

A Comparative “Hard Look” at *Chevron*: What the United Kingdom and Australia Reveal About American Administrative Law*

Students of American administrative law often notice a striking anomaly in judicial deference to agency decisions: Judges are experts in interpreting statutes yet give great deference to agencies’ legal interpretations, whereas judges closely review agencies’ policy determinations despite the agencies’ superior expertise and accountability.¹ Scholars and judges have long noted this anomaly, observing that one might expect precisely the opposite—that courts would review questions of law *de novo* but generally defer to agencies’ policy decisions.² After all, why should courts give substantial deference to the statutory interpretations of agencies when statutory interpretation is a core judicial function?³ Conversely, why should unelected judges exercise a strict standard of review over policy decisions made by agencies when agencies are subject to political pressures from the two elected branches of American government?⁴

This Note offers one explanation of the anomaly through a comparative analysis of American, British, and Australian political institutions. The anomaly is conspicuously absent in the United Kingdom and Australia.⁵ Judges in those countries give no deference to administrative interpretations

* I am extremely grateful to Professor Peter Cane of The Australian National University College of Law for his invaluable guidance in researching and revising this Note. Likewise, I thank Professor Matthew Spitzer for his very helpful comments and suggestions. I also greatly appreciate the hard work and thoughtful recommendations of the members and editors of the Texas Law Review, particularly Daniel Aguilar, Daniel Cohen, Katherine Hacker, James Hughes, Jessica Miller, and Brice Wilkinson—thank you all. Finally, I would like to thank my family for their continued support.

1. See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 364–65 (1986) (“[C]urrent doctrine is anomalous [because i]t urges courts to defer to administrative interpretations of regulatory statutes, while also urging them to review agency decisions of regulatory policy strictly.”).

2. See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS, AND CASES 403 (6th ed. 2006) (“‘Might a foreigner . . . exclaim: ‘How odd. The American courts defer to agencies on questions of law, where courts are expert, but they conduct ‘in-depth’ reviews of policy, where agencies are expert. They seem to have it backwards.’”).

3. *Id.*

4. See *infra* notes 89–90 and accompanying text. This strict standard of review over policy is especially puzzling, given that a principal justification for *Chevron* deference rests on the superior democratic accountability of agencies over courts. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is appropriate for this political branch of the Government to make such policy choices . . .”). Why should this accountability argument not apply *a fortiori* with respect to agencies’ policy decisions?

5. See *infra* Part II.

of law but grant substantial deference on policy decisions.⁶ One important factor underlying this dichotomy is that the emergence of the administrative state has generated more significant institutional tensions in the United States than in the United Kingdom and Australia. In the British and Australian parliamentary systems, the executive and the legislature are functionally fused: the Prime Minister controls both government as well as Parliament.⁷ As a result, there are no interbranch power struggles over control of the administrative state. In contrast, American administrative agencies are often caught in a tug-of-war between the President and Congress.⁸ Furthermore, unlike the unitary executives of both Australia and the United Kingdom, the American Executive is bifurcated between the President and the administrative agencies.⁹ Therefore, the American system is also more prone to intra-Executive discord than are the British and Australian systems, where executive power is more consolidated.

Thus, the American anomaly has its origins in the U.S. Constitution's separation of powers and the difficulties of applying our three-branch system of checks and balances to a fourth branch—the administrative state. The framers of the U.S. Constitution devised an ingenious system of checks and balances between the three branches of government. However, the framers did not envision the massive growth of the administrative state. The British and Australian legal systems were able to assimilate the administrative state with less complexity, in that administrators are situated squarely under the control of the executive.¹⁰ As a result, the United Kingdom and Australia have largely avoided the contentious issues of accountability and deference that plague American administrative law.¹¹

The principal difference between the American system on the one hand and the two parliamentary systems on the other hand is the issue of electoral

6. See *infra* Part II.

7. See AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 11–12 (1999) (indicating that although the House of Commons theoretically can vote a cabinet out of office, “in reality, the relationship is reversed” so that “[t]he cabinet is clearly dominant vis-à-vis Parliament”); Parliament of Austl., Parliament: An Overview, <http://www.aph.gov.au/PARL.HTM> (“The Prime Minister is appointed by the Governor-General, who by convention under the Constitution, must appoint the parliamentary leader of the party, or coalition of parties, which has a majority of seats in the House of Representatives.”).

8. Scholars disagree about whether or not Congress controls agencies. See, e.g., Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766–67 (1983) (dividing scholarly views of agency policy making into two approaches: the traditional approach, which considers agencies to be independent of Congress, and the congressional-dominance approach, which argues that congressional committees exert control over agency decisions).

9. See *infra* subpart III(B) (contrasting the American bifurcated Executive with the British and Australian systems).

10. See *supra* note 7 and accompanying text.

11. See *infra* Part III; see also Michael Asimow, *Delegated Legislation: United States and United Kingdom*, 3 OXFORD J. LEGAL STUD. 253, 253 (1983) (noting that in Britain “nearly everyone seems satisfied with . . . procedural and substantive aspects of delegated legislation”).

accountability. Voters in the United Kingdom and Australia know whom to hold accountable for administrative action: the party in power. American voters, in contrast, cannot attribute the blame or credit for administrative action quite as clearly: is Congress primarily responsible—since it passed the relevant legislation—or is the President responsible, since the Executive implements the legislation?

