ARTICLES

INSIDE AGENCY STATUTORY INTERPRETATION

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The Constitution vests all legislative powers in Congress, yet Congress grants expansive lawmaking authority to federal agencies. As positive political theorists have long explored, Congress intends for federal agencies to faithfully exercise their delegated authority, but ensuring fidelity to congressional wishes is difficult due to asymmetries in information, expertise, and preferences that complicate congressional control and oversight. Indeed, this principal-agent problem has a democratic and constitutional dimension, as the legitimacy of administrative governance may well depend on whether the unelected bureaucracy is a faithful agent of Congress. Despite the predominance of lawmaking by regulation and the decades-long application of principal-agent theory to the regulatory state, we know very little about how federal agencies interpret statutes.

This Article looks inside the black box of agency statutory interpretation in the rulemaking context. The Article reports the findings of a 195-question survey of agency rule drafters at seven executive departments (Agriculture, Commerce,

Energy, Homeland Security, Health and Human Services, Housing and Urban Development, and Transportation) and two independent agencies (the Federal Communications Commission and the Federal Reserve). Of the 411 officials sent the survey, 128 responded, and their answers shed considerable light on the tools and approaches they use to interpret statutes and draft regulations. The findings uncovered challenge some theories on agency interpretation while reinforcing others. As Congress, courts, and scholars gain more insight into how federal agencies use the canons, legislative history, and judicial deference doctrines in agency statutory interpretation, the relationship between Congress and federal agencies should improve, as should the judicial branch's ability to monitor and faithfully constrain lawmaking by regulation.

INTRODUCTION

Given the rise and rise of the modern administrative state,[1] the focus and function of lawmaking have shifted from judge-made common law, to congressionally enacted statutes, and now to agency-promulgated regulations.[2] As of 2013, the *Code of Federal Regulations* exceeded 175,000 pages and included

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1. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

2. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 356-57 (2012). To be sure, the administrative state is not purely a creature of the New Deal. *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (tracing the history of the regulatory state from the Founding to the Gilded Age). But its rise as a predominant lawmaking branch is of more recent vintage. *See* Stack, *supra*, at 356-57.

tens of thousands of rules.[3] In 2013 alone, federal agencies filled about 80,000 pages of the *Federal Register* with adopted rules, proposed rules, and notices.[4] By contrast, the 133rd Congress (2013-2014) enacted just 144 public laws for a total of 1750 pages in the *Statutes at Large*.[5] Such broad delegation of lawmaking authority by Congress to federal agencies creates a principal-agent problem: "[T]he legislature would like the agency to carry out its wishes faithfully, but ensuring the fidelity of the agency may be costly, if not impossible."[6]

Political scientists have spent decades exploring the difficulties involved in Congress's control and oversight of its bureaucratic agents.[7] Those difficulties can be attributed to, among other things, asymmetries in information, expertise, and preferences between Congress (the principal) and federal agencies (the agents).[8] Positive political theorists have also emphasized the dueling princi-

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3. *See* CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 20 & fig.13, 21 & fig.14 (2014) (reporting the total pages in 2013 as 175,496).

4. *See* Exec. Order No. 13,655, 78 Fed. Reg. 80,451, 80,462 (Dec. 31, 2013) (displaying the last page from 2013); *see also* CREWS, *supra* note 3, at 61 (noting that 1151 of the 80,462 pages were blank). *See generally* MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 17 tbl.6 (2013) (providing year-by-year statistics on the content of the *Federal Register* by pages and actual numbers of proposed and final rules).

5. *Compare* Pub. L. No. 113-1, 127 Stat. 3 (2013), *with* Pub. L. No. 113-144, 128 Stat. 1751, 1752 (2014) (reflecting the number of pages taken up with public laws).

6. Nuno Garoupa & Jud Mathews, *Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review*, 62 AM. J. COMP. L. 1, 5-6 (2014); *see also* JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY 26 (2002) ("The principal-agent framework from economics has played an extremely prominent and powerful role in th[e] institutional approach to relations between politicians and bureaucrats."); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1767-76 (2007) (reviewing the positive political theory account of administrative procedures).

7. Congressional oversight and control has been the central focus in the political science literature with foundational contributions by Mathew McCubbins, Roger Noll, and Barry Weingast (collectively known as "McNollgast"). *See, e.g.*, Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 254 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 468-81 (1989) [hereinafter McCubbins, Noll & Weingast, *Structure and Process*].

8. *See, e.g.*, Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 765-72 (1984) (applying principal-agent theory to the administrative state and detailing asymmetries and other complications); *see also* Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203 (2005) (reviewing political science literature on the evolution of the principal-agency model for the administrative state); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1043 (2006) ("The basic principal-agent dilemma, of which legislative delegation is a subspecies, involves a tradeoff

pals problem: many federal agencies report to at least two principals—Congress and the President.[9] Other scholars have explored the justifications for congressional delegation of interpretive authority—for example, agency expertise, legislative drafting costs, and political insulation—and how these different justifications may affect what agency interpretive fidelity means.[10] Moreover, the principal-agent model has been criticized as overly simplistic as other actors—for example, the executive, interest groups, and the public—play an important role in the relationship.[11] For example, in critiquing one such model Adrian Vermeule has remarked that "the crucial simplifications seem not only artificial, but arbitrary—as though a political scientist decided to study only the behavior of left-handed senators, deferring right-handed ones to future research."[12] Indeed, the agency can even become the principal in manipulating the elected branches.[13]

These criticisms notwithstanding, this principal-agent problem may well implicate the democratic and constitutional legitimacy of administrative governance. After all, the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States"[14]—not in either the executive or judicial branch, much less in an unelected bureaucracy. So the legitimacy of delegating expansive lawmaking authority to unelected regulators may well depend on whether those regulators are faithful agents of Congress (though, as noted above, assessing agency interpretive fidelity may vary based on the justi-

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between the principal's desire to exploit the agent's informational advantages and the principal's concern that the agent will pursue divergent goals.").

9. *See, e.g.*, Miller, *supra* note 8, at 211-12; Moe, *supra* note 8, at 768-69. The legal literature has also grappled with this principal-agent dilemma in the administrative state—focusing primarily on Congress's imposition of agency procedures via statute and its enlistment of the judicial branch to monitor and constrain agency behavior. *See, e.g.*, Bressman, *supra* note 6, at 1749, 1751-55 (combining positive political theory with legal scholarship on administrative law to understand courts' role in "mediating the strategic needs of both political branches for control of agency action" (italics omitted)); Garoupa & Mathews, *supra* note 6, at 5-9 (utilizing principal-agent theory to model "the interaction between three institutions"—"the legislature, an agency, and a reviewing court"—comparatively across various national governments worldwide); *see also* McNollgast & Daniel B. Rodriguez, *Administrative Law Agonistes*, 108 COLUM. L. REV. SIDEBAR 15 (2008), http://columbialawreview.org /wp-content/uploads/2008/04/15_McNollgast.pdf (responding to Bressman, *supra* note 6).

10. For a literature review of the application of positive political theory to agency statutory interpretation, see Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

11. For an overview of the various models, see Brigham Daniels, *Agency as Principal*, 48 GA. L. REV. 335, 345-71, 358 fig.1, 360 fig.2, 365 fig.3, 366 fig.4, 367 fig.5, 368 fig.6, 369 fig.7, 370 fig.8 (2014).

12. Adrian Vermeule, *The Delegation Lottery*, 119 HARV. L. REV. F. 105, 105-06 (2006), http://ssrn.com/abstract=891831.

13. *See* Daniels, *supra* note 11, at 383-411.

14. U.S. CONST. art. I, § 1.

fication for delegation, and the principal-agent model may be too simplistic to capture fully the relationship between Congress and the regulatory state).[15]

Despite the predominance of lawmaking by regulation and the decades-long application of principal-agent theory to the administrative state, agency statutory interpretation remains, to a large extent, a black box. Terry Moe has explained how these information asymmetries create a "built-in control problem" because the bureaucratic

> agent has expertise and other information—about his own diligence and aptitude, for example, or his actual behavior on the job—that are largely unavailable to the principal, and this asymmetry makes it difficult for the principal to ensure that his own interests are being faithfully pursued by the agent.[16]

This control problem affects not only how Congress delegates its lawmaking authority to and then oversees federal agencies but also how courts patrol such delegations. We do not know if federal agencies are familiar with, much less adhere to, the rules, customs, and practices that Congress and courts would expect an agent of Congress to follow. Nor do we know how federal agencies distinguish circumstances in which Congress has delegated by ambiguity a measure of broader authority for agencies to pursue policies in the public interest from those in which it has delegated only narrower authority to enforce the law "as written"—to the extent there is even a meaningful difference between these two functions. Jerry Mashaw has underscored the critical need for empirical work on these matters: "Inquiry into the empirical realities of agency interpretive practice can provide a crucial window on these issues and an essential step in the assessment of the legitimacy of administrative governance."[17]

To better understand the empirical realties of statutory interpretation inside the administrative state, this Article reports the findings of a 195-question survey of agency rule drafters that covers a variety of topics related to agency rule drafting and statutory interpretation.[18] The survey is modeled on the pathbreaking empirical work Lisa Bressman and Abbe Gluck have conducted on con-

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15. The debate over the constitutional legitimacy of such broad delegation of lawmaking authority to federal agencies, which lies outside the scope of this Article, is rich and ongoing. For a recent example, compare PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014), with Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEX. L. REV. (forthcoming May 2015) (reviewing HAMBURGER, *supra*), *available at* http://ssrn.com/abstract=2475853, and Adrian Vermeule, *No*, 93 TEX. L. REV. (forthcoming May 2015) (reviewing the same), *available at* http://ssrn.com/abstract =2488724. *See also* Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003 (2015).

16. Terry M. Moe, *Political Control and the Power of the Agent*, 22 J.L. ECON. & ORG. 1, 3 (2006).

17. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 537 (2005).

18. The survey consisted of thirty-five main questions, with twenty-three questions containing three to thirty-three subquestions. In this Article, those questions (and the relevant subquestions) are cited to with a prefix "Q." The survey is reproduced in the Appendix.

gressional drafting, though it differs in substantial respects.[19] The author administered the survey during a five-month span at seven executive departments (Agriculture, Commerce, Energy, Homeland Security, Health and Human Services, Housing and Urban Development, and Transportation) and two independent agencies (the Federal Communications Commission and the Federal Reserve). Responses were received from 128 agency officials whose primary duties included statutory interpretation and rulemaking (for a thirty-one percent response rate). Although agency concerns for confidentiality placed methodological constraints on the study—including anonymity as to the individual respondent and the respondent's respective agency—the findings shed considerable light on agency rule drafting and the role of the canons, legislative history, and administrative law doctrines in agency statutory interpretation.

The Article proceeds as follows: Part I provides an overview of the empirical study. Part I.A defines the scope of the study and situates it within the existing literature as the first comprehensive investigation into agency statutory interpretation. Part I.B then details the survey methodology and its limitations, with Part I.C introducing the background of the survey respondents. Part I.D concludes by providing a 10,000-foot view of the survey findings—comparing the interpretive tools explored in this survey based on the rule drafters' reported familiarity with and use of those tools.

Part II presents the findings regarding the fifty-four questions asked about the rule drafters' familiarity with and use of the canons of interpretation. The canons are considered by many to be key indicia of interpreter fidelity because they purport to reflect the meaning of the statutory language (semantic canons) or at least what the words should mean in light of background principles (substantive canons). The rule drafters were generally more familiar with the semantic canons by concept than by name, and this was particularly true of the canons with Latin names. Of the ten semantic canons covered in the survey, those most reported as used in interpretation are two pairs of related principles: the whole act rule and consistent usage canon; and *noscitur a sociis* (associated words canon) and *ejusdem generis* (residual clause canon). The ordinary meaning canon was another clear winner. By contrast, two related canons were generally known by name but rejected in practice: the whole code rule and *in pari materia* (similar statutory provisions should be interpreted similarly). These findings are similar in many respects to those in the Bressman and Gluck study on congressional drafters, including the conclusion that dictionaries are not used when drafting.[20] But they also challenge some of those findings. The

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19. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, *Part I*]; 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 (2014) [hereinafter Bressman & Gluck, *Part II*].

20. Gluck & Bressman, *Part I*, *supra* note 19, at 938.

agency rule drafters, for instance, reported that they were more than twice as amenable to using a dictionary when interpreting as opposed to when drafting.

Part II.B turns to the substantive canons. The federalism canons—the presumptions against preemption of state law and against the waiver of state sovereign immunity—were the most known by the agency rule drafters surveyed of the six substantive canons covered, followed by constitutional avoidance. The agency rule drafters' reported use of the substantive canons, however, was substantially lower, with the presumption against preemption the only one reported as being used by more than a third of the rule drafters. These findings of varied awareness and usage add to the ongoing debate about the role substantive canons should play in agency statutory interpretation (and subsequent judicial review).[21]

Part III explores the findings from the thirty-five questions on legislative history and the role of federal agencies in the legislative process. With respect to the legislative process as discussed in Part III.A, nearly four in five rule drafters reported that their agencies always or often participate in a technical drafting role of statutes they administer, whereas three in five indicated that their agencies similarly participate in a policy or substantive drafting role. The rule drafters reported that their personal participation in the legislative process was less involved, though still significant. The lower personal participation may be explained in part by the organizational division in many agency general counsel offices between the legislative affairs and regulation staffs.

Despite less personal participation in the legislative process, as discussed in Part III.B, three in four rule drafters considered legislative history useful in interpreting statutes, and at least four in five agreed that legislative history serves to explain the purposes of a statute and the meaning of particular terms in a statute. Of over twenty interpretive principles included in the survey, legislative history had the sixth-highest response for use in interpretation. Only *Chevron* deference, the whole act rule, the ordinary meaning canon, the *Mead* doctrine, and *noscitur a sociis* were reported by more rule drafters as being used in their interpretation efforts. Similarly, as discussed in Part III.C, the rule drafters surveyed demonstrated, on balance, a sound understanding of how to assess the reliability of legislative history—including that committee and conference reports are usually the most reliable and floor statements by nonsponsors the least reliable. Many rule drafters indicated that the timing of the legislative history matters whereas whether a member of Congress drafted or even

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21. *Compare* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330 (2000) (arguing that substantive canons trump *Chevron*), *with* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 915 (2001) (arguing that *Chevron* trumps constitutional avoidance), Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A* Brand X *Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 143-44 (2012) (same), *and* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 68-69 (2008) (arguing for a middle ground that substantive canons apply as part of *Chevron* Step Two's reasonableness inquiry).

read or heard the legislative history does not—findings consistent with those of the congressional respondents in the Bressman and Gluck study. These findings on legislative history and process—in particular, that federal agencies are heavily involved in the legislative process and that agency rule drafters are experts at using legislative history in interpretation—seem to support the scholarly call for a more purposivist approach to agency statutory interpretation (as compared to a more textualist approach to judicial statutory interpretation).[22]

Part IV explores the relevant findings from the ninety-seven questions asked on administrative law doctrines regarding congressional delegation and the scope of federal agency interpretive authority.[23] As set forth in Part IV.A, much like the congressional respondents in the Bressman and Gluck study, the agency rule drafters emphasized that federal agencies—not courts—are the primary interpreters of statutes Congress has empowered them to administer. In other words, it is more appropriate to focus on the relationship between Congress and agencies, rather than on the relationship between Congress and the courts. Unlike the congressional respondents, however, the agency rule drafters seemed to perceive a more involved judicial role in agency statutory interpretation. The vast majority of rule drafters surveyed recognized that judicial review plays a role in their interpretive efforts and that judicial views on the various interpretive tools also influence the agency's rule-drafting process.

As detailed in Part IV.B, the agency rule drafters agreed with the congressional respondents that Congress does not intend to delegate by ambiguity with respect to all types of issues. Instead, the rule drafters generally believed that Congress intends to delegate ambiguities relating to implementation details, areas within agency expertise, omissions in statutes, and even the agency's scope of statutory authority or jurisdiction. By contrast, there was less consensus with respect to ambiguities relating to major policy questions, preemption of state law, and serious constitutional questions. These findings contribute to the continuing *Chevron* "Step Zero" debate about which ambiguities should signal a delegation of lawmaking authority, and to the "Step One" debate about which interpretive tools should be used to resolve statutory ambiguities.[24]

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22. *See, e.g.*, William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 427; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91-99 (1985); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. (forthcoming 2015) (on file with author); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321-22 (1990); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003).

23. The findings on the use of administrative law doctrines to shape agency interpretive behavior are further explored in Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703 (2014).

24. *See* Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 477-84 (2014) (reviewing literature on the *Chevron* Step Zero and Step One debates).

Part IV.C turns to the rule drafters' familiarity with and use in drafting of the administrative law deference doctrines. The rule drafters surveyed were well aware of the *Chevron* deference standard—the tool cited most frequently as known and used in drafting—as well as the less deferential *Skidmore* standard that generally applies when *Chevron* does not. Compared to *Chevron*, half as many rule drafters confirmed that *Auer/Seminole Rock* deference—the rule that agencies' interpretations of their own regulations are controlling unless plainly erroneous—plays a role in their drafting decisions. Moreover, whereas the *Mead* doctrine was not as well known by name, the rule drafters overwhelmingly confirmed that the principles articulated in *Mead*—congressional authorization of rulemaking or formal adjudication and the agency's use of it—affect whether an agency's interpretation will receive *Chevron* deference.

Although this empirical study into agency statutory interpretation has its methodological limitations and leaves many questions unanswered while raising additional questions for further research, it "provide[s] a crucial window"—to borrow from Mashaw—"into the empirical realities of agency interpretive practice"—at least with respect to agency statutory interpretation in the rulemaking context.[25] The study reveals valuable insights into lawmaking by regulation and should encourage further empirical and theoretical work. The findings also underscore how our understanding of what it means for federal agencies to be faithful agents of Congress is greatly undertheorized. Indeed, as outlined above and further discussed in the Article, the findings challenge some theories on agency statutory interpretation while reinforcing others. And the study sheds considerable light on the relationship between federal agencies, Congress, and the courts from the vantage point of the rule drafters surveyed.

This Article focuses on fidelity in agency statutory interpretation, but the findings have implications far beyond principal-agent theory. In addition to contributing to the legal and political science literature on the modern administrative state, this unprecedented empirical look inside agency statutory interpretation should be a valuable resource to a number of real-world audiences—the congressional principal who wants to better "predict whether and how agencies will interpret statutes";[26] the agency general counsel who wants to train her rule drafters based on current deficiencies in interpretive understanding and practic-

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25. Mashaw, *supra* note 17, at 536-37. This study is limited to rulemaking, but agencies also conduct statutory interpretation via adjudication, decisions to initiate enforcement, informal guidance, and so forth. There may well be differences in interpretive practices depending on which process is utilized. *See* Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 226 (exploring how "an agency's approach to statutory interpretation is in part a function of the policymaking form through which it acts").

26. Bressman & Gluck, *Part II*, *supra* note 19, at 767. Indeed, nearly two in five congressional respondents (37%) volunteered this as a use of the canons, with the following representative comment: "If you know the agency will use these interpretive principles they matter absolutely because you want to know how they will be interpreted." *Id.* at 767-68 (internal quotation marks omitted).

es;[27] and the judge who is faced with reviewing an agency statutory interpretation or interpreting a regulation—a subject that has been given so very little scholarly attention.[28] As Congress, courts, and scholars gain more insight into how agencies understand and use the canons, legislative history, and judicial deference doctrines in their interpretive efforts, the relationship between Congress and federal agencies should improve, as should the ability of the judicial branch, as another congressional agent, to better monitor and faithfully constrain lawmaking by regulation.

I. OVERVIEW OF EMPIRICAL STUDY

A. *Scope of Study and Relevant Literature*

As set forth in the Introduction, Congress has delegated vast lawmaking authority to federal agencies by statute. Under principal-agent theory, Congress strives to ensure that federal agencies are its faithful agents when interpreting those statutes. For legal academics, the concept of faithful agency is a familiar one in statutory interpretation. But it is more often invoked when discussing the relationship between Congress and courts, rather than between Congress and federal agencies. Indeed, there is a robust literature and debate on these matters of interpretation, including whether textualism or purposivism better advances the judicial role as a faithful congressional agent.[29] As Bressman and Gluck have remarked in this judicial context, "the faithful-agent concept provides an extremely broad umbrella for the application of many different kinds of interpretive rules."[30]

Far less theoretical or empirical work, however, has been done with respect to interpretation inside the regulatory state. As Mashaw observed nearly a decade ago, "virtually no one has even asked, much less answered, some simple questions about agency statutory interpretation."[31] In his preliminary inquiry into the matter, Mashaw found "persuasive grounds for believing that legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory in-

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27. At least a half-dozen agency general counsels or deputies agreed to participate in large part so that they could better train their rule drafters based on the results.

28. *See* Stack, *supra* note 2, at 357 ("While all agree that regulations are primary sources of law, strikingly little attention has been devoted to the method of their interpretation."). Indeed, certain questions asked in the survey address how courts should approach regulatory interpretation, including Kevin Stack's pioneering theory for interpreting regulations. Those questions (Q34(a)-(d)) will be addressed in subsequent work.

29. For a helpful overview on the debate between textualism and purposivism, see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761-68 (2010).

30. Gluck & Bressman, *Part I*, *supra* note 19, at 913; *see also id*. at 912-19 (providing an overview of faithful agency in the judicial statutory interpretation context).

31. Mashaw, *supra* note 17, at 501-02; *see also id*. at 502 n.2 (reviewing literature).

terpretation."[32] After theorizing about interpretive norms and practices at the agency level, he concluded that answers to the normative questions about appropriate (or faithful) agency statutory interpretation require a missing empirical foundation into the "realities of agency interpretive practice."[33]

The theoretical work to date mainly proceeds in this manner with calls to adapt traditional statutory interpretation conducted by courts by relying on the comparative expertise—or the unique "interpretive voice"[34]—of federal agencies. Cass Sunstein and Adrian Vermeule, for instance, have argued that "attention to institutional considerations can show why agencies might be given the authority to abandon textualism even if courts should be denied that authority."[35] William Eskridge has advanced a somewhat analogous position: "[R]ead statutes broadly, in light of their purposes, and follow a quasi-legislative political process for interpretations addressing big policy questions or arenas not resolved by the statute."[36] Mashaw, Peter Strauss, and others have reached conclusions along similar comparative expertise lines.[37] In sum, the theoretical development of agency statutory interpretation remains in its early stages, and metrics for assessing faithful agency interpretation are even more infant.[38]

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32. *Id*. at 504. Additional literature regarding agency interpreters' use of specific tools—such as legislative history, the substantive canons, and the administrative law doctrines—are addressed in the relevant Parts of this Article.

33. *Id*. at 537.

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

35. Sunstein & Vermeule, *supra* note 22, at 928; *accord* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 206 (2006); *see also* Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 952-53 (2003) (agreeing that there is an institutional dimension of legal interpretation but disagreeing that this is a novel insight, as scholars and judges have long considered this institutional dimension).

36. Eskridge, *supra* note 22, at 427.

37. Mashaw, *supra* note 22, at 91-99 (arguing that delegation of policy decisions to agencies is better than delegation to courts based on comparative accountability, responsiveness, and legitimacy); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 134-41 (2000) (arguing on public choice grounds that lawmaking delegation to agencies is comparatively better than such delegation to courts); Strauss, *supra* note 22, at 321-22 (arguing that "the use of legislative history may have an importance in the agency context for maintaining law against politics, however one regards its use at the judicial level"); Walker, *supra* note 21, at 159-61 (arguing for comparative agency expertise in the context of avoiding constitutional questions). In an important forthcoming article, Stack further develops a purposivist model for agency statutory interpretation. *See* Stack, *supra* note 22.

