight over an agency.[129] But inserting that legislative history requires some level of collective action. Not only must a committee agree to include the history in an appropriations bill and ensure that the bill becomes law, but also the legislative history must be backed by the credible threat that disobeying it will be met by *statutory* action. Otherwise, an agency could likely disregard the leg-

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124. *Id.* at 21 (quoting interviews with Chris Fonzone, Dep. Ass't and Dep. Counsel to President and Legal Adv. to Nat'l Sec. Council, Obama Admin. (May 22, 2018) and C. Boyden Gray, White House Counsel, George H.W. Bush Admin., and Counsel to Vice Pres. George H.W. Bush, Reagan Admin. (June 27, 2018)).

125. *See id.* at 32–37.

126. In her article on interpreting executive orders, Grove disagrees that we should defer to agency interpretations. She argues for a purely textual approach because the text of an executive order is what "best give[s] effect to the [agency consultation and executive order drafting] structure the President has created under Article II." Grove, *supra* note 15. I agree with Grove's premises, but not her doctrinal solution. The president's extensive consultation of agencies during the order drafting process suggests to me that, on average, agencies understand the origins and meaning of any given order better than courts. And even leaving aside whether deference to agencies effectuates an order's intent, deference also furthers political accountability and expert policymaking. *See infra* Part III-B-2 & 3, at pp. 130–33.

127. *See, e.g.*, 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, 768 (2014) (explaining the difficulties with inserting instructions into the legislative history); Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189, 1197–98 (2018) (describing the burdens of public hearings); Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U. L. REV. 51, 88 (1979) (discussing "tenuous" nonstatutory controls like Conference Report language).

128. Fisher, *supra* note 127, at 87–88.

129. *Id.*

islative history, because current statutory interpretation doctrine favors statutory text over extra-textual considerations.[130]

In contrast, the President wields many weapons against erroneous agency interpretations of an executive order, including informal communications, vetting of appointees and high-level staff, regulatory review, and control of DOJ litigation.[131] And the President's control over agencies is only increasing while Congress's is decreasing.[132] In particular, two presidential powers can definitively stop an erroneous interpretation: (1) amendment of the interpreted order to remove ambiguities or specifically (dis)approve of certain agency actions taken under the order, and (2) removal of the heads of executive agencies. Of these two weapons, the power to amend orders is itself a theoretically sufficient check against an erroneous agency interpretation,[133] because even under current doctrine, an interpretation that unambiguously contradicts the order wouldn't be "reasonable."[134] If amending an order is infeasible or insufficient, then firing agency officials and hampering an agency's operations is an alternative.

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130. *See, e.g.*, NLRB. v. SW Gen., Inc., 137 S. Ct. 929, 941–42 (2017); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)). The legislative history would still have some force, since many judges still consult it after the legal text. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1324–26 (2018) (finding that all but one judge in the sample admitted using legislative history).

131. Stack, *supra* note 31, at 294; *see* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 698 (2016) (arguing that the Obama presidency "'elevated White House control over agencies' regulatory activity to its highest level ever, relying on a mix of covert control and overt command.").

132. *Compare* Watts, *supra* note 131, at 698, *with* Peter Hanson, *Weakening Oversight: Two Warning Signs in Appropriations*, THE HILL (Feb. 5, 2018), http://thehill.com/opinion/finance/372060-weakening-oversight-two-warning-signs-in-appropriations (quantifying a "staggering decline" in oversight activity since the 104th Congress, and highlighting failures in the House and Senate to complete appropriations bills).

133. Grove expertly details the laborious process that virtually all presidential directives go through, and thus suggests that amending an executive order to fix an erroneous interpretation wouldn't be so easy. *See* Grove, *supra* note 44, at 27. Her point is well taken. But as Grove herself recognizes, a President may opt for a modified process that skips customary steps (e.g. OLC "form and legality" review). *See id.* I see no reason why a President would feel bound to go through a tedious process if his only purpose is to correct an agency's erroneous interpretation of an order. If correcting an error requires a tremendous amount of work, perhaps the "correction" is better conceptualized as a change in policy.

134. Tallman v. Udall, 380 U.S. 1, 4 (1965).

Granted, political backlash or limited decisionmaking resources may limit how much the President may employ those powers. Even so, these political and managerial constraints to the President and Congress alike. So, if deference is owed to agency interpretations of statutes despite congressional inertia, there is no reason that presidential inertia should be particularly damaging to agency interpretations of executive orders.

What *does* complicate this simple account of intent are two issues. One: When an agency is interpreting an executive order issued by a former President, should the former President's or current President's intent control? Two: Where there is conflict between an order and other presidential statements, how should courts discern presidential intent, assuming coherent intent even exists? I address these two issues below.

ii. Complication 1: Past vs. Current Presidential Intent

When interpreting statutes, courts generally look to what the legislature (or relevant linguistic community) intended at the time of enactment.[135] So too when interpreting regulations.[136] It's intuitive, then, that when interpreting an executive order, the issuing President's intent should control.

But this intuition becomes less compelling once we consider the unilateral nature of executive "law." Unlike Congress, the President can unilaterally amend his orders. Unlike agencies, he can even do so without customary process.[137] Thus, if it is clear what the current President means to do under a previous President's order, it seems pointless to require him to "reissue" that order to make his intentions effective. And to the extent the President can direct a court's interpretive method, perhaps every President would want an interpretive rule that extends his influence over *all* executive orders while

135. *See, e.g.*, New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the *enacting* Legislature's understanding of otherwise ambiguous terms.") (emphasis added).

136. *See, e.g.*, Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2072 (2018) (interpreting words in a regulation "at the time the IRS promulgated the regulation in 1938"); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) ("[W]e must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'") (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)).

137. *Compare* 5 U.S.C. § 553 (2012), *with infra* Section III-B-4, at pp. 133–37 (discussing secret modification and waiver of orders), *and infra* Section IV-C-1 (discussing order that bypassed virtually all process).

he is in office,[138] rather than a rule that gives him enduring influence over the relatively few orders he issues.[139]

Still, the best course is to hold that the issuing/enacting actor's intent should control. To illustrate this point, consider a textually unambiguous order issued a century ago. It is implausible that the issuing president would want—or the relevant linguistic community would expect—courts to weigh semantic drift and other factors. To consider these factors would risk an interpretation of the order that contradicted everyone's original understanding. That would be unlike how courts interpret nearly every other legal instrument.[140] So we shouldn't adopt such a different interpretive methodology without a clear change in what some have called the "law" of interpretation.[141] Perhaps a change like this could come from an executive order that directs a certain interpretive method,[142] but for now there is no such thing.

So, we are back to analyzing how deference to agency interpretations of executive orders best effectuates the issuing president's intent. The analysis is easy when the agency interpretation and executive order issue in the same administration. As discussed above, agencies generally help draft executive orders directed to them, and once the president issues an order, his oversight tools over agencies are formidable.

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138. *See* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 41–42 (2008) (making this argument, but for statutory interpretation); *see also* Elizabeth Garrett, *Preferences, Laws, and Default Rules*, 122 HARV. L. REV. 2104, 2132–35 (2009) (identifying problems with Elhauge's argument, which are less relevant when dealing with a unitary actor).

139. There are as many as 50,000 presidential orders, but even the most active president will probably only issue a few thousand. Gerhard Peters & John T. Woolley, *Executive Orders*, THE AMERICAN PRESIDENCY PROJECT (Jan. 21, 2019), http://www.presidency.ucsb.edu/data/orders.php (showing that President Roosevelt issued the most orders—3,721—in his 12.1 years in office, that runner-up Woodrow Wilson issued only 1,803 orders in his 8 years in office, and that modern presidents have issued only hundreds of orders each).

140. *See, e.g.*, *New Prime Inc.*, 139 S. Ct. at 539 (statutes); *Wisconsin Cent. Ltd.*, 138 S. Ct. at 2072 (regulations); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1132–35 (2017) (arguing that for most texts, "the law of interpretation, at the time, likely cross-referenced the linguistic practices of the time, and not any unknown practices to be developed in the future" and that "[a] society *could* require phrases like 'domestic Violence' to be read according to their evolving meanings over time; for obvious reasons, very few do.").

141. Baude & Sachs, *supra* note 140, 1132–36.

142. *See id.* at 1132–34, 1138–40 (discussing the nature of interpretive rules and limits on deliberate change of those rules); Nicholas Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1456 & n.455 (2017) (noting that the Dodd-Frank Act commands courts to review certain agency decisions using the *Skidmore* standard).