The seemingly inconsistent American deference doctrines for questions of law and policy actually represent rational judicial responses to imbalances created by the unanticipated growth of a fourth branch in a three-branch system of checks and balances. The resulting institutional tensions inherent in American administrative law cannot be resolved by current judicial doctrines alone. Thus, these tensions will likely continue to manifest themselves through—at times—seemingly inconsistent applications of judicial deference to administrative action, as judges attempt to strike a balance between two often conflicting values: the desire to defer to the superior expertise and political accountability of administrators on the one hand, and the desire to ensure that administrative action accurately tracks congressional mandates on the other.¹²

This Note will proceed in six Parts. Part I reviews the nature of the American anomaly. Part II briefly describes the deference regimes in Australia and the United Kingdom. In Part III, an institutional comparison reveals structural differences that affect the deference regimes in each country. Next, Part IV attempts to help explain the American anomaly in light of this institutional comparison. Part V examines what the comparative analysis suggests about the future of American deference doctrines. Finally, Part VI concludes.

I. The American Anomaly

The American anomaly is that courts give substantial deference to agencies’ interpretations of law but grant far less deference to agencies’ policy decisions.¹³ Yet statutory interpretation traditionally falls within the province of the courts,¹⁴ and judges typically prefer to avoid second-guessing the policy choices of the political branches of government.¹⁵ Why, then, do American courts turn this natural order on its head when reviewing administrative action? In considering that question, this Part discusses the

12. An analysis of the motivations of judges reviewing administrative action is far beyond the scope of this Note. Rather, I intend to show merely that institutional tensions inherent in the U.S. constitutional structure have generated these conflicting pressures on the Judiciary with respect to administrative action.

13. See *supra* note 1 and accompanying text.

14. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 674 (2007).

15. See, e.g., Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511, 515 (“Under our democratic system, policy judgments are not for the courts but for the political branches . . .”).

influence of two seminal cases that embody the traditional doctrines of deference to agency determinations of law and policy: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹⁶ (questions of law) and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*¹⁷ (questions of policy). This Part thus provides a basic—and admittedly oversimplified¹⁸—outline of the American anomaly.

A. *Questions of Law: Chevron Deference*

In modern literature on American administrative law, any discussion of judicial review of agencies' interpretations of statutes almost always includes *Chevron*. Upon its decision in 1984, *Chevron* was immediately recognized as a particularly significant administrative law opinion.¹⁹ Two decades later, Cass Sunstein described *Chevron* as “unquestionably and by far the most important case about legal interpretation in the last thirty years.”²⁰ It has been cited more often than *Marbury v. Madison*,²¹ *Brown v. Board of Education*,²² and *Roe v. Wade*.²³ If it does not already hold the distinction, *Chevron* may become the most cited case in American public law.²⁴

Although the Administrative Procedure Act (APA) states that “[t]he reviewing court shall decide all relevant questions of law” and “interpret constitutional and statutory provisions,”²⁵ courts—even before *Chevron*—

16. 467 U.S. 837 (1984).

17. 463 U.S. 29 (1983).

18. The deference actually afforded to agencies by courts is much more complex in practice than this simplified dichotomy suggests. See *infra* Part V; see also, e.g., 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, 1090 (2008) (finding that “*Chevron* was applied in only 8.3% of Supreme Court cases evaluating agency statutory interpretations” and demonstrating that the Supreme Court employs a “*continuum of deference regimes*”). Eskridge and Baer further claim that:

This continuum is more complicated than the literature or even the Court's own opinions suggest, and it is a continuum in which *Chevron* plays a modest role. Indeed, our most striking finding is that in the majority of cases—53.6% of them—the Court does not apply any deference regime at all. Instead, it relies on ad hoc judicial reasoning of the sort that typifies the Court's methodology in regular statutory interpretation cases.

Id. The deference regimes are simplified in this discussion for purposes of highlighting the American anomaly. In Part V, *infra*, I argue that such complexity is to be expected, given the inherent institutional tensions in American administrative law.

19. RUTH ANN WATRY, ADMINISTRATIVE STATUTORY INTERPRETATION: THE AFTERMATH OF *CHEVRON V. NATURAL RESOURCES DEFENSE COUNCIL* 6 (Eric Rise ed., 2002).

20. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 227 (1999).

21. 5 U.S. (1 Cranch) 137 (1803).

22. 347 U.S. 483 (1954).

23. 410 U.S. 113 (1973). By December 2005, federal courts had cited *Chevron* almost 8,000 times, far eclipsing the number of cites for *Brown v. Board of Education* (1,829 cites), *Roe v. Wade* (1,801 cites), and *Marbury v. Madison* (1,559 cites). BREYER ET AL., *supra* note 2, at 247.

24. SUNSTEIN, *supra* note 20, at 227.

25. 5 U.S.C. § 706 (2006).

have traditionally held that the agencies shall decide at least *some* questions of law.²⁶ Courts reasoned that in these cases, Congress has statutorily granted the agency the authority to make such a legal determination or interpretation.²⁷ But when such congressional intent is not clear, the courts remain the final arbiters of questions of law.²⁸

Nonetheless, while remaining the ultimate arbiters of law, courts have given varying degrees of deference to agency determinations of questions of law. In the seminal pre-*Chevron* case, the Supreme Court in *Skidmore v. Swift & Co.*²⁹ noted that while the “rulings, interpretations and opinions” of an administrator are not controlling upon the courts, such determinations *do* “constitute a body of experience and informed judgment” to which courts can “properly resort for guidance.”³⁰ In short, courts can rely on the agency determination as persuasive authority—a weak form of deference. The persuasive weight of an agency determination in a given case “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”³¹ These are the famous *Skidmore* factors, which courts would examine to determine how much deference to afford an agency’s interpretation of law.³²

However, the application of these factors was by no means an exact science. Forty years after *Skidmore*, the Supreme Court in *Chevron* seemingly adopted a simplified approach.³³ In *Chevron*, the Court famously set out a two-step test for reviewing an agency’s interpretation of a statute.³⁴ In “Step One,” the reviewing court must determine “whether Congress has directly spoken to the precise question at issue.”³⁵ If Congress has directly spoken, then the court must apply Congress’s clear meaning.³⁶ If not, then the court proceeds to “Step Two.”