38. The same is true for judicial interpretation of agency regulations. In proposing a purposivist approach for interpreting regulations that relies more heavily on regulations' express statements of basis and purpose, Stack recently observed that "theorizing about how a court—or any other legal actor, for that matter—should interpret regulations has attracted only occasional notice, especially in comparison to the volume of legal work devoted to figuring out how to comply with regulations." Stack, *supra* note 2, at 358 (footnote omitted); *see also id*. at 358 n.7 (noting that "[t]he most helpful descriptive accounts are more than a

As for empirical studies, even less work has been done. Sunstein and Vermeule have remarked that "[p]recisely because the empirical study of interpretation remains in an extremely primitive state, there is every reason to think that much will be gained by further empirical efforts."[39] The most comprehensive study on interpretation to date is the Bressman and Gluck study on congressional drafters, in which the authors asked 137 congressional staffers 171 questions about statutory interpretation.[40] Bressman and Gluck observed that "there has been almost no other empirical research of this kind" with the exception of one prior, more limited study of eighteen congressional staffers by Victoria Nourse and Jane Schacter.[41]

With respect to administrative law, more empirical work has been done, but such work has focused on how courts review administrative interpretations of law,[42] as well as how Congress delegates authority to federal agencies.[43]

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generation out of date" and citing John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996), Frank C. Newman, *How Courts Interpret Regulations*, 35 CALIF. L. REV. 509 (1947), Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 306-22 (2000), and Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681 (1984)); *see also* Manning, *supra*, at 688 n.359 ("Detailed consideration of the relative legitimacy and utility of particular approaches to [regulatory interpretation] is for another day."). Although not the central focus of this Article, the findings reported herein shed considerable empirical light on that subject as well.

39. Sunstein & Vermeule, *supra* note 22, at 919. The empirical projects Sunstein and Vermeule suggested, *see id.* at 917-19, do not encompass the study presented in this Article. *But see* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 675 (1999) (noting difficulties in conducting such empirical studies); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 642 (1999) ("The principal qualification to my basic thesis—that formalism must be defended empirically—comes from the fact that without normative claims of some kind, it is impossible to know what counts as a 'mistake' or an 'injustice' in interpretation . . . ."); Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698, 701 (1999) ("Many of the empirical questions relevant to the choice of interpretive doctrines are . . . unanswerable, at least at an acceptable level of cost or within a useful period of time.").

40. Gluck & Bressman, *Part I*, *supra* note 19, at 905-06.

41. *Id.* at 909-10 (citing Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002)); *see also id.* at 916-19 (discussing empirical work in more detail).

42. For empirical studies at the Supreme Court level, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006); and Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010). For similar studies at the court of appeals level, see Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts*

Terrific studies on particular agency practices have also been conducted,[44] though none has looked specifically at how agencies interpret statutes they administer. Indeed, little, if any, empirical work has been undertaken to understand what federal agencies consider when interpreting the statutes they administer.

The underexamined state of agency statutory interpretation is particularly noteworthy in light of one of the main conclusions from the Bressman and Gluck study on congressional drafting: "[C]urrent theory and doctrine are focusing on the wrong cues and the wrong relationships."[45] The congressional drafters surveyed "resisted" the theory that "Congress is in some kind of dialogue with courts—be it a principal-agent relationship, a partnership, or a rule-of-law relationship."[46] To the contrary, they "saw agencies as the everyday statutory interpreters, viewed interpretive rules as tools for agencies, too, and made no distinction, as some scholars have, between agency statutory 'implementation' and agency statutory 'interpretation.'"[47] In other words, the congressional drafters surveyed "saw their primary interpretive relationship as one with agencies, not courts"[48]—suggesting that study of the relationship between Congress and federal agencies is just as important as, if not more so than, that of any relationship between Congress and the courts.

That congressional drafters may view their relationship with federal agencies as more direct and personal than their relationship with courts is not too surprising. After all, Congress delegates lawmaking authority directly to federal agencies as a matter of course during the legislative process. As Mashaw has concluded, "In some sense, the position of agencies as 'faithful agents' of the legislature has a constitutional clarity that exceeds that of the judiciary."[49] Moreover, Strauss has observed that the Congress-agency relationship is more

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of Appeals, 15 YALE J. ON REG. 1 (1998); and Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984. *See also* Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 634-42 (2014) (surveying *Chevron* deference in the Supreme Court and courts of appeals).

43. Such studies on delegation tend to come more from political scientists. *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999); DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997 (2003); McCubbins & Schwartz, *supra* note 7; McCubbins, Noll & Weingast, *Structure and Process*, *supra* note 7, at 468-81; Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989).

44. For a classic example, see JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983). For a more recent example, see Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

45. Bressman & Gluck, *Part II*, *supra* note 19, at 765.

46. *Id.*

47. *Id.*

48. *Id.* at 767.

49. Mashaw, *supra* note 17, at 505.

direct due to the agency's expert role in the legislative process: "The agency may have helped to draft the statutory language, and was likely present and attentive throughout its legislative consideration. Its views about statutory meaning may have been shaped in the immediate wake of enactment, under the enacting Congress's watchful eye."[50]

Accordingly, the case for more empirical investigation into agency statutory interpretation is an easy one to make. Deciding what and how to investigate, however, is much more difficult. For instance, there is a great divide in statutory interpretation as to what constitutes fidelity, with the predominant camps being textualism and purposivism.[51] And who the assessor of fidelity is also matters: whether she is a textualist or purposivist judge, a scholar advocating for an even less textually constrained interpretive practice for agency interpretation,[52] or a congressional drafter who views legislative history and process as perhaps the best guide for fidelity to congressional wishes.[53] Fidelity in agency statutory interpretation is indeed in the eye of the beholder—a beholder (or beholders) whose preferences are perhaps not fully understood as an empirical matter.[54]

This study does not take sides on which is the appropriate approach for assessing fidelity in agency statutory interpretation. Instead, it explores a variety of different metrics, which can be grouped into three broad categories: (1) awareness and use of the canons of statutory interpretation, which judges have developed and utilize in part based on faithful-agent theories (Part II); (2) awareness and use of legislative history and related legislative process tools (Part III); and (3) awareness and use of administrative law doctrines that may reflect when and how much discretion Congress (the principal) intends to delegate to a federal agency (its agent) (Part IV). How these interpretive tools and doctrines may measure agency fidelity is explored in more detail in the relevant Parts of the Article.

In light of the undertheorized state of agency statutory interpretation and the pioneering nature of this empirical study, each and every one of the 195 questions asked may not be too helpful for any interpretive method. With hindsight, some could have been omitted or at least framed differently; and un-

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50. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143, 1146 (2012); *accord* Strauss, *supra* note 22, at 329-31; *see also* Christopher J. Walker, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 79 (2013), http://www.texaslrev.com/wp-content/uploads/Walker.pdf.

51. *See* Gluck, *supra* note 29, at 1761-68 (surveying the debate).

52. *See* sources cited *supra* notes 34-37.

53. For instance, the Bressman and Gluck study found that "[m]ore than 94% of [the congressional drafters surveyed] said that the purpose of legislative history is to shape the way that agencies interpret statutory ambiguities." Bressman & Gluck, *Part II*, *supra* note 19, at 768. The use of legislative history is discussed in more detail in Part III.

54. Indeed, using the findings of the Bressman and Gluck study on congressional drafting, James Brudney has succinctly demonstrated how a court's assessment of interpreter fidelity would arguably differ from Congress's. *See* James J. Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS U. L.J. 975 (2013).

doubtedly, other questions should have been asked. The Article notes where that is the case and suggests additional lines of inquiry for subsequent investigation. Moreover, even the answers that this empirical study does provide may well be incomplete in light of the numerous other factors unaddressed by the study that influence the drafting process. The Article's main ambition is for its preliminary findings to lead to further theoretical development and empirical investigation into agency statutory interpretation.

B. *Survey Methodology*

The methodology for this empirical study on agency rule drafting is based in large part on the 171-question survey recently conducted by Bressman and Gluck of 137 congressional staffers.[55] Indeed, for comparison purposes between congressional and agency drafters, many of the questions were asked verbatim in this survey. Some questions in the Bressman and Gluck study were excluded from this study, including questions about federalism, clear statement rules, legislative processes, and legislative counsel. Conversely, this survey included substantially more questions about the drafters' awareness and use of various administrative law doctrines as well as the rule-drafting process more generally. In particular, nearly half of the questions (97 of 195) dealt with administrative law doctrines, whereas the Bressman and Gluck study included 45 questions on administrative law.[56] Many of these additional questions borrow from Mashaw's framework for empirical investigation of agency statutory interpretation[57]—though much, much more needs to be done to explore the questions he has posed.

The Bressman and Gluck methodology also had to be adapted to the federal agency context, where the pool of potential respondents is spread across hundreds of federal agencies and offices, and adequate access to that pool would require approval from the agency and not just the individual respondent. Accordingly, over the span of nine months, the author reached out to officials at every executive department and a dozen or so independent agencies (roughly every independent agency with substantial rulemaking authority)—meeting in person, by phone, and via e-mail to design the survey instrument and enlist their participation in the study. Ultimately, various agencies and offices at seven executive departments and two independent agencies agreed to participate.[58]

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55. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 919-24.

56. *Id.* at 992.

57. *See* Mashaw, *supra* note 17, at 522 tbl.1 (detailing ten "Canons for Institutionally Responsible Statutory Interpretation").

58. A total of forty-one offices and agencies were included in the survey, with the breakdown by department and independent agency as follows (total population sent survey in parentheses):

- U.S. Department of Agriculture (USDA) (55): Office of General Counsel and eighteen USDA agencies and offices (for example, Food Safety and Inspection Service, Forest Service, and Office of Risk Assessment and Cost-Benefit Analysis);

The point persons at each agency then helped determine the population of agency officials with experience in statutory interpretation and rulemaking.[59] Some departments limited the survey population to particular agencies or offices, but within those populations the survey was sent to all officials with experience in statutory interpretation and rulemaking.[60] Despite all agency rule drafters at these agencies receiving the survey, not every executive department, much less every federal agency, agreed to participate. So the generalizability of the survey's findings is limited by whether the surveyed agencies constitute a fair representation of agencies overall.[61] Whereas the relatively large sample

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- U.S. Department of Commerce (13): Office of General Counsel, Commerce Bureau of Industry and Security, and U.S. Patent and Trademark Office;
- U.S. Department of Energy (18): Office of General Counsel;
- U.S. Department of Homeland Security (DHS) (55): Office of General Counsel, Federal Emergency Management Agency, Transportation Security Administration, U.S. Customs and Border Protection, and U.S. Coast Guard;
- U.S. Department of Health and Human Services (146): Food and Drug Administration (FDA) and Public Health Division;
- U.S. Department of Housing and Urban Development (10): Office of General Counsel;
- U.S. Department of Transportation (81): Office of the Secretary, National Highway Traffic Safety Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, Pipeline and Hazardous Material Safety Administration, Federal Transit Administration, Federal Aviation Administration, and Federal Highway Administration;
- Federal Communications Commission (FCC) (16): Office of General Counsel; and
- Federal Reserve (17): Legal Division. Unlike the other agencies surveyed, to reduce the workload on the Legal Division, the Federal Reserve only sent the survey to a seventeen-person subset of potential rule drafters, selected randomly by the point of contact from the population agency officials engaged in rule drafting on a regular basis.

59. Question 1 confirmed and clarified the survey population by asking whether the respondent is "currently working, or ha[s] worked within the last two years, in a general counsel office, legal department, or other rulemaking office in a federal agency AND had experience in statutory interpretation and rulemaking in that employment." Of the 128 individuals who responded, only one answered this question in the negative and thus did not respond to the rest of the survey beyond the background questions.

60. Once the rule-drafter populations were defined at each agency, the point person at the agency e-mailed the population a link to the online survey with a short description of the empirical project, encouraging but not requiring a response. The agency point persons then followed up roughly two weeks later with another invitation via e-mail, and a final reminder about two weeks after that.

61. *See generally* FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 9-11 (5th ed. 2014) (summarizing the broad scope of biases that need to be considered by describing two types of errors that can be made in conducting a survey: (1) errors in generalizing from the set of individuals who completed the survey to the population of interest and (2) mismatch between the information reported by the survey and the actual reality being measured). One could imagine a strong selection bias at the agency participation level. For instance, perhaps agencies whose rules are challenged more in court—and thus whose rule drafters may be more familiar with these interpretive tools—would be less likely to agree to participate in the survey. The Environmental Protection Agency (EPA) and the Securities and Exchange Commission, for example, declined to participate. The EPA actually agreed to participate but

size, the fairly diverse set of participating agencies, and the high response rate may counteract some of those limitations, the Article errs on the side of caution and presents these findings descriptively only as to the rule drafters surveyed.

The online survey consisted of thirty-five primary questions, many of which had multiple subquestions, for a total of 195 questions.[62] As a condition for participation, the agencies required that the survey be anonymous as to both the respondent and the respondent's agency and that the survey be conducted online rather than in person, the approach utilized in the Bressman and Gluck study.[63] The data collection took place on a rolling basis by agency over a five-month period from July to November 2013. In total, 411 agency officials received the survey and 128 responded, resulting in a 31% response rate.[64] Of the

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did not want to burden its entire rule-drafting staff with the survey, and so suggested survey-ing a handpicked subset—an offer refused so as to not undercut the methodology. On the other hand, many litigation-heavy agencies (for example, DHS, the FCC, and the FDA) did participate. Moreover, a number of the agencies agreed to participate based on a level of trust they had with the author. Once a few agreed to participate, more agencies where the author's personal connections were weaker or nonexistent were willing. Many of the agen-cies—including most of the independent agencies—that declined to participate indicated they did not want to burden their rule drafters with a survey, especially as the survey was being administered during the government-wide hiring freeze (and then furlough).

62. Because many questions build on prior questions and in light of concerns about in-complete surveys, the thirty-five main questions were asked in a fixed order; subquestions were randomized within each main question to minimize response-order effects. *See, e.g.*, Jon A. Krosnick & Duane F. Alwin, *An Evaluation of a Cognitive Theory of Response-Order Effects in Survey Measurement*, 51 PUB. OP. Q. 201 (1987); William S. Sekely & Vicki L. Blakney, *The Effect of Response Position on Trade Magazine Readership and Usage*, J. ADVER. RES., Nov./Dec. 1994, at 53. There are methodological costs to not fully randomiz-ing the survey in that the order may affect the answers, though such effects are typically more an issue with attitudinal studies (which this is not). *See generally* HOWARD SCHUMAN & STANLEY PRESSER, QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS: EXPERIMENTS ON QUESTION FORM, WORDING, AND CONTEXT (1981). Moreover, Bressman and Gluck found no response-order effects when they scrambled the questions in their related congressional drafting survey. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: Methods Appendix*, STAN. L. REV. 12 & n.45 (May 2013), http://www.stanford lawreview.org/print/article/statutory-interpretation-inside-methods-appendix   [hereinafter *Methods Appendix*]. To help the reader account for any response-order effects, the Article references the question number being discussed, with the full survey reproduced in the Ap-pendix.

63. With the exception of the FDA, the federal agencies insisted not only that the sur-vey be anonymous but also that a critical mass of other agencies participate. Attempts were made to conduct smaller case studies on particular agencies, but agencies resisted that idea.

64. The anonymous nature of the survey limits the ability to calculate a response rate by agency or department. However, because the survey was rolled out at different times at different agencies, the data collected confirm that at least some individuals in all of the popu-lation pools responded (as opposed to being predominated by one department or independent agency). That said, there is no way to assess with precision whether the response rate differs across the agencies contacted. As a result, it is possible that nonresponse bias is strong with-in a single agency due to cultural or other factors. Moreover, the FDA requested that its rule drafters have the option to indicate that they work at the FDA, so the first question was mod-ified to allow for the respondents to voluntarily so indicate. Of the 128 responses, twenty indicated that they worked at the FDA. The survey was sent to seventy FDA rule drafters, so

respondents, 98 (77%) answered each and every question.[65] The survey also allowed the respondents to make additional comments on most questions, and the dataset includes 345 such comments.

Before turning to the findings, it is important to underscore that, as with any survey that attempts to understand human behavior, one should be careful in reading too much into the rule drafters' responses. Indeed, because of the methodological limitations imposed by the participating agencies—including the anonymous nature of the survey and a limited sampling of agencies[66]—and the exploratory nature of the study, the Article limits itself to presenting a descriptive picture of these particular 128 agency rule drafters. (The Bressman and Gluck study took the same approach.)[67] That said, this study is the most extensive inquiry into actual agency interpretive practices to date, and the raw numbers provide a unique window into lawmaking in the regulatory state.

C. *The 128 Rule Drafters Surveyed*

The agency rule drafters who responded to the survey reflect diverse experience and backgrounds, and many have extensive experience in statutory in-

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assuming all FDA respondents self-identified, the FDA response rate was 27%, which is in line with the overall 31% response rate.

   65. The answers from respondents who did not fully complete the survey are included in the findings. A sizeable number of respondents (thirty) provided only partial responses. This rate might indicate that the survey was intimidating to individuals who did not possess a strong grasp of the concepts being discussed, resulting in undersampling of less knowledgeable individuals at the agencies. Another plausible explanation is that some respondents tired of the 195-question survey, as there does not appear to be any pattern about when respondents stopped answering questions. Because the main thirty-five questions were not randomized (though the subquestions were), *see supra* note 62, the undersampling can be taken into account and the total number of respondents "(n=__)" will be included for each question.

   66. These, of course, are not the only methodological limitations. For instance, there is always the possibility of social desirability bias, in that respondents might feel they should indicate greater familiarity with the interpretive tools (and greater use of them) than they actually possess (and do), since they might view it as the most appropriate way to conduct their jobs. The tendency to modify answers in this way arises from two sources, termed "self-deception" and "other-deception." *See* Harold A. Sackeim & Ruben C. Gur, *Self-Deception, Self-Confrontation, and Consciousness*, *in* 2 CONSCIOUSNESS AND SELF-REGULATION: ADVANCES IN RESEARCH AND THEORY 139, 142-50 (Gary E. Schwartz & David Shapiro eds., 1978). Attempts were made to minimize social desirability bias. As for other-deception, the survey was completely anonymous and taken online outside the presence of an interviewer; as for self-deception, the survey was designed to ask about the same interpretive tools in different ways, by name and by principle. *See* Anton J. Nederhof, *Methods of Coping with Social Desirability Bias: A Review*, 15 EUR. J. SOC. PSYCHOL. 263 (1985). As discussed in notes 61-65 above, there may also be issues with selection bias, incomplete surveys, nonrandomization of main questions order, and other biases that the study has attempted to minimize but nonetheless cannot be completely controlled or measured through the methodology utilized.

   67. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 923 ("Out of an abundance of caution, moreover, we have chosen to report our findings in a descriptive manner mostly using only the raw data rather than engaging in more sophisticated hypothesis testing to explore whether there were statistically significant drivers of certain answers.").

terpretation and rulemaking. Here are the highlights: All are career civil servants as opposed to political appointees,[68] and all but eleven went to law school.[69] Nearly two-thirds have worked at a federal agency in a capacity that includes some rulemaking work for at least five years.[70] About two in five respondents (39%) have had a role in the drafting process of at least a dozen rules, with another 16% in the seven to eleven range, 25% in the three to six range, and most of the rest (17%) in the zero to two range.[71] One respondent, for instance, indicated involvement in "over 500 rulemaking actions"; another indicated that "[j]ust in the past 7 years, it has been 80 rules between proposed rules, interim rules, and final rules"; and a third indicated that the number of rules was "too numerous to count."[72] Moreover, 38% of the respondents are over the age of forty-five, 51% are between thirty-one and forty-five, and the remaining 11% are between twenty-two and thirty.[73] Four in ten respondents (42%) took a course in law school that focused on legislation, statutory interpretation, or statutory drafting, whereas approximately half (49%) did not take such a course.[74] Only one in four respondents (25%) have taken such a course outside of law school—many via continuing legal education or government training programs.[75]

At the end of the survey, the rule drafters were asked whether they consider themselves "strong" or "moderate" purposivists or textualists. These terms were not otherwise mentioned or defined in the survey. Half of the rule drafters identified as textualist—35% "moderate textualist" and 15% "strong textualist." About one in four identified as purposivist—19% "moderate purposivist" and only 3% "strong purposivist." Perhaps significantly, 21% indicated they did not know, and another 6% indicated "other," with answers in the comments that they are both or that it depends on the context.[76] One comment may be illustrative of the "other" rule drafters: "I start with the text, but keeping in mind the context (which I guess is what you mean by purpose). I want to say that I'm a moderate text/purpose hybrid."[77] Another may reflect those who chose either of the two "moderate" labels: "The text ALWAYS comes first. But Congress doesn't always write good or comprehensive text, so you have to use common

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68. Q2 (n=128).

69. Q7 (n=126).

70. Q3 (n=128).

71. Q4 (n=128). Another five respondents indicated "other," explaining among other things that it depends on how "rule" is defined. *See, e.g.*, *id*. cmt. 9.

72. *Id*. cmts. 3, 10, 11.

73. Q5 (n=126). The survey also asked what year the respondent graduated from law school (Q6), and such results are consistent with the age ranges.

74. Q7.

75. Q8 (n=126).

76. Q35 (n=98). Because asking whether someone is a textualist or purposivist could affect how respondents would answer other questions regarding their understanding and use of a variety of semantic and substantive canons and legislative history, this question was intentionally included as the last question in the survey.

77. *Id*. cmt. 7.

sense and agency expertise to fill in the blanks. If Congress wrote better stat-
utes, I'd be a stronger textualist. But they don't, which leaves me only a mod-
erate one."[78]

D. *The 10,000-Foot View*

In addition to the nine questions on their background discussed in Part I.C,
the survey asked rule drafters fifty-four questions about the canons, thirty-five
on legislative history, and ninety-seven on the administrative law doctrines.
The Introduction presents the highlights for each set of questions, which will
not be repeated here, and Parts II, III, and IV, respectively, explore those in
great detail. Before getting into the details, however, it may be helpful to pro-
vide the 10,000-foot view. The following two Figures attempt to do that.

Figure 1 presents the agency rule drafters' responses as to their knowledge
of the various interpretive tools by name, along with the responses for these
same questions from the congressional drafters surveyed in the Bressman and
Gluck study.[79] This Article repeatedly references the findings from their study
on congressional drafting, so that those congressional drafters' expectations can
be compared with the rule drafters' perspectives here. In some ways this com-
parison is easy to make as many questions were asked verbatim to both groups.
But the comparison should be made carefully and descriptively, as neither the
Bressman and Gluck study nor this study purports to generalize its findings to
the larger drafting populations (all congressional drafters and all agency rule
drafters, respectively) and the methodologies differ in substantial respects (in-
cluding in-person versus online surveying, respectively).[80]

Indeed, the comparison between the agency and congressional respondents
should be done cautiously for the additional reason that these two drafting pop-
ulations differ in substantial respects. In the Bressman and Gluck study, 106 of
the 137 congressional respondents were political staffers serving on congres-
sional committees, whereas the remainder were nonpartisan drafters—28 of
whom worked in the Offices of the House and Senate Legislative Counsel.[81]
By contrast, as detailed in Part I.B-C, the agency rule drafters surveyed here are
all career civil servants at various federal agencies. Like the Bressman and
Gluck study, this study targeted the population with the greatest likelihood of

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78. *Id.* cmt. 12.

79. Q9(a)-(h) (n=119); Q17(a)-(d) (n=109); Q24(a)-(f) (n=99); Gluck & Bressman,
Part I, *supra* note 19, at 927 fig.1, 946, 948. With respect to some findings in the Bressman
and Gluck study, the exact percentages of congressional respondents were not reported. In
those circumstances, Bressman and Gluck graciously provided the author with those per-
centages. Thanks are owed to their research assistant Adriana Robertson for confirming
those numbers from the Bressman and Gluck data for the purposes of this Article. Two of
these interpretive rules—the ordinary meaning canon and the *Seminole Rock/Auer* deference
doctrine—were not included in the Bressman and Gluck study.

80. *See supra* Part I.B (describing differences in methodologies).

81. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 920, 921 & tbl.1.

substantial experience in drafting and interpretation. But unlike the Bressman and Gluck study, none of the agency respondents is a political appointee; indeed, the agency respondents seem more like the 28 congressional respondents who worked in the nonpartisan drafting Offices of the House and Senate Legislative Counsel. In other words, the comparison of these two drafting populations is probably not too helpful if one is trying to compare how each institution—Congress and the regulatory state—knows or uses certain interpretive tools. Aside from the methodological limitations discussed above, these two populations arguably are not similarly situated or motivated within their respective institutions, such that their responses may reflect their different roles and incentives. That said, the comparison still provides a useful baseline and point of reference, and it also sheds at least some (methodologically limited) light on the interpreter fidelity questions of whether the career agency rule drafters surveyed use the interpretive tools in ways similar to the Bressman and Gluck congressional respondents.