But the analysis is less straightforward when an agency interprets an executive order from a different administration. Here, the intent-based rationale mirrors our reasons for *Chevron* and *Auer*: implied delegation and agency knowledge about the purposes of a law.[143] In other words, textual ambiguity could reflect the issuing president's intent that a future administration adapts an order to changing times. Or ambiguity could reflect nothing at all, which in *Chevron* and *Auer* can be an implied delegation (through a background rule of interpretation) all the same.[144] And just as *Chevron* and *Auer* don't toggle off when a presidential administration changes, neither should a deference doctrine for agency interpretations of executive orders.

iii. Complication 2: Presidential Speech and Agency Interpretations Inconsistent with an Order's Text

A second issue is how to evaluate presidential speech (or informal presidential documents) that conflict with the unambiguous text of an executive order. On the one hand, courts lack a strong formalistic justification for disregarding presidential speech as they might disregard legislators' floor statements. That's because textualism carries less force in the executive order context than it does in the statutory context. As discussed in Part I, executive orders lack an express constitutional basis for being more binding than other presidential statements or actions. To imbue executive orders with their unusual force, presidents rely on the historical weightiness of executive orders as well as the Federal Register Act, which requires publication of proclamations and executive orders "having general applicability and legal effect."[145] But other forms of presidential actions or speech can also have "general applicability and legal effect." The Act demands this conclusion by mandating that other "documents or classes of documents that the President may determine from time to time have general applicability and legal effect" must also be published in the Federal Register.[146] So while bicameralism and presentment gives statutory text its power over extra-textual elements, nothing formally privileges executive order text. Extending this antiformalist argument further, one might claim that *agency* interpretations should be able to contradict an order's plain text because agencies might have a sense of what the President "really wants," and any litigated interpretations will be represented in court as bona fide.

On the other hand, as a pragmatic matter of accurately discerning intent,

143. *See supra* notes 106–109.

144. *See* Baude & Sachs, *supra* note 140, at 1127, 1134 (discussing *Chevron* as a modifiable "closure rule"—a rule that determines outcomes in cases of uncertainty); *supra* note 106.

145. 44 U.S.C. § 1505(a)(1) (2012).

146. *Id.* § 1505(a)(2).

there are at least two reasons to privilege unambiguous executive order text over both (1) other presidential statements or documents not published in the Federal Register and (2) agency interpretations. First, letting unambiguous executive orders speak for themselves without the interference of other presidential or agency communications preserves the binding status of executive orders—thus preserving an important form of presidential power. As discussed above, executive orders derive their force largely from historical practice, especially when they are "effective only against Federal agencies" as opposed to nongovernmental parties.[147] If governmental and nongovernmental parties alike were to believe that executive orders *shouldn't* be taken at face value, then the president would have to expend more effort to issue directives. He would have to provide some extrinsic evidence that he "really mean[s] it"[148]—an ultra-plain statement rule that wouldn't only hamper the implementation of presidential intent,[149] but would also increase the costliness of judicial interpretation as courts search for and weigh competing extrinsic evidence. In contrast, a better approach makes the plain statement the text of the executive order itself. If the text of an executive order and later presidential statements seem to contradict one another, defaulting to the executive order is the best course of action because the President *could have amended the order* if he had wanted to.

Second, not every lawsuit against agency action reaches the attention of the President.[150] The President or his staff cannot police the activities of all federal agencies.[151] Thus, a court cannot be positive that an agency's representations in court accurately reflect the President's intentions instead of merely the agency's wishes, which have gone unchecked because of presidential inertia or mismanagement. When the text of an executive order in question is ambiguous, it may be reasonable to assume the president has intentionally delegated interpretative authority to an agency. But when an executive order is textually unambiguous, this assumption is less plausible.

Framing these two reasons another way, focusing on the text of an executive order to determine its effect enables all actors to bifurcate presidential

147. *Id.* § 1505(a)(1).

148. *Cf.* Bond v. United States, 572 U.S. 844, 872 (2014) (Scalia, J., concurring) (suggesting that Congress should define all words that could have an alternative meaning other than their standard definitions).

149. Significant confusion over what the President intends may even be an unconstitutional violation of the President's prerogatives. *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1902 (2015).

150. Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 125 (2017).

151. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 996 (1992).

communications into messaging speech versus speech intended to have legal effect. Failing to preserve a distinction between these two types of speech would be, at the extreme, unworkable for both the President and the courts. The President would fear communicating with the public, lest a stray comment have legal effect.[152] And courts would have to divine which presidential statements are reliable indicia of intent—a challenge like identifying useful information in legislative history (for statutory interpretation) or looking outside the administrative record (for review of agency action).[153]

Further supporting the difference between binding and nonbinding speech is that the Executive Branch itself has recognized the distinction.[154] For instance, the military declined to act on President Trump's July 26, 2017 tweets that purported to exclude transgender individuals from the military, until the President issued a presidential memorandum.[155] Whether tweets will remain nonbinding will be a question of future Executive Branch practice and what courts will consider law. While tweets may be "official statements of the President of the United States" in the view of the DOJ as of November 13, 2017,[156] it is unclear whether (i) "official statements" necessarily have binding effect, (ii) DOJ's view is the entire government's, or (iii) this view should indeed be one that courts adopt.

2. Political Accountability

The greater political accountability of agencies relative to courts is generally one of the strongest justifications for judicial deference to agency interpretations of statutes.[157] In the context of statutes, while it is unlikely that

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152. *See* Shaw, *supra* note 150, at 131.

153. *See* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200695, draft at 37–43. Shaw thus concludes that presidential speech generally shouldn't be weighed when interpreting the scope of a presidential instrument. But she supports weighing speech when it relates to the constitutionality of a president's intent. *See id.* at 43–54.

154. *See* Kagan, *supra* note 16, at 2284–85 (describing how a written memorandum accompanying a spoken announcement by President Clinton gave the Secretary of Labor more leeway than Clinton's oral remarks at a commencement address, and distinguishing between "formal directives" and nonbinding "appropriation" of agency action, which take the form of informal public announcements).

155. *See* Recent Social Media Posts, *supra* note 46, at 941–42.

156. *See* Defendant's Supplemental Submission and Further Response to Plaintiffs' Post-Briefing Notices at 2, James Madison Project v. Dep't of Justice, 320 F. Supp. 3d 143 (D.D.C. 2018) (No. 1:17-cv-00144-APM).

157. *See, e.g.*, Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 HARV.

every agency interpretation is an intentional delegation of legislative authority from Congress, it is likely that every agency interpretation is a de facto act of lawmaking.[158] So where there is statutory ambiguity, courts defer to agencies in part because agencies are more accountable to voters than judges. Agencies report to the President, and the President ultimately reports to the citizenry.

The political accountability rationale is also a good reason for courts to defer to agency interpretations of executive orders. Here, the rationale is at least as strong as it is in the statutory context, even though the substantive law at issue differs. That is, the choice between the interpretive actor is still between the courts or an agency. Faced with only these two options, an agency is obviously stronger from a democratic accountability standpoint. Moreover, just as the public can theoretically hold Congress accountable for ambiguous statutes that delegate power to the Executive, the public could hold the President accountable for vague executive orders that diffuse power within the Executive Branch.

In fact, the political accountability rationale may even be *stronger* for deference to agency interpretations of executive orders. While deference to agency interpretations of statutes is effectively judicial acquiescence to a form of inter-branch delegation of powers (i.e., Congress delegating legislative power to the Executive Branch),[159] judicial deference to an interpretation of an executive order implicates few delegation issues. Deference to the latter promotes the separation of powers by reducing judicial intervention in the Executive Branch. After all, if an agency interpretation of an executive order is inaccurate, the President has tools to correct the interpretation unilaterally.[160] But deference to statutory interpretation is technically constitutionally dubious, given that inter-branch delegation of powers is still unconstitutional as a matter of law (but not practice).[161]

L. REV. 2043, 2048 (2010) [hereinafter *Justifying the* Chevron *Doctrine*].

158. *See, e.g.*, Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 121 (2016); Manning, *supra* note 109, at 626; *cf.* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2571 (2019) (stating that the Secretary of Commerce's actions under the Census Act "called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty," and thus didn't need to follow technocratic recommendations from the Census Bureau).

159. *See, e.g.*, Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 270 (1988).