26. BREYER ET AL., *supra* note 2, at 232.

27. *Id.* (citing Henry P. Monahan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25 (1983)).

28. *See, e.g.*, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (“[C]ourts are the final authorities on issues of statutory construction [and] must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.”).

29. 323 U.S. 134 (1944).

30. *Id.* at 140.

31. *Id.*

32. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *River St. Donuts, L.L.C. v. Napolitano*, 558 F.3d 111, 116 (1st Cir. 2009); *Choin v. Mukasey*, 537 F.3d 1116, 1120 (9th Cir. 2009) (all quoting this language from *Skidmore*).

33. BREYER ET AL., *supra* note 2, at 241.

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

35. *Id.*

36. *Id.* at 842–43.

The Step Two inquiry is whether the agency's interpretation "is based on a permissible construction of the statute."³⁷ The Court further explained that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."³⁸ Therefore, "the *Chevron* two-step" instructs reviewing courts to determine: (1) whether Congress's intent is clear or ambiguous and (2) if ambiguous, whether the agency's interpretation is "reasonable."³⁹ If the agency's interpretation is reasonable, the court will uphold the agency's decision.

Chevron thus established an extraordinarily deferential standard of review for agency statutory interpretations. As Professor Elizabeth Foote has observed, "[c]ourts rarely invoke unreasonableness as a ground for setting aside agency action."⁴⁰ Indeed, Foote concluded that "it is hard to find a single case in which the Court deemed the agency action unreasonable at the second step of the [*Chevron*] test."⁴¹ Accordingly, *Chevron* created a judicial review doctrine that holds that the interpretation of ambiguous regulatory and administrative statutory provisions is primarily the province of the agencies and not the courts.⁴²

Chevron does not tell the whole story, however. Recent Supreme Court decisions have provided means of narrowing *Chevron*'s scope, including the application of another inquiry that is sometimes referred to as *Chevron* Step Zero: the gateway question of whether or not the *Chevron* framework applies at all.⁴³ Furthermore, the Supreme Court does not always apply *Chevron* deference when reviewing agency statutory interpretations.⁴⁴ Nonetheless, *Chevron* is still good law, and as the most famous and most cited case in

37. *Id.* at 843.

38. *Id.* at 844.

39. *Id.* at 842–44. Matthew Stephenson and Adrian Vermeule have argued that, logically, the *Chevron* two-step really only has one step. Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 587, 599–600 (2009). If an agency's interpretation is contrary to clear congressional intent (Step One), then it is also necessarily not a permissible construction (Step Two). *Id.* Therefore, all cases that could be addressed by Step One are merely a subset of cases that could be decided under Step Two, so the *Chevron* test could be reduced to just the Step Two inquiry. *Id.*

40. Foote, *supra* note 14, at 708.

41. *Id.* at 709; see also BREYER ET AL., *supra* note 2, at 247 ("As of this writing, no Supreme Court decision has invalidated an agency decision under step 2, though several courts of appeals decisions do so.")

42. See BREYER ET AL., *supra* note 2, at 247 ("If *Chevron*'s basic holding is that ambiguous statutory terms should be interpreted by agencies rather than courts, *Chevron* can be seen as a kind of counter-*Marbury* for the administrative state.")

43. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006); see also, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.")

44. See Eskridge & Baer, *supra* note 18, at 1090 (finding that the Supreme Court does not consistently apply *Chevron* but rather applies a continuum of deference doctrines to agency statutory interpretations).

American administrative law,⁴⁵ it represents the doctrine that courts should give substantial deference to agencies’ legal interpretations.

B. Questions of Policy: State Farm Deference

A year before *Chevron*, the Supreme Court handed down another of the most important cases in American administrative law: *State Farm*. Whereas *Chevron* is the best known case on review of agencies’ determinations of law, *State Farm* is perhaps the best known case⁴⁶ concerning judicial review of agencies’ policy choices.⁴⁷ And as the *Chevron* doctrine grants deference to agencies’ legal interpretations despite the APA’s language that courts “shall decide all relevant questions of law [and statutory interpretation],”⁴⁸ the *State Farm* doctrine provides for more searching judicial review than is provided by the APA’s “arbitrary and capricious” standard.

Under the APA,⁴⁹ reviewing courts shall set aside agency actions or conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁵⁰ By the 1960s, however, this “arbitrary and capricious” standard increasingly seemed inadequate to address concerns about “agency capture”—which posits that agency decision making is often hijacked by regulated industries and interest groups.⁵¹ In response, federal appellate courts—especially the D.C. Circuit—developed the “hard look doctrine.”⁵² Courts began demanding that agencies show that they had taken a “hard look” at the substantive issues before deciding on a particular policy.⁵³

45. See BREYER ET AL., *supra* note 2, at 247 (noting that *Chevron* had been cited in federal courts nearly 8,000 times by the end of 2005 and “may well qualify as the most influential case in the history of American public law” by “sheer number of citations”).

46. *Id.* at 378.

47. Cf. M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 98 (John F. Duffy & Michael Herz eds., 2005) (“The two steps of *Chevron* apply to questions of statutory interpretation, while *State Farm* applies to exercises of policy judgment.”).

48. 5 U.S.C. § 706 (2006).

49. Pub. L. No. 79-404, 60 Stat. 238 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706).

50. 5 U.S.C. § 706(2)(A).