FIGURE 1
Knowledge of Interpretive Tools by Name
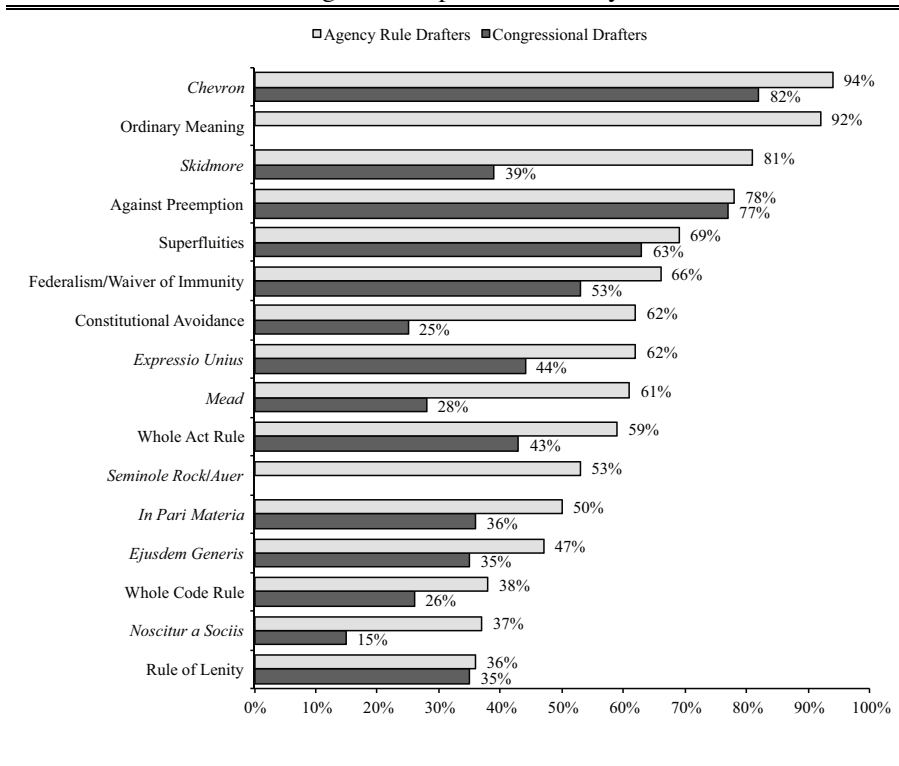
Figure 2 presents the findings with respect to the rule drafters' reported use of the interpretive tools explored in this study.[82] These findings are reported as the percentage of rule drafters who indicated that they use these tools when interpreting statutes or drafting rules. Figure 2 reports the rule drafters' indication of use of the interpretive principle by name—except where indicated with an asterisk, in which case the use is reported by concept.[83]

FIGURE 2
Agency Rule Drafters' Use of Interpretive Tools
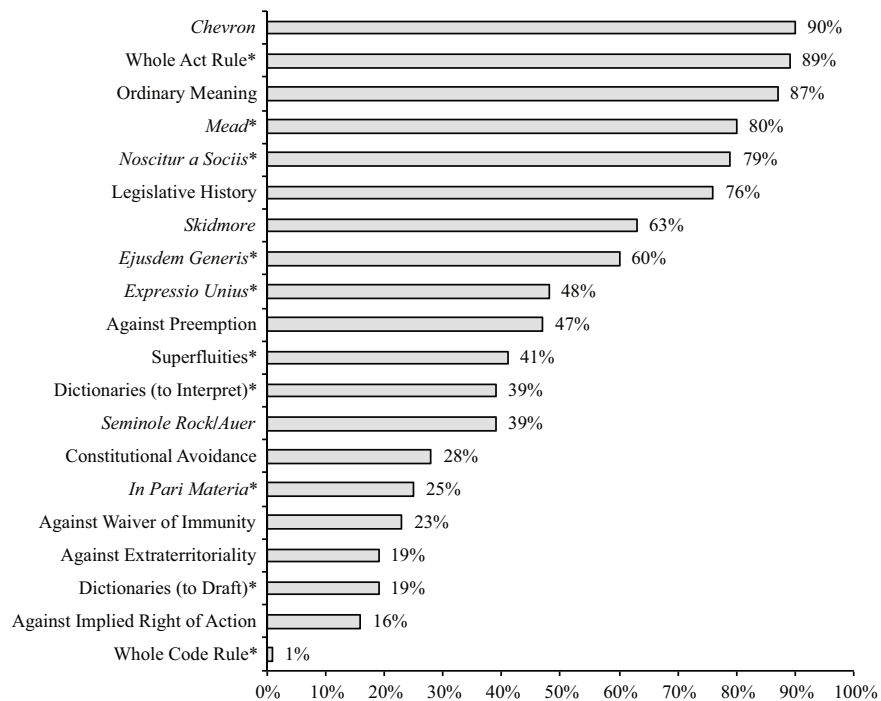
II. THE CANONS

This Part presents the responses to fifty-four questions posed to the agency rule drafters about the canons of construction, which are "interpretive princi-

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82. Q10(a) (n=119); Q13(a)-(d) (n=117); Q14(a)-(e) (n=114); Q18(a)-(b), (d) (n=109); Q19(a)-(b) (n=92); Q25(b)-(f) (n=99); Q31 (n=98). For readability, the following interpretive principles are not included in Figure 2: Rule of Lenity (13%), and *Curtiss-Wright* deference (2%). Q18(e) (n=109); Q25(a) (n=99).

83. For canons reported by concept, use is calculated by including those who responded that those concepts were always or often true. *See* Q13(a)-(d) (n=117); Q14(a)-(e) (n=114). The *Mead* doctrine is calculated by concept by taking the lower percentage reported of the two conditions. Q19(a)-(b) (n=92).

ples or presumptions that judges use to discern—or, at times, to construct—statutory meaning."[84] These canons can be divided into two groups: the semantic or textual canons (Part II.A), and the substantive or normative canons (Part II.B).

The canons are considered by many to be key indicia of interpreter fidelity. They purport to reflect either the meaning of the statutory language (semantic canons) or at least what the words should mean in light of background principles (substantive canons). Justice Antonin Scalia and Bryan Garner have remarked that "[t]he canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts."[85] Faithful-agency justifications for the canons include that they reflect the ordinary meaning of words at the time,[86] constitute background principles against which Congress drafts,[87] or are "rules with such established common law pedigrees that it is assumed everyone knows them."[88] As Bressman and Gluck have chronicled, "[s]ome justifications turn expressly on congressional awareness and use of the canons."[89] Justice Frankfurter's observation in 1947 still rings true today: "Insofar as canons of construction are generalizations of experience, they all have worth."[90]

That said, as is well chronicled in the literature, not everyone agrees that the canons advance a faithful-agency approach to statutory interpretation or reflect the empirical realities of congressional drafting. Judge Abner Mikva, for instance, once quipped, "When I was in Congress, the only 'canons' we talked

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84. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 202 (2d ed. 2013); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 51 (2012) ("Most of the canons of interpretation . . . are so venerable that many of them continue to bear their Latin names. Properly regarded, they are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys.").

85. SCALIA & GARNER, *supra* note 84, at 61.

86. *See, e.g.*, James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1203 (2010); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005).

87. *See, e.g.*, John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1864-65 (2004); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 801-02.

88. Gluck & Bressman, *Part I*, *supra* note 19, at 925 (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29 (Amy Gutmann ed., 1997)).

89. *Id.* Other justifications "are less tethered to congressional practice." *Id.*

90. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947); *accord* JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 2, at 3 (Boston, Little, Brown & Co. 1882) ("[O]n the whole, the rules of statutory interpretation are specially stable.").

about were the ones the Pentagon bought that could not shoot straight."[91] The polarized reaction to Scalia and Garner's 2012 statutory interpretation treatise *Reading Law*[92] is emblematic of the scholarly debate.[93] And sixty-five years later scholars are still responding to Karl Llewellyn's classic cannoning of the canons, in which he detailed how "there are two opposing canons on almost every point."[94] Indeed, Scalia and Garner's most recent response to Llewellyn is to create a new canon—the "Principle of Interrelating Canons," which instructs that "[n]o canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions."[95]

This Article does not weigh in on the debate about which canons should be utilized to assess whether an interpreter is a faithful agent of Congress. Instead, this Part merely reports the findings with respect to the rule drafters surveyed as to their awareness and use of the canons, along with some descriptive comparisons to the views of the Bressman and Gluck congressional respondents.

A. *The Semantic Canons*

As John Manning and Matthew Stephenson have explained, the semantic canons "are generalizations about how the English language is conventionally used and understood, which judges may use to 'decode' statutory terms. The use of semantic canons can therefore be understood simply as a form of textual analysis."[96] Justice Scalia has added that semantic canons are "so commonsensical that, were the canons not couched in Latin, you would find it hard to believe anyone could criticize them."[97] As discussed, however, many scholars dispute whether these canons are grounded in how Congress actually legislates. Judge Posner is perhaps the loudest modern critic, calling the canons "[v]acuous and inconsistent" and "just plain wrong."[98] And the findings from

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91. Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987); *accord* James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 179, 180 & n.113 (2003) (questioning congressional awareness of canons).

92. SCALIA & GARNER, *supra* note 84.

93. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 912, 913 & n.16 (chronicling the debate); *see also* Josh Blackman, Archive of Articles Discussing Posner-Scalia Disagreement, JOSH BLACKMAN'S BLOG, http://joshblackman.com/blog/category/articles/posner-v-scalia (last visited Apr. 28, 2015).

94. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). *See generally* MANNING & STEPHENSON, *supra* note 84, at 205-07 (discussing the impact of Llewellyn's criticism of the canons and subsequent scholarship).

95. SCALIA & GARNER, *supra* note 84, at 59 (bolding omitted).

96. MANNING & STEPHENSON, *supra* note 84, at 202.

97. Scalia, *supra* note 88, at 26.

98. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806, 816 (1983); *see also* Cont'l Cas. Co. v. Pittsburgh Corning Corp., 917 F.2d 297, 300 (7th Cir. 1990) (calling the canons "figleaves for decisions reached on other grounds").

the Bressman and Gluck study, discussed below, cast further doubt on the use-fulness of at least some of these canons for gauging interpreter fidelity.

This survey asked agency rule drafters thirty-five questions about the se-mantic canons. The survey first asked for the drafters' familiarity with and use of certain canons—"the six textual canons most commonly deployed by courts and scholars"[99]—by name and then by concept:

- *Noscitur a sociis* (construe ambiguous terms in a list in reference to oth-er terms on the list);
- *Ejusdem generis* (construe general, often catch-all, terms in a list in ref-erence to other, more specific, terms in a list);
- *Expressio/inclusio unius est exclusio alterius* (the inclusion of specific terms or exceptions indicates an intent to exclude terms or exceptions not included);
- The rule against superfluities (construe statutes to avoid redundancy; when there are two overlapping terms, construe to give an independent meaning to each);
- The whole act rule (statutory terms are presumed to have a consistent meaning throughout a statute); and
- The whole code rule (statutory terms are presumed to have a consistent meaning throughout the U.S. Code).[100]

As in the Bressman and Gluck study, the rule drafters were also asked about *in pari materia* (similar statutory provisions should be interpreted similarly)[101] as well as about their use of dictionaries when drafting.[102] Unlike the Bressman and Gluck study, the rule drafters were asked if they knew and used the ordi-nary meaning canon (by name only)[103] as well as a follow-up question on the use of dictionaries when interpreting.[104]

The overall results on the semantic canons are reported in the following two Figures. Figure 3 presents the agency rule drafters' responses as to the knowledge of the semantic canons by name, along with the responses from the Bressman and Gluck congressional drafters for these same questions.[105] As Figure 3 illustrates, a somewhat larger fraction of the agency rule drafters sur-

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99. Gluck & Bressman, *Part I*, *supra* note 19, at 930.

100. Q9(b)-(e), (g)-(h) (n=119); Q10(b)-(e), (g)-(h) (n=119); Q13(a)-(d) (n=117); Q14(a)-(d) (n=114). These definitions are taken verbatim from Gluck & Bressman, *Part I*, *supra* note 19, at 930.

101. Q9(f) (n=119); Q10(f) (n=119); Q14(a)-(d).

102. Q14(e) (n=114).

103. Q9(a) (n=119); Q10(a) (n=119); *see also* SCALIA & GARNER, *supra* note 84, at 69 (defining the "Ordinary-Meaning Canon" as dictating that "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense" (bolding omitted)).

104. Q14(f) (n=114) ("Dictionaries should be used by interpreters in determining the meaning of terms used in statutes (or rules).").

105. Q9(a)-(h) (n=119); Q14(e) (n=114); Gluck & Bressman, *Part I*, *supra* note 19, at 927 fig.1, 931 fig.3.

veyed here reported that they knew each semantic canon by name than their congressional counterparts in the Bressman and Gluck study. The varying level of recognition by name, however, roughly corresponds between the two groups.

FIGURE 3
Knowledge of Semantic Canons by Name
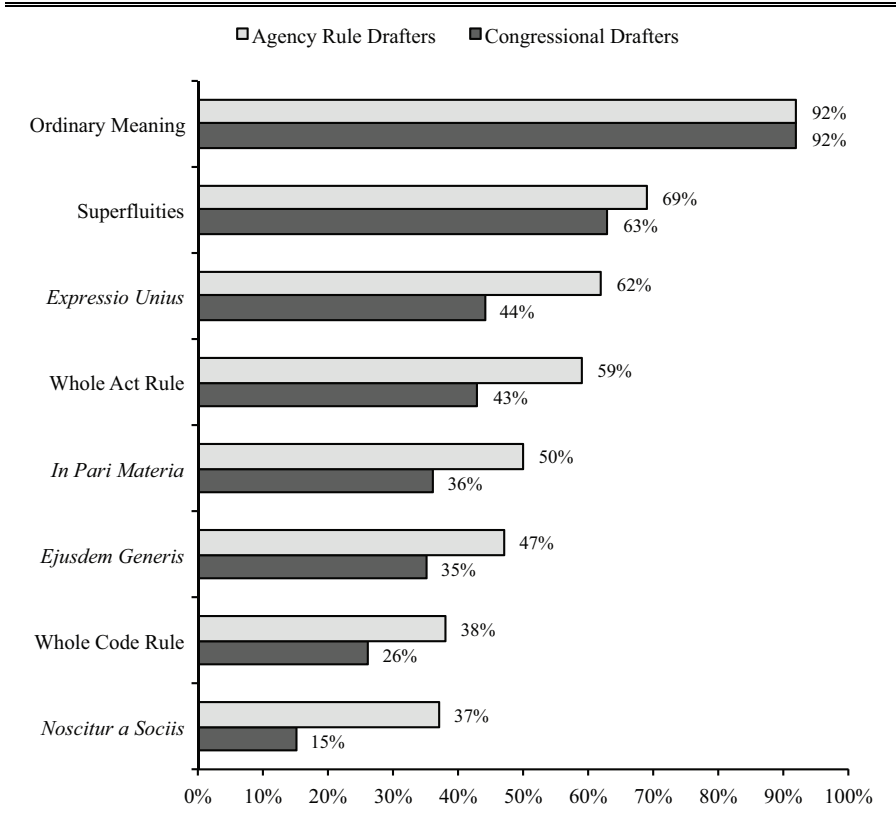
Figure 4 compares the agency rule drafters' use of the semantic canons when asked by name versus when asked by concept, including two formulations about the use of dictionaries.[106] As Figure 4 illustrates, the rule drafters' reported use of a particular canon varies greatly depending on whether they were asked by name or by concept. The following Subparts address the key takeaways from these findings, including how they compare descriptively to

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106. Q10(a)-(h) (n=119); Q13(a)-(d) (n=117); Q14(a)-(e) (n=114). The use of canons by concept reports the percentage of drafters who answered that those concepts are "always" or "often" used in drafting. The ordinary meaning canon was not asked by concept, and the use of dictionaries was not asked by name but was asked in two different formulations. Moreover, if the respondent indicated in Question 9 that she did not know the canon by name, any response in Question 10 for that same canon was excluded.

the congressional respondents in the Bressman and Gluck study (and thus how they may relate to interpreter fidelity).[107] These takeaways—like many of the other findings in this Article—draw on the framework and taxonomy developed in the Bressman and Gluck study.[108]

FIGURE 4
Agency Drafters' Use of Semantic Canons

□ By Name   ■ By Concept

Canon	By Name	By Concept
Ordinary Meaning	87%	
Whole Act Rule	55%	89%
Noscitur a Sociis	26%	79%
Ejusdem Generis	35%	60%
Expressio Unius	50%	48%
Superfluities	61%	41%
Dictionaries (to Interpret)		39%
In Pari Materia	39%	25%
Dictionaries (to Draft)		19%
Whole Code Rule	24%	1%

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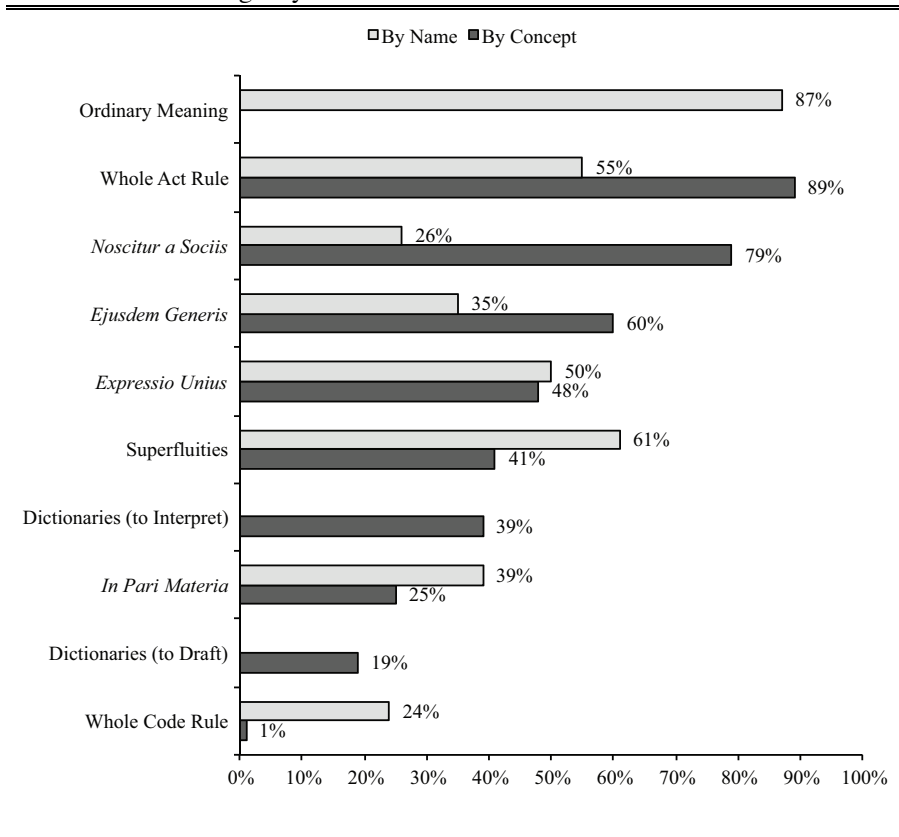
107. As discussed in Part I.D, this comparison between the agency and congressional respondents should be made carefully not only because of the methodological limitations in both studies but also because the two drafting populations differ in substantial respects. Similar to the Bressman and Gluck study, this survey also asked whether "it matter[s] to your rule drafting practices whether courts routinely rely on any of these rules," Q12 (n=119), and, by semantic canon, whether the rule drafter "believe[s] that courts rely on any of these rules in interpreting legislation and/or regulations," Q11(a)-(h) (n=119). As to the former, nearly four in five (78%) indicated that it did matter. As for the latter, the results roughly correspond with the results for awareness and use of the canons by name. While both sets of questions yielded a few interesting comments quoted elsewhere in the Article, with hindsight, Question 11 in particular was probably not worth asking.

108. *See, e.g.*, Gluck & Bressman, *Part I*, *supra* note 19, at 1016 tbl.3 (developing a typology of canon awareness and use).

1. *More familiarity by concept than by name (especially for canons with Latin names)*

It is not too surprising that the agency rule drafters surveyed generally were more familiar with the semantic canons when asked by concept than by name, particularly with respect to canons with Latin names. This finding is consistent with that of the congressional respondents in the Bressman and Gluck study.[109] In *Reading Law*, Scalia and Garner bemoaned lawyers' and judges' lack of familiarity with the semantic canons, relying on a quasi-experiment they conducted at an American Bar Association (ABA) meeting to drive home this point: "When your authors, as an experiment, asked a group of about 600 lawyers how many knew the meaning of *ejusdem generis* (one of the oldest and most frequently applied canons), only about 10 had sufficient confidence in the answer to raise their hands."[110]

Whereas the lack of familiarity with the canons no doubt continues, the focus on the names—especially the Latin names—seems misplaced. The comments to this question reinforced that point. Of sixteen comments made, thirteen rule drafters criticized the survey for quizzing about Latin terms. One representative comment, for instance, stated that "[i]t is a little silly to ask about canons using [L]atin terms. More relevant would be to ask using English translations."[111] It seems like one of the 600 lawyers at the ABA event should have responded along those lines. Indeed, as another rule drafter commented, "Many of us have been instructed that the use of Latin phrases is discouraged, thus, our continued knowledge of the foreign terms is limited."[112]

Instead, the more important findings deal with which concepts are definitely in use or probably in use, and which canons are known by name but rejected in practice.[113] The following Subparts address these three sets of semantic canons before turning to the ordinary meaning canon and the use of dictionaries.

2. *Concepts definitely in use: whole act rule, consistent usage,* noscitur a sociis, *and* ejusdem generis

Although only about half of the rule drafters (55%) recognized it by name, nearly nine in ten (89%) indicated that the assumption underlying the whole act rule—that statutory terms are presumed to have a consistent meaning throughout a statute—always or often applies. Only one rule drafter indicated that it

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109. *Id.* at 930.

110. SCALIA & GARNER, *supra* note 84, at 7, 8 & n.17 (citation omitted). By comparison, 47% of rule drafters responded that they knew *ejusdem generis* by name. Q9(c).

111. Q9, cmt. 1.

112. *Id.* cmt. 12.

113. It is thus no surprise that Bressman and Gluck similarly focused on two of these three categories—concepts in use and canons known by name but rejected in practice—though these canons do not perfectly align in both studies. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 932-39.

rarely applies, and none that it never applies.[114] Similarly, when framed in terms of a consistent usage canon—that a term used in multiple places in the same section of a statute is intended to mean the same thing within that section—93% of the rule drafters reported that this presumption is often or always true.[115] These findings are consistent with *Reading Law*'s conclusion that "[t]he correlative points of the presumption of consistent usage make intuitive sense."[116] It may also be due in part to the Supreme Court's modern focus on this canon.[117] Part I.A.4 returns to the whole act rule and consistent usage canon in light of related principles (the whole code rule and *in pari materia*) that were known but rejected by the rule drafters.

The next most used semantic canons by concept are again related principles: *noscitur a sociis*—construe ambiguous terms in a list in reference to other terms on the list—at 79%, and *ejusdem generis*—construe general, often catch-all, terms in a list in reference to other, more specific, terms in a list—at 60%.[118] This is despite the fact that these canons were two of the lesser known by name, at 37% and 47%, respectively.[119] As discussed in Part II.A.1, the likely reason for the lack of name recognition is due to the Latin names—further suggesting that these canon names should be translated into ordinary English.[120] This rationale finds further support by the stark disparity in the rule drafters' reported use of the canons by concept versus by name: 79% versus 26% for *noscitur a sociis*, and 60% versus 35% for *ejusdem generis*.[121]

The rule drafters' reported use of *noscitur a sociis* and *ejusdem generis* is consistent with the Bressman and Gluck study. Most congressional respondents did not know these canons by name—85% and 65%, respectively—but they were the two most used semantic canons by general concept at 71%.[122]

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114. Q14(a) (n=114).