160. *See supra* Part 1.

161. *See, e.g.*, Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 371–78 (2017) (lambasting nondelegation doctrine as a legal fiction that should be discarded); *Justifying the* Chevron *Doctrine*, *supra* note 157, at 2051. *But see* Gundy v. United States, 139 S. Ct. 2116,

Granted, the political accountability rationale is weaker—although arguably viable[162]—for the subset of agencies that are independent. Commentators, such as Professor Thomas Merrill, argue that the less directly accountable an interpreter is to the President, the less the interpretation draws on the President's constitutional authority and the weaker it should be as executive precedent.[163] Independent agencies are less accountable to the President because the President has less statutory control over them.[164]

3. Technical Expertise

The expertise rationale is grounded in a few different principles. Some commentators have collapsed the expertise rationale with the intent rationale, arguing that an agency has "superior knowledge of congressional intent" because of its greater substantive expertise in its organic statute(s) relative to the courts.[165] Others combine the expertise justification with the political accountability justification, citing the "often-inextricable relationship between politics and expertise."[166] But expertise should also be conceptualized as a separate rationale grounded in policy outcomes—i.e., that courts should defer to agency interpretations because they generally lead to better results than judicial interpretations. Indeed, in the context of arbitrary-or-capricious review, the Supreme Court requires agencies to base policy decisions on expertise; it cannot merely cite congressional intent or active political support.[167]

2131–48 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) (discussing three principles for reinvigorating the nondelegation doctrine; claiming that the court "regularly rein[s] in" delegation under other doctrines; and noting Justice Alito's willingness to reconsider nondelegation doctrine).

162. *See* Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) ("[A]gencies—even the independent ones—have superior political standing to the life-tenured federal judiciary in performing that policy making function [of choosing between interpretations].").

163. Merrill, *supra* note 151, at 1011.

164. *Id.* at 996.

165. Silberman, *supra* note 162, at 823.

166. Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 146 n.312 (2015); *cf.* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019) ("[A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a 'rarified technocratic process, unaffected by political considerations or the presence of Presidential power.'") (quoting Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981)).

167. Nou, *supra* note 166, at 146 n.312. (citing Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

The idea that expertise will lead to better policy outcomes itself has two parts. First, an agency may select a better policy goal than a court.[168] Second, and perhaps less intuitive, is that an agency will be better at implementing a coherent and administrable program. That is, even if a court would select a theoretically superior policy goal, an agency achieves superior real-world results given (i) administrative constraints, such as the costs of switching to or adding a new policy goal;[169] (ii) differing implementation methods, such as rulemaking versus adjudication;[170] and (iii) the benefits of national uniformity.[171] Applying these concepts to executive orders, we should generally expect better policy goals and policy implementation from agencies vis-à-vis courts, especially because the President can presumably identify who has the expertise to execute his orders.

Even so, the expertise rationale for deference is weaker than the intent and accountability rationales, no matter if an agency is interpreting a statute or an executive order. One commentator has even stated that in the context of statutory interpretation, the agency expertise justification "may be dispensed with immediately."[172] If taken at face value, the logic of the rationale demands that courts ask whether an agency has actually employed its expertise when issuing an interpretation.[173] Further, a judge could decline to defer to an agency if she felt technically adept in the subject matter of the interpretation.[174] Yet under current *Chevron* doctrine, courts take neither of these logical steps. Under *Auer* after *Kisor*, courts must take the first step (asking whether the agency employed its comparative expertise) but not the second[175]—a doctrinal compromise that may reflect concerns with *Auer* more than anything else.

Similarly, in the context of executive interpretation, permitting judges to ask whether an agency has exercised its subject-matter expertise in interpreting an executive order would create problems of judicial economy and accuracy.

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168. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 137–39 (1944); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406, 419–21 (2007).

169. *See* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 532–33 (1989).

170. *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 203 (1947).

171. *See*, *e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2413–14 (2019) (plurality opinion).

172. *Justifying the* Chevron *Doctrine*, *supra* note 157, at 2045.

173. *Id.* at 2046 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

174. *Id.* at 2046.

175. *See Kisor*, 139 S. Ct. at 2417 ("When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority."). The *Kisor* Court spoke in general terms about what may implicate an agency's expertise, not about whether a given judge's expertise outmatches the agency's expertise.

Framing this inquiry raises tough questions about what level of expertise would be feasible, yet sufficient. For example, would a judge have to discover the resume and thought processes of the agency employees who worked on the interpretation? If not, what type of information would suffice to demonstrate expertise? Moreover, if a judge is expert at the subject matter of the interpretation (thereby weakening the expertise rationale), who would verify the judge's expertise upon review—an advisory committee, a panel of generalist judges, or something else altogether?[176] So although the expertise rationale has some weight, conclusions on judicial deference shouldn't hinge on expertise.

4. Rule of Law

Counterbalancing the three affirmative justifications for deference is the requirement that deference accord with the rule of law. The rule of law has many dimensions. That said, most conceptions of the rule of law have the prevailing principle that people in power should act "within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong."[177] In addition, many formulations of the rule of law emphasize formality,[178] "legal certainty, predictability, and settlement; on the determinacy of the norms that are upheld in society; and on the reliable character of their administration by the state."[179] As discussed in Part IV.A, *Mead* and *Barnhart* codified rule of law principles in determining whether to defer to agency interpretations of statutes.[180]

The rule of law rationale for deferring to agency interpretations of executive orders is weaker than the rationale vis-à-vis statutes because executive orders lack some crucial characteristics of law that statutes have. In particular, executive orders are characterized by less formality, less legal certainty, and less administrative predictability. That is, even though executive orders can act with the force of law,[181] they aren't law in the same way statutes are. And consequently, judicial deference to agency interpretations of executive orders may conflict with the rule of law if the underlying order isn't law-like.

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176. For an account of the pros and cons of technical advisory committees, *see generally* SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS (1990).

177. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GEORGIA L. REV. 1, 6 (2008).

178. *See id.* at 18, 40, 55.

179. *Id.* at 6; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.").

180. *See infra* Part IV.A.

181. *See supra* Part I.

There are two major ways in which an executive order may not have the customary characteristics of law. First, as discussed in Part I, executive orders (unlike statutes) don't have express constitutional mooring, which leaves their status unsure and dependent on norms. Nor is it usually clear from where any given order even claims to source its power because presidents often aggregate several sources of law to authorize their executive orders.[182] As a result, historical practice, not legal necessity, makes executive orders formal, legally certain, and predictably administered. Indeed, while executive orders can generate significant reliance interests,[183] they often aren't judicially enforceable unless the President omits language precluding review.[184] So the President can toggle the judicial enforceability of an operative executive order on and off—an odd result for documents that can bear the force of law.

Second, the Executive Branch secretly purports that the President can toggle the very *operation* or *force* of public executive orders on and off—and *without public notice*. This purported presidential authority stems from three declassified legal propositions from otherwise "highly classified" Office of Legal Counsel (OLC) opinions related to government surveillance.[185] According to Senator Sheldon Whitehouse, a former member of the Senate's Select Committee on Intelligence, the three propositions are:

> One:
>
> An Executive order cannot limit a President. There is no constitutional requirement for a President to issue a new Executive order whenever he wishes to depart from the terms of a previous Executive order. Rather than violate an Executive order, the President has instead modified or waived it.
>
> No. 2:
>
> The President, exercising his constitutional authority under [A]rticle II, can determine whether an action is a lawful exercise of the President's authority under [A]rticle II.
>
> And 3:
>
> The Department of Justice is bound by the President's legal determinations.[186]

Three caveats apply to the effect of these OLC opinions. First, it is unclear

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182. *See supra* text discussing sources of law accompanying note 34.

183. See, for example, Executive Order 11,246, which since 1965 has protected employees of federal contractors—about one-fifth of the entire U.S. labor force—from discrimination on the basis of race, color, religion, and national origin. *See* Office of Federal Contract Compliance Programs, "History of Executive Order 11246," DEP'T OF LABOR, https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html.

184. See *supra* text discussing justiciability accompanying note 56.

185. 153 Cong. Rec. S15,011, S15,011–12 (daily ed. Dec. 7, 2007) (statement of Sen. Whitehouse).