51. BREYER ET AL., *supra* note 2, at 348.

52. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761 (2008); see also Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1421 (2000) (“The decline of the group pluralist model of policy-making brought to administrative law and theory a profound fear that agencies had stopped serving the public interest and were simply representing the interests of the industries they regulated.”).

53. Miles & Sunstein, *supra* note 52, at 761 (citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 35 (D.C. Cir. 1976) (en banc)).

As set out in the landmark *State Farm* case,⁵⁴ the doctrine calls for courts to take a hard look at whether the agency has sufficiently considered all the available evidence and alternatives before making (and explaining) a well-reasoned policy choice.⁵⁵ In contrast to the *Chevron* doctrine, which involves an outcome-focused inquiry, the hard look doctrine endorsed by the Court in *State Farm* is a procedural test: it evaluates the agency's decision-making process.⁵⁶ Under *State Farm* and its progeny, the "failure of an agency to consider obvious [significant] alternatives has led uniformly to reversal."⁵⁷ Often, deciding whether an agency has sufficiently considered the alternatives as a procedural matter necessarily requires the court to examine the substantive issues in order to evaluate to what degree the agency should have investigated its options.⁵⁸ Thus, the hard look doctrine can be considered a fairly intrusive review of agency decision making.

C. Summary of the American Anomaly

The coexistence of two different approaches to judicial deference to agency action—the broad deference toward agency interpretations of law epitomized by *Chevron*, contrasted with the lower level of deference afforded to agency policy choices under *State Farm*—creates an anomaly in American administrative law. Following these doctrines, judges presumably give more deference to agencies' decisions of law than they do to agencies' policy choices.

The Judiciary is the least democratic branch of American government: federal judges are neither elected nor removed by the people.⁵⁹ Yet under the hard look doctrine, unelected judges review the policy decisions made by administrative agencies—often under the authority of the President—that implement statutes passed by Congress. A reviewing court may void an agency decision that did not amount to a well-reasoned (and explained)

54. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46, 48–49 (1983) (agreeing with the D.C. Circuit that the agency acted arbitrarily and capriciously and requiring that the agency "cogently explain why it . . . exercised its discretion in a given manner"); BREYER ET AL., *supra* note 2, at 383 ("*State Farm* is regarded as having endorsed a relatively intensive version of 'hard look' review, of the type pioneered by the D.C. Circuit.>").

55. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001) ("The current version of [the hard look] doctrine subjects all agency decisionmaking, irrespective of provenance or pedigree, to a wide-ranging judicial review for errors of process: the courts take a hard look at whether the agencies themselves have taken a hard look at the range of evidence, arguments, and alternatives relevant to an issue, and have made and explained a reasoned policy choice based on these considerations.>").

56. Magill, *supra* note 47, at 98.

57. *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 & n.46 (D.C. Cir. 1987).

58. See, e.g., *State Farm*, 463 U.S. at 53–54 & nn.16–19 (examining the empirical evidence in the record and venturing into sophisticated statistical analysis).

59. Of course, the Judiciary is not entirely free from political pressures. See John A. Ferejohn & Barry W. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 263 (1992) ("If a court's decision fails to reflect external political reality, it cannot stand for long.>").

choice among carefully considered policy alternatives.⁶⁰ Thus, unelected judges review policy decisions that can be considered to be the product of the two elected branches.

Meanwhile, under *Chevron*, judges give great deference to agencies’ interpretations of law. This deference might seem incongruous with the separation of powers enshrined in the Constitution and the intent of the framers that “[t]he interpretation of the laws is the proper and peculiar province of the courts.”⁶¹ Therefore, the American anomaly is that judges defer to agencies on questions of law—where judges have expertise and constitutional legitimacy—but take a hard look at policy decisions by agencies that have superior expertise and democratic legitimacy.⁶² This Note attempts to help explain this anomaly by means of a comparative institutional analysis, so it will next turn to a discussion of the analogous deference regimes in Australia and the United Kingdom.

II. Judicial Deference in Australia and the United Kingdom

The American anomaly is brought into even sharper relief by a comparative look at the Australian and British systems, which invert the American model of deference. Courts in both Australia and the United Kingdom give *no deference* to administrative interpretations of statutes, while granting substantially more deference to administrative policy decisions.

A. Australia

The Australian deference regime is exactly the reverse of the American system: Australian courts retain the exclusive authority to decide questions of law but generally give near-complete deference to administrators’ policy decisions.⁶³ Justice Sackville has called these the “twin pillars” of judicial review of Australian administrative action: that legal interpretation is the province of the courts and not the executive, and that courts may not infringe upon the power of the executive to make policy or to make administrative decisions on the “merits.”⁶⁴ The Australian High Court has flatly rejected *Chevron*, holding that “there is very limited scope for the notion of ‘judicial

60. Kagan, *supra* note 55, at 2380.

61. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

62. BREYER ET AL., *supra* note 2, at 403.

63. Ronald Sackville, *The Limits of Judicial Review of Executive Action—Some Comparisons Between Australia and the United States*, 28 FED. L. REV. 315, 329 (2000). Justice Sackville also observed that “[t]he situation in the United States is itself paradoxical; but the nature of the paradox is the mirror image of that in Australia.” *Id.* at 323. Unlike this Note, which argues that the American anomaly is tied to the U.S. presidential system, Justice Sackville highlights the American example in order to question whether Australia might learn from the American approach. *Id.* at 323, 328–30.

64. *Id.* The twin pillars derive from the strict separation of the judicial power from the other powers of government. *Id.* at 319.

deference” to administrative interpretations of law.⁶⁵ The High Court reasoned that “an essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers.”⁶⁶ For a court to fail to make its own, independent legal determination would be “to abdicate judicial responsibility.”⁶⁷ Therefore, Australian courts grant no deference to legal interpretations by administrators.

