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Disrupting Deference for Disruptive Technology

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By Jennifer Huddleston

Soft law and more informal policymaking is being utilized by administrative agencies to govern many policy areas including emerging technologies that often disrupt the status quo. In many ways these tools have been beneficial for technologies that otherwise might have been derailed by out-dated and inflexible regulatory structures, but there are also concerns about their potential abuse.¹ This paper will examine what current standards of deference would likely result in for these policies if the courts use them to evaluate the “soft law” policies that increasingly cover emerging technologies.

Such standards and their impact will become increasingly important as federal agencies increasingly turn to a wide range of informal governance mechanisms, including multistakeholder collaborations, agency workshops, voluntary best practices, more traditional industry guidance documents, and comments issued through social media and blogs.²

Building on my previous work with Adam Thierer and Ryan Hagemann,³ I summarize why such soft law tactics are becoming the dominant form of modern technological governance. Then I present a range of examples of how this type of governance is likely to be used for various technology and a series of hypothetical scenarios about how these soft law mechanisms might play out in the courts under the current frameworks. I conclude by analyzing proposed reforms to judicial deference and how they might affect the governance of technology as well as why the courts are the most likely check against potential soft law abuse.

I. The Use of Soft Law in Governing Disruptive and Emerging Technology

As described in my previous work with Hagemann and Thierer, “hard law” refers to formalized government regulation including both informal and formal rulemaking under the Administrative Procedures Act (APA) as well as legislative actions that might occur on a state or federal level.⁴ “Soft law,” in contrast, refers to the various ways through which agencies might seek to regulate an industry or actor without ever actually engaging in reportable rulemaking or quantifiable regulation.⁵ These soft law actions take so many various forms and go by different names at different agencies that they become almost impossible to keep track of, let alone count.⁶

Other scholars have also documented this shift to less formal and more flexible policymaking for both better and worse both more generally in actions by the administrative state as well as in specific policy areas. For example, Clyde Wayne Crews has characterized these various sub-regulatory and often unaccountable actions as “regulatory dark matter” and provided recommendations for accounting for its uses and restraining its potential abuses.⁷ Phil Weiser has argued that such flexible policymaking tools can enable agencies to engage in “entrepreneurial

¹ See Ryan Hagemann, Jennifer Huddleston Skees, and Adam Thierer, *Soft Law for Hard Problems: The Governance of Emerging Technology in an Uncertain Future*, 17 COLO. TECH. L.J. 37 (2019).

² Clyde Wayne Crews Jr., *Mapping Washington’s Lawlessness: An Inventory of “Regulatory Dark Matter” 2017 Edition*

³ Hagemann et al., *supra* note 1.

⁴ *See id.*

⁵ *See id.*; *see also* Crews, *supra* note 2.

⁶ *See id.*

⁷ *See* Crews, *supra* note 2.

administration” by agencies and that it allows them to better carry out their missions and interact with those in the field who may have greater expertise particularly in rapidly changing fields.⁸ Yet, it quickly becomes apparent why such regulation is likely to be favored – particularly for disruptive technologies – for both regulators and innovators.⁹

The exact contours of soft law are difficult to define. In many cases, it is more easily defined by what it is not. The broadest definition of soft law could include anything that does not follow the formal procedures of regulation via the APA or formal legislation from Congress or a local legislature. A slightly more precise definition would be the variety of sub-regulatory actions engaged in by policymakers typically in cooperation with various stakeholders such as the innovators creating the product and with an awareness of the need for regulatory flexibility.¹⁰ This type of policy-making can vary significantly and exists on a spectrum both in regards to its formality from informal consultations and tweets to much more recognizable forms such as formal guidance or regulatory sandboxes as well as to the enforceability and certainty it provides.¹¹ In general soft law creates a degree of expectations for both regulated parties and the regulators, but lacks some of the various elements of hard law such as enforceability or the indefinite certainty.¹²

With both its benefits and detriments the reality remains that such flexible policy-making tools are an increasing reality when it comes to administrative law. As Gary Marchant and Brad Allenby have discussed these new tools have increasingly been useful to policymakers grappling with technology that often moves in an uncertain and disruptive direction.¹³ But the reality remains that it is often a second best tool. In some cases, soft law may be used to create restrictions on technologies that would have otherwise benefited from unregulated development and instead find themselves subject to various regulations. In many scenarios, such as with autonomous vehicles, it provides a flexible alternative for exceptions to burdensome regulations that would prevent beneficial technology from being deployed and discourage potentially important research and development.¹⁴ For these technologies, soft law provides an adaptive and flexible alternative that is able to move in conjunction with disruption and development rather than the static and restrictive nature of traditional hard law processes.