115. Q14(b) (n=114). No one responded that it never applies; only one responded that it rarely applies.

116. SCALIA & GARNER, *supra* note 84, at 170.

117. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 937 ("In the October 2011 Term of the Supreme Court alone, the whole act rule was used in at least three cases, and the leading case for the principle has been cited in at least 118 federal cases since 1995." (footnote omitted)).

118. Q13(a), (d) (n=117). These percentages include where the rule drafters indicated that the assumptions were often or always true. Only one indicated never and none rarely for *noscitur a sociis*; and only three indicated never and three rarely for *ejusdem generis*.

119. Q9(b)-(c) (n=119).

120. Indeed, when the author teaches these canons in his first-year legislation course, he includes the Latin names but also refers to *noscitur a sociis* as the associated words canon and *ejusdem generis* as the residual clause canon. *Compare* SCALIA & GARNER, *supra* note 84, at 195 (naming *noscitur a sociis* the "Associated-Words Canon" (bolding omitted)), *with id.* at 199 (providing no English name for the "*Ejusdem Generis* Canon" (bolding omitted)).

121. Q10(b)-(c) (n=119); Q13(a), (d).

122. Gluck & Bressman, *Part I*, *supra* note 19, at 933.

3. *Concepts probably in use:* expressio unius *and superfluities*

More than four in ten agency rule drafters reported that the concepts for two additional semantic canons were often or always true: *expressio unius/inclusio unius*—the inclusion of specific terms or exceptions indicates an intent to exclude terms or exceptions not included—at 48%, and the rule against superfluities at 41%.[123] These canons are placed in a "concepts probably in use" category because both were quite known by name (62% and 69%, respectively[124]) yet also less used by name (50% and 61%, respectively[125]) and by concept. This may suggest that there is less consensus about their use. Indeed, one in ten rule drafters (9%) indicated they rarely use *expressio unius* by concept (in addition to four respondents who said never); 21% reported that they rarely used superfluities by concept (in addition to one respondent who said never).[126]

Again, these findings are roughly consistent with the congressional drafters' responses—though Bressman and Gluck classify *expressio unius* (at 33%) among "concepts in use" and superfluities (at 31%) among "canons known, but rejected."[127] They placed superfluities in the rejected category because 18% of congressional respondents indicated that the concept rarely applies and 45% said it sometimes applies.[128] This is similar to the 22% of agency rule drafters who indicated that it rarely or never applies, in addition to the 37% who said it sometimes applies.[129] The agency rule drafters surveyed likely reached the same conclusion as Bressman and Gluck and their congressional respondents: "[c]ommon sense tells us that, despite the popularity of this rule with judges, there is likely to be redundancy, especially in exceedingly long statutes," and that "even in short statutes—indeed, even within single sections of statutes — . . . terms are often *purposefully redundant to satisfy audiences other than courts*."[130] The findings detailed in Part III concerning federal agencies' extensive involvement in the legislative process arguably reinforce this conclusion.

In sum, *expressio unius* and superfluities seem to be somewhere in between canons used and canons known but rejected in practice, though the degree in between is roughly within the spectrum set forth in the Bressman and Gluck study. In other words, if the congressional respondents there were representative of congressional wishes more generally, then the responses from the agency respondents here would seem to be faithful to those wishes. Conversely, if a textualist judge grounded in the canons assessed fidelity, she would not be as pleased with the agency rule drafters surveyed here. Both conclusions would

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123. Q13(b)-(c) (n=117).

124. Q9(d)-(e) (n=119).

125. Q10(d)-(e) (n=119).

126. Q13(b)-(c).

127. Gluck & Bressman, *Part I*, *supra* note 19, at 932 & fig.4, 933-36.

128. *Id.* at 934.

129. Q13(c).

130. Gluck & Bressman, *Part I*, *supra* note 19, at 934-35 (footnote omitted).

likely also be true for the known but rejected canons discussed in the following Subpart.

4.   *Canons known by name, rejected in practice: whole code rule and in pari materia*

Although the whole act rule (at 89%) and consistent usage canon (at 96%) were reported as the most used by concept among the semantic canons,[131] their related canons—the whole code rule and *in pari materia*—were strongly rejected in practice. Only one in four (25%) indicated they often or always use *in pari materia*—similar statutory provisions should be interpreted similarly—in agency statutory interpretation.[132] Even worse, only *one* rule drafter (<1%) indicated use of the whole code rule.[133] This is despite the fact that 50% and 59% indicated they knew *in pari materia* and the whole code rule, respectively, by name.[134]

The rule drafters provided more details on this rejection in the comments. For instance, two rule drafters indicated they had "rarely seen courts invoke the whole code rule in interpreting statutes."[135] Based on personal experience, another expressed little confidence in the legislative process:

> Having seen how congress legislates—and knowing how much drafting is done by basically know-nothing congressional staffers, I think it is basically impossible to generalize about whether terms are intended to be used consistently—most often the drafters, as well as their legislator bosses, have no clue what is already in the statute that they are adding to or amending. I wish I could be more positive, but have you read the shit that congress churns out . . . [?][136]

And two rule drafters commented on how federal agencies are more careful and precise than their congressional counterparts.[137] The best way to reconcile their embrace of the whole act rule and consistent usage canon yet rejection of the whole code rule and *in pari materia* may be that the rule drafters surveyed are more confident in the presumption of consistent usage in the same statute or section of a statute than they are across statutes (much less the entire code).

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131. Q14(a)-(b) (n=114).

132. Q14(c) (n=114).

133. Q14(d) (n=114).

134. Q9(f)-(g) (n=119).

135. Q11, cmt. 1; *accord id*. cmt. 4 ("All are applied by at least some courts and judges, but the whole code rule seems to be applied less frequently than the others.").

136. Q14, cmt. 4; *see also* Q15, cmt. 9 ("Congress is producing some pretty terrible stuff to work with.").

137. Q14, cmt. 7 ("[W]e try to be consistent in drafting regulations, but it surely is clear congress is not in drafting the statutes."); *id*. cmt. 13 ("It's not accurate to make the same statement with regard to statutes and agency rules. Agencies are more precise and consistent with drafting their regulations than Congress is with statutes.").

The Bressman and Gluck congressional respondents similarly rejected the whole code rule and *in pari materia*.[138] But the congressional respondents also "emphasized time and again the significant organizational barriers that the committee system, bundled legislative deals, and lengthy, multidrafter statutes pose to the realistic operation of" consistent usage principles.[139] Apparently, the agency rule drafters surveyed have greater confidence in Congress's ability to use words consistently within a statute or section of a statute than (at least) the congressional drafters surveyed in the Bressman and Gluck study.

5. *Ordinary meaning canon used, but perhaps not dictionaries*

A clear winner in this study was the ordinary meaning canon, which instructs that "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."[140] The ordinary meaning canon was the most known (at 92%) and the second most used (at 87%) among the semantic canons in the study.[141] That is not too surprising as "[t]he ordinary-meaning rule is the most fundamental semantic rule of interpretation"[142] and has been a foundational rule since at least the 1800s.[143]

What perhaps is more surprising is that the agency rule drafters soundly rejected the use of dictionaries as a drafting tool. Only about one in five (19%) indicated that dictionaries are often or always used in determining what terms to use in statutes (or rules); only the whole code rule was used by fewer of the rule drafters surveyed.[144] This may be surprising, as a number of scholars have noted that, "driven by the rise of the new textualism, the Supreme Court has increasingly relied on dictionaries in discerning ordinary meaning."[145] On the

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138. Gluck & Bressman, *Part I*, *supra* note 19, at 933-34.

139. *Id.* at 936.

140. SCALIA & GARNER, *supra* note 84, at 69 (bolding omitted).

141. Q9(a) (n=119); Q10(a) (n=119).

142. SCALIA & GARNER, *supra* note 84, at 69.

143. *See, e.g.*, 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 432 (New York, O. Halsted 1826) ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense."); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 157 (Boston, Hilliard, Gray & Co. 1833) ("[E]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.").

144. Q14(d)-(e) (n=114).

145. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 252 (2000); *accord* MANNING & STEPHENSON, *supra* note 84, at 115 (citing Samuel A. Thumma & Jeffery L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 252-60 (1999)); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 516-39 (2013) (presenting empirical findings on dictionary use on the Rehnquist and Roberts Courts). Indeed, *Reading Law* includes a ten-page appendix on the proper use of dictionaries to derive ordinary meaning. SCALIA & GARNER, *supra* note 84, at 415-24.

other hand, this finding is not too surprising in light of the Bressman and Gluck study, which similarly found that the congressional respondents rejected the use of dictionaries in legislative drafting. Indeed, more than half of the congressional respondents reported that dictionaries are never or rarely used in drafting.[146] One congressional drafter colorfully explained that "Scalia is a bright guy, but no one uses a freaking dictionary."[147]

Because the Bressman and Gluck study only inquired into whether dictionaries are used when drafting and not whether they "should be used by interpreters in determining the meaning of terms used in statutes," this follow-up question was added here.[148] One rule drafter reflected the intuition behind this addition: "A dictionary is helpful to understand intent, even if a dictionary was not used by the drafters."[149] Indeed, it seems like many rule drafters agreed, as double the number of rule drafters (39% from 19%) reported that dictionaries are often or always used *by interpreters* in contrast to being used *by drafters*.[150] This finding does not necessarily mean an interpreter is more faithful to congressional wishes if she uses a dictionary, but it should make one even more "curious about the distinct and unasked question [in the Bressman and Gluck study about] whether congressional drafters think courts [or agencies] should consult dictionaries to help discern the meaning of statutory terms."[151]

B. *The Substantive Canons*

Substantive canons differ substantially from semantic canons. As Manning and Stephenson have explained, substantive or normative canons "do not purport to be neutral formalizations of background understandings about the way people use and understand the English language. Instead, these substantive canons ask interpreters to put a thumb on the scale in favor of some value or policy that courts have identified as worthy of special protection."[152] Put differently, per Henry Hart and Albert Sacks, substantive canons "promote objectives of the legal system which transcend the wishes of any particular session of the legislature."[153]

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146. Gluck & Bressman, *Part I*, *supra* note 19, at 938.

147. *Id.* (internal quotation marks omitted). Added another: "This question presumes that legislative staff have dictionaries. I have tried to get an OED but people over at finance say we aren't spending money to buy you a dictionary. And no *Black's Law Dictionary* either." *Id.* (internal quotation marks omitted).

148. Q14(f) (n=114).

149. *Id.* cmt. 3.

150. Q14(e)-(f) (n=114).

151. Christopher Walker, *Does Congress Really Mean to Delegate Interpretative Authority to Agencies?*, JOTWELL (Aug. 16, 2013), http://adlaw.jotwell.com/does-congress -really-mean-to-delegate-interpretative-authority-to-agencies.

152. MANNING & STEPHENSON, *supra* note 84, at 247.

153. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1376 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

It has long been understood that substantive canons are not about empirical realities of congressional drafting. This is a point Judge Henry Friendly made long ago: "It does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them."[154] That understanding, however, has been called into question in recent years. Justice Stephen Breyer, for instance, recently argued in dissent that "Congress would prefer a less-than-optimal interpretation of its statute to the grave risk of a constitutional holding that would set the statute entirely aside."[155] And, as discussed in this Part, the Bressman and Gluck study provides some support that interpreter fidelity to congressional wishes may include adherence to at least some of these substantive canons.

Although there are more than 100 substantive canons,[156] this survey asked the agency rule drafters nineteen questions about six substantive canons that seemed most relevant to agency statutory interpretation (and tracked those asked in the Bressman and Gluck study). Figure 5 presents the agency rule drafters' responses as to their knowledge and use of the substantive canons by name; unlike the semantic canons, to keep the survey under 200 questions, these questions were not asked about knowledge or use by concept.[157]

With respect to substantive-canon awareness, the federalism canons—the presumption against preemption of state law and the presumption against the waiver of sovereign immunity—were the clear winners with 78% and 66% of

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154. HENRY J. FRIENDLY, BENCHMARKS 210 (1967).

155. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 566 (2009) (Breyer, J., dissenting).

156. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 940; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598-629 (1992) (chronicling substantive canons).

157. Q24(a)-(f) (n=99); Q25(a)-(f) (n=99). While the semantic and substantive canons are discussed together in Part II of this Article, they were the second and fourth parts of the survey, with the administrative law doctrines in between. This was a strategic decision made due to the length of the online survey, the concern for incomplete answers, and a priority for answers about the administrative law doctrines over the substantive canons. In light of the responses regarding the substantive canons, this seems like a sound decision. With hindsight, however, the final part of the survey on legislative history should have been moved before the part on the substantive canons (and perhaps before the administrative law questions)—although the number of responses only dropped by one between those final two parts.

Moreover, similar to the Bressman and Gluck study, this survey also asked whether "it matter[s] to your rule drafting practices whether courts routinely rely on any of these rules," Q27 (n=98), and, by substantive canon, whether the rule drafter "believe[s] that courts rely on any of these rules in interpreting legislation," Q26(a)-(g) (n=98). As to the former, 54% of the rule drafters surveyed indicated that it did matter. As for the latter, the results roughly correspond with the results for awareness of the substantive canons by name. With hindsight, Q26 was probably not worth asking.

agency rule drafters indicating they knew the canons by name.[158] Constitutional avoidance was similarly well known at 62%.[159] By contrast, the other three substantive canons were not as well known: the presumption against an implied right of action (at 44%); the presumption against extraterritoriality (at 42%); and the rule of lenity (at 36%).[160] The reported use of each substantive canon was substantially lower with only the presumption against preemption above 40% (at 47%), followed by constitutional avoidance (at 28%) and the presumption against the waiver of sovereign immunity (at 23%).[161]

FIGURE 5
Knowledge vs. Use of Substantive Canons
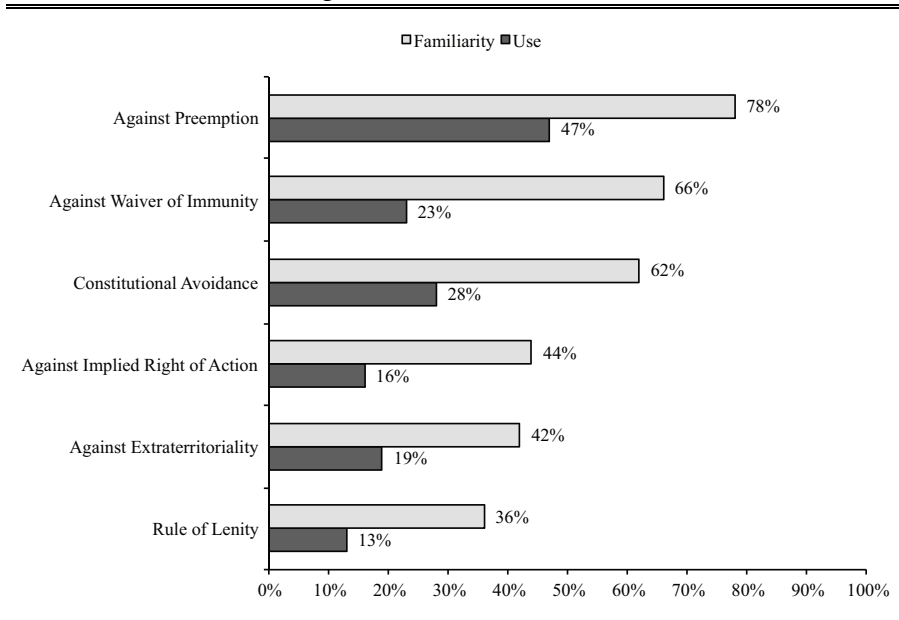
Of these canons, by comparison, the congressional respondents in the Bressman and Gluck study reported using constitutional avoidance at 25% (by concept) and the rule of lenity at 14% (by name).[162] Nearly four in five con-

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158. Q24(c)-(d) (n=99); *see also* ESKRIDGE ET AL., *supra* note 145, at 354-55 (classifying the presumptions against preemption and against the waiver of state sovereign immunity as federalism canons); *accord* MANNING & STEPHENSON, *supra* note 84, at 267-68.

159. Q24(b) (n=99).

160. Q24(a), (e)-(f) (n=99).

161. Q25(b)-(d) (n=99).

162. Gluck & Bressman, *Part I*, *supra* note 19, at 941 fig.5, 948. On the rule of lenity, comparisons between the drafter populations would be unproductive as Bressman and Gluck only asked congressional drafters who participated in drafting criminal legislation, whereas this study asked all agency rule drafters. Moreover, based on the federal agencies in the survey population, *see supra* note 58, it is unlikely that many of the rule drafters surveyed have had any on-the-job experience interpreting criminal statutes.

gressional respondents were familiar with either the federalism or preemption canons—with half being familiar with both—and of those familiar with at least one, 65% indicated they play a role in drafting decisions.[163] And they found the clear statement rules to be virtually irrelevant.[164] In other words, there is decent evidence that some of these substantive canons are used in legislative drafting, but whether that translates to an indicator of agency interpreter fidelity is less clear. Indeed, at least one scholar (Mashaw) has suggested in the context of constitutional avoidance that agency interpreters are arguably not in the same position as judicial interpreters: "Obviously, administrators who fail to pursue implementation any time a constitutional issue looms on their horizon could not possibly carry out their legislative mandates effectively. Constitutionally timid administration both compromises faithful agency and potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command."[165]

Because the substantive canons arguably do not reflect congressional wishes, Mashaw's observation may well apply to most or even all of them. But if these canons do reflect interpreter fidelity—as Justice Breyer and some of the congressional drafters surveyed have suggested—then the agency rule drafters' modest familiarity with, but lack of use of, these substantive canons suggests room for improvement. Perhaps the more important lesson here is that the application of substantive canons to agency statutory interpretation and their place within a faithful-agency interpretive framework are highly undertheorized and even less understood empirically.

III. LEGISLATIVE HISTORY

This Part turns to the survey's thirty-five questions about the other main set of tools of statutory interpretation—legislative history, which some refer to as "extrinsic canons."[166] As Bressman and Gluck have explained, like the canons, there is an ongoing debate on the use of legislative history in statutory interpretation, but the argument is different: "No one doubts that drafters are aware of legislative history or that they write it. Instead, the divide is over the constitutionality and effect on the legislative process of judicial reliance on legislative history and also its reliability as evidence of statutory meaning."[167]

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163. Gluck & Bressman, *Part I*, *supra* note 19, at 942.

164. *See id.* at 945-46.

165. Mashaw, *supra* note 17, at 508; *see also* Walker, *supra* note 21, at 140 (arguing that modern constitutional avoidance should play no role when reviewing an agency's interpretation of a statute it administers). *But see* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1196 (2006) (arguing for a more nuanced use of constitutional avoidance in the executive branch, including that "it should be inapplicable in cases where the executive interpreter's knowledge of congressional intent and statutory purpose removes the statute's ambiguity").

166. Gluck & Bressman, *Part I*, *supra* note 19, at 924-25.

167. *Id.* at 965.

That debate will not be repeated here. Instead, the present question is what role legislative history should play under a faithful-agency approach to agency statutory interpretation. And what effect does or should the legislative process have on agency statutory interpretation? Many would assert that the role of legislative history should be the same regardless of whether an agency or judge is the interpreter and whether legislative history is deemed to reveal congressional intent or statutory meaning. Strauss and the congressional respondents in the Bressman and Gluck study, however, would disagree.

Strauss argued nearly a quarter century ago that "[l]egislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons who are outside government and are accustomed to considering its relevance only to actual or prospective judicial resolution of discrete disputes."[168] He went on to paint a vivid picture of legislative history's role in agency statutory interpretation by depicting the law library of a federal agency:

> Alongside the statutes for which the agency is responsible, you will find shelf after shelf of their legislative history—collections that embrace not only printed materials such as might make their way to a depositary library, but also transcripts of relevant hearings, correspondence, and other informal traces of the continuing interactions that go on between an agency and Capitol Hill as a statute is being shaped in the legislative process, and perhaps afterwards in [the] course of implementation.[169]

One of the important benefits of "[t]he enduring and multifaceted character of the agency's relationship with Congress," he explained, is that the agency has comparative expertise "to distinguish reliably those considerations that served to shape the legislation, the legislative history wheat, from the more manipulative chaff."[170] Although not advanced in faithful-agency terms, as Mashaw has noted, Strauss's "basic case is that agencies have a direct relationship with Congress that gives them insights into legislative purposes and meaning . . . . For a faithful agent to forget this content, to in some sense ignore its institutional memory, would be to divest itself of critical resources in carrying out congressional designs."[171] It is perhaps for this reason that, as discussed in Part I.A, a number of scholars—in addition to Mashaw and Strauss—have called for a more purposivist approach to agency statutory interpretation (than to judicial interpretation) based on comparative institutional expertise.[172]

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168. Strauss, *supra* note 22, at 329.

169. *Id.*

170. *Id.* at 347.

171. Mashaw, *supra* note 17, at 511 (discussing Strauss, *supra* note 22).

172. *See, e.g.*, Aprill, *supra* note 34, at 2085-87 (describing agencies' "interpretive voice[]" in comparative expertise terms); Eskridge, *supra* note 22, at 424 (arguing for more purposivist agency statutory interpretation because, inter alia, "the administrators are probably more knowledgeable about the ongoing legislative history of the statute than judges are"); *see also* Sunstein & Vermeule, *supra* note 22, at 928 (arguing that agencies can be more purposivist "mostly because agencies have a superior degree of technical competence" but also because "agencies are subject to a degree of democratic supervision").

The Bressman and Gluck study painted a similar picture of Congress's relationship with its bureaucratic agents. Over nine in ten congressional drafters (94%) indicated that a purpose of legislative history is to shape the way agencies interpret statutory ambiguities, with one in five (21%) volunteering that legislative history also provides an oversight role for agency implementation of a statute it administers.[173] One congressional drafter provided a helpful example: "'We use everything from floor statements to letters to the agency—members know how to communicate with agencies and make their policy preferences known' . . . ."[174] Moreover, half of the congressional respondents (53%) emphasized the importance of legislative history in the appropriations context, as such legislative history specifies where the funds appropriated go within the administrative state.[175]

Whereas Strauss has provided his personal insights into the agency's relationship with legislative history and the congressional drafters have presented theirs, until now no study has attempted to uncover in any comprehensive manner the empirical realities of how federal agencies use legislative history in agency statutory interpretation. Part III.A presents the perspectives of the agency rule drafters surveyed on how their agencies participate in the legislative process. Part III.B evaluates their views on the purposes of legislative history, comparing descriptively the views of the agency rule drafters surveyed with those of the congressional respondents in the Bressman and Gluck study. Finally, Part III.C looks at the agency rule drafters' stances on the reliability of different types of legislative history, again comparing them with that of their previously surveyed congressional counterparts.

A. *Federal Agencies in the Legislative Process*

During the survey design phase, a number of agency officials suggested that the survey ask about the rule drafters' participation in the legislative process and, in particular, whether they worked on technical or substantive drafting. Technical drafting, the agency officials explained, deals with reviewing legislation to make sure it is textually and structurally coherent and consistent with existing law. Substantive drafting, by contrast, involves shaping the actual policy objectives of the proposed legislation.[176] Other officials further suggested that the survey ask not only about the rule drafters' personal participation but also about their agency's participation, as many general counsel offices have separate staffs for regulation and legislative affairs. Figure 6 presents the findings from these four questions.[177]

173. Bressman & Gluck, *Part II*, *supra* note 19, at 768.

174. Gluck & Bressman, *Part I*, *supra* note 19, at 972.

175. Bressman & Gluck, *Part II*, *supra* note 19, at 768.

176. Of course, whether the rule drafters understood these distinctions when responding to the survey is a separate matter; no definition was provided in the survey instrument itself.