With respect to administrators’ policy choices, review by Australian courts does not extend to the “merits” of the administrators’ decisions.⁶⁸ Australian courts observe a strict distinction between the legality and the merits of administrative decisions.⁶⁹ Administrative actions are only reviewable for their legality and not for their merits.⁷⁰ Thus, the Australian deference regime presents a mirror image of the American anomaly. With its sharp divide between judicial review of administrators’ legal interpretations and policy choices, the Australian system comports with our intuitions about judicial deference to administrative action: judges defer to administrative policy choices while retaining the exclusive authority to interpret the law.

B. *United Kingdom*

As in Australia, courts in the United Kingdom afford no deference to administrative interpretations of law.⁷¹ In the *Anisminic* case,⁷² the House of Lords ruled that all “errors of law” by administrative tribunals or authorities are reviewable de novo.⁷³

With respect to judicial review of administrative policy decisions in the United Kingdom, the degree of deference differs based on the subject matter involved.⁷⁴ For example, English decisions after the 1998 passage of the Human Rights Act⁷⁵ have been trending in favor of higher scrutiny in cases implicating fundamental human rights.⁷⁶ Thus, depending on the subject

65. *City of Enfield v. Dev. Assessment Comm’n* (2000) 199 C.L.R. 135, 158.

66. *Id.* at 153.

67. *Id.* at 158.

68. Sackville, *supra* note 63, at 315.

69. *Id.* at 321.

70. *Id.* at 321–22.

71. See Michael C. Tolley, *Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective*, 31 POL’Y STUD. J. 421, 428 (2003) (“In the 1960s, courts in Britain took assertive steps that made them the conclusive arbiters on all questions of law.”).

72. *Anisminic Ltd. v. Foreign Compensation Comm.*, [1969] 2 A.C. 147 (H.L. 1968) (appeal taken from Eng.).

73. *Id.* at 182. “Error of law” is the traditional basis for judicial review of administrative action in England, and error of law claims generally involve statutory interpretation. Tolley, *supra* note 71, at 428.

74. *R. v. Sec’y of State for the Home Dep’t, ex parte Daly* [2001] UKHL 26, [2001] 2 A.C. 532, 549 (H.L. 2001) (appeal taken from Eng.).

75. 1998 c. 42 (U.K.).

76. Tolley, *supra* note 71, at 430.

matter, courts may review administrative policy decisions under standards ranging from reasonableness under *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*,⁷⁷ to proportionality, to heightened scrutiny.⁷⁸ The default standard, however, is *Wednesbury* reasonableness—a low threshold that upholds administrative action unless the decision is “so unreasonable that no reasonable decision maker could ever have come to it.”⁷⁹

Therefore, British judges generally extend significant deference to most administrative action. This deference comports with the fundamental English doctrine of the legislative supremacy of Parliament.⁸⁰ Under this doctrine, Parliament enjoys unlimited and exclusive legislative authority.⁸¹ Accordingly, the judiciary reviews executive action chiefly to ensure that government is acting within the powers granted by Parliament through legislation—the *ultra vires* principle.⁸² Thus, the British deference regime is the reverse of the American anomaly: judges in the United Kingdom review errors of law *de novo* and give significant deference to administrative policy actions.

III. A Comparative Institutional and Political Analysis: Australia, the United Kingdom, and the United States

The rise of the administrative state has generated more significant institutional tensions in the United States than in the United Kingdom and Australia. In the British and Australian parliamentary systems, control over the executive and legislative branches is consolidated, with the Prime Minister controlling both government and Parliament. Furthermore, the executive is more unified in Britain and Australia than in the United States, where there are significant constitutional and statutory divisions between the President and administrative agencies.

In Britain and Australia, then, the executive controls both the legislature and administrators.⁸³ Accordingly, this parliamentary structure minimizes interbranch power struggles over control of the administrative state. In contrast, American administrative agencies are often the subject of struggles for influence between the President and Congress.⁸⁴ Especially during periods of divided government, the agencies are at the forefront of President–

77. [1948] 1 K.B. 223 (C.A. 1947).

78. Tolley, *supra* note 71, at 430.

79. ANDREW LE SUEUE ET AL., *PRINCIPLES OF PUBLIC LAW* 302 (2d ed. 1999).

80. See Eric Barendt, *Fundamental Principles*, in *ENGLISH PUBLIC LAW* 30, 30 (2004) (maintaining that English constitutional law is dominated by three principles—the legislative supremacy of Parliament, the rule of law, and the separation of powers—and that the first principle has traditionally been considered the most important).

81. *Id.*

82. *Id.* at 41.

83. See *supra* note 7 and accompanying text.

84. See CHARLES H. KOCH ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 90 (5th ed. 2006) (noting interbranch conflicts on the appointment and removal of officials).

Congress conflicts.⁸⁵ The Judiciary, as the natural constitutional arbiter of these disputes, thus finds itself in a position to mediate between the other two branches.

A. Separation of Powers

The separation of legislative and executive powers is more pronounced in the American context than it is in the United Kingdom and Australia. One reason is that the separation of powers is more important to the American approach to protecting individual freedom. The British–Australian approach—the “rule of law” approach—seeks to protect citizens through robust legal protections for individual liberties.⁸⁶ The American approach—checks and balances—aims to protect individual freedoms indirectly, by limiting the power of government generally.⁸⁷ The three branches of government are played against each other in a struggle for power; attempts at tyranny by any one branch can be thwarted by the other two.⁸⁸ Thus, the power of government collectively is also restrained.⁸⁹

The American constitutional system has three defining characteristics: (1) separation of powers, (2) checks and balances, and (3) federalism.⁹⁰ The importance of the concept of separation of powers is made apparent by the organization of the U.S. Constitution itself, which assigns the “legislative

85. See Kagan, *supra* note 55, at 2346–47 (“Presidential administration may alter congressional oversight of agency action, making this activity less effective yet more vehement, especially in periods of divided government.”).