186. *Id.*

how far these OLC opinions claim to apply outside the surveillance context, or whether the current Administration has amended or revoked the opinions. Second, while OLC opinions may be binding as a matter of practice within the Executive Branch, the D.C. Circuit and the Second Circuit have recently suggested that OLC opinions cannot constitute working law.[187] And third, it is arguable that in the context of administrative guidance, courts have essentially condoned the Executive Branch's right to execute sudden changes in policy without much consideration or public notice.[188] But even with these caveats, the possibility that the President can secretly violate an executive order—an order that the public (and potentially nearly all Executive Branch itself) believes to be binding—cuts to the heart of "legal certainty, predictability, and settlement; on the determinacy of the norms that are upheld in society; and on the reliable character of their administration by the state."[189]

Moreover, even when the President wants an order to be in full effect, *agency* noncompliance may be troubling. This is especially true if noncompliance with executive orders is more frequent and severe than noncompliance with statutes and regulations. As President Clinton said in 2007, "[o]ne of the things that I was frustrated about, when I was president, was that I had all these great ideas, and I'd issue all these executive orders, and then you can never be 100 percent sure that they were implemented."[190] While at least one empirical scholar speculates that executive orders may receive more White House oversight and agency compliance than statutory requirements,[191] the fact is that the absolute level of compliance with executive orders is far from perfect, thereby leaving room for doubt about relative levels of compliance.[192]

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187. *See* Jameel Jaffer & Brett Max Kaufman, *A Resurgence of Secret Law*, 126 YALE L.J.F. 242, 245–48 (2016) (discussing Elec. Frontier Found. v. U.S. Dep't of Justice, 739 F.3d 1 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 356 (2014) and New York Times Co. v. U.S. Dep't of Justice, 806 F.3d 682 (2d Cir. 2015)).

188. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015) (eliminating the "one-bite" doctrine for agency interpretive rules, a doctrine which required agencies to promulgate relatively formal regulations if they wished to change a type of informal agency guidance); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 502–03 (2009) (rejecting, with limited exceptions, the rule that courts subject agency changes in policy to more searching review than initial decisions).

189. Waldron, *supra* note 177.

190. *Philanthropy and the Presidency*, ABC NEWS (Sept. 26, 2007).

191. *See* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 Admin. L. Rev. 65, 125 (2015).

192. *See* Joshua B. Kennedy, *"Do This! Do That!' and Nothing Will Happen": Executive Orders and Bureaucratic Responsiveness*, 43 AM. POL. RES. 59, 72 (2015). For an example of seemingly

Even so, the rule of law argument against agency interpretations of executive orders shouldn't be overstated. If *Auer* deference is permissible, agency interpretations of executive orders should receive deference as well. The rule of law rationale for deferring to agency interpretations of executive orders is *stronger* than the legalistic rationale for *Auer*—i.e., deference to agency interpretations of their own regulations. Both judges and scholars have identified that *Auer*'s greatest flaw is that it weakens the separation of powers by combining legislative and executive power, if not also judicial power.[193] In contrast, agency interpretations of executive orders don't formally violate the separation of powers to the same extent. Unlike regulations, executive orders derive their power either solely from the President's Article II powers, or at most from an amalgam of Article II power and statutory authority. Thus, agency interpretations of executive orders are more an exercise of the executive power alone than the interpretations at issue in *Auer*. To be sure, values like notice and predictability are still implicated in the executive order deference context as they are in *Auer*. Yet it is difficult to see how interpretations of executive orders threaten these values more than interpretations of regulations.

IV. A NEW FRAMEWORK

This Article's analysis demonstrates that—rule of law concerns aside—the justifications for deferring to agency interpretations of executive orders are stronger than the justifications for deferring to agency interpretations of statutes.[194] Thus, in the executive order context, any proposed legal test should

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systemic noncompliance with one recent executive order, President Trump's Executive Order 13,771 (the "two for one" deregulatory executive order), *see* Roncervert Almond et al., *Regulatory Reform in the Trump Era—The First 100 Days*, 35 YALE J. ON REG. BULLETIN 29, 38–49 (2017) (Author disclosure: I was the Yale Journal on Regulation's editor for this article.).

193. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2421–22 (2019) (Gorsuch, J., concurring in the judgment, joined by Thomas, Alito, and Kavanaugh, JJ.) ("*Auer* thus means that, far from being 'kept distinct,' the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised."); Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring); Manning, *supra* note 109, at 631. *But see Kisor*, 139 S. Ct. at 2422 (plurality opinion) (dismissing the separation-of-powers criticism of *Auer*, because agency action is always an exercise of the executive power, even when the action takes legislative or judicial forms).

194. I thus quibble with Manheim & Watt's statement that "there are good reasons for the courts to resist trying to transfer into the presidential-order context something akin to Chevron deference." Manheim & Watts, *supra* note 15, at 75; *see id.* at 76–77. These reasons include deference doctrine's need for public process, as exemplified by Mead (which I don't believe should apply to executive orders, see *infra* Part C); and rule of law concerns (also addressed above and below).

give agencies at least *Tallman* or *Chevron* "reasonable[ness]" deference if those rule of law concerns are addressed, *and* there are no special circumstances weakening the intent, political accountability, or technical expertise rationales for deference. In sum, the rule of law concerns are two-fold. First, executive orders risk losing their legal force and usefulness to the Executive because of political or judicial overreach, because they source their authority mainly from history and practice, not express constitutional authorization. For instance, an interpretive doctrine that weighed all presidential speech as legally equivalent to (or amendments of) executive orders would significantly erode the usefulness of executive orders. Second, executive orders raise notice and predictability concerns, because some executive orders are secret and, according to OLC, even public orders may be secretly modified.

My proposed test is therefore:

- **Step 1:** Is the text within the four corners of the executive order ambiguous in relation to the agency's interpretation? If the text is *un*ambiguous, the text controls.
- **Step 2:** If the text is ambiguous, then a court generally should defer to the agency's interpretation if it is "reasonable" *unless* one or more of following exceptions are true, in which case a court should give the text of the order its best reading.
    - Exception 1: The agency's interpretation conflicts with a prior interpretation of the order (whether by that same agency or other executive agencies) or is a *post hoc* rationalization in response to litigation.
    - Exception 2: The agency is an independent agency, not an executive agency.[195]

A. Step One: Prioritizing Unambiguous Text

Prioritizing the unambiguous text of an executive order over other sources of meaning—e.g., agency interpretation or presidential speech—addresses both of the rule of law concerns highlighted above. First, on preserving executive orders as a tool imbued with the force of law, imagining the operation of a *contrary* rule shows why courts shouldn't ignore unambiguous text. If an agency could override unambiguous text, then executive orders would be better called "executive suggestions." In judicial review of agency action taken

195. To be clear, my proposed test addresses the proper interpretation of a presidential instrument, not its legal validity. Presidential instruments can be unlawful in many ways. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2266–73 (2018) (arguing that breaching norms alone may justify judicial intervention in extreme circumstances).

under a constitutionally-valid order—such as in *Tallman* or *Sherley*—the agency would automatically prevail, because its action would define the order regardless of its language. This rule wouldn't resemble legal interpretation at all. And it is improbable that this rule is one the President would choose. Underscoring the implausibility of this alternative rule is the reality that the President and agencies are often in imperfect alignment or even conflict.[196]

Thus, an agency's inconsistency with an unambiguous executive order is strong evidence that the agency is in fact in conflict with the President. Said another way, if one assumes that the President and agencies are in fact of one mind, why would the President even issue the unambiguous order and what, if anything, would the order affect? Under an alternative regime of unambiguous executive order language signifying nothing, it is unclear why executive orders would retain any legitimacy or force.

Even a more limited rule—one that only enables agency departures from unambiguous text when presidential speech supports the agency interpretation—would collapse the distinction between presidential communications that have legal effect and those that don't.[197] Preserving this distinction has little cost, because the President can unilaterally and easily designate any communication as an "executive order" or as otherwise bearing legal force. Thus, the proposed Step 1 notably differs from *Chevron* in that it looks *only* to the text within the four corners of the order, not the expanded universe of sources available as "traditional tools of statutory construction."[198]

Second, on furthering public notice and predictability, prioritizing unambiguous text avoids the absurd result of a court upholding agency action that hurts reliance interests because either (a) the agency unilaterally decided to deviate from an unambiguous order, or (b) the President secretly amended the order to authorize the action. Scenario (a) would transform executive orders into de facto executive "guidance," which cannot have the force of law.[199] Scenario (b) raises serious due process concerns, particularly if a secret modification is used retroactively to justify agency action.[200] Said another way, it would likely breed public confusion and distrust if courts were

196. *See, e.g.*, JOHN P. BURKE, THE INSTITUTIONAL PRESIDENCY 35–36, 91–97, 125, 132, 148, 183 (2d ed. 2000); HOWELL, *supra* note 30, at 21–22; Kagan, *supra* note 16, at 2272.