177. Q29(a)-(d) (n=98).

FIGURE 6
Agency Participation in Legislative Drafting

□Always □Often ■Sometimes
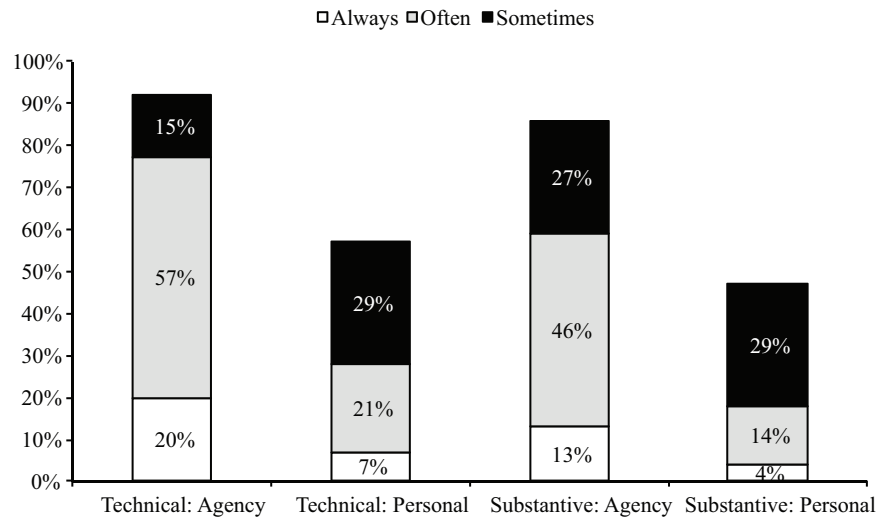
As Figure 6 illustrates, the rule drafters reinforced Strauss's portrayal of federal agencies' direct involvement in the legislative process. Nearly eight in ten (78%) indicated that their agency always or often participates in a technical drafting role for the statutes it administers (with another 15% indicating sometimes), and 59% reported that their agency always or often participates in a policy or substantive drafting role for the statutes the agency administers (with another 27% indicating sometimes).[178] It is not surprising that the numbers were lower for personal participation: 29% always or often participate in technical drafting with 29% more saying sometimes, and 18% always or often participate in substantive drafting with 29% more saying sometimes.[179] As indicated above, many agency general counsel offices have separate regulation and legislative affairs staffs, so the rule drafters surveyed here may not work often, if ever, on the legislative affairs side. One comment is illustrative: "This survey seems to assume that I have a role in both legislative and regulatory work—I do not. I only work on the agency's regulatory actions and have no role in legislative work."[180]

The rule drafters were also asked if they personally or their agencies generally participate "in drafting legislative history (e.g., floor statements, committee reports, conference reports, hearing testimony and questions, etc.)" of statutes

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178. Q29(a), (c) (n=98).
179. Q29(b), (d) (n=98).
180. *Id*. cmt. 5.

the agency administers.[181] These questions were similarly added based on feedback from agency officials during the survey design phase. One in four (24%) indicated their agency always or often participates in legislative history drafting with another 20% saying sometimes.[182] Personal participation was lower: only three rule drafters (3%) indicated they often participate, and none always participate; one in five (21%), however, indicated they sometimes participate.[183] Again, this disparity may be due in part to the separation of rule-making and legislative functions within some agencies.

The rule drafters who commented on legislative history drafting provided additional insights. One indicated that she "wouldn't think agencies would have much of a public hand in this."[184] Another thought it would be "strange" and had "never known my agency to do this, but I'm not very involved in the legislative work we do."[185] A third similarly doubted whether the agency drafted legislative history generally but noted some possibilities: "The agency would never draft legislative history documents other than testimony and responses to inquiries. However, it is possible that congressional staff could use Agency produced documents in drafting documents on behalf of the committee."[186]

In sum, these findings, based on answers to just six questions, provide an interesting yet limited window into the role of federal agencies in the legislative process. According to the rule drafters surveyed, agencies play a significant role in the technical and substantive drafting of statutes and even some role in the creation of legislative history—though in many agencies different staffs may do the legislative and regulatory work. As discussed further at the end of Part III, this structural legislative-regulatory separation in many agency general counsel offices merits deeper empirical inquiry.

B. *Purposes of Legislative History*

Regardless of the extent to which the structuring of an agency may separate the legislative history experts from the rule drafters interpreting the statute, the rule drafters surveyed still emphasized the importance of legislative history in their statutory interpretation efforts. In particular, three in four (76%) agreed that, in general, legislative history is a useful tool for interpreting statutes; another 13% chose "other" (as opposed to the binary yes/no) to qualify their answer as "sometimes" or "it depends."[187]

To put that number in perspective, of the twenty-two interpretive principles included in the survey, legislative history (at 76%) had the sixth-highest re-

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181. Q29(e)-(f) (n=98).
182. Q29(e).
183. Q29(f).
184. *Id.* cmt. 2.
185. *Id.* cmt. 4.
186. *Id.* cmt. 3.
187. Q31 (n=98).

sponse for use in interpretation. The only tools above it were *Chevron* defer-ence (at 90%), the whole act rule (at 89%), the ordinary meaning canon (at 87%), the *Mead* doctrine (at 80%), and *noscitur a sociis* (at 79%).[188] Contrast that finding with the use of dictionaries as an interpretive tool, which came in at 39%.[189] By comparison, Bressman and Gluck found for their congressional re-spondents that "legislative history scored above both the textual and substantive canons, with roughly 70% of respondents stating that courts should use those canons when determining congressional intent, compared to 92% favoring leg-islative history."[190]

This question on legislative history also attracted the most comments—from one in five respondents (21%).[191] Many commenters attempted to qualify the usefulness of legislative history. For instance, one remarked, "In general, the legislative history can be a helpful tool to obtain insight into the purpose and motivation for certain provisions when the legislative history is robust. But, when the history is not as robust, it is not as useful a tool."[192] Another echoed this sentiment by explaining that "[i]t can be [useful] to the extent that Con-gress actually explains what it is trying to achieve."[193]

Another rule drafter, by contrast, seemed to channel Justice Scalia but with a pragmatic qualification: "It needs to be considered, because of the signifi-cance it may have with courts. However, the only thing all the members of Congress agreed upon was the words that actually made it into the statute."[194] In response to a different question about the reliability of legislative history, however, another rule drafter expressly harkened to Justice Scalia but asserted

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188. *See supra* Figure 2. Moreover, if the "other" answers (which appear to have meant either "sometimes" or "it depends") are included, the reported use of legislative history would rise to 89%, putting its use on par with *Chevron*, the whole act rule, and the ordinary meaning canon. *See* Q31. In hindsight, this question would have been more effective if there were not an option to select "other" instead of yes/no; or better yet, perhaps it should have been styled like the by-concept questions in the semantic canons section, *see* Q13(a)-(d) (n=117); Q14(a)-(f) (n=114), which provided the concept as a statement and then asked how often (never, rarely, sometimes, often, or always) it was true. Note that for these canons re-ported by concept, use is calculated by including those who responded that those concepts were always or often true, excluding those who responded that they are sometimes true. For this reason, the 76% number for legislative history use is used for comparison purposes.

189. Q14(f).

190. Gluck & Bressman, *Part I*, *supra* note 19, at 975.

191. Q31. Question 33, which asked about the reliability of various characteristics of legislative history, also garnered twenty-one comments, constituting 21% of respondents. Q33 (n=98). Although Question 8 received a greater number of comments at twenty-five, *see* Q8 (n=126), it had a lower comments-to-respondents percentage (20%).

192. Q31, cmt. 21.

193. *Id*. cmt. 19.

194. *Id*. cmt. 9; *cf*. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy. We are gov-erned by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spo-ken is in the act itself* . . . .'" (alteration in original) (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1844))).

that legislative history may well be more helpful to an agency interpreter than a judicial interpreter:

> Although Justice Scalia would not be persuaded by any of these categories of legislative history, they are sometimes the only source an agency has to discern legislative intent and apply its discretion in a way that is consistent with legislative intent. In that regard, these types of legislative history can be more valuable to an agency than they would be to a court.[195]

A number of rule drafters also commented on the decreasing usefulness of legislative history. One explained that its usefulness "seems less so today, since so much legislative history is in electronic e-mail format that is unpublished and committee reports are less useful."[196] Another bemoaned the lack of "real legislative history": "In many cases, the so-called legislative history just restates the statutory language in slightly different terms. That's not helpful. I don't know why staffers bother with such non-substantive 'explanations.'"[197] And yet another suggested the rise of the modern administrative state may have caused the fall of legislative history:

> Legislative history is sometimes useful, but it is becoming less so. Congress puts less time into drafting legislative history that is useful to interpretation of the statute and leaving more of that work to the agencies. The administrative rulemaking process is taking on a larger role in shaping the rules that actually apply to the country.[198]

The agency rule drafters also addressed the purpose of legislative history—being provided with the list used in the Bressman and Gluck study, which includes "the conventional judicial and scholarly assumptions" about purposes of legislative history.[199] Figure 7 presents these findings, descriptively comparing them to those from the Bressman and Gluck congressional respondents.[200]

As in the Bressman and Gluck study, the conventional understanding—that legislative history helps explain the purpose of the statute—was the purpose most identified by the agency rule drafters (at 93%), with four in five (80%) also seeing legislative history as important in explaining the meaning of particular statutory terms.[201] In contrast to the congressional respondents, however, the agency rule drafters did not seem to embrace as fully a number of other main purposes. For instance, only 39% of agency rule drafters indicated that legislative history is used to facilitate political "deals" that resulted in enacting the statute, whereas 92% of congressional respondents so indicated.[202] Similar-

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195. Q32, cmt. 1.

196. Q31, cmt. 20.

197. *Id.* cmt. 15; *accord* Q30, cmt. 8 ("The value of legislative history has diminished as the committee reports have tended to merely parrot the statutory text.").

198. Q31, cmt. 13.

199. Gluck & Bressman, *Part I*, *supra* note 19, at 970.

200. Q30(a)-(i) (n=98); Gluck & Bressman, *Part I*, *supra* note 19, at 971 fig.7.
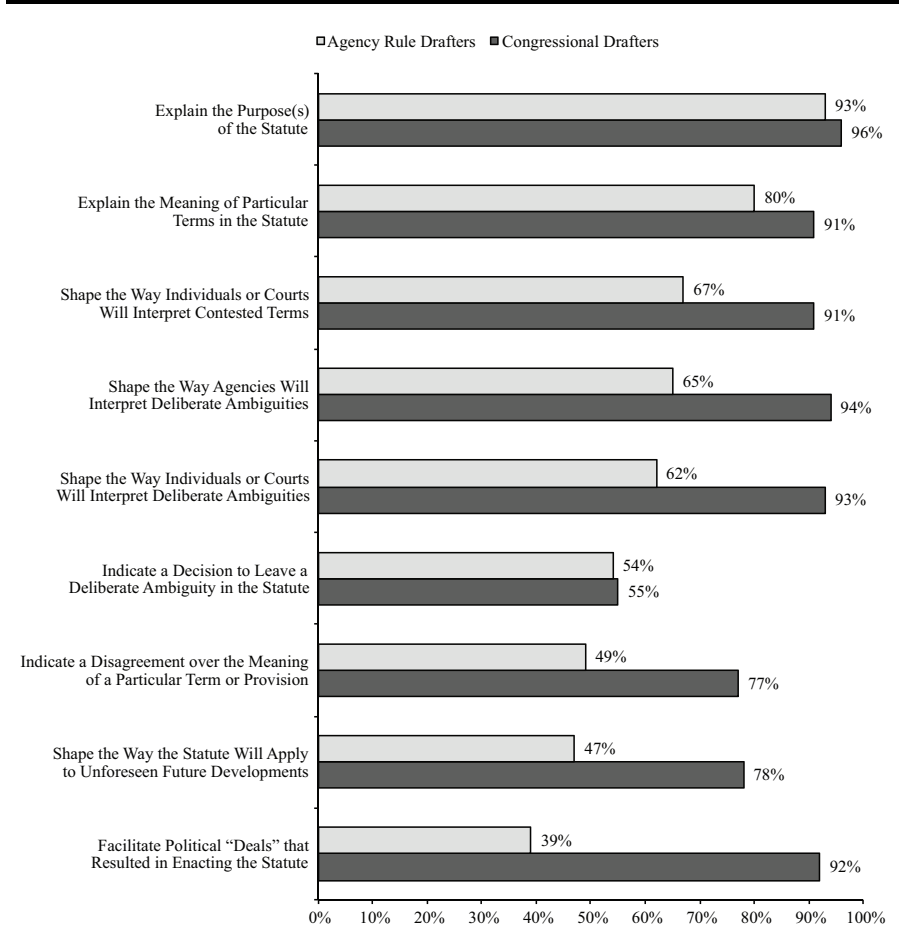
201. Q30(a)-(b) (n=98); Gluck & Bressman, *Part I*, *supra* note 19, at 971 fig.7.

202. Q30(e) (n=98); Gluck & Bressman, *Part I*, *supra* note 19, at 972. This difference in views on the importance of the "political deal" appears again when both groups were asked about whether the reliability of a type of legislative history is affected by whether that

ly, only 47% of rule drafters agreed that legislative history is intended to shape the way the statute will apply to unforeseen future developments (compared to 78% of congressional respondents), and only 49% of rule drafters agreed that it is intended to indicate a disagreement over the meaning of a particular term or provision (compared to 77% of congressional respondents).[203]

FIGURE 7
Perceived Purposes of Legislative History

□ Agency Rule Drafters ■ Congressional Drafters

Category	Agency Rule Drafters	Congressional Drafters
Explain the Purpose(s) of the Statute	93%	96%
Explain the Meaning of Particular Terms in the Statute	80%	91%
Shape the Way Individuals or Courts Will Interpret Contested Terms	67%	91%
Shape the Way Agencies Will Interpret Deliberate Ambiguities	65%	94%
Shape the Way Individuals or Courts Will Interpret Deliberate Ambiguities	62%	93%
Indicate a Decision to Leave a Deliberate Ambiguity in the Statute	54%	55%
Indicate a Disagreement over the Meaning of a Particular Term or Provision	49%	77%
Shape the Way the Statute Will Apply to Unforeseen Future Developments	47%	78%
Facilitate Political "Deals" that Resulted in Enacting the Statute	39%	92%

With respect to its use as a guide for agency statutory interpretation, 65% of rule drafters indicated that legislative history is intended to shape the way

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statement/report was essential to the political deal that resulted in enacting the statute. Six in ten congressional respondents (61%) reported that it did affect reliability, whereas only three in ten agency rule drafters (32%) agreed. Gluck & Bressman, *Part I*, *supra* note 19, at 983 fig.9; Q33(f) (n=98).

203. Q30(c), (h) (n=98); Gluck & Bressman, *Part I*, *supra* note 19, at 971 fig.7.

agencies will interpret deliberate ambiguities.[204] This is lower than the 94% of congressional respondents who so indicated.[205] One explanation may be that the higher percentage comes from the principal who delivers the message, whereas the lower comes from the agent who is trying to make sense of that message. One rule drafter's comment reflects this potential explanation: "[I]n my experience, legislative history hasn't been particularly helpful in addressing ambiguities."[206]

Similar to the congressional respondents (at 55%), only 54% of rule drafters agreed that a purpose of legislative history was to indicate a decision to leave a deliberate ambiguity in a statute.[207] Resistance to the notion that legislative history is used to signal deliberate ambiguity may have more to do with a disagreement about (or at least distaste for) the idea that Congress deliberately creates ambiguities, much less confesses to them in legislative history. One rule drafter keyed in on this point in a comment to another question:

> The idea that congressional drafters intentionally create ambiguities that they expect agencies to interpret is often naive. In many cases there are ambiguities because legislators can not agree on issues but can compromise by accepting ambiguous language. Probably most often, ambiguities are the result of drafters not anticipating issues that the language presents. The latter observation is based on having drafted legislative as well as regulatory language.[208]

Although the rule drafters surveyed may have been less receptive to the agency-specific purposes for legislative history than their congressional counterparts, that should not distract from their overall embrace of legislative history as a useful tool when engaging in agency statutory interpretation. Indeed, 76% indicated that legislative history is a useful tool, and over 80% agreed that its objectives include explaining the purpose of the statute and the meaning of particular terms in the statute. For interpreters, those uses of legislative history are critical for resolving statutory ambiguities. One rule drafter nicely summed up this takeaway: "Legislative history can help to clarify Congress's purpose in enacting particular provisions, which in turn can help the Agency resolve ambiguities in a way that is consistent with legislative intent."[209]

C. *Reliability of Legislative History*

In proposing a rules-based approach to using legislative history in statutory interpretation that focuses on the time, place, and manner in which legislative

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204. Q30(f) (n=98).

205. Gluck & Bressman, *Part I*, *supra* note 19, at 972.

206. Q31, cmt. 17.

207. Gluck & Bressman, *Part I*, *supra* note 19, at 971 fig.7; Q30(d) (n=98).

208. Q15, cmt. 1; *accord id*. cmt. 6 ("I don't think Congress generally intends to create ambiguities or gaps . . . ."); *id*. cmt. 17 ("Maybe I'm cynical, but I don't always think congressional drafters 'intend' these gaps. Often, they're just things they haven't thought about.").

209. Q31, cmt. 1.

history was created, Nourse has observed that some law professors have demonstrated "a stunning lack of knowledge about Congress's rules," resulting in both their own and the average lawyer's ignorance about how to read the congressional record and about how to use legislative history generally.[210] One would expect better from an agency rule drafter, who has extensive, daily experience in statutory interpretation and whose agency plays a substantial role in the legislative process. To gauge their understanding, the rule drafters were asked fifteen questions about the reliability of legislative history—almost all of which were also asked verbatim to the congressional respondents in the Bressman and Gluck study.[211]

1.   *Reliability of types of legislative history*

Figure 8 reports how the agency rule drafters ranked a variety of the most common types of legislative history in terms of reliability.[212] The order of the reliability rankings is virtually identical to that of the congressional respondents in the Bressman and Gluck study.[213] The agency rule drafters, however, generally indicated that each type of legislative history is less reliable than was indicated by their congressional counterparts. For instance, 71% of congressional drafters ranked conference reports as very reliable compared to 59% of agency rule drafters; 69% to 37% for committee reports in support; 29% to 22% for committee reports in opposition; 20% to 13% for hearing transcripts; and 12% to 1% for floor statements by party leadership.[214]

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210. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72-73 (2012).

211. *Compare* Q32(a) (n=92), Q32(b) (n=92), Q32(c) (n=87), Q32(d) (n=92), Q32(e) (n=95), Q32(f) (n=91), Q32(g) (n=92), Q32(h) (n=92), *and* Q33(a)-(f) (n=98), *with* Gluck & Bressman, *Part I*, *supra* note 19, at 977 fig.8, 983 fig.9. The rule drafters were asked to assess the reliability of two additional sources: presidential signing statements and floor statements made by the sponsor(s) of the statute. Q32(d); Q32(i) (n=86). Moreover, it should be noted that four of the ten comments made on Question 32 questioned the use of the term "reliable," suggesting "useful" or "helpful" would have been a better term to use. *See* Q32, cmts. 4, 7, 9-10.

212. Q32(a) (n=92); Q32(b) (n=92); Q32(c) (n=87); Q32(d) (n=92); Q32(e) (n=95); Q32(f) (n=91); Q32(g) (n=92); Q32(h) (n=92); Q32(i) (n=86). Because these questions are about the reliability of certain types of legislative history, the number of respondents considered for each of these questions and the percentage calculations for Figure 8 exclude those respondents who indicated that they did not know the level of reliability.

213. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 977 fig.8; *see also* MANNING & STEPHENSON, *supra* note 84, at 152 ("The conventional wisdom has been that the most reliable form of legislative history consists of the reports prepared by the House and Senate committees, which accompany bills favorably reported to the chamber, and the conference committee reports which accompany the reconciled version of the House and Senate bills.").

214. Gluck & Bressman, *Part I*, *supra* note 19, at 977 fig.8; Q32(c) (n=87); Q32(e) (n=95); Q32(f) (n=91); Q32(g) (n=92); Q32(h) (n=92).

FIGURE 8
Perceived Reliability of Legislative History
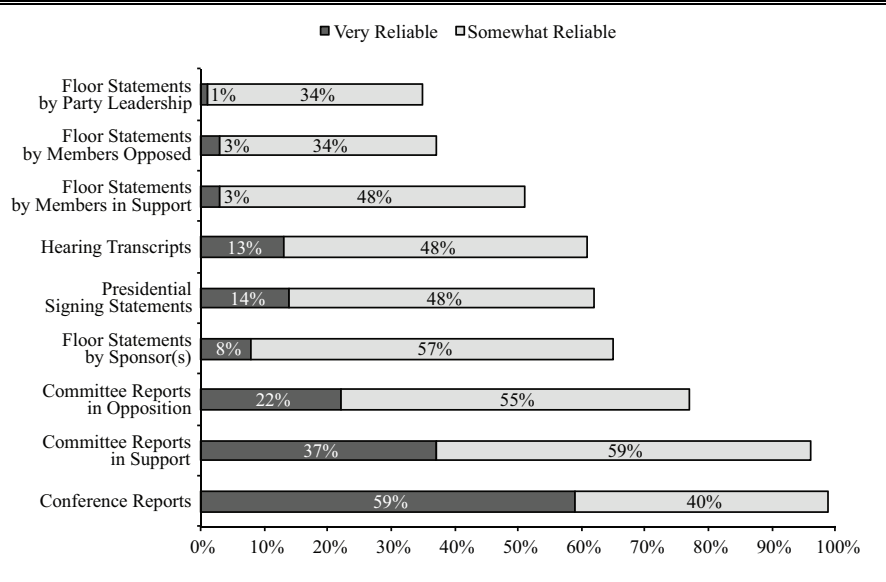
The main takeaway is similar to that of the congressional respondents in the Bressman and Gluck study: committee-produced legislative history is the most reliable, though not per se reliable.[215] This point was driven home by one of the rule drafters: "Assuming a bill is debveloped [sic] in committee, that committee's reports together with any conference committee report is the only legislative history that I would give real significant weight."[216] By ranking legislative history materials that support the legislation above those that oppose it, the agency rule drafters seem to have grasped (at least to some extent) Nourse's fourth principle for reading legislative history: "[N]ever cite legislative history without knowing who won and who lost the textual debate."[217] Similarly, by ranking statements by party leadership as the least reliable on the list, they seem to echo the Bressman and Gluck congressional respondents' feedback that such statements are "nonexpert remarks by those having little to do with how the legislation was put together."[218]

Finally, it is worth noting that presidential signing statements (14% very reliable, 48% somewhat reliable) were ranked below the committee and confer-

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215. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 976-78.

216. Q32, cmt. 8; *accord id.* cmt. 6 ("The most important documents are the bill and the report accompanying it because that is what Congress votes on. Floor statements should not be given as much weight. I review all of it, but place the greatest weight on the documents that are actually used for the vote."); Q33, cmt. 13 (stating that "unless it's a report, I wouldn't be likely to consider using it").

217. Nourse, *supra* note 210, at 118-27 (capitalization altered).

218. Gluck & Bressman, *Part I*, *supra* note 19, at 979.

ence reports but on par with floor statements by sponsors (8% very reliable, 57% somewhat reliable) and hearing transcripts (13% very reliable, 48% somewhat reliable).[219] The Bressman and Gluck study did not inquire into presidential signing statements, but they seem more relevant in the agency context. As noted in the Introduction, one complexity of principal-agent theory in the administrative state is that the agent serves at least two principals: Congress and the President.[220] One rule drafter noted this potential significance: "Pres[idential] signing statements may shape what agencies do, as reflective of the policy choice of the administration, but I don't view them as true leg[islative] history."[221] Asking one question on presidential signing statements does not even begin to help us understand the role of the President as another principal in agency statutory interpretation; much more work needs to be done.[222]

2.   *Factors that may affect reliability*

The second set of questions on the reliability of legislative history inquired into a half dozen of the factors judges and scholars have identified as important in assessing the reliability of legislative history—the same factors and questions included in the Bressman and Gluck study. Figure 9 presents the findings as to both drafter populations.[223]

As was true of their reliability rankings for the different types of legislative history, the rule drafters' responses here generally tracked the congressional respondents' responses in terms of the order of reliability or importance of the factors. But the rule drafters surveyed also found each factor less likely to affect reliability than their congressional counterparts. This disparity may be explained in part by the fact that one in four rule drafters (24%) indicated they did not know if *any* of these factors affected reliability.[224] By contrast, with respect to the reliability of the nine types of legislative history discussed above and de-

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219. Q32(d) (n=92); Q32(e) (n=95); Q32(f) (n=91); Q32(g) (n=92); Q32(h) (n=92); Q32(i) (n=86).

220. *See supra* note 9 and accompanying text.