By their nature, soft law mechanisms lack the same substantive expectations or direct enforceability of traditional hard law processes.¹⁵ Yet, soft law tools are becoming the prevalent policy mechanism in technology regulation as a result of the “pacing problem.”¹⁶ The pacing problem refers to the inability of traditional policy and regulation to evolve as quickly as technology.¹⁷ At times, this “problem” becomes a benefit that allows technology to become

⁸ See Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011, 2017 (2017).

⁹ See Gary E. Marchant & Brad Allenby, *Soft Law: New Tools for Governing Emerging Technologies*, 73 BULL. ATOMIC SCIENTISTS 108, 108 (2017).

¹⁰ Hagemann et al., *supra* note 1 at 79-96.

¹¹ *Id.* at 97-119.

¹² See *id.* at 44; Marchant & Allenby, *supra* note 8.

¹³ See Marchant & Allenby, *supra* note 8.

¹⁴ See Ryan Hagemann, Jennifer Huddleston, and Adam Thierer, *Soft Law is Eating the World: Driverless Car Edition*, Oct. 11, 2018, THE BRIDGE, <https://www.mercatus.org/bridge/commentary/soft-law-eating-world-driverless-car>.

¹⁵ See *id.*; see also Hagemann et al., *supra* note 1.

¹⁶ See *id.*

¹⁷ *Id.*

indispensable to consumers before regulations or legislation can catch up.¹⁸ For a great many new or emerging tech sectors, including autonomous vehicles, 3D printing, smartphone apps, and drones, traditional hard law simply cannot evolve as quickly as technology does; however, a complete lack of guidance for these sectors, whose more traditional counterparts are often already governed by regulations, also seems unpalatable to both regulators and innovators and their investors.¹⁹ This leaves policymakers with a dilemma: either follow the strictures of hard law that risk being obsolete almost immediately or caging the potential of these innovations, or utilize less enforceable soft law to address concerns as they arise. Further complicating this issue, an increasingly dysfunctional political process for more formal legislation seems less capable than ever of reaching final consensus or priority on many tech governance matters and lacks the needed expertise to do so.²⁰

Beyond just the difficulties of faced by such pacing, regulators must also grapple with how technology has enabled many innovators to do an end-run around current or proposed regulatory systems by engaging in various forms of “technological civil disobedience.” This can include various actions depending on the technology such relocating in a form of innovation arbitrage or gaining such massive popular support they result in automatic deregulation.²¹

Given these challenges associated with hard law, soft law has become the second-best or least-worst option, causing agencies’ use of these strategies and mechanisms with increasing regularity.²²

II. Soft law and the courts

While soft law has the advantages of speed, adaptability, and flexibility, its use raises questions regarding the enforceability and legitimacy of soft law processes in comparison to the strictures of hard law.²³ The advantages and disadvantages of soft law, as opposed to more formalized rulemaking, are discussed in greater detail in other work,²⁴ but inevitably friction regarding such policies between regulators and innovators will arise and require remedies. This piece will look at one particular question in regards to these potential remedies: What would happen if the concerns related to these soft law tools are challenged in court?

The tech-oriented soft law activities this article focuses on have not yet truly faced legal challenges. One reason may be because despite their amorphous and varied nature, soft law processes follow many of the traditional APA requirements, such as public notices and the opportunity for comments to be filed with the agency considering such policies.²⁵ It also may be

¹⁸ See Adam Thierer, *The Pacing Problem and the Future of Technology Regulation*, THE BRIDGE, Aug. 8, 2018, <https://www.mercatus.org/bridge/commentary/pacing-problem-and-future-technology-regulation>.

¹⁹ See, e.g., Vivkek Wadhwa, *Laws and Ethics Can’t Keep Pace with Technology*, MIT TECH. REV., Apr. 15, 2014, <https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology/>.

²⁰ See Jeff Stein, *A Staff Survey Shows Just How Broken Congress Is*, VOX, Aug. 8, 2017, 11:50 a.m. EDT, <https://www.vox.com/policy-and-politics/2017/8/8/16112362/congress-survey-broken-yikes>.