197. See *supra* Part III, Section B.1.iii.

198. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). The Supreme Court has stressed the importance of thoroughly interpreting statutory and regulatory text before asserting it is ambiguous. *E.g.*, *Kisor*, 139 S. Ct. at 2423–24. Executive order text shouldn't be any different. *Cf.* Grove, *supra* note 15 (advocating a purely textualist approach).

199. *See* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).

200. *See* Jaffer & Kaufman, *supra* note 187, at 242.

to rule that a president's unambiguous words (as written in an executive order) can mean something entirely different than expected.[201]

B. Step Two: Deference to a "Reasonable" Interpretation of Ambiguous Text

In contrast, when an order's text is ambiguous, deference to an agency interpretation generally will not weaken the rule of law. One may conceptualize the effect of deference as creating a "space," bounded by the extent of textual ambiguity, within which an agency has interpretive power.[202] That some standard—here *reasonableness*—limits deference ensures that executive order text maintains its force, and that agency interpretations cannot be so unpredictable as to harm reliance interests.

Empirical research also suggests that creating a two-step framework and deferring to "reasonable" interpretations would be more than a formalistic exercise.[203] It would further intent, political accountability, and technical expertise values by increasing the likelihood that agencies will prevail in court.[204] So to have a real-world effect on judicial outcomes, it is unnecessary to resolve the live debate over the exact operation of a two-step test—e.g., distinguishing ambiguous text from clear text and delimiting "reasonableness."[205]

A more pressing issue is the ideal strength of the deference standard. The Supreme Court has recognized a spectrum of deference ranging from super-strong (for foreign affairs and national security matters) to anti-deference (for criminal cases).[206] This Article's "reasonable[ness]" standard mirrors *Tallman*, *Chevron*, and now also *Auer* (after *Kisor*).[207] A weaker standard would be

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201. At the risk of making your eyes roll, *cf.* GEORGE ORWELL, 1984 8 (1949) ("[T]he three slogans of the Party stood out in bold capitals: WAR IS PEACE / FREEDOM IS SLAVERY / IGNORANCE IS STRENGTH.").

202. Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143, 1145, 1164 (2012).

203. And even if it were, courts need some framework to handle Congress's delegation of tremendous policymaking discretion to the Executive. *See* Bednar & Hickman, *supra* note 142, at 1398 (making the same argument for *Chevron*).

204. *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

205. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Kavanaugh, *supra* note 130, at 2134–44.

206. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008).

207. Before Kisor v. Wilkie, there was wide agreement that Auer's "plainly erroneous"

inappropriate, because justifications for deference are generally stronger vis-à-vis executive orders than statutes. A stronger (if not the strongest) standard, the *Curtiss-Wright* standard for foreign affairs,[208] is likely too deferential because it has historically guaranteed agency victory.[209] So "reasonable[ness]" is the best standard, because it achieves similar outcomes to *Chevron* and *Auer* while according some *stare decisis* value to *Tallman* (a unanimous decision).

C. Exceptions

1. Conflict with a Prior Interpretation Anywhere in the Executive Branch, or a Post Hoc Rationalization

When the text is *ambiguous*, the court should defer to reasonable interpretations unless special circumstances weaken the intent, political accountability, expertise, and rule of law rationales for deference. A noncontemporaneous agency interpretation—at least one not merely codifying long-standing practice under the order—raises problems related to intent and rule of law. As for intent, the empirical literature suggests that pressure to faithfully implement an executive order subsides over time,[210] because the White House's scant supervisory attention turns elsewhere,[211] and publicity surrounding the order fades.[212] In addition, to defer to a noncontemporaneous interpretation

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standard was stronger than Chevron's "reasonable." *See supra* text accompanying note 71. But the Kisor Court held the standards equal. 139 S. Ct. 2400 (2019) (plurality opinion). And even before Kisor, the recent empirical effect of Auer deference may have been the same as Chevron deference. *See* William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 Geo. L.J. 515, 547 (2018) (analyzing the impact of Gonzales v. Oregon, 546 U.S. 243 (2006)).

208. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

209. *Id.*

210. If we analogize new executive orders to new statutory mandates, *see* Raso, *supra* note 191, at 130, 131 Table 6, 132 Figure 1 (showing empirically that after Congress passed laws to expand procedural requirements under the Regulatory Flexibility Act in 1996, agency compliance of approximately 20% to 30% lasted only about one year before plummeting to about 2% to 10%).

211. *See* Kagan, *supra* note 16, at 2273 ("In a world of extraordinary administrative complexity and near-incalculable presidential responsibilities, no President can hope (even with the assistance of close aides) to monitor the agencies so closely as to substitute all his preferences for those of the bureaucracy."); *cf.* Nou, *supra* note 166, at 100 (stating that while executive orders have created mechanisms for sharing information within the Executive Branch, they have fallen into disuse over time).

212. *See* Anthony Downs, *Up and Down with Ecology—the "Issue-Attention Cycle"*, 28 PUB. INT. 38, 40–41 (1972); *cf.* Kagan, *supra* note 16, at 2299 ("Especially when agency resistance

is to assume that the President has implicitly delegated *permanent* interpretive authority to an agency, which may not be empirically accurate.[213] As for the rule of law, Aditya Bamzai has recently argued that the APA permits judicial deference to agency interpretations "if and only if that interpretation reflected a customary or contemporaneous practice" under the law at issue.[214] It may thus appear attractive to impose a *Barnhart*-like prerequisite to deference that only long-standing agency interpretations should receive deference.[215] Indeed, such a requirement would mirror the facts of *Tallman*, which involved an agency interpretation at least seven years old.[216]

But there are two reasons to believe withholding deference from *all* noncontemporaneous interpretations of executive orders would go too far. First, as discussed above, the principal-agent relationship between the President and his agencies is likely to be more effective, on average, than the principal-agent relationship between the President and the courts. So even when an agency makes a noncontemporaneous interpretation of an ambiguous order, it isn't obvious that a court's "best reading" of that order will be more accurate than the agency's *unless* there are other indicia of the agency's unfaithfulness.

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to presidential preferences need take only the form of inertia, publicity can serve as a useful weapon in the hands of a President — turning a spotlight on and creating a constituency for the action ordered, and thereby increasing the costs of noncompliance to agency officials.").

213. *Cf.* Kagan, *supra* note 16, at 2379 ("The delegation of power to an agency to administer a statute, even when manifested in explicit rulemaking and adjudicatory authority, does not necessarily entail a delegation of power to the agency (rather than the courts) to answer any and all interpretive questions to which the statute may give rise.").

214. Bamzai, *supra* note 107, at 987. While Bamzai only explicitly refers to *statutory* interpretation, the case law and APA legislative history underlying his argument broadly applies to agency interpretations of any substantive law, which would include presidential directives with the force of law. *See id.* at 935 (stating the contemporaneous exposition "canon was not directed at statutes alone: it was viewed as a generalized method of proper interpretation, applicable to all manner of legal instruments."); *id.* at 988 (discussing legislative history).

215. Barnhart v. Walton, 535 U.S 212, 222 (2002).

216. Udall v. Tallman, 380 U.S. 1, 5–16 (1965) (interpreting Public Land Order 487 to not exclude leasing since at least 1951); *see* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 79 (2015). Reinforcing this *Barnhart*/Bamzai perspective, at least four Justices read *Tallman* as a case in which the Court "accept[ed] a regulatory interpretation by the Secretary of the Interior that was consistent, widely disseminated, and heavily relied upon." Kisor v. Wilkie, 139 S. Ct. 2400, 2429 n.27 (2019) (Gorsuch, J., concurring in the judgment, joined by Thomas, Alito, and Kavanaugh, JJ.).

Second, a rule withholding deference from *all* noncontemporaneous interpretations of executive orders would be inconsistent with how courts currently treat an agency's interpretation of its own *regulations*.[217] The comparison to *Auer* is relevant because, if the case for deferring to agency interpretations of executive orders is at least similar in strength to the case for *Auer*, getting deference for agency interpretations of executive orders shouldn't be harder. What's more, *Auer* and its progeny provide doctrinal guideposts for when courts should deny deference even though normally, deference would be granted.