221. Q32, cmt. 5; *see also id.* cmt. 4 (stating that these types of history "are not authoritative, in my opinion, other than the conference report & Pres[idential] signing statement").

222. *See, e.g.*, Peter M. Shane, Chevron *Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679 (2014) (exploring whether presidential involvement in agency statutory interpretation should affect the level of deference a reviewing court owes to that interpretation); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376 (2001) ("*Chevron*'s primary rationale suggests a[n] . . . approach [that] would link deference in some way to presidential involvement.").

223. Q33(a)-(f) (n=98); Gluck & Bressman, *Part I*, *supra* note 19, at 983 fig.9. Of the 98 rule drafters who responded to this question, 24 indicated they did not know. Q33(g) (n=98). Because the question asks whether any of these factors "matter to [the rule drafter's] assessment" of reliability of the legislative history, a response that the rule drafter does not know for all practical purposes means that those factors do not matter to the drafter's assessment. Those responses are thus included in the percentage calculations for Figure 9.

224. Q33(g) (n=98).

picted in Figure 8, only two types garnered "I don't know" responses above 5%: presidential signing statements at 11%, and floor statements by party leadership at 9%.[225]

FIGURE 9
Factors that Affect Reliability of Legislative History

□ Agency Rule Drafters ■ Congressional Drafters
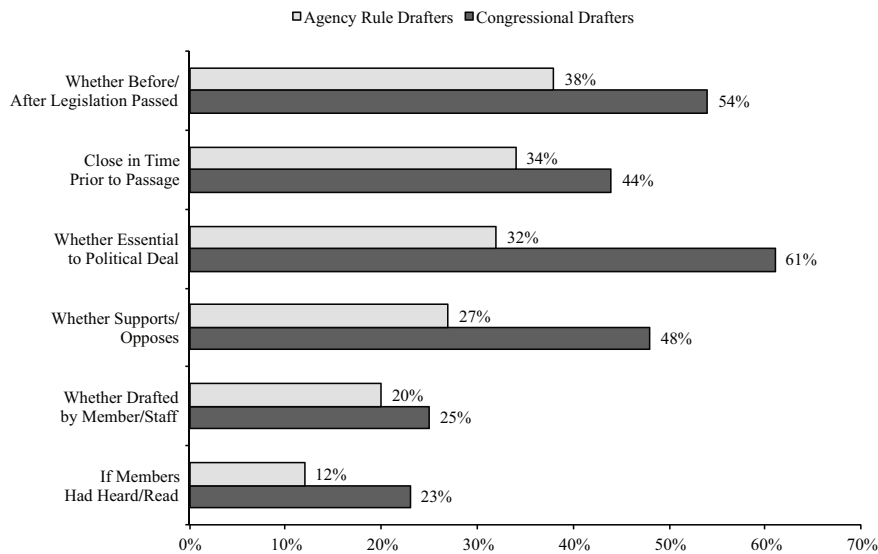
Many of the rule drafters surveyed appear to have understood (at least to some extent) Nourse's second and third principles (later textual decisions trump earlier ones, and the importance of proximity to the textual decision, respectively) for reading legislative history, both of which deal with the timing of the legislative history.[226] The agency rule drafters surveyed identified the timing concerns—"[h]ow close the statement/report was made prior to the day the legislation passed" and "[w]hether the statement was made after the legislation passed"—as the top two factors from this list of six that affect reliability.[227] Again, these findings are consistent with those of their congressional counterparts in the Bressman and Gluck study.[228] Also in line with the congressional

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225. Q32(c) (n=87); Q32(i) (n=86).

226. *See* Nourse, *supra* note 210, at 98-117; *see, e.g.*, Q33, cmt. 16 ("Statements after the legislation is passed should not be given any weight. That is just one member's view. Statements that are made significantly before legislation is passed should be given [little] weight because legislation and views may change quickly over time.").

227. Q33(c)-(d) (n=98).

228. Gluck & Bressman, *Part I*, *supra* note 19, at 984-85. The congressional drafters ranked timing—closeness in time (before or after passage), and whether the statement was

respondents, the agency rule drafters were least concerned from a reliability perspective with whether the actual members of Congress had drafted the legislative history or had even heard or read it.[229]

In sum, while the data here are limited and comparisons should be made cautiously, the agency rule drafters surveyed seemed to rank reliability of legislative history in roughly the same order as the Bressman and Gluck congressional respondents. The biggest difference is that the rule drafters, on balance, tended to consider legislative history less reliable than their congressional counterparts. And as to various factors that could affect reliability, one in four confessed to not knowing how to consider their effect.

*   *   *

The findings from these thirty-five questions on the use of legislative history in agency statutory interpretation and the role of federal agencies in the legislative process only scratch the surface of an area of administrative law that is ripe for empirical investigation. From an agency interpretation perspective, for example, the separation between legislative and regulatory functions within an agency raises a number of questions that this study cannot answer, including the following: Under an agency's typical structure, does the agency's legislative experience get incorporated into its rulemaking activities, such that the Congress-agency relationship Strauss detailed actually extends to agency statutory interpretation? Or do the legislative experts at the agency only get involved once there is a threat of judicial challenge? Are there better ways to structure an agency general counsel's office to make sure that interaction occurs?

One agency rule drafter volunteered an insightful observation in the somewhat analogous context of the interaction between an agency's rulemaking staff and the government's litigators:

> [M]ost rule drafters and attorneys that practice admin law in the government do not handle the litigation associated with rules. I think that is kicked to DOJ [the U.S. Department of Justice], so I defin[itely] think there is a big disconnect between drafters and litigators/those who are defending the rule in court. We often don't talk to each other until the rule is challenged. There is a lot we can learn from the litigators, ways we can be more proactive in the rulemaking rather than defensive after the fac[t].[230]

This comment also reflects this author's experience while working on the Justice Department's Civil Appellate Staff, which defends federal agencies and their statutory interpretations in a variety of contexts.[231] Once a regulation is

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made after the legislation passed—as the most important and third most important factors, respectively. *See id.* at 983 fig.9.

229. Q33(a)-(b) (n=98); Gluck & Bressman, *Part I*, *supra* note 19, at 983 fig.9.

230. Q20, cmt. 5.

231. *See* Al Daniel, *The Role of DOJ's Appellate Staffs in the Supreme Court and in the Courts of Appeals*, SCOTUSBLOG (Dec. 12, 2012, 11:03 AM), http://www.scotusblog.com /2012/12/the-role-of-dojs-appellate-staffs-in-the-supreme-court-and-in-the-courts-of-appeals.

challenged in court, the government litigators marshal all federal agency re-
sources—the relevant agency rule drafters, the policy and legislative affairs
teams, the scientists and economists where applicable, and so forth—to defend
the regulation and provide the court with an accurate and detailed background
on the regulatory and statutory scheme. How many agencies encourage such
interaction prior to litigation and instead during the rule-drafting process, how-
ever, is an important question that merits further inquiry.

In light of the theoretical arguments that have been advanced about the dis-
tinct role legislative history (and purposivism more generally) should play in
agency statutory interpretation, there is a critical need for further empirical
work into the relationship between Congress and federal agencies in the legisla-
tive process as well as into the agency's internal use of legislative history in the
rulemaking process. Unlike many of the questions asked in this survey that
more directly implicate confidentiality or deliberative process privilege con-
cerns, agency general counsels may be more willing to entertain agency-
specific case studies on their agency's role in the legislative process. This
seems like a perfect research project to be pursued through the Administrative
Conference of the United States (ACUS).[232]

IV. THE ADMINISTRATIVE LAW DOCTRINES

This fourth and final Part explores the rule drafters' familiarity with and
use of various administrative law doctrines in agency statutory interpretation. It
probably comes as no surprise that nearly half of the survey questions—97 of
195—dealt with administrative law.[233] This Article focuses on the findings
from these questions to explore various aspects of agency interpreter fidelity.[234]

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232. One note of caution: During the survey design phase, a predominant theme in in-
terviews with higher-level agency counsels was that agency general counsel offices vary
substantially in structure, practices, norms, and culture. Anyone who has worked at or stud-
ied federal agencies quickly realizes this. Yet little attention has been paid to these differ-
ences—an important exception being a terrific sourcebook published by the ACUS, which
explores the differences among federal agencies in general. *See* DAVID E. LEWIS & JENNIFER
L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (1st ed. 2012), *available at*
https://www.acus.gov/publication/sourcebook-united-states-executive-agencies. Indeed, an
empirical project focused just on mapping out those organizational and cultural differences
within agency general counsel's offices would be a meaningful contribution to the literature.
In all events, such diversity poses methodological challenges for generalizing findings across
the administrative state, but it also presents opportunities for drawing out best practices from
these various laboratories of bureaucracy.

233. *See* Q15-Q23, Q28. The Bressman and Gluck study, by contrast, included 45 ques-
tions on administrative law. Gluck & Bressman, *Part I*, *supra* note 19, at 992.

234. A number of the survey questions on administrative law explored the rule drafters'
views on how judicial behavior affects agency rule drafting as well as which interpretive
tools should apply at the various stages in the *Chevron* deference framework. Those findings
will not be presented in this Article. In total, the administrative law questions not discussed
(Q20-Q21; Q28) encompass 58 of the 97 questions on administrative law, though some of
the comments to those questions are incorporated. Seven of those questions (Q20(a)-(g)) are

Part IV.A presents the rule drafters' responses as to their perceived relationship to Congress. Part IV.B explores their views about what types of issues Congress intends to delegate by ambiguity to federal agencies. Part IV.C explores the agency rule drafters' knowledge and use of the key deference doctrines with respect to judicial review of agency statutory interpretations.

A. *Principal-Agent Interpretive Relationship*

As discussed in Part I.A, one of the most interesting findings from the Bressman and Gluck study is that the congressional drafters surveyed perceived Congress's primary interpretive relationship to be not with courts but with federal agencies.[235] Indeed, as Bressman and Gluck have noted, the congressional respondents "saw agencies as the everyday statutory interpreters, viewed interpretive rules as tools for agencies, too, and made no distinction, as some scholars have, between agency statutory 'implementation' and agency statutory 'interpretation.'"[236] Accordingly, they conclude that "current theory and doctrine are focusing on the wrong cues and the wrong relationships"—the wrong relationship being that between Congress and courts.[237]

Putting to one side the wrong cues, which Part IV.B addresses, it is not as clear that modern administrative law doctrine is necessarily focused on the wrong relationship. If anything, the Supreme Court's post-*Chevron* precedent seems to expressly embrace the agency as the primary interpreter. And this doctrine has developed in large part because of the separation of powers values that undergird congressional delegation of interpretive authority to federal agencies.[238] Even the Court's framing of the *Chevron* rule defines the primacy of the Congress-agency relationship in these terms: "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[239] So does *Chevron* itself when holding that an agency's reasonable interpretation of an ambiguous statute controls even if it is not "the

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the central focus of Walker, *supra* note 23, while the findings from the others (Q21; Q28) will be explored in subsequent work.

235. Bressman & Gluck, *Part II*, *supra* note 19, at 767.

236. *Id.* at 765.

237. *Id.*

238. The author has explored elsewhere these separation of powers values with respect to the role of federal agencies as primary interpreters and implementers, and those points will only briefly be discussed here. *See* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV 221, 271-73 (2014); Walker, *supra* note 21, at 173-82; Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1561-78 (2014); Walker, *supra* note 50, at 78.

239. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996).

reading the court would have reached if the question initially had arisen in a judicial proceeding."[240]

Over the last decade the Court has deepened its commitment to this concept that federal agencies—not courts—are the primary and authoritative interpreters of statutes Congress has entrusted them to administer. Three cases are illustrative.

First, in 2005, the Court held that an agency's interpretation of an ambiguous statute it administers trumps a court's prior interpretation of the statute.[241] The *Brand X* Court explained that this conclusion necessarily follows from the fact that the primary relationship in agency statutory interpretation is between Congress and federal agencies, not between Congress and courts:

> Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.[242]

Second, the Court clarified in 2009 that the ordinary remand rule—that is, if an error is found, a court generally should remand to the agency for additional investigation or explanation as opposed to the court deciding the issue itself—applies even to questions of agency statutory interpretation.[243] There, the *Negusie* Court held that *Chevron* deference to an agency's interpretation was inappropriate when the agency misread prior judicial precedent and erroneously concluded that such precedent bound it. Instead of providing its own interpretation of the statute, however, the Court remanded to the agency to interpret the statute in the first instance. In reaching this conclusion, the Court relied on *Brand X* and its understanding that agencies are the primary interpreters: "This remand rule exists, in part, because 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.'"[244]

Finally, in 2013, the Court held in *City of Arlington v. FCC* that *Chevron* deference applies even to an agency's interpretation that defines "the scope of its regulatory authority (that is, its jurisdiction)."[245] In reaching this conclusion the Court reiterated its understanding of the primary principal-agent interpre-

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240. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984).

241. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."); *see also* Walker, *supra* note 21, at 170-71.

242. *Brand X*, 545 U.S. at 983.

243. Negusie v. Holder, 555 U.S. 511, 523 (2009). *See generally* Walker, *supra* note 238, at 1561-78 (tracing the evolution of the ordinary remand rule).

244. *Negusie*, 555 U.S. at 523 (quoting *Brand X*, 545 U.S. at 980).

245. 133 S. Ct. 1863, 1866, 1874-75 (2013).

tive relationship: "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[246] In sum, while there are dissents from and disagreements about the holdings in these cases, it seems fair to conclude that the Court's post-*Chevron* doctrine has focused on the right relationship—that between Congress and federal agencies.

Whereas the Court and the congressional drafters surveyed have prioritized the court-agency relationship as primary in agency statutory interpretation, until now we had little insight into whether federal agency rule drafters perceive their role—and their organization's relationship with Congress—in a similar light. To attempt to understand the rule drafters' perspectives on these issues, the survey asked them about these cases by name and concept. This Part focuses on the concepts, whereas Part IV.C focuses on the cases by name.

First and foremost, the rule drafters surveyed generally agreed with the bedrock *Chevron* principle that federal agencies, not courts, are the primary interpreters of statutes Congress has charged them to administer. Without referring to *Chevron* by name, the rule drafters were asked whether they agreed with the following statement: "If a statute is ambiguous and the agency's construction is reasonable, a court must accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."[247] Eight in ten rule drafters (85%) indicated that they either strongly agreed (45%) or agreed (40%), and another one in ten (10%) agreed somewhat. Only 5% disagreed, with one rule drafter indicating strong disagreement.[248] No doubt the following comment reflected the latter's perspective: "'[A] court MUST ACCEPT the agency's interpretation'? Uh, no. Maybe they should, but after all, it is courts that review agency interpretations and not the other way around."[249] But in general, the rule drafters surveyed

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246. *Id.* at 1868 (citation omitted).

247. Q16(b) (n=107).

248. *Id.* Because Question 16 asks about the rule drafters' agreement with particular statements, those who indicated they did not know, as well as those who marked "other," are not included in the number of respondents or the percentage calculations. Moreover, this question was not included in the Bressman and Gluck study. Instead, they used the following deference-related statement: "The principles related to how much deference courts will accord federal agency decisions allow congressional drafters to leave statutory terms ambiguous because the agency can later specify those terms." *Methods Appendix*, *supra* note 62, at 27. This survey similarly asked that question, but the rule drafters did not agree as strongly with this statement as with Question 16(b): 17% strongly agreed, 42% agreed, 29% somewhat agreed, 10% disagreed, and 2% strongly disagreed. Q16(a) (n=103). This study focuses on Question 16(b) instead of Question 16(a) because the statement presented in Question 16(b) better reflects the *Chevron* doctrine.

249. Q16, cmt. 3. Moreover, one respondent remarked that "[t]he answers to these questions vary circuit by circuit." *Id.* cmt. 9. And another noted, "It depends on how reasonable the agency's interpretation was. Just because a statute is ambiguous doesn't mean an agency can pick the nuttiest interpretation out there." *Id.* cmt. 10.

seemed to embrace the idea that federal agencies are the primary partners of Congress in agency statutory interpretation.

When asked about the *Brand X* principle, the agency rule drafters surveyed were not quite as bullish. Without referring to *Brand X* by name, the rule drafters were asked whether they agreed with the following statement: "A court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative; instead, the agency may choose a different construction so long as it is reasonable."[250] Again, a strong majority (65%) either agreed (39%) or strongly agreed (25%), and another 10% agreed somewhat. But one in four (26%) disagreed (21%) or strongly disagreed (5%).[251] In other words, not only were there fewer who agreed strongly (25% to 45%), but five times as many who disagreed (26% to 5%).

Accordingly, it seems that, while the rule drafters viewed federal agencies as the primary interpreters of statutes they administer, they were also more sensitive to the importance of courts than were the Bressman and Gluck congressional respondents. The overwhelming majority of rule drafters surveyed recognized that judicial review plays a role in their interpretive efforts and that judicial views on the various interpretive tools influence their rule-drafting process. For instance, nearly four in five rule drafters indicated that it matters to their rule-drafting practices whether courts routinely rely on the canons.[252] Perhaps there are more rule drafters who would agree with Justice Scalia's dissent in *Brand X*—in particular, that it is "not only bizarre" but "probably unconstitutional" to make "judicial decisions subject to reversal by executive officers."[253] In all events, the findings uncovered here only start the conversation on how federal agencies view their role in the modern administrative state in relation to Congress and the courts. Much more work needs to be done.[254]

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250. Q16(c) (n=102).

251. *Id*. One rule drafter commented that whether an agency may choose a different construction "depends on the circumstances. A court's interpretation could make it difficult to have a different interpretation." *Id*. cmt. 2.

252. Q12 (n=119).

253. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1016-17 (2005) (Scalia, J., dissenting).

254. The rule drafters were also asked about whether they were familiar by name with *Brand X*, the ordinary remand rule, and a third government litigation concept (governmental intercircuit nonacquiescence) and whether those principles played a role in their rule drafting. A short description was included along with the name of the case/principle. *See* Q22-Q23. With respect to *Brand X*, 43% of rule drafters indicated that they were familiar with the principle and 29% indicated that it played a role in drafting. Q22(a) (n=99); Q23(a) (n=99). The findings were similar for the ordinary remand rule—45% familiar, 21% used in drafting—and for governmental intercircuit nonacquiescence—57% familiar, 25% used. Q22(b)-(c); Q23(b)-(c). The findings with respect to these questions are explored more fully in Walker, *supra* note 19, at 726, 727 & fig.4, 728.

B. *Scope of Lawmaking Delegation*

Although there seems to be an understanding among the Supreme Court, Congress, and the rule drafters surveyed that federal agencies are the primary interpreters of ambiguous statutes Congress has charged them to administer, not everyone agrees about the scope of that interpretive authority. As the congressional respondents in the Bressman and Gluck study made clear, not every type of ambiguity left in a statute is intended to delegate lawmaking authority to federal agencies.[255] This finding no doubt is at least part of the conclusion Bressman and Gluck reach that "current theory and doctrine are focusing on the wrong cues."[256]

FIGURE 10
Types of Statutory Gaps or Ambiguities
Congress Intends for Federal Agencies to Fill

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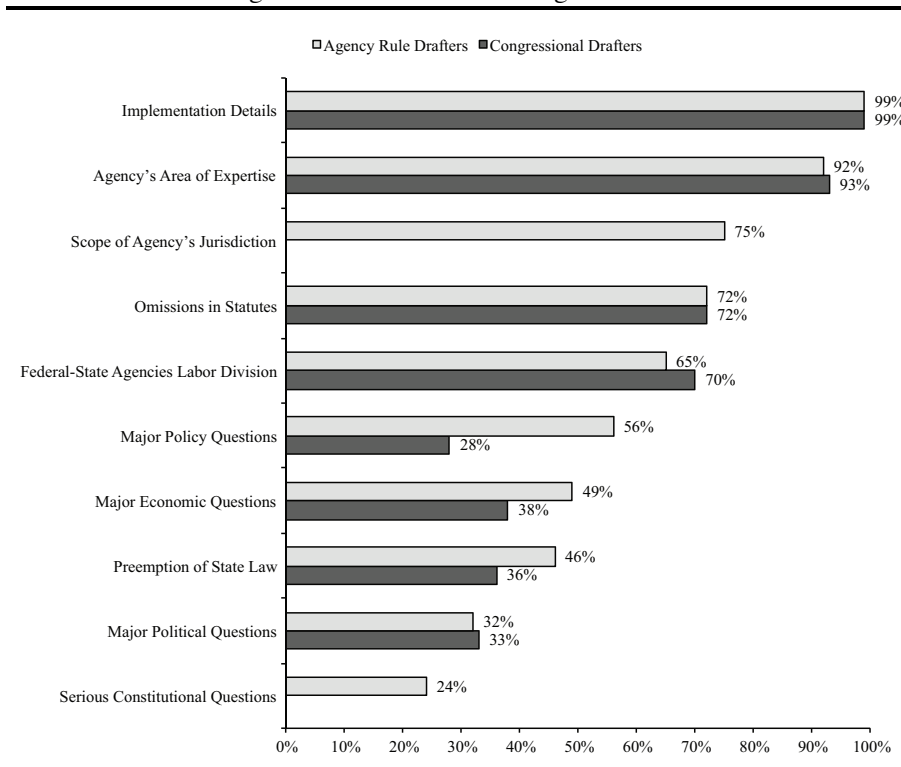
255. *See* Gluck & Bressman, *Part I*, *supra* note 19, at 1003-04, 1005 & fig.11, 1006.

256. Bressman & Gluck, *Part II*, *supra* note 19, at 765. *See generally* Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2025-34 (2011) (reviewing literature and showing consensus that the primary justification for *Chevron* is a legal fiction and not that Congress intends to delegate lawmaking authority each and every time there is an ambiguity in a statute an agency administers).

To assess the rule drafters' understanding about which ambiguities signal delegation, the survey asked about the same eight types of ambiguities covered in the Bressman and Gluck study and added two more: ambiguities relating to the agency's own jurisdiction or regulatory authority and those implicating serious constitutional questions. Figure 10 presents the findings as to both the agency rule drafter and congressional drafter populations.[257]

All ten of these types of ambiguity relate to the ongoing judicial and scholarly debate about the scope of lawmaking delegation that is often termed the *Chevron* "Step Zero" inquiry.[258] The survey findings on these ten questions can be grouped into three main observations.

1. *Consensus delegation: implementation details, agency expertise, omissions in statutes, and federal-state agencies' labor division*

With respect to the gaps or ambiguities that most congressional respondents indicated federal agencies should fill, there was remarkable agreement among the rule drafters surveyed here. Perhaps unsurprisingly, the top vote-getter in both populations was ambiguities relating to the details of implementation, with 99% of both populations agreeing that Congress intends for agencies to fill such gaps.[259] The one rule drafter to dissent chose "[n]one of the above," indicating that Congress does not intend for agencies to fill any of the types of ambiguities listed.[260] Most agency rule drafters and congressional drafters also agreed that Congress intends to delegate ambiguities relating to the agency's area of expertise (92% and 93%, respectively); relating to omissions in the statute (72% for both); and relating to the division between state and federal agencies when both are given implementation roles (65% and 70%, respectively).[261]

From a faithful-agency perspective, it seems the agency rule drafters surveyed understood that their main lawmaking role involved filling in the implementation details in statutes, resolving ambiguities where the federal agency

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257. Q15(a)-(j) (n=111); Gluck & Bressman, *Part I*, *supra* note 19, at 1005 fig.11. Two respondents indicated that they did not know, so the number of respondents considered and the percentage calculations in Figure 10 do not include those responses. Another rule drafter indicated none of the above, so that response is included.

258. Tom Merrill and Kristin Hickman coined this term shortly after the Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001). Merrill & Hickman, *supra* note 21, at 836-37; *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 207-11 (2006). *See generally* Shane & Walker, *supra* note 24, at 477-84 (reviewing literature on the *Chevron* Step Zero debate).

259. Q15(a) (n=111); Gluck & Bressman, *Part I*, *supra* note 19, at 1004, 1005 fig.11.

260. Q15(k). Of the eighteen comments, five expressed concern that the question could not be answered in a general matter but rather depended on the particular statute. *See* Q15, cmts. 3-4, 6, 11, 13. Another criticized the question because it "indulges the unsupportable fiction that congressional drafters have a unified approach on these things. They don't." *Id*. cmt. 5.