²¹ Adam Thierer, *Innovation Arbitrage, Technological Civil Disobedience & Spontaneous Deregulation*, MEDIUM, Dec. 7, 2016, <https://medium.com/tech-liberation/innovation-arbitrage-technological-civil-disobedience-spontaneous-deregulation-eb90da50f1e2>.

²² See, e.g., Hagemann et al., *supra* note 1; Aaron L. Nielson, *Rethinking Formal Rulemaking*, MERCATUS RESEARCH, available at https://www.mercatus.org/system/files/Nielson_FormalRulemaking_v1.pdf.

²³ See Hagemann et al., *supra* note 1.

²⁴ See *id.*

²⁵ See Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKLEY TECH. L.J. 175, 206-17 (2014).

that the use of multistakeholder processes and sandboxing, where stakeholders who may be subject to regulatory action meet with regulators prior to engaging in certain acts to determine what regulations they would be subject to, have allowed affected parties to play a role in shaping the final product outside traditional notice and comment and allowed any concerns to be worked out before the finalization of the regulation.²⁶ Finally, the lack of legal challenge may simply be because the soft law mechanisms lacked clear enforcement and as a result no one party was sufficiently aggrieved to mount a challenge.²⁷

This piece will assume that soft law is able to successfully make it to court in the first place. The most flexible of these policies would face a great amount of difficulty in proving justiciability for those wishing to challenge them, but could still have an impact on the development or non-development of new technologies and their potential deployment. There are highly relevant questions regarding how one might show the exhaustion of administrative remedies for soft law and what issues may have to be addressed to gain judicial standing. These questions will certainly become more relevant as soft law is used on various levels and if enforcement is used to prevent certain actions. For now, soft law's general collaborative nature has avoided many of these disputes, or the administrative state has turned to more formal hard law tools when enforcement of soft law occurs. The broader questions of justiciability of more informal soft law are beyond the scope of this paper.

Courts generally grant administrative agencies some form of deference in their rulemaking for both hard and soft law. Because of this deference, an innovator wishing to challenge an agency decision in any form is likely to face an uphill battle if they are even able to make a legal challenge at all.²⁸ This is further complicated by the courts' difficulties in addressing the more flexible forms of soft law regulation and determining its role in regulation. As University of Florida law professor Lars Noah has noted, "courts continue to struggle in their attempts to differentiate such 'nonlegislative' rules from binding regulations."²⁹ When courts do determine such actions to be binding regulations, the exact nature of the courts' deference, however, will depend on the nature and type of agency regulation, as well as the source of the agency's authority to undertake such actions. What is and is not binding as well as what is or is not final is even further complicated by the evolving nature of soft law. For example, the Department of Transportation's guidance on autonomous vehicles appears to be undergoing nearly annual iterative updates following the numbering systems of software.³⁰

²⁶ See Nick Sinai, *Sandboxing and Smart Regulation in an Age of A/B Testing*, TECHCRUNCH, Jan. 30, 2015, <https://techcrunch.com/2015/01/30/sandboxing-and-smart-regulation-in-an-age-of-ab-testing/>.

²⁷ See Cortez, *supra* note 15.

²⁸ See Chris S. Leason, *4 Considerations for Challenging Agency Actions*, LAW 360, Sep. 28, 2016, <https://www.law360.com/articles/845046/4-considerations-for-challenging-agency-actions>.

²⁹ Lars Noah, *The FDA's New Policy on Guidelines: Having Your Cake and Eating It Too*, 47 CATHOLIC U.L. REV. 113, 113 (1997).

³⁰ See Jennifer Huddleston Skees & Trace Mitchell, *Continuing DOT's Automated Vehicle Soft-Law Approach Will Encourage Innovation and Promote Safety*, MERCATUS CENTER, Nov. 30, 2018, <https://www.mercatus.org/publications/regulation/continuing-dots-automated-vehicle-soft-law-approach-will-encourage>.