Under *Auer*, courts generally defer to an agency's interpretation of its own ambiguous regulation except in four situations. First is when the agency's interpretation is unreasonable.[218] Second is when the agency's interpretation comes from an "ad hoc statement not reflecting the agency's views."[219] Third is when the agency's interpretation doesn't "implicate its substantive expertise," such as when the interpretation involves "a simple common-law property term" or "the award of an attorney's fee."[220] And fourth is when the interpretation doesn't reflect the agency's "fair and considered judgment,"[221] such as when "the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a 'convenient litigating position' or a '*post hoc* rationalization' advanced by an agency seeking to defend past agency action against attack."[222]

To justify a more limited deference rule for executive orders, three things would have to be true. First, agencies would need to be less accurate in interpreting executive orders entrusted to their administration than interpreting their own regulations. This is plausible enough.[223] But then, second, this reduced interpretive faithfulness would have to outweigh the fact that the worst problem with *Auer* deference—the separation of powers—is absent when

217. *See* Kisor, 139 S. Ct. at 2418–19 (barring deference to several types of new interpretation, but not all).

218. *Id.* at 2417.

219. *Id.* at 2416

220. *Id.* at 2417

221. *Id.* (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

222. *Christopher*, 567 U.S. at 155 (first quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988); then quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)) (quotation marks and citations omitted); *accord* Kisor, 139 S. Ct. at 2417; *see also* Bamzai, *supra* note 214, at 944–47 (summarizing a line of Supreme Court precedent invalidating executive action on the grounds the action conflicted with contemporaneous or customary interpretations of the law).

223. For example, while agencies do help draft executive orders, I would guess that on average, they have a bigger role in drafting their own regulations. So, they may have a better idea of what their own regulations mean.

agencies interpret executive orders and thus exercise only executive power.

Third, we'd have to presume that the President intends to delegate less interpretive power to agencies than Congress does. For the scope of presumed delegation is how the *Kisor* Court justifies not deferring in situations two through four above.[224] But we shouldn't presume that of the President here. There aren't many situations in which the President would want courts rather than agencies interpreting an order. As explained above, agencies work closely with the President in drafting orders.[225] And once an order is issued, an agency official's misinterpretation of that order may result in prompt professional embarrassment or unemployment.[226]

Taken together, these three points at least offset each other, if not weigh in favor of executive order deference. Courts thus should defer to an agency's interpretation of an ambiguous executive order unless the interpretation bears established indicia of unreliability. These indicia include those mentioned in *Christopher* and *Fox Television*.[227] Moreover, these indicia aren't merely judicial creations. It tracks traditional *Executive Branch* practice to disfavor legal interpretations that conflict with prior practice[228] or that issue during litigation.[229]

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224. *See Kisor*, 139 S. Ct. at 2416 ("[W]e give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to. But the administrative realm is vast and varied, and we have understood that such a presumption cannot always hold.") (citation omitted). *But cf.* David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 238 (2001) (arguing that the justification for a deference requirement similar to *Kisor*'s "ad hoc statement" bar is a "policy consideration[]," not congressional intent).

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

226. *See id.*; *cf.* Jess Bravin & Janet Adamy, *Justice Department Renews Citizenship Question Push as Confusion Spreads*, WALL ST. J. (July 3, 2019), https://www.wsj.com/articles/trump-tweet-sows-confusion-on-census-11562175122 (detailing DOJ's public embarrassment when the agency seemingly misinterpreted the President's position on an issue).

227. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (stating that agencies must provide more detailed justifications for changes in policy "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account").

228. *See* Bamzai, *supra* note 214, at 945 n.149 (compiling Opinions of the Attorney General, including 19 Op. Att'y Gen. 354 (1889), which stated that long-standing and uniform executive practice precluded reaching a different statutory interpretation).

229. *See* Texas State Comm'n for the Blind v. United States, 796 F.2d 400, 428 (Fed. Cir. 1986) (stating "[t]he Department of Justice is not allowed to issue a ruling on a matter already in litigation" and citing 38 Op. Att'y Gen. 149 (1934), 37 Op. Att'y Gen. 34 (1932), and 32 Op. Att'y Gen. 472 (1921)); *see also* Office of Legal Counsel—Limitation on Opinion Function, 3 Op. O.L.C. 215–16 (1979); Memorandum from O.L.C. on Best Practices for OLC Legal

This scenario of intra-Executive Branch conflict over an executive order isn't just speculative. Consider, for example, President Trump's Executive Order 13,769 (a.k.a. the "Travel Ban"), which barred for ninety days "the immigrant and nonimmigrant entry into the United States of aliens"[230] from seven countries. Trump issued the order "without traditional interagency consultation," surprising the agencies addressed in the order.[231] So at the time of the order's issuance on January 27, 2017, the Department of Homeland Security (DHS) and White House officials disagreed whether the order applied to lawful permanent residents (a.k.a. "green-card" holders).[232] Senior White House advisors insisted that the order also barred permanent residents and purported to overrule DHS's interpretation.[233] DHS therefore barred permanent residents from entering the country.[234] But by January 29, DHS had seemed to reverse course again by declaring that legal residents could enter the United States "absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare."[235] And on February 1, White House Counsel Donald F. McGahn issued "authoritative guidance" to the Secretary of State, Attorney General, and the Secretary of Homeland Security.[236] In the one-page memo, McGahn went

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Advice and Written Opinions to Attorneys of the Office of the Assistant Attorney Gen. 3 (July 16, 2010) ("As a prudential matter, OLC generally avoids opining on questions likely to arise in pending or imminent litigation involving the United States as a party.").

230. Exec. Order 13,769, § 3(c), 82 Fed. Reg. 8977, 8978 (Feb. 1, 2017).

231. Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 620 (D. Md. 2017) (citing IRAP v. Trump, 241 F. Supp. 3d 539, 558–59 (2017)); *see* Aziz v. Trump, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (internal citations omitted); Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338466, draft at 30 (noting "widespread agreement" that Executive Order No. 13,769 "bypassed virtually all agency review").

232. Evan Perez, et al., *Inside the confusion of the Trump executive order and travel ban*, CNN (Jan. 30, 2017), https://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/ index.html.

233. *Id.*

234. Michael D. Shear et al., *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order. html.

235. Press Release, Statement by Sec'y Dep't. of Homeland Sec. John Kelly, on the Entry of Lawful Permanent Residents into the United States, (Jan. 29, 2017), https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states; see Peter Baker, *Travelers Stranded and Protests Swell Over Trump Order*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/politics/white-house-official-in-reversal-says-green-card-holders-wont-be-barred.html.

236. Memorandum from Donald F. McGahn II, Counsel to the President, to the Acting

further than DHS, writing: "I now clarify that Sections 3(c) and 3(e) do not apply to such individuals."[237] Yet it's still doubtful that the White House Counsel can bind the Secretary of State, the Attorney General, or the Secretary of Homeland Security; nor can the White House Counsel issue an executive order.[238]

In addition to the indicia of unreliability expressly listed in *Christopher* and *Fox*, there is another left unstated. When different agencies (or high-ranking Executive officials) have taken (or directed) agency action under conflicting interpretations of an executive order, courts should give the order its best reading. This scenario of intra-Executive Branch conflict has not arisen in the *Auer* context because *Auer* is limited to an agency's interpretations of its *own* regulations. But if we conceptualize the Executive Branch as one large "agency" for *Auer* and *Christopher* purposes, the reasons for not deferring in such a chaotic scenario become clear. A court wouldn't give *Auer* deference to an agency if the agency could not internally agree on an interpretation for its regulation.[239] Analogously, if there is conflict within the Executive Branch over how to interpret an ambiguous order, and the President has not resolved that conflict by amending the order, then courts cannot be sure which agency's interpretation—*if any*—is favored by the Executive.

To be fair, an interpretation issued by the Department of Justice might cure this problem of which agency's interpretation controls, because the DOJ almost always speaks for the Executive Branch on legal issues. But this DOJ supremacy is a norm that, like any other norm, may be deviated from in certain cases or generally eroded.[240] So where there's already intra-Executive conflict suggesting the norm has already broken down for a given order,

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Sec'y of State, the Acting Att'y Gen., and the Sec'y of Homeland Sec. (Feb. 1, 2017), https://case.edu/executive-order-updates/docs/f.pdf.