86. See, e.g., John McMillan, *An Overview of the Australian Legal System*, in ASPECTS OF ADMINISTRATIVE LAW IN AUSTRALIA AND INDONESIA 36, 44 (Robin Creyke et al. eds., 1996) (“Under the banner of [the rule of law] principle the courts have always declared that they have a special duty to protect the interests of the individual.”).

87. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (“Like separation of powers, [checks and balances] seeks to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle; the intent of that struggle is to deny to any one (or two) of them the capacity ever to consolidate all governmental authority in itself, while permitting the whole effectively to carry forward the work of government.”); see also, e.g., PATRICK M. GARRY, AN ENTRENCHED LEGACY: HOW THE NEW DEAL CONSTITUTIONAL REVOLUTION CONTINUES TO SHAPE THE ROLE OF THE SUPREME COURT 35 (2008) (recounting that the framers believed that the best way to safeguard individual liberties against government tyranny was to design weak institutions and diffuse government power).

88. Strauss, *supra* note 87, at 578; see also THE FEDERALIST NO. 51 (James Madison), *supra* note 61, at 321–22 (“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”).

89. See *supra* note 87 and accompanying text.

90. See BREYER ET AL., *supra* note 2, at 31 (describing the American constitutional system as one of separation of powers and of checks and balances); see also GARRY, *supra* note 87, at 27 (“The most important governing structures created by the Constitution are federalism and separation of powers.”).

Powers” to Congress in Article I, the “executive Power” to the President in Article II, and the “judicial Power” to the Judiciary in Article III.⁹¹

In contrast to the American strict separation-of-powers regime, the separation of powers is far less stringent in England⁹² and Australia.⁹³ In these parliamentary systems, the formal separation of legislative and executive powers breaks down as a practical matter. Government is formed by the party who wins a majority in Parliament.⁹⁴ This institutional structure, together with strong party discipline, ensures that the governing party can pass and implement legislation as it sees fit.⁹⁵ As a result, Australia and the United Kingdom generally do not experience the significant Executive–Legislative conflicts that occur in the United States.⁹⁶

B. *The Executive and the Administrative State*

A crucial difference between the American administrative state on the one hand and the Australian and British administrative states on the other is that America has a bifurcated Executive whereas Australia and the United Kingdom each have a unified executive.

The Constitution grants the President the right to appoint the major executive officials,⁹⁷ and the President currently appoints over 8,000 other executive officials.⁹⁸ This power to appoint gives the President considerable power over administrative agencies.⁹⁹ However, the President does not have

91. U.S. CONST. arts. I–III; *see also, e.g.*, GARRY, *supra* note 87, at 29 (observing that “a general principle of separation of power can be constructed from various provisions in the Constitution,” which “outlines the powers of each branch and then creates a complex system of checks and balances on the respective branches”).

92. *See* Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 171, 177 (1994), *reprinted in* ECONOMICS OF ADMINISTRATIVE LAW 567, 573 (Susan Rose-Ackerman ed., 2007) (describing the Westminster parliamentary system, in which the same party controls the executive and legislature).

93. *See* McMillan, *supra* note 86, at 43 (“Separation of powers could never be practiced in any pure form in Australia. Responsible government is itself a fundamental breach, since the executive’s Ministers also sit in the Parliament.”).

94. Moe & Caldwell, *supra* note 92, at 573.

95. *Id.*

96. *See id.* at 574 (“[In parliamentary systems, t]he executive is the leadership of the majority party, and thus the leadership of the legislature itself. What the executive wants, it gets.”).

97. *See* U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to nominate ambassadors, ministers, judges, and “all other Officers of the United States”).

98. David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEXAS L. REV. 1401, 1415 (2009) (citing Lois Romano, *In Any Guise, Podesta a Smooth Master of the Transition Game*, WASH. POST, Nov. 25, 2008, at C1).

99. *See, e.g.*, JEFFREY PFEFFER, *MANAGING WITH POWER: POLITICS AND INFLUENCE IN ORGANIZATIONS* 130 (1994) (identifying the “power to hire, fire, and reward” as central to the power associated with a formal leadership position within an organizational hierarchy). Nevertheless, the agencies still maintain a significant degree of independence from the President, and their power is limited by the organic and regulatory statutes passed by Congress. Strauss, *supra* note 87, at 586.

complete power over the administrative agencies. Instead, there is a separation between the President and the rest of the Executive. The American executive power is divided between the President and the agencies, in contrast to the unitary executives in Australia and the United Kingdom. Therefore, not only is American governmental power divided between the Executive and the Legislative Branches, but the executive power is further divided within the Executive between the President and the agencies. This is yet another reason why the administrative state generates greater institutional tensions in the United States than in Australia and the United Kingdom.

C. Legislation

In Australia and the United Kingdom, legislation is drafted by the executive and then approved by Parliament.¹⁰⁰ Legislation is therefore an instrument of the executive. From a balance-of-powers perspective, legislation in the United States can be conceived of as a tool of the Legislature to control the Executive. Consistent with the American system of checks and balances, the Executive is then constitutionally tasked with implementing legislation.¹⁰¹

However, congressional delegations to executive agencies can create significant principal-agent problems. Congress passes statutes, and executive agencies are tasked with interpreting and executing those regulations. Yet the agencies are primarily accountable not to Congress but to the President.¹⁰² Thus, there is strong potential for misalignment between the interests and objectives of Congress and those of the agency.¹⁰³ One logical result of this system is that Congress tends to delegate more authority to agencies when the Executive and Legislative Branches are politically aligned.¹⁰⁴

In Australia and the United Kingdom, the executive and the lower legislative body are *always* politically aligned.¹⁰⁵ Therefore, Australian and

100. ANDY WILLIAMS, *UK GOVERNMENT AND POLITICS* 8 (2d ed. 1998).

101. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

102. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 485 (2003) (explaining how President Reagan and his successors have exerted both managerial and directorial control over administrative agencies).

103. See *id.* at 507–08 (illustrating “the ability of *any* president, Republican or Democrat, to use passive-aggressive strategies of controlling regulatory policy that are less likely to achieve their purported public purpose than to please private interests”).

104. See Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 569 (2009) (“Congress is likely to delegate more authority to executive branch agencies when the president is of the same political party, that is, during periods of unified government. In such periods, Congress may reasonably assume that presidential preferences are less likely to diverge from legislative preferences.”).

105. It is important to note that in Australia, while the lower house (the House of Representatives) and the Prime Minister are always aligned, the Senate can be controlled by a different political party. See Ben Sharples, *Rudd Seeks Election Trigger Over Health, Herald Says*, BUS. WK., Feb. 18, 2010, available at <http://www.businessweek.com/news/2010-02-18/rudd-seeks->

British legislators do not have to doubt—at least to the same degree as their American counterparts—whether administrators will faithfully execute their statutes.¹⁰⁶ The U.S. model, on the other hand, provides ample incentive and opportunity for administrators to undermine congressional intent, particularly when different parties control the presidency and Congress.

IV. What the Australian and British Models Suggest About the American Anomaly

A. *Why U.S. Courts Give More Deference to Administrators’ Legal Interpretations*

A significant reason why American courts defer to agencies’ legal interpretations is that an agency’s interpretation of a statute is often tied to its policy choices,¹⁰⁷ and—as expressed by the Supreme Court in *Chevron*—unelected judges should not substitute their own policy preferences for those of administrators accountable to the democratically elected president.¹⁰⁸ But why should this be more of a concern for American judges than for their Australian and British counterparts?

One response is that the American Judiciary is more politicized than the judiciaries of Australia and the United Kingdom.¹⁰⁹ This politicization of the

election-trigger-over-health-herald-says-update1-.html (stating that while the Labor government has a majority in the House of Representatives, “neither it nor the opposition Liberal–National party coalition control the Senate, with both sides needing the support of other parties to pass or block legislation”). Similarly, the English Prime Minister may not be able to exert as much control over the House of Lords as over the House of Commons. Cf. LIJPHART, *supra* note 7, at 18–19 (explaining that while the House of Commons is popularly elected, the House of Lords consists of the hereditary nobility and government-appointed life peers; while “almost all legislative power belongs to the House of Commons,” the House of Lords can delay legislation). Furthermore, a notable difference between the two countries is that the Australian Senate has a legislative veto, while the British House of Lords does not. See George Tsebelis, *Veto Players and Institutional Analysis*, 13 GOVERNANCE 441, 459 (2000) (arguing that although the House of Lords lacks veto power, it is “able to abort legislation just by delaying passage until the election”).

106. There is, of course, a temporal problem with the implementation of legislation under all three systems. With the passage of time and subsequent elections, control of the legislative and executive branches can change hands in all three countries. Yet even this problem is lessened in the parliamentary systems: since political accountability for administration action (or inaction) is so much clearer than in the United States, Australian and British judges can depend on the political process to resolve discrepancies with more confidence than can their American counterparts.

107. Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 190 (1992) (“Separating interpretation from lawmaking is both easy and impossible. . . . Yet under almost any theory of statutory interpretation, the two overlap.”).

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

109. See ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 134 (1998) (observing that with respect to the appointment of British judges, “[t]here is admittedly no evidence that party political considerations play any part in this process; Lord Mackay, the last Conservative Lord Chancellor, appointed some judges who were known to have liberal, left-wing sympathies”); Mita Bhattacharya & Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia*, 30 J. LEGAL STUD. 223, 230–31 (2001)

Judiciary may result—at least in part—from the American system of checks and balances, in which the Judiciary plays an important role in checking the power of the other two branches. With the Judiciary situated as a coordinate political branch to the Executive and Legislative Branches, American judges occupy a more overtly political role than do Australian and British judges. As such, the Supreme Court had cause to fear that judges' policy preferences could affect their review of agencies' statutory interpretation.¹¹⁰

It is also perfectly reasonable for generalist judges to defer to the legal interpretations of administrators who may have more expertise within their own specialized statutory regimes. For these reasons, judicial deference to agencies' legal interpretations makes sense in the American context. However, these reasons—the politicization of the Judiciary coupled with agencies' superior accountability and expertise—seem to support with even greater force the argument that judges should give significant deference to agencies' policy choices.

B. Why U.S. Courts Give Less Deference to Administrator's Policy Choices

Why then do American courts give comparatively less deference to policy choices? One explanation is that the U.S. Judiciary must fulfill a role in correcting political defects—defects that are largely absent in the Australian and British systems. The modern American “administrative state” has often been called the fourth branch of the U.S. government.¹¹¹ There are now over 100 federal regulatory agencies and subagencies, which promulgate approximately 4,500 new rules every year.¹¹² The existence of this expansive administrative state has upset the balance of power between the American political branches, leading to President–Congress conflicts over control of the agencies. For example, President Reagan centralized review of agency rules in the Office of Information and Regulatory Affairs, increasing presidential influence over agency rulemaking.¹¹³ Later, through the passage

(contrasting the rarity of politically driven judicial appointments in Australia with the overtly partisan judicial-selection practices in the United States).

110. *Cf. Chevron*, 467 U.S. at 865 (“Courts, must in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences.”).

111. Strauss, *supra* note 87, at 578.

112. John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Speech to Weidenbaum Center Forum: Executive Regulatory Review: Surveying the Record, Making It Work (Dec. 17, 2001) (transcript available at http://georgewbush-whitehouse.archives.gov/omb/inforeg/graham_speech121701.html).

113. *Oversight of the Congressional Review Act Before the H. Subcomm. on Commercial and Administrative Law*, 110th Cong. 3 (2007) (statement of Morton Rosenberg, Specialist in American Law, Congressional Research Service) [hereinafter *Hearings*] (describing the “effectiveness of President Reagan's executive orders centralizing review of agency rulemaking . . . in the [OMB's] Office of Information and Regulatory Affairs (OIRA) in the face of aggressive challenges of congressional committees”).

of the Congressional Review Act,¹¹⁴ many legislators hoped to shift the balance of power over administrative rulemaking back towards Congress.¹¹⁵

The growth of the administrative state in the United Kingdom and Australia has not created a corresponding imbalance in those countries, thanks in large part to two institutional factors: (1) that each country has a unitary executive (as opposed to the bifurcated American Executive, split between the presidency and the administrative agencies) and (2) control of the executive and legislative branches is largely consolidated in the hands of the governing party. Therefore, political accountability for administrative decisions in the United Kingdom and Australia is clear: responsibility for such decisions lies with the governing party.

In contrast, the American Congress has experienced great difficulty in ensuring that the administrative agencies faithfully execute the legislation they are charged with implementing.¹¹⁶ The system of checks and balances established by the U.S. Constitution, which did not foresee the massive administrative state of the twentieth and twenty-first centuries, does not adequately address principal-agent concerns with respect to administrative action. Therefore, Congress relies on the courts to help police administrative action to ensure that the agencies serve as the “faithful agents” of Congress. U.S. courts help restrict the agencies’ ability to circumvent legislative will. For these reasons, there is a greater need for judicial review of administrative policy choices in the United States than in Australia and the United Kingdom.

V. What This Comparative Analysis Predicts About Deference Regimes in American Administrative Law

The comparison with Australia and the United Kingdom demonstrates that the American anomaly is a result of tensions inherent in the U.S. political structure.¹¹⁷ While the American anomaly is contrary to both our logical intuitions as well to the Australian and British models, it represents the natural outgrowth of competing judicial values: the desire to defer to agencies who may have greater expertise and political accountability than courts on the one hand, and the need to serve as a political check on abuses of discretion by agencies on the other.¹¹⁸

114. Pub. L. No. 104-121, sec. 251, 110 Stat. 847, 868 (1996) (codified as amended at 5 U.S.C. §§ 801–808 (2006)).

115. See *Hearings*, *supra* note 113, at 3 (“The expectation of many was that Congress, through the CRA, would again become a major player in influencing agency decisionmaking.”).

116. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (holding that the Constitution does not allow congressional intrusion into executive functions and that retention of removal power constitutes such an intrusion); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (striking down the use of the legislative veto).

117. See *supra* Parts III and IV.

118. See STEPHEN BREYER, *ACTIVE LIBERTY* 103, 108 (2005) (arguing that “[t]o reconcile democratically chosen ends with administrative expertise requires striking a balance—some

The American deference regime does not resolve the fundamental institutional tensions that led to its genesis: hence the proliferation of scholarly works continuing to debate fervently the proper degree of deference.¹¹⁹ Therefore, we should expect to continue to see judicial flexibility and changes with respect to American deference doctrines. We might also expect a multiplicity of doctrines that seek to correct imbalances in the system of checks and balances.

Justice (then-Judge) Breyer advocated against a broad, simplistic reading of *Chevron* shortly after its decision.¹²⁰ Breyer presciently predicted that courts would instead follow “more varied approaches, sometimes deferring to agency interpretations, sometimes not, depending upon the statute, the question, the context, and what ‘makes sense’ in the particular litigation, in light of the basic statute and its purposes.”¹²¹ Indeed, this is exactly what has resulted. Eskridge and Baer have recently shown that even the Supreme Court does not religiously apply the *Chevron* doctrine, but rather it employs a continuum of deference doctrines depending on the particularities of each case.¹²² In light of the institutional tensions in American administrative law, courts will likely continue to need the flexibility offered by such a continuum of doctrines in order to calibrate the borders of the President–Congress divide.

VI. Conclusion

It has been noted that in the United States, “the substance of regulations and the procedure by which they are made present issues which generate enormous controversy,” whereas in the United Kingdom, “nearly everyone seems satisfied with . . . procedural and substantive aspects of delegated legislation.”¹²³ This dichotomy can be traced back to the fundamental institutional differences between presidential and parliamentary systems. In the Australian and British parliamentary systems, political accountability for administrative action is clear, and principal–agent problems between the legislature and executive are minimized. In contrast, the American system involves significant principal–agent problems between Congress and executive agencies, as well as between the President and the agencies. As a result, political accountability is also unclear. Therefore, deference doctrines in American administrative law will continue to be flexible—and at times seemingly inconsistent—as they struggle to address the institutional tensions

delegation, but not too much” and that judges therefore should treat *Chevron* “not as an absolute rule, but as a rule of thumb”).

119. See *supra* Part I.

120. See Breyer, *supra* note 1, at 373 (“To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law . . . would be seriously overbroad, counterproductive and sometimes senseless.”).

121. *Id.* at 381.

122. See *supra* note 18.

123. Asimow, *supra* note 11, at 253.

generated by the application of a three-branch system of checks and balances to a fourth branch—the administrative state.

—*Robert C. Dolehide*