261. Q15(h)-(j); Gluck & Bressman, *Part I*, *supra* note 19, at 1004, 1005 fig.11.

actually has expertise, and filling in the statutory holes or omissions. Those delegated roles seem like the predominant ones even if the congressional drafters surveyed in the Bressman and Gluck study (who wholeheartedly agreed) were not representative of Congress as a whole.[262] Similarly, it seems reasonable to conclude, as the majority of both the agency rule drafters and congressional drafters surveyed did, that when Congress does not specify that a state agency should take the lead, Congress intends for the federal agency to make that determination (as opposed to, for instance, a court or state agency).

2. *Both less sure: major questions and preemption*

Like the Bressman and Gluck congressional respondents, the agency rule drafters here were less confident and more conflicted about whether Congress intends to delegate major policy questions by ambiguity. This is an important issue in administrative law, as the Supreme Court has carved out an exception to the *Chevron* presumption of delegation. Bressman and Gluck nicely frame this major questions doctrine as "a presumption of *non*delegation in the face of statutory ambiguity over major policy questions or questions of major political or economic significance."[263] This doctrine exists, as Justice Scalia has famously observed, because it is presumed that Congress "does not . . . hide elephants in mouseholes."[264]

Both studies approached this question about the major questions doctrine by asking it in three different ways, with the results as follows:

- Ambiguities/gaps relating to major policy questions: 56% agency rule drafters, 28% congressional drafters;
- Ambiguities/gaps implicating questions of major economic significance: 49% agency rule drafters, 38% congressional drafters; and
- Ambiguities/gaps implicating questions of major political significance: 32% agency rule drafters, 33% congressional drafters.[265]

In other words, like the congressional respondents, far fewer agency rule drafters believed that Congress intends to delegate ambiguities implicating major questions than the ambiguities discussed in Part IV.B.1 about implementation details and agency expertise. But twice as many agency than congressional respondents (56% to 28%) believed that Congress intends to delegate ambiguities relating to major policy questions.

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262. *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. Rᴇᴠ. 1271, 1275 (2008) (noting that core justifications for *Chevron* deference include "(1) congressionally delegated authority, (2) agency expertise, (3) political responsiveness and accountability, (4) deliberative rationality, and (5) national uniformity").

263. Gluck & Bressman, *Part I*, *supra* note 19, at 1003.

264. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001). There is a robust scholarly discussion on this doctrine that need not be repeated here. *See, e.g.*, Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 Aᴅᴍɪɴ. L. Rᴇᴠ. 19 (2010) (reviewing literature and providing a summary of doctrinal development).

265. Q15(b)-(d) (n=111); Gluck & Bressman, *Part I*, *supra* note 19, at 1003.

Based on the comments made by various drafters surveyed in Congress and the federal agencies, one can construct an informative exchange between Congress and a federal agency regarding whether Congress intends to delegate by ambiguity—or actually does delegate—major questions to federal agencies. Consider the following dialogue, pieced together with some artistic license but with the actual comments in quotation marks:

Agency:	"Generally major policy, economic, or political decisions should be made by congress unless congress has delegated to the agency on the basis of the agency's expertise."[266]
Congress:	Completely agree. "[Delegating major questions], never! [We] keep all those to [our]selves."[267]
Agency:	But "[s]ometimes issues of substantial political import are left to agencies . . . ."[268]
Congress:	Well, "[w]e *try* not to leave major policy questions to an agency . . . . [They] should be resolved here."[269]
Agency:	Trying is different than succeeding. "While members of Congress and their staff would likely answer these questions [about delegating major questions] very differently, the reality is that Congress *often* leaves unanswered decisions to the implementing agency, not because they trust the agency, but in order to achieve the necessary consensus to move a bill."[270]
Congress:	Fair enough. "*Sometimes* because of controversy, we can't say what to include—either complexity or controversy."[271]
Agency:	Agreed. In other words, "Congress should make the major policy decisions in a statute, but can leave details of precise implementation to agency regulations. However, Congress sometimes passes laws that leave broad areas to agency discretion in order to achieve a political compromise."[272]

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266. Q15, cmt. 7.

267. Gluck & Bressman, *Part I*, *supra* note 19, at 1004 (internal quotation marks omitted).

268. Q15, cmt. 2.

269. Gluck & Bressman, *Part I*, *supra* note 19, at 1004 (second and third alterations in original) (emphasis added) (internal quotation marks omitted).

270. Q15, cmt. 16 (emphasis added).

271. Gluck & Bressman, *Part I*, *supra* note 19, at 1004 n.395 (emphasis added) (internal quotation marks omitted).

272. Q15, cmt. 14.

Congress:	Yes, "*sometimes* [we] have to punt."[273]
Agency:	No, "Congress *often* punts on difficult political questions."[274]
Congress:	Okay, it happens "[w]hen we can't reach agreement."[275]
Agency:	"I think [not delegating major questions to agencies] is what Congress thinks it is doing, but in reality, I think agencies are often left to decide almost all of these—and I think Congress doesn't understand the types of ambiguities it leaves when it drafts legislation. Congress is producing some pretty terrible stuff to work with."[276]

Indeed, this dialogue may help explain why the agency rule drafters surveyed were more willing to accept that Congress intends to delegate major policy questions by ambiguity to federal agencies.

The results were similar with respect to ambiguities or gaps relating to the preemption of state law: 46% of agency rule drafters agreed that Congress intends to delegate by ambiguity on these questions, compared to 36% of the congressional respondents.[277] As Bressman and Gluck have noted, this substantial, but not overwhelming, response from both drafter populations is similar to the divide in the scholarly debate and may be due in part to the Supreme Court's failure to date to provide more clarity.[278]

3. *At least agencies think so: yes, for scope of agency's jurisdiction; no, for serious constitutional questions*

With respect to the two questions asked only of the agency rule drafters (and not of the congressional drafters), the rule drafters had very different reactions. Only one in four rule drafters (24%) believed that Congress intends for federal agencies to fill gaps or ambiguities implicating serious constitutional questions.[279] That was the clear loser for this question. The three next lowest responses concern the major questions doctrine discussed in Part IV.B: major political questions (at 32%), preemption of state law (at 46%), major economic questions (at 49%), and major policy questions (at 56%).[280] These findings

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273. Gluck & Bressman, *Part I*, *supra* note 19, at 1004 n.395 (emphasis added) (internal quotation mark omitted).

274. Q15, cmt. 18 (emphasis added).

275. Gluck & Bressman, *Part I*, *supra* note 19, at 1004 n.395 (alteration in original) (internal quotation marks omitted).

276. Q15, cmt. 9.

277. Q15(g) (n=111); Gluck & Bressman, *Part I*, *supra* note 19, at 1005 fig.11.

278. Gluck & Bressman, *Part I*, *supra* note 19, at 1004 & nn.396-97.

279. Q15(e) (n=111).

280. Q15(b)-(d), (g) (n=111).

about whether agencies are delegated authority to resolve major questions, constitutional questions, or preemption issues may shed light on the current debates among scholars, judges, and policymakers about whether such substantive canons should trump *Chevron* deference.[281]

By contrast, three in four rule drafters (75%) indicated that Congress intends for federal agencies to fill gaps or ambiguities relating to the agency's own jurisdiction or regulatory authority.[282] Only ambiguities about implementation details (at 99%) and those relating to the agency's area of expertise (at 92%) received more responses from the rule drafters.[283] And in another question asking about which factors affect whether *Chevron* deference applies, nearly half (46%) indicated that it matters "[w]hether the agency's statutory interpretation sets forth the bounds of the agency's jurisdiction or regulatory authority."[284] That question, however, did not ask in what way such a factor would matter.

At first blush, it may be puzzling that 75% of rule drafters believed that Congress intends to delegate such questions by ambiguity. After all, "[j]urisdictional questions often overlap with or are indistinguishable from 'major questions,'" such that Bressman and Gluck "suspect[ed] that [their congressional drafter] respondents would emphasize the obligation of Congress, not agencies, to resolve such questions."[285] There are at least two probable explanations for this apparent inconsistency. First, this survey went live after the Court decided *City of Arlington v. FCC*, discussed in Part IV.A, which held that "an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to [*Chevron*] deference."[286] Many rule drafters surveyed probably knew of that definitive precedent. Second, and more fundamentally, this question about the scope of an agency's authority to decide its own authority was asked not of congressional drafters but of agency rule drafters. After all, an agent may be naturally inclined to view her role in defining her authority more broadly than would the principal.

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281. *Compare* Sunstein, *supra* note 21, at 330-35 (arguing that certain nondelegation canons—including constitutional avoidance, the presumption against preemption, and the major questions doctrine—should trump *Chevron* deference), *with* Walker, *supra* note 21, at 140 (arguing against the conventional view that the modern constitutional avoidance doctrine trumps *Chevron* deference), *and* Bamberger, *supra* note 21, at 111, 114 (arguing that substantive canons should apply at *Chevron* Step Two).

282. Q15(f) (n=111).

283. Q15(a), (j) (n=111).

284. Q19(c) (n=109). Part IV.C.3 below further addresses these findings.

285. Gluck & Bressman, *Part I*, *supra* note 19, at 1005-06; *accord* Walker, *supra* note 151 ("The survey did not ask whether [congressional] drafters intend to delegate by ambiguity authority for agencies to determine the scope of their own statutory jurisdiction—the question *City of Arlington* answered in the affirmative.").

286. 133 S. Ct. 1863, 1866, 1868-69 (2013).

C. *The Judicial Deference Doctrines*

This final Part turns to the rule drafters' awareness of the foundational deference doctrines for judicial review of administrative interpretations of law—*Chevron*, *Mead*, *Skidmore*, and *Auer*/*Seminole Rock*—as well as whether the doctrines play a role in their drafting decisions.

Administrative law recognizes two main deference doctrines relating to agency statutory interpretation: *Chevron* and *Skidmore*. The first is the familiar *Chevron* two-step approach, under which a reviewing court defers to an agency's interpretation of a statute it administers if, at step one, the court finds "the statute is silent or ambiguous" and then, at step two, determines that the agency's reading is a "permissible construction of the statute."[287] "The court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[288] The second is *Skidmore*, under which an agency's interpretation does not control so long as it is reasonable but, instead, is given "weight" based on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[289]

Strauss has helpfully reframed these doctrines as "*Chevron* space" and "*Skidmore* weight."[290] An agency receives *Chevron* space to fill in holes in statutes it administers because Congress empowered the agency to be "the authoritative interpreter (within the limits of reason) of such statutes."[291] Or, as Strauss puts it, "the natural role of courts, like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field and that the game is played according to its rules. It is not for courts themselves to play the game."[292] *Skidmore* weight, by contrast, "addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority" even when *Chevron* space does not apply.[293] Under *Skidmore*, the agency retains the power to persuade based on its special knowledge and experience that may qualify it as an expert on statutory meaning and purpose. Among other sources of agency

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287. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

288. *Id.* at 843 n.11.

289. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

290. Strauss, *supra* note 50, at 1144-45; *see also* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (explaining that *Chevron* "create[s] a space, so to speak, for the exercise of continuing agency discretion"); *Skidmore*, 323 U.S. at 140 (describing the standard as "weight" based on "power to persuade").

291. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005).

292. Strauss, *supra* note 50, at 1145.

293. *Id.*

expertise, agencies often have nationwide experience in implementing the stat-ute and may well have assisted in the drafting of the statute.[294]

It is important to note that the lack of *Chevron* space may occur in one of two ways: Congress has not delegated interpretive authority to the agency; or Congress has delegated it, but the agency has "cho[sen] not to exercise that au-thority, but rather to guide—to indicate desired directions without undertaking (as [it] might) to compel them."[295] This was the basic takeaway from *Mead*: "[A] very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudi-cation that produces regulations or rulings for which deference is claimed."[296] The *Mead* Court also noted that it had "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[297] Finally, the *Mead* Court explained that *Skidmore* weight ap-plies when *Chevron* space does not.[298]

A final judicial review doctrine evaluated in the survey is *Auer* or *Seminole Rock* deference, which deals with reviewing an agency's interpretation of its own regulations.[299] This doctrine instructs courts that an agency's interpreta-tion of its own regulation is given "controlling weight unless it is plainly erro-neous or inconsistent with the regulation."[300] Scholars,[301] joined by Justice Scalia[302] and more recently this Term by Justices Thomas and Alito,[303] have called for the Court to revisit this doctrine.

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294. *See id.* at 1146 ("It is not only that agencies have the credibility of their circum-stances, but also that they can contribute to an efficient, predictable, and nationally uniform understanding of the law that would be disrupted by the variable results to be expected from a geographically and politically diverse judiciary encountering the hardest . . . issues with little experience with the overall scheme and its patterns."); *supra* Part III.A (presenting findings on the role of federal agencies in the legislative process).

295. Strauss, *supra* note 45, at 1146.

296. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

297. *Id.* at 231.

298. *Id.* at 234-38 (reviewing *Skidmore* factors). *See generally* Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1356-76 (2013) (elaborating on *Chevron*, *Skidmore*, and *Mead*, providing a literature review, and explaining that the vagueness of the *Mead* standard means that the application of either *Chevron* or *Skidmore* deference will ultimately depend on the random assignment of circuit judges); Walker, *supra* note 50 (responding to Mathews, *supra*).

299. Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

300. *Seminole Rock*, 325 U.S. at 414; *accord Auer*, 519 U.S. at 461.

301. *See, e.g.*, Manning, *supra* note 38, at 617 (arguing that "the Court should replace *Seminole Rock* with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning").

302. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concur-ring in part and dissenting in part) ("For decades, and for no good reason, we have been giv-ing agencies the authority to say what their rules mean . . . ."); *accord* Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265-66 (2011) (Scalia, J., concurring).

303. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concur-ring in the judgment) ("By my best lights, the entire line of precedent beginning with *Semi-*

The rule drafters' responses with respect to these administrative law doctrines can be grouped into three main findings.[304]

1. Chevron *most known and used by name, followed by* Skidmore *then* Mead

The agency rule drafters were asked whether they were familiar, by name, with these "interpretive doctrines related to how much deference courts will accord federal agency decisions" as well as whether "these doctrines play a role in [their] rule drafting decisions."[305] Figure 11 depicts the agency rule drafters' responses to these questions.[306]

FIGURE 11
Awareness and Use of Deference Doctrines
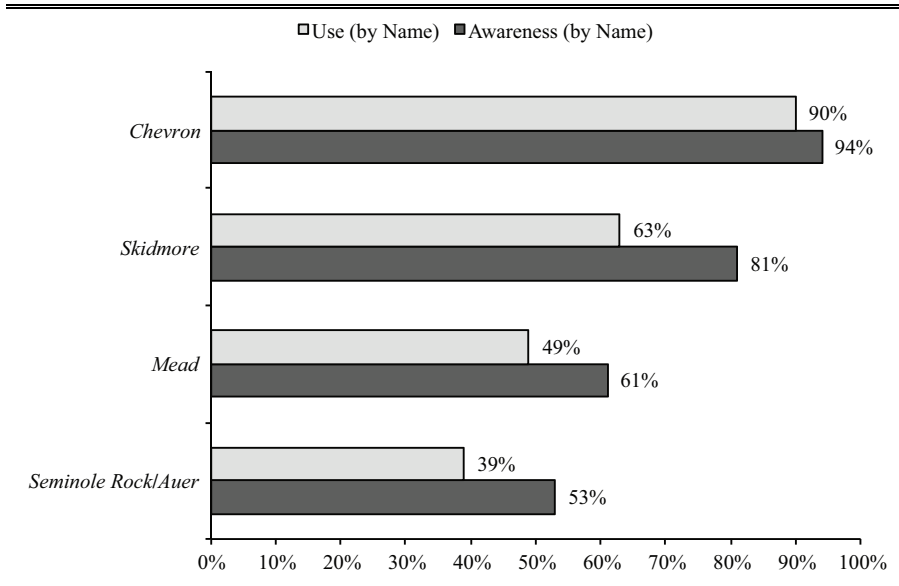
nole Rock raises serious constitutional questions and should be reconsidered in an appropriate case."); *accord id.* at 1210 (Alito, J., concurring in part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect.").

304. The agency rule drafters were also asked about *Curtiss-Wright* deference, which is a "super-strong deference to executive department interpretations in matters of foreign affairs and national security." Eskridge & Baer, *supra* note 42, at 1100; *see* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (holding that legislation dealing with matters "within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"). Only 6% of rule drafters indicated any awareness of this doctrine by name with 2% indicating they had used it in interpretation. Q17(e) (n=109); Q18(e) (n=109).

305. Q17-Q18.

306. Q17(a)-(d) (n=109); Q18(a)-(d) (n=109).

As Figure 11 illustrates, 94% of the rule drafters knew *Chevron* deference by name, followed by 81% for *Skidmore*, 61% for *Mead*, and 53% for *Seminole Rock/Auer*.[307] Two rule drafters were familiar with certain doctrines by name, but would have to "look them up to remember the details."[308] At 94%, *Chevron* was the most known among the rule drafters surveyed of all the interpretive tools covered by name in the survey. In the Bressman and Gluck study, *Chevron* deference was also the big winner in the name recognition game with awareness by 82% of congressional respondents.[309] *Skidmore* (at 39%) and *Mead* (at 28%), however, were far less known among congressional respondents than among the rule drafters surveyed here.[310] This should not be too surprising; agency rule drafters, after all, are (hopefully) thinking about administrative law doctrines on a much more regular basis than their congressional counterparts.

With respect to the role of these doctrines in drafting decisions, the agency rule drafters' reported use of these doctrines follows the same pattern, with varying levels of less reported use than familiarity: *Chevron* at 90%, *Skidmore* at 62%, *Mead* at 49%, and *Seminole Rock/Auer* at 39%.[311] One in ten rule drafters (11%), however, also indicated that none of these deference doctrines played a role in their drafting decisions. One rule drafter's comment may summarize the sentiments of this minority view:

> Honestly . . . not so much. I generally try to make a rule conform with a statute as much as possible. If the statute has gaps, I rely on my agency's technical expertise for the best, most reasonable way to fill them. That may be what these doctrines ultimately stand for, but I think of it in terms of what is practicable and honest, not what the court cases specifically say.[312]

With nine in ten rule drafters (90%) indicating that *Chevron* plays a role in their drafting decisions, *Chevron* was reported as used by the most rule drafters surveyed of all the interpretive tools inquired about in this survey.[313] Again, *Chevron* (at 58%) was also the big winner in the use-by-name game among congressional respondents.[314]

Unlike in the congressional context, these findings with respect to the rule drafters' use of the various administrative law deference doctrines have implications beyond how federal agencies understand their relationship with Congress and the scope of congressional delegation of lawmaking authority to fed-

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307. Q17(a)-(d) (n=109).

308. Q17, cmt. 2; *see also id*. cmt. 1 ("I don't know these cases intimately by name. I may be familiar with the principles they stand for, but I would have to look them up. I have checked only the ones I know by name.").

309. Gluck & Bressman, *Part I*, *supra* note 19, at 927 fig.1, 994.

310. *See id*. at 927 fig.1.

311. Q18(a)-(d) (n=109).

312. Q18, cmt. 5 (ellipsis in original).

313. *See supra* Figure 2 (mapping where all of these deference doctrines rank among the interpretive tools agency rule drafters use when drafting).

314. Gluck & Bressman, *Part I*, *supra* note 19, at 928 fig.2.

eral agencies. The findings also shed light on how agency interpretive practices could differ depending on whether the agency believes *Chevron* or *Skidmore* will apply. As explored elsewhere, the vast majority of agency rule drafters surveyed think about judicial review when drafting statutes and understand *Chevron* and *Skidmore* and how their chances in court are better under *Chevron*. Indeed, two in five rule drafters surveyed agreed or strongly agreed—and another two in five somewhat agreed—that a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies.[315]

In other words, when rule drafters indicate they "use" administrative law doctrines when interpreting statutes, it could mean that they are more or less aggressive in their interpretive efforts depending on which deference standard applies. Understanding how agencies perceive and use the deference doctrines in rule drafting can shed light on how Congress or courts can modify those doctrines to control and patrol congressional delegations of lawmaking authority to its bureaucratic agents. These findings on how the rule drafters use the administrative law deference doctrines—and how, in turn, congressional or judicial modification of the deference doctrines may shape agency statutory interpretation—are explored in much greater detail elsewhere.[316]

2. *Big winner by concept:* Mead *(and agency expertise)*

As noted in Part IV.C.1, fewer rule drafters knew (61%) and used (49%) *Mead* by name than *Chevron* or *Skidmore*. But when asked if they knew the principles set forth in *Mead*—that is, that congressional authorization for, and agency use of, rulemaking or formal adjudication are strong indicia of congressional delegation of law-elaboration authority to agencies[317]—their answers indicate they understood the *Mead* doctrine in practice. In particular, the rule drafters were asked whether eight different factors "affect whether Chevron deference (as opposed to Skidmore deference or no deference) applies to an agency's interpretation of an ambiguous statute it administers." Table 1 presents their answers to this question.[318]

The leading factors the agency rule drafters reported to affect whether *Chevron* deference applies are the two *Mead* principles: whether Congress authorized the agency to engage in rulemaking and/or formal adjudication under the statute (84%), and whether the agency promulgated the interpretation via rulemaking and/or formal adjudication (80%), followed closely by whether the agency has expertise relevant to interpreting the statutory provisions at issue

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315. *See* Walker, *supra* note 19, at 721-25.

316. *See id.* at 709-11, 721-29.

317. United States v. Mead Corp., 533 U.S. 218, 229-31 (2001).

318. Q19(a)-(h) (n=92). Because this question asks the rule drafters about which factors affect which deference regime applies, the number of respondents considered and the percentage calculations in Table 1 exclude the seventeen respondents who indicated they did not know.

(79%).[319] No other factor received an affirmative response from more than half of the rule drafters surveyed. The longstanding nature of the agency's interpretation garnered 43%, its contemporaneous nature 20%, and its furtherance of the uniform administration of law 18%.[320] Perhaps most remarkably, only one in ten (9%) indicated that whether the agency is politically accountable for its interpretation affects *Chevron* deference.[321] In the comments, one legal realist suggested an additional factor: "A review of the cases suggest[s] that whether a court is inclined to agree with the agency sometimes dictates whether it will apply *Chevron*."[322]

With the rule drafters flagging the two *Mead* principles at 84% and 80%, the *Mead* doctrine was one of the most reported as used among the interpretive tools tested in this study. Only *Chevron* (at 90%), the whole act rule (at 89%), and the ordinary meaning canon (at 87%) were reported as used by more of the rule drafters surveyed.[323] Bressman and Gluck also indicated that, when congressional drafters were asked about the doctrines by concept,

> *Mead* was a "big winner" in our study—the canon whose underlying assumption was most validated by our [congressional] respondents after *Chevron*: 88% told us that the authorization of notice-and-comment rulemaking (the signal identified by the Court in *Mead*) is always or often relevant to whether drafters intend for an agency to have gap-filling authority.[324]

In other words, while Justice Scalia and a number of scholars might be right that *Mead* has "[m]uddled"[325] the approach courts apply to determine if *Chev-*

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319. Q19(a)-(b), (d) (n=92). That four in five rule drafters indicated that agency expertise is a touchstone for *Chevron* deference may provide support for the argument advanced by a number of scholars that "agency expertise . . . should be a necessary condition for *Chevron* deference." Kent Barnett, *Codifying* Chevmore, 89 N.Y.U. L. REV. 1, 41 (2015); *see also id.* at 11-16 (reviewing literature and case law).

320. Q19(e)-(g) (n=92).

321. Q19(h) (n=92).

322. *Id.* cmt. 1. The agency rule drafters were also asked if they agreed that formal adjudication is a useful tool for promulgating agency statutory interpretations and if courts defer to agency interpretations in formal adjudications to the same extent as rulemaking. Perhaps unsurprisingly, a significant number either did not know or did not agree:

- Formal adjudication can serve as a useful tool for promulgating agency statutory interpretations: 4% strongly agree, 22% agree, 34% somewhat agree, 30% disagree, 11% strongly disagree. Q16(d) (n=83). Of those who did not weigh in, 23 expressly indicated they did not know.
- Courts defer to agency interpretations in formal adjudication to the same extent as rulemaking: 3% strongly agree, 15% agree, 40% somewhat agree, 37% disagree, 5% strongly disagree. Q16(e) (n=60). Of those who did not weigh in, 47 expressly indicated they did not know.

These findings may just reflect that the respondents are *rule* drafters, but they may also reflect the scarce attention given—at least in the literature—to *Chevron* deference in the adjudication context.

323. Q9(a) (n=119); Q14(a) (n=114); Q18(a) (n=109); *see supra* Figure 2 (providing the full list).

324. Gluck & Bressman, *Part I*, *supra* note 19, at 999.

325. Bressman, *supra* note 42, at 1443.

ron applies to a particular agency statutory interpretation,[326] it seems agency rule drafters and congressional drafters—at least those surveyed in these two studies—are fairly adept at recognizing the *Mead* touchstones for congressional delegation.

TABLE 1

Which Factors Affect Whether *Chevron* Deference Applies to Agency's Interpretations of Ambiguous Statutes It Administers?

Congress Authorized Agency Rulemaking or Formal Adjudication	84%
Agency Interpretation Made by Rulemaking or Formal Adjudication	80%
Agency Expertise Relevant to Statutory Provision	79%
Agency Interpretation Sets Forth Bounds of Agency's Jurisdiction	46%
Agency Interpretation Is Longstanding	43%
Agency Interpretation Is Contemporaneous	20%
Agency Interpretation Furthers Uniform Administration of Law	18%
Agency Is Politically Accountable for Its Interpretation	9%

3. *What about* Seminole Rock/Auer*?*

It is a bit of a puzzle what impact *Seminole Rock*/*Auer* deference has on the two in five agency rule drafters (39%) who said they think about it when drafting regulations. One comment, however, may shed some light: "Re: *Seminole Rock*/*Auer*, I personally would attempt to avoid issuing ambiguous regulations that we would then have to interpret."[327] In other words, the rule drafters who

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326. *See* United States v. Mead Corp., 533 U.S. 218, 239-41, 245-46 (2001) (Scalia, J., dissenting) (explaining the confusion *Mead* causes for courts in deciding whether *Chevron* applies); *see also, e.g.*, Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 480 (2002) (describing *Mead* as "provid[ing] little guidance to lower courts, agencies, and regulated parties about how to discern congressional intent in any given set of circumstances"); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 813 (2002) (explaining that *Mead* provides "an undefined standard that invites consideration of a number of variables of indefinite weight"); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003) (arguing that *Mead*'s opaque standard "inadvertently sent the lower courts stumbling into a no-man's land").

327. Q18, cmt. 2.

indicated *Auer* deference plays a role in drafting decisions may be saying they attempt to avoid drafting ambiguous regulations.

Or perhaps because *Auer* is so deferential to an agency's interpretation of its own regulation, the rule drafters may be saying they do not have to worry about being clear and precise, as they can always clarify and clean up in subsequent guidance. That two in five rule drafters confirmed that *Auer* deference plays a role in drafting may also provide some support for Justice Scalia's call to revisit the doctrine due to the odd incentives it may create for agency drafting: "[T]he power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect."[328]

Unfortunately, there was not enough space in the survey to ask how the rule drafters "use" *Auer* deference when drafting regulations and interpreting statutes. It would be interesting to know how exactly agency rule drafters use *Auer* to assess whether Justice Scalia's intuitions about perverse incentives are empirically grounded. But the fact that two in five rule drafters surveyed indicated that they are using *Auer* deference when drafting regulations may well persuade many that it is not worth preserving, as such a doctrine should play no role at the initial regulation-drafting stage. In all events, this is another area of agency statutory interpretation that could benefit from deeper empirical investigation.

CONCLUSION

The findings reported in this Article shed unprecedented light inside the black box that is agency statutory interpretation. It turns out that the rule drafters surveyed knew the canons of interpretation and administrative law doctrines as well as, if not better than, their congressional counterparts surveyed in the Bressman and Gluck study. Moreover, the findings suggest that federal agencies play a critical role in the legislative process such that the rule drafters have the intimate understanding of legislative history that Strauss hypothesized nearly a quarter century ago. The study's findings also provide a new window into how federal agencies view themselves as faithful agents of Congress, as well as the role of courts in this relationship—at least from the viewpoint of the agency rule drafters surveyed. In sum, the rule drafters surveyed perceived the principal-agent relationship with Congress, where federal agencies—not courts—are the primary interpretive agents but courts play a meaningful oversight role, such that rule drafters often think about subsequent judicial review when interpreting statutes.

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328. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part); *see also* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 11-12 (1996) (asserting that *Auer* deference encourages agency rule drafters to be "vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures").

In addition to contributing to the legal and political science literature on statutory interpretation and the modern administrative state, these findings provide valuable guidance for the real-world actors who actually make the administrative state function—whether that be the congressional principal who wants to ensure federal agencies faithfully exercise their delegated lawmaking authority, the agency general counsel who strives to train her rule drafters to utilize proper interpretive practices, or the judge who is tasked by Congress to review an agency statutory interpretation or interpret a regulation.

Of all the empirical findings uncovered and theories confirmed or called into question, however, the most important takeaway is that much more empirical and theoretical work needs to be done. If the democratic (and perhaps constitutional) legitimacy of congressional delegation of lawmaking authority to the regulatory state depends on faithful agency, then Congress, courts, and scholars need to spend much more time understanding the empirical realities of statutory interpretation inside the modern administrative state.

INSIDE AGENCY STATUTORY INTERPRETATION:

SURVEY APPENDIX[†]

INTRODUCTION

This study is the first to investigate empirically how federal agency rule drafters approach statutory interpretation. You are being asked to participate in this survey because you have been identified as an agency official who has experience in statutory interpretation and rulemaking.

Courts have developed a broad variety of judicial review doctrines in administrative law as well as tools of statutory interpretation—many of which are based on empirical assumptions about how Congress and agencies draft statutes and regulations, respectively. Yet little work has been done to understand whether these empirical assumptions are correct, much less the extent to which the drafters actually work against this interpretive backdrop. As courts, Congress, and scholars gain insight into how agencies understand and use interpretive rules and judicial review doctrines, these rules and doctrines should evolve to better reflect actual congressional and agency assumptions and lead to more predictable administrative law.

Your participation is voluntary, and you can withdraw at any time during the survey. The survey consists of 35 questions and should take between 15-25 minutes to complete. The survey asks what you, as an agency rule drafter, think about the use of semantic and substantive canons of interpretation and legislative history as well as the effect that the Supreme Court's administrative law doctrines may have on agency drafting. The survey results will be anonymous, and you should not include any agency-specific or otherwise sensitive information in the survey's optional open-ended comment boxes.

If you have any questions or comments about the survey, please do not hesitate to contact me (walker-research@osu.edu; 614-247-1898). For questions about your rights as a participant in this study or to discuss other study-related concerns with someone not part of the research team, you may contact Sandra Meadows in the Office of Responsible Research Practices at 1-800-678-6251.

Sincerely,
Christopher J. Walker, Principal Investigator

Christopher J. Walker is an Assistant Professor of Law at The Ohio State University's Moritz College of Law. Professor Walker previously worked on the Justice Depart-

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[†] *Author's Note*: This survey was administered via an online instrument, so the formatting of the questions differs in this reproduced version in two ways. First, with respect to the multipart questions, this version collapses them into one question whereas the online survey presented those multipart questions in matrices. Second, this version does not reflect that—with the exception of the first two questions in the survey—all questions included an open-ended prompt for additional comments.

PART I: BACKGROUND

Please answer the following eight questions about your background.

1. Our records show that you are currently working, or have worked within the last two years, in a general counsel office, legal department, or other rulemaking office in a federal agency AND that you have had experience in statutory interpretation and rulemaking in that employment. Is that correct?
    i. Yes
    ii. No
    If you are at the FDA, please type "FDA" here:

2. Are/were you a political or career employee?
    i. Political
    ii. Career
    iii. Both, but most recently political
    iv. Both, but most recently career

3. How long have you worked at a federal agency in a capacity that includes some rulemaking work?
    i. Five years or more
    ii. Fewer than five years
    iii. Other (explain)

4. For how many rules have you had a role in the drafting process?
    i. 0-2
    ii. 3-6
    iii. 7 or more
    iv. Don't know

5. What is your age? (mark one)
    i. 22-30
    ii. 31-45
    iii. Over 45

6. What year did you graduate from law school? If you are not an attorney, please indicate your terminal degree in the Additional Comments box.
    i. Drop-down menu
    ii. I am currently in law school
    iii. I did not attend law school (please indicate terminal degree)

7. Did you take a course in law school that focused on legislation, statutory interpretation, or statutory drafting in general?
    i.   Yes
    ii. No
    iii. N/A—I did not attend law school
    iv. Other (explain)

8. Have you taken a course other than in law school that focused on legislation, statutory interpretation, or statutory drafting in general?
    i.   Yes (state where and when)
    ii. No
    iii. Other (explain)

PART II: THE SEMANTIC CANONS

Please answer the following six questions regarding your understanding and use of various semantic canons of interpretation. Throughout the rest of the survey, there will be optional, open-ended comment boxes at the end of each question. Please include any additional comments that you feel appropriate, including insights into whether we are asking the right questions. Remember not to include any agency-specific or otherwise sensitive information in these comment boxes.

9. Are you familiar with any of the following canons of construction that concern how textual terms are to be construed? (mark all that apply)
    a. Ordinary meaning canon
    b. Noscitur a sociis
    c. Ejusdem generis
    d. The rule against superfluities or redundancy
    e. Expressio unius/inclusio unius
    f. In pari materia
    g. Whole act rule
    h. Whole code rule
    i. None of the above

10. Which have you considered in interpreting statutes and/or drafting rules? (mark all that apply)
    a. Ordinary meaning canon
    b. Noscitur a sociis
    c. Ejusdem generis
    d. The rule against superfluities or redundancy
    e. Expressio unius/inclusio unius
    f. In pari materia
    g. Whole act rule
    h. Whole code rule
    i. None of the above

11. Do you believe that courts rely on any of these rules in interpreting legislation and/or regulations? (mark all that apply)
    a. Ordinary meaning canon
    b. Noscitur a sociis
    c. Ejusdem generis
    d. The rule against superfluities or redundancy
    e. Expressio unius/inclusio unius
    f. In pari materia
    g. Whole act rule
    h. Whole code rule
    i. None of the above

12. Does it matter to your rule-drafting practices whether courts routinely rely on any of these rules?
        i. Yes
        ii. No
        iii. Other (explain)

13. The following statements concern statutory or regulatory "lists." By this, we mean provisions such as: "No person shall commit animal cruelty, where 'animal cruelty' is defined as 'conduct in which a living animal is intentionally maimed, mutilated, kicked, punched, or harmed.'"

    Please rate the accuracy of the following assertions by indicating how often you would expect the statement to be true:
    a. The terms in such a list relate to one another.
    b. Terms not on the list are intended to be excluded.
    c. Each word in the list has an independent meaning and is not intended to overlap with other terms on the list.
    d. Where a list includes specific classes of things and then refers to them in general ("or any other" thing), the general statement only applies to the same kind of things specifically listed.
            i. Never
            ii. Rarely
            iii. Sometimes
            iv. Often
            v. Always
            vi. Other (explain)

14. Please rate the accuracy of the following assertions by indicating how often you would expect the statement to be true:
    a. When a particular term is used in multiple places in the same statute (or rule), that term is intended to mean the same thing throughout the entire statute (or rule).
    b. When a particular term is used in multiple places in the same section of a statute (or rule), that term is intended to mean the same thing within a single section.

c. When a particular term is used in a statute (or rule), that term is intended to mean the same thing as the same term means in other statutes (or rules) in related subject areas.

d. When a particular term is used in a statute, that term is intended to mean the same thing in other statutes on unrelated subjects throughout the U.S. Code.

e. Dictionaries are used by drafters in determining what terms to use in statutes (or rules).

f. Dictionaries should be used by interpreters in determining the meaning of terms used in statutes (or rules).
    i. Never
    ii. Rarely
    iii. Sometimes
    iv. Often
    v. Always
    vi. Other (explain)

PART III: AMBIGUITIES IN STATUTES AGENCIES ADMINISTER

Please answer the following nine questions regarding your views on interpreting ambiguities in statutes agencies administer.

15. What kinds of statutory ambiguities or gaps do you believe congressional drafters intend for the agency to fill? (mark all that apply)
    a. Ambiguities/gaps relating to the details of implementation
    b. Ambiguities/gaps relating to major policy questions
    c. Ambiguities/gaps implicating questions of major economic significance
    d. Ambiguities/gaps implicating questions of major political significance
    e. Ambiguities/gaps implicating serious constitutional questions
    f. Ambiguities/gaps relating to the agency's own jurisdiction or regulatory authority
    g. Ambiguities/gaps relating to the preemption of state law
    h. Ambiguities/gaps relating to the division of labor between state and federal agencies when both are given implementation roles
    i. Ambiguities/gaps relating to omissions in the statute
    j. Ambiguities/gaps relating to the agency's area of expertise
    k. None of the above
    l. I don't know
    m. Other (explain)

16. Please evaluate the following statements:
    a. The principles related to how much deference courts will accord federal agency decisions allow congressional drafters to leave statutory terms ambiguous because the agency can later specify those terms.

    b. If a statute is ambiguous and the agency's construction is reasonable, a court must accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

    c. A court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative; instead, the agency may choose a different construction so long as it is reasonable.

    d. Formal adjudication can serve as a useful tool for promulgating agency statutory interpretations.

    e. Courts defer to agency interpretations in formal adjudication to the same extent as rulemaking.

        i. Strongly agree
        ii. Agree
        iii. Agree somewhat
        iv. Disagree
        v. Strongly disagree
        vi. I don't know
        vii. Other (explain)

17. Are you familiar with any of the following interpretive doctrines related to how much deference courts will accord federal agency decisions when agencies are charged with implementing federal statutes? (mark any that apply)

    a. Chevron
    b. Skidmore
    c. Mead
    d. Seminole Rock/Auer
    e. Curtiss-Wright
    f. None of the above

18. Do any of these doctrines play a role in your rule drafting decisions (mark any that apply)?

    a. Chevron
    b. Skidmore
    c. Mead
    d. Seminole Rock/Auer
    e. Curtiss-Wright
    f. None of the above

19. Which of the following do you believe affect whether Chevron deference (as opposed to Skidmore deference or no deference) applies to an agency's interpretation of an ambiguous statute it administers (mark all that apply):

    a. Whether Congress authorized the agency to engage in rulemaking and/or formal adjudication under the statute

    b. Whether the agency promulgated the statutory interpretation via rulemaking and/or formal adjudication

     c. Whether the agency's statutory interpretation sets forth the bounds of the agency's jurisdiction or regulatory authority

     d. Whether the agency has expertise relevant to interpreting the statutory provisions at issue

     e. Whether the agency's statutory interpretation is longstanding

     f. Whether the agency's statutory interpretation is contemporaneous

     g. Whether the agency's statutory interpretation furthers the uniform administration of federal law

     h. Whether the agency is politically accountable for its statutory interpretation

     i. None of the above

     j. I don't know

20. Please evaluate the following statements:

     a. When drafting rules and interpreting statutes, agency drafters such as yourself think about subsequent judicial review.

     b. The level of deference (Chevron, Skidmore, no deference, etc.) that courts will apply to a particular agency statutory interpretation is reasonably predictable.

     c. Agency expectations about which level of deference (Chevron, Skidmore, no deference, etc.) courts will apply to its statutory interpretation affect the agency's drafting process.

     d. If Chevron deference (as opposed to Skidmore deference or no deference) applies to an agency's interpretation of an ambiguous statute it administers, the agency is more likely to prevail in court.

     e. If the agency knows or strongly believes that Chevron deference (as opposed to Skidmore deference or no deference) will apply to a particular agency interpretation, the agency will be more willing to advance a more aggressive interpretation of the statute.

     f. If Skidmore deference (as opposed to no deference) applies to an agency's interpretation of an ambiguous statute it administers, the agency is more likely to prevail in court.

     g. If the agency knows or strongly believes that Chevron deference will not apply, the agency will be less willing to advance a more aggressive interpretation of the statute.

         i. Strongly agree

         ii. Agree

        iii. Agree somewhat

        iv. Disagree

         v. Strongly disagree

        vi. I don't know

       vii. Other (explain)

For this question, the following definitions apply:

- Chevron Step Zero: whether Congress delegated interpretive authority to the agency

- Chevron Step One: whether the statute is silent or ambiguous with respect to the specific issue
- Chevron Step Two: whether the agency's interpretation is reasonable or permissible under the statute

21. At which step of Chevron do you think courts should resort to the following tools of construction when reviewing an agency's interpretation of the law? (mark all that apply)
      a. Ordinary meaning canon
      b. Noscitur a sociis
      c. Ejusdem generis
      d. The rule against superfluities or redundancy
      e. Expressio unius/inclusio unius
      f. In pari materia
      g. Whole act rule
      h. Whole code rule
      i. Statutory structure
      j. Statutory purpose/mischief evidence
      k. Legislative history
            i.   N/A—do not know interpretive tool
            ii. Not sure
            iii. Never
            iv. Chevron Step Zero
            v.   Chevron Step One
            vi. Chevron Step Two

22. Are you familiar with any of the following principles in administrative law? (mark any that apply)
      a. Brand X (that a prior judicial interpretation does not always trump an agency's subsequent and different interpretation of an ambiguous statute)
      b. Ventura ordinary remand rule (when a court finds an agency's decision to be erroneous, absent exceptional circumstances, the matter should be remanded to the agency for further proceedings)
      c. Governmental Inter-Circuit Nonacquiescence (that a ruling by one circuit does not force the agency to abandon its interpretation in another circuit)
      d. None of the above

23. Do any of these doctrines play a role in rule drafting decisions (mark any that apply)?
      a. Brand X
      b. Ventura ordinary remand rule
      c. Governmental Inter-Circuit Nonacquiescence
      d. None of the above

PART IV: THE SUBSTANTIVE CANONS

Please answer the following five questions regarding your understanding and use of various semantic canons of interpretation.

24. Are you familiar with any of the following substantive canons of construction that concern how textual terms are to be construed? (mark all that apply)
    a. Rule of Lenity
    b. Constitutional Avoidance
    c. Presumption Against Preemption
    d. Presumption Against Waiver of Sovereign Immunity
    e. Presumption Against Extraterritoriality
    f. Presumption Against Implied Right of Action
    g. None of the above

25. Which have you considered in interpreting statutes and/or drafting rules? (mark all that apply)
    a. Rule of Lenity
    b. Constitutional Avoidance
    c. Presumption Against Preemption
    d. Presumption Against Waiver of Sovereign Immunity
    e. Presumption Against Extraterritoriality
    f. Presumption Against Implied Right of Action
    g. None of the above

26. Do you believe that courts rely on any of these rules in interpreting legislation? (mark all that apply)
    a. Rule of Lenity
    b. Constitutional Avoidance
    c. Presumption Against Preemption
    d. Presumption Against Waiver of Sovereign Immunity
    e. Presumption Against Extraterritoriality
    f. Presumption Against Implied Right of Action
    g. None of the above

27. Does it matter to your rule drafting practices whether courts routinely rely on any of these rules?
    i. Yes
    ii. No
    iii. Other (explain)

For this question, the following definitions apply:
- Chevron Step Zero: whether Congress delegated interpretive authority to the agency
- Chevron Step One: whether the statute is silent or ambiguous with respect to the specific issue

- Chevron Step Two: whether the agency's interpretation is reasonable or permissible under the statute

28. At which step of *Chevron* do you think courts should resort to the following substantive canons when reviewing an agency's interpretation of the law? (mark all that apply)
    a. Rule of Lenity
    b. Constitutional Avoidance
    c. Presumption Against Preemption
    d. Presumption Against Waiver of Sovereign Immunity
    e. Presumption Against Extraterritoriality
    f. Presumption Against Implied Right of Action
        i. N/A—do not know canon
        ii. Not sure
        iii. Never
        iv. Chevron Step Zero
        v. Chevron Step One
        vi. Chevron Step Two

PART V: LEGISLATIVE AND DRAFTING PROCESS

This is the final part of the survey. Please answer the following seven questions regarding your understanding of the legislative and drafting process.

29. Please evaluate the following statements about you and your agency's role in the legislative process:
    a. The agency participates in a technical drafting role of the statutes it administers.
    b. I participate on behalf of the agency in a technical drafting role of the statutes the agency administers.
    c. The agency participates in a policy or substantive drafting role of the statutes it administers.
    d. I participate on behalf of the agency in a policy or substantive drafting role of the statutes the agency administers.
    e. The agency participates in drafting legislative history (e.g., floor statements, committee reports, conference reports, hearing testimony and questions, etc.) of statutes it administers.
    f. I participate on behalf of the agency in drafting legislative history (e.g., floor statements, committee reports, conference reports, hearing testimony and questions, etc.) of statutes the agency administers.
        i. Never
        ii. Rarely
        iii. Sometimes
        iv. Often
        v. Always
        vi. N/A—I don't know

       vii. Other (explain)

30. What is the purpose of legislative history? (mark all that apply)
      a. To explain the purpose(s) of the statute
      b. To explain the meaning of particular terms in the statute
      c. To indicate a disagreement over the meaning of a particular term or provision
      d. To indicate a decision to leave a deliberate ambiguity in the statute
      e. To facilitate the political "deals" that resulted in enacting the statute
      f. To shape the way that agencies will interpret deliberate ambiguities
      g. To shape the way that individuals or courts will interpret deliberate ambiguities
      h. To shape the way that the statute will apply to unforeseen future developments
      i. To shape the way that individuals or courts will interpret contested terms
      j. I don't know
      k. Other (explain)

31. In general, do you believe legislative history is a useful tool for interpreting statutes? (mark one)
        i. Yes
       ii. No
     iii. Other (explain)

32. For each of the following, please tell us if the type of legislative history is a (VR) very reliable source, a (SR) somewhat reliable source, or not a (NR) reliable source for agencies (and courts) to use in resolving questions about statutory ambiguities or statutory implementation. Or indicate that you do not know.
      a. Floor statements by Members in support of the statute
      b. Floor statements by Members opposed to the statute
      c. Floor statements by party leadership
      d. Floor statements by sponsor(s) of the statute
      e. Committee reports in support of the statute
      f. Committee reports in opposition to the statute
      g. Conference reports
      h. Hearing transcripts
      i. Presidential signing statements

33. In deciding whether a piece of legislative history is sufficiently reliable to guide your interpretation of a statute, do any of the following matter to your assessment? (mark all that apply)
      a. How many Members have heard/read the relevant statement/report
      b. Whether the statement/report was drafted or made by a Member
      c. How close the statement/report was made prior to the day the legislation passed

      d. Whether the statement was made after the legislation passed
      e. Whether the statement/report favors or opposes the legislation
      f. Whether the statement/report was essential to the political deal that resulted in enacting the statute
      g. I don't know
      h. Other (explain)

34. Please evaluate the following statements:
      a. Agencies should draft the statements of basis and purpose accompanying their rules in part to guide courts in interpreting those rules
      b. Agencies actually do draft the statements of basis and purpose accompanying their rules in part to guide courts in interpreting those rules
      c. Courts should use statements of basis and purpose when interpreting those rules
      d. Courts actually do use statements of basis and purpose when interpreting those rules
          i. Strongly agree
          ii. Agree
          iii. Agree somewhat
          iv. Disagree
          v. Strongly disagree
          vi. I don't know
          vii. Other (explain)

35. Thinking about your own experiences with statutory interpretation, how would you characterize the approach that is most likely to serve as your starting point?
          i. Strong Purposivist
          ii. Moderate Purposivist
          iii. Strong Textualist
          iv. Moderate Textualist
          v. N/A—I don't know
          vi. Other (explain below)

CONCLUSION

Thank you for taking the time to fill out this survey on agency drafting. If you would like to receive updates on the study's findings or would be willing to participate in a follow-up interview (subject to permission from your agency), please email me at walker-research@osu.edu. If you have any questions or additional comments, please do not hesitate to contact me by email or phone (614-247-1898).

Sincerely,

Christopher J. Walker