237. *Id.*

238. Washington v. Trump, 847 F.3d 1151, 1165–66 (9th Cir. 2017), *reh'g denied*., 853 F.3d 933 (9th Cir. 2017), *reh'g denied*, 858 F.3d 1168 (9th Cir. 2017), *cert. denied sub nom*. Golden v. Washington, 138 S. Ct. 448 (2017); *see also* Bob Bauer, *Thoughts on the Proper Role of the White House Counsel*, LAWFARE (Feb. 21, 2017), https://www.lawfareblog.com/thoughts-proper-role-white-house-counsel. It is also unclear whether the Attorney General—and by extension, OLC, who exercises the Attorney General's delegated powers—can authoritatively interpret executive orders. *See* W. Neil Eggleston & Amanda Elbogen, *supra* note 45, at 841; Jaffer & Kaufman *supra* note 187.

239. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019) (holding that an agency interpretation "must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context").

240. *See, e.g.*, Renan, *supra* note 195, at 2229 (noting violations of Executive Branch legal review norms); Jonathan H. Adler, *What Happens When the Justice Department Files a Brief Against*

a special deference rule to the DOJ may be unwise.[241] A special rule would also assume that when there's agency conflict but the President hasn't issued a clarifying order, he wants DOJ's view to triumph. But this assumption probably overgeneralizes DOJ's closeness to the President on all policy areas.[242] And it presumes the President wants to pick sides between the DOJ and an opposing agency, when in fact he may prefer to let courts resolve a conflict without his intervention.[243]

All in all, when there's intra-Executive conflict over an executive order, an agency's interpretation likely doesn't reflect "fair and considered judgment on the matter in question."[244] And judicial deference doesn't further the intent, political accountability, or rule of law aims of deference. No matter which interpretation the court defers to, at least one agency (e.g., DHS) would potentially be in conflict with another agency or significant executive branch official (e.g., White House Counsel). It is difficult to believe the President would intend that an executive order result in internecine conflict, or that contradictory policies could vindicate public preferences, or that this conflict enhances the predictability and legitimacy of executive orders. Thus, when there is intra-Executive Branch conflict, a court should give an order its best reading, and leave it to the President to clarify definitively the meaning of the order should he disagree.

2. Independent Agencies

Deference to independent agency interpretations of executive orders runs contrary to the intent and political accountability justifications for deference. As for intent, it seems unlikely that Presidents would implicitly delegate interpretive authority to independent agencies. As evidenced by the text of

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a Federal Agency?, WASH. POST (Mar. 18, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/18/what-happens-when-the-department-of-justice-files-a-brief-against-a-federal-agency/?utm_term=.7a0e3999eb63 (noting DOJ amicus brief against the CFPB and dueling briefs in Buckley v. Valeo, 424 U.S. 1 (1976)).

241. *See also* Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 578–79 (2003) (arguing that giving DOJ control of federal litigation is "possibly a perverse way of achieving presidential control of agency policymaking," and noting how policy positions across the Executive and even within DOJ itself may differ).

242. *Cf. id.* at 604–05 (arguing that cases based on an agency's regulatory program should be left to the agency, because agencies are more likely to have familiarity with the program's history and context).

243. *Id.* at 578–79 (stating that Bush 41's White House embraced dueling briefs in Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)).

244. Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012).

several executive orders, presidents recognize their limited control over independent agencies.[245] Presumably, presidents wouldn't normally delegate broad authority to entities they cannot control. As for political accountability, independent agencies have an "almost inexorabl[e]" gap between them and the President due to (1) legal insulation from the presidential removal power, (2) an organizational structure that often features multiple agency heads of diverse parties serving staggered terms, and (3) longstanding norms of independence widely held within both the bureaucracy and Congress.[246] Thus, any political accountability for incorrect interpretations of executive orders would somehow have to stem mainly from Congress or the public at large, not Presidential pressure.

Admittedly, in the context of *Chevron* and *Auer* deference, the courts have historically refused to distinguish independent and executive agencies,[247] although some commentators—including then-Professor Kagan and now possibly four other Justices—have argued that they should.[248] But the 2009 case *FCC v. Fox Television Stations*[249] revealed a Supreme Court split on whether and how to distinguish independent vs. executive agencies in the context of APA arbitrary and capricious review. In *Fox Television*, Justice Scalia wrote in the plurality portion of his opinion that "it is assuredly not 'applicable law' [under the APA] that rulemaking by independent regulatory agencies is subject to heightened scrutiny."[250] Scalia therefore rejected two different dissenting perspectives presented by Justices Stevens and Breyer. Echoing the contemporaneous interpretation canon discussed above, Justice Stevens (writing for himself) argued that changes in FCC interpretation should be disfavored because "[t]here should be a strong presumption that the FCC's *initial* views . . . also

245. *See, e.g.*, Nou, *supra* note 166, at 138 n.274 (noting styles of regulatory interpretation like Justice Scalia's "regulatory textualism").

246. Kagan, *supra* note 16, 2376–77.

247. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2408–24 (2019) (plurality and majority opinions) (omitting any mention of "executive" or "independent" agencies, let alone conditioning deference on an agency being an executive agency); Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433, 437 (2010).

248. *See* Kagan, *supra* note 16, at 2376–77, 2377 n.506; May, *supra* note 247; *see also Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment) (asserting, without comment, that "Auer requires judges to accept an *executive agency's* interpretation of its own regulations") (emphasis added); *id.* at 2438–39 & n.84 (using the term "executive agency" rather than just "agency" four more times).

249. 556 U.S. 502 (2009) (plurality opinion).

250. *Id.* at 525 (joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, but not Justice Kennedy, who was the fifth vote for his majority opinion).

reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute."[251] In contrast, Justice Breyer echoed Kagan-like concerns in arguing that the FCC's "comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law—including law requiring that major policy decisions be based upon articulable reasons."[252] Justice Kennedy's possibly controlling opinion didn't reveal Justice Kennedy's views.[253]

But importantly for our analysis, "heightened scrutiny"[254] of independent agency interpretations is even more warranted in the executive order context than the statutory context. Examining Justice Scalia's plurality opinion and Justice Stevens' and Justice Breyer's dissents in turn is instructive. If we maintain, as Justice Scalia does, that "independent agencies are sheltered not from politics but from the President, and . . . that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction,"[255] then deferring to an independent agency's interpretation of an *executive order* would essentially allow the current Congress to exercise Presidential power. If we believe, as Justice Stevens does, that independent agencies are agents of the Congress that *enacted* the statutory provision at issue, a similar separation of powers problem arises, with the potential twist that a *past* Congress—which, assuming some congressional turnover, cannot be held politically accountable—is now exerting influence. If we think, as Justice Breyer does, that independent agencies are politically insulated, that political insulation is even more complete when an independent agency is interpreting an executive order instead of a statute. When an independent agency is acting under statute, both the President and Congress have an institutional stake in oversight, because the independent agency is part of the Executive Branch (at least nominally) and implementing a legislative mandate. But when an independent agency is acting under an executive order, Congress has a weaker incentive or authority to conduct oversight, because executive orders generally draw upon a vague amalgam of Article II and statutory powers (if they cite a statute at all).

The strongest counterargument to "heightened scrutiny" for independent

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251. *Id.* at 541 (Stevens, J., dissenting) (emphasis added).

252. *Id.* at 547 (Breyer, J., dissenting) (joined by Justices Stevens, Souter, and Ginsburg).

253. *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 195–213 (2016) (discussing how with a plurality decision, the only opinion with precedential value is the narrowest opinion (a.k.a. the *Marks* rule), but discussing difficulties with identifying the narrowest opinion).

254. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 525 (2009) (plurality opinion).

255. *Id.* at 523.

agency interpretations of executive orders is, as discussed in the above section on Exception 1, that even *independent* agencies will be more faithful and politically-accountable agents of the President than the courts.[256] But this counterargument proves too much. Reliance on comparative institutional competencies or principal-agent faithfulness could justify strong deference to legal interpretations that courts don't assign the force of law—e.g., interpretations by low-level agency staff[257] and individual legislators.[258] After all, in cases involving legal interpretation, such actors are more involved in the executive action or legislation at issue than judges are, and they are also certainly more politically accountable. So, a principal-agent theory alone will not justify deference to independent agencies. One must show affirmative reasons to defer, and such reasons don't exist.