Chevron deference has probably received the most attention for possible reform from critics of the courts' current standards; however this changing landscape of regulation requires a deeper look at deference to administrative agencies' interpretations and decisions more generally.³¹

Under *Chevron* deference, if Congress created ambiguity in granting authority and the agency has gone through formal or informal rulemaking processes, then the courts will be highly deferential to the agency's interpretation provided that it is reasonable given the ambiguity.³² Still, this deference is not absolute and requires ambiguity in the hard law at issue that would necessitate agency interpretation.³³

Chevron deference is unlikely to be implicated in the soft law actions that tend to govern technology (since so little technology regulation is done through formal agency action) and instead deference precedents under *Skidmore* and *Auer* are more likely to be relevant. Under *Skidmore* deference, courts give persuasive weight to agency interpretations or reinterpretations made through subsequent agency actions (i.e., additional guidance documents, clarification letters, amicus briefs, etc.).³⁴ *Skidmore* deference does not require ambiguity in the original interpretation or guidance, but is designed to allow agencies to change interpretation or policy.³⁵ *Auer* deference provides a high level of deference to agency interpretations of its own regulations so long as that interpretation is not plainly erroneous or clearly a *post hoc* rationalization.³⁶

While questions of soft law enforceability have come up in other contexts in the courts, the way these deference doctrines play out has not yet been fully seen in the disruptive technology context. As a result, one can hope that the desire for innovation and entrepreneurship might raise enough concerns over the potential pitfalls of unchecked administrative power to allow disruptive technology to disrupt judicial deference precedents. Otherwise, if scenarios play out under the current judicial deference doctrines, it risks allowing agencies to detour or discourage disruptive technology and prevent the benefits to human flourishing of these innovations.³⁷

III. The Current and Possible Future Landscape of Soft Law Technological Governance and the Courts: Three Scenarios

To truly understand what existing deference doctrines may mean for legal challenges to soft law governance of emerging technologies, it is best to look at examples of how the courts might address challenges to current soft law technological governance regimes if they were to face legal challenge. This section will provide three such examples based on current soft law actions affecting emerging technologies.

A. Deference for Guidance Documents Governing Disruptive Technology

³¹ See David Borgen & Jennifer Liu, *Significant Legal Developments in Wage & Hour Law: Deference Standards*, GOLDSTEIN, DEMCHAK, BALLER, BORGAN & DARDARIAN, Oct. 19, 2017, http://gbdhlegal.com/wp-content/uploads/article/NELA_Paper.2007.pdf.

³² *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

³³ Borgen & Liu, *supra* note 31.

³⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

³⁵ Borgen & Liu, *supra* note 31.

³⁶ *Auer v. Robins*, 519 U.S. 452, 462-63 (1997).

³⁷ See Mark Strauss, *Four-in-Ten Americans Credit Technology with Improving Life Most in the Past 50 Years*, PEW RESEARCH CENTER, Oct. 12, 2017, <http://www.pewresearch.org/fact-tank/2017/10/12/four-in-ten-americans-credit-technology-with-improving-life-most-in-the-past-50-years/>.

Consider the following real-world example: an agency issues new guidance for an emerging technology that changes elements of its previous guidance without a formal notice-and-comment period. Indeed, this very scenario recently played out when the National Highway Traffic Safety Administration (NHTSA) issued a report with new guidelines for autonomous vehicles in 2017 following a 2016 workshop, co-hosted with the Federal Trade Commission (FTC).³⁸ Prior to this, in September 2016, NHTSA had also released a non-binding soft law guidance on autonomous vehicle safety without any notice-and-comment mechanism.³⁹ It is unclear whether updated guidance is a result of comments from the workshop, but as NHTSA's guidance for autonomous vehicles⁴⁰ becomes less and less formal, open questions remain regarding what happens when a technology doesn't fit into a box, defies an agency recommendation, or relied on previous guidance that is now overturned by more recent statements from the agency. Additionally, the formal request for comments has typically followed the release of the guidance rather than preceding its release.

Guidance documents consisting of both a more formally issued statements, such as the 2016, 2017, and 2018 NHTSA guidelines, and more informal comments or reports, such as FTC workshop reports, have become more prevalent tools for agencies to regulate or quasi-regulate technology.⁴¹ While in some cases it clear formal guidance has been issued, it less clear for the vague recommendations of an agency such as those seen in the recent NHTSA guidelines.⁴² It also remains unclear whether guidance documents are as "voluntary" as NHTSA and other agencies insist.⁴³ NHTSA continues to update such documents on a practically annual basis and while the latest version did not contain substantial changes from the earlier version 2.0, but also did not clarify either enforceability, remedy, or the regulatory nature of the framework.⁴⁴

The issue of the use and abuse of guidance documents, as they pertain to the technology industry, has not been explicitly addressed, but has been discussed in its use by agencies in other policy areas including environmental and labor regulations. The D.C. Circuit questioned the misuse of this guidance power in *Appalachian Power Co. v. EPA* stating that agency reliance on such soft law is effectively law "without notice and comment, without public participation, and without publication."⁴⁵ The Supreme Court addressed similar issues in *Perez v. Mortgage Bankers Association* where the Department of Labor had changed its official opinion on whether mortgage officers were typically exempt or non-exempt employees only through agency opinion

³⁸ *Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected>, last accessed Aug. 22, 2017.

³⁹ *Federal Automated Vehicles Policy: Accelerating the Next Revolution in Roadway Safety*, DEPT. OF TRANSPORTATION, Sep. 2016, available at <https://www.transportation.gov/AV/federal-automated-vehicles-policy-september-2016>.

⁴⁰ *See Automated Driving Systems: A Vision for Safety*, DEPT. OF TRANSPORTATION, Nov. 2017, available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf.

⁴¹ *See Crews*, *supra* note 2.

⁴² *See id.*

⁴³ Adam Thierer & Jennifer Huddleston Skees, *Big Questions About NHTSA's "Soft Law" Driverless Car Guidance*, PLAIN TEXT, Sep. 13, 2017, <https://readplaintext.com/big-questions-about-nhtsas-soft-law-driverless-cars-guidance-e9da327a7522>; Adam Thierer, *DOT's Driverless Cars Guidance: Will "Agency Threats" Rule the Future?*, THE TECHNOLOGY LIBERATION FRONT, Sep. 20, 2016, <https://techliberation.com/2016/09/20/dots-driverless-cars-guidance-will-agency-threats-rule-the-future/>.

⁴⁴ *See Huddleston Skees & Mitchell*, *supra* note 30.

⁴⁵ 208 F.3d 1015, 1020 (D.C. Cir. 2000)

letters and interpretations.⁴⁶ As interpretative rules, neither of these opinions had required procedural notice and comment under the APA.⁴⁷ The Supreme Court held that notice-and-comment is not required when an agency is merely changing its interpretation of previous interpretative rules or guidance.⁴⁸ However, the Court noted that the agencies are “require[d] to provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests.’”⁴⁹

Still regulatory agencies regularly use guidance in the technology sphere to create guidelines without the formalities required under the APA.⁵⁰ With this increase in use of guidance over APA-proscribed rulemaking, there is the potential for conflict or confusion in an environment characterized by the inevitable friction between fast-paced innovation and ambiguous agency responses. This situation is not unique to modern tech sectors, but is further amplified by the pacing problem and the risks of changing the trajectory of an emerging technology industry’s development. An agency’s perceived ability to enforce a “recommendation” for emerging technologies with little to no warning or input from those who are subject to the regulation runs the risk of stifling innovations like autonomous vehicles when adverse decisions could render such improvements illegal.⁵¹ In fact, the potential for regulatory uncertainty has led to certain automakers deciding not place their most advanced technology in their cars sold in the United States.⁵² This uncertainty is only further intensified by the courts’ deference to agency interpretations in such scenarios.⁵³

In the scenario described at the start of this section, courts would likely hold that a new policy statement issued by NHTSA in the form of a workshop report would not require notice and comment. This type of change in policy, in which an agency reinterprets its own informal interpretations, is entitled to deference under the *Skidmore* standard of judicial deference.⁵⁴ As a result, it would be given persuasive weight.⁵⁵ Although such statements are not formally binding or entitled to a higher level of deference, as shown in *Perez*, courts typically consider them highly persuasive and likely would defer to any such statements as reinterpretations of agency policy.

While such interpretation and guidance documents are not binding, *per se*, the lack of predictability that can accompany this soft law policymaking makes it difficult for these newer technologies to find investors, customers, and/or insurance.⁵⁶ In some cases, where more formal

⁴⁶ *Id.* at 1204-5.

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *Id.* at 1209.

⁵⁰ *See Crews, supra* note 2.

⁵¹ *See* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 376 (2011).

⁵² *See* Joseph Capparella, *2019 Audi A8 Won’t Offer Hands-