3. Rejected Exception: Mead *"Step Zero"*

This Article's proposed test includes only two major exceptions.[259] But courts could also conceivably require that agency interpretations of executive orders satisfy *Mead*—i.e., take place in a relatively formal process like formal

256. *Id.* at 525–26 ("There is no reason to magnify the separation-of-powers dilemma posed by the headless Fourth Branch, by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive.") (citation omitted); *see* Silberman, *supra* note 162.

257. *See, e.g.*, Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 810 (D.C. Cir. 2006) (holding that agency guidelines were nonbinding policy statements rather than legislative rules because the official that issued the guidance had no authority to issue binding regulations or make certain final determinations).

258. *See, e.g.*, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1661 (2017) ("[E]xcerpts from committee hearings and scattered floor statements by individual lawmakers [are] the sort of stuff we have called 'among the least illuminating forms of legislative history.'") (quoting NLRB v. SW General, Inc., 137 S. Ct. 929, 943 (2017)).

259. We might also consider other conditions to deference. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (requiring that agencies have an "authoritative" interpretation and "implicate [their] substantive expertise" to receive *Auer* deference); King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (major questions exception to *Chevron* deference). *Kisor*'s "authoritative" condition, for example, maps well onto Exception 1 above. But at some point, adding more conditions only "leaves [deference doctrine] so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*." *Kisor*, 139 S. Ct. at 2427–31 (Gorsuch, J., concurring in the judgment) (discussing his view of *Kisor*'s effect on *Auer* deference). And if a deference doctrine doesn't constrain courts' judgment, then it fails to realize the benefits of deference.

adjudication or notice-and-comment rulemaking—to receive judicial deference.[260] That said, such a requirement wouldn't only be inconsistent with the intent and political accountability justifications for deference, but also contrary to the Court's justifications for *Mead*. It would also impose a condition that isn't even needed for *Auer* deference after *Kisor*.

First, consider intent. It is dubious that Presidents intend that agencies cannot interpret ambiguous terms in executive orders without either (a) using formal procedures, or (b) receiving an express delegation of interpretive authority within a given order. Presidents issue executive orders to *avoid* procedural hurdles and to effect changes in administrative action. In the words of a senior advisor to President Clinton, "[s]troke of the pen . . . [l]aw of the land."[261] Importing *Mead* into executive orders would morph this aphorism into something like: "stroke of the pen, law of the land after notice-and-comment rulemaking (or on-the-record adjudication) and successfully defeating legal challenges to these agency actions."[262] Moreover, when the President wants to direct formal procedures for interpreting ambiguous terms, the history of executive orders shows he knows how to do it, even on seemingly trivial subject matters.[263] When an Executive Order does set out formal procedures, the White House's priority is generally to accomplish underlying policy goals, rather than follow process for its own sake.[264]

Said another way, because ambiguity is practically unavoidable in legal drafting,[265] an interpretive rule that demands unambiguity or express delegations of interpretive authority would be inefficient. Under such an interpretive regime, a President would have to label the appropriate interpretive

260. *See generally* United States v. Mead Corp., 533 U.S. 218 (2001).

261. James Bennet, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, N.Y. TIMES (July 5, 1998), http://www.nytimes.com/1998/07/05/us/true-to-form-clinton-shifts-energies-back-to-us-focus.html (quoting Paul Begala, Counselor to President Clinton).

262. *See, e.g.*, PARRILLO, *supra* note 39, at 30–34 (summarizing reasons to prefer guidance to legislative rulemaking).

263. *See, e.g.*, Exec. Order 7998, § 5, 3 Fed. Reg. 2603 (Oct. 29, 1938) (creating the Interdepartmental Committee on Printing and Processing, and stating "[t]he Committee *shall* promulgate rules and regulations relating to the establishment, coordination, and maintenance of uniform policies and procedures, consistent with law, for the efficient and economical utilization of printing and processing in the executive branch of the Government.") (emphasis added).

264. *See* Raso, *supra* note 191, at 107–11; Kagan, *supra* note 16, at 2289.

265. *See, e.g.*, Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1527–63 (2014) (detailing inherent ambiguity in some ordinary verbs, and arguing courts often misinterpret these verbs); Kavanaugh, *supra* note 130, at 2144.

actor (e.g., particular agencies or the courts) for each provision of an executive order, or risk a court incorrectly forcing formal procedures on an agency acting under the order. But rather than go through this costly drafting exercise, a President may want to act in broad strokes quickly—perhaps even before deciding whether and which agencies should receive interpretive deference—and then resolve questions about interpretation after the fact through informal channels.

Now consider *Mead*'s own reasoning. Because a default rule requiring formal procedures would generally not reflect the President's intentions, *Mead* militates against importing a *Mead*-like rule into the executive context. *Mead* rests on the idea that when Congress intends to delegate interpretive authority to an agency, Congress generally shows that intent by authorizing agency rulemaking or formal adjudication.[266] As just discussed, it is unlikely presidents generally intend their agencies to be so constrained.

As for political accountability, a *Mead* requirement would also reduce it in three ways. First, *Mead* would weaken the causal link between presidential directives and agency action. As Kagan persuasively argues, "more nakedly assertive (and legally aggressive)" modes of presidential control are better at furthering political accountability because assertive control enables "the public, Congress, and interested parties to identify the true wielders of administrative authority."[267] Compared to an interpretive regime without a *Mead* default rule, an interpretive regime with *Mead* would have more executive orders bogged down in formal processes and litigation. The outcome after such an extended, legalistic, and multilateral process isn't as easily traceable to the President. Second, because presidents would realize that the *ex post* cost of issuing executive orders has increased, they would increase their use of secretive or informal channels not subject to judicial scrutiny. Lower public scrutiny makes it more likely the President will play to parochial interests.[268] Third, agencies will alter their behavior too. As the cost of complying with an executive order increases, compliance will decrease. In addition, to the extent an agency expects that a court will be reluctant to uphold an interpretation issued in a formal process if the court had rejected that same interpretation issued in *informal* guidance, agencies may abstain from announcing informal interpretations of executive orders.[269] This lag in interpretation may lead to under-enforcement of an executive order and broad uncertainty about what the order means.

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266. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001).

267. Kagan, *supra* note 16, at 2333.

268. *Id.* at 2337.

269. *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1490–91 (2011) (advocating adding *Mead* as a prerequisite to *Seminole Rock/Auer* deference, but describing difficulties with the idea).

Finally, imposing a *Mead* requirement would make executive order deference harder to come by than regulatory/*Auer* deference—again, a senseless result.[270] *Auer* deference requires that an agency's interpretation be its "authoritative" or "official position," but it needn't "come[] from," or "even [be] in the name of, the Secretary or his chief advisers."[271] So the agency's interpretation needn't come from a formal adjudication or a (circular) notice-and-comment rulemaking.[272] Driving this point home is the *Kisor* Court's choice of citation for this "official position" principle: Justice Scalia's *dissenting* opinion in *Mead*.[273]

CONCLUSION

Executive orders are key to defining and exerting presidential power. But while executive orders can have the force of law, courts have avoided how to decide what an executive order means. This lack of an interpretive methodology is particularly relevant when agencies act under an executive order, and that agency action ends up in court. While *Chevron*, *Auer*, and their progeny have developed a comprehensive framework for evaluating agency action under statute or regulation, there is no such framework for executive orders. To create a framework, I examined the four goals underlying judicial evaluations of agency legal interpretations: effectuating lawmaker intent, furthering political accountability, enabling better policy outcomes through technical expertise, and preserving the rule of law. The resulting two-step test satisfies these goals. And by drawing on existing doctrine, it aspires to be judicially administrable. But no matter if this test is necessarily correct, the interpretation of presidential directives—which determines their purported legal force—deserves more rigorous analysis than it has so far received.

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270. *See supra* Part 1 (discussing why the biggest objection to regulatory deference doesn't apply to executive order deference).

271. Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019) (quoting United States v. Mead Corp., 533 U.S. 218, 257–59 & n.6 (2001) (Scalia, J., dissenting)). The *Kisor* Court thus adopted—albeit with what appear to be pro-deference changes—an approach that Justice Kagan (*Kisor*'s author) and then-Professor David J. Barron had advocated for *Chevron* in 2001. *See* Barron & Kagan, supra note 224, at 234–57.

272. *See Kisor*, 139 S. Ct. at 2416 (citing deference to official staff memoranda).

273. *Id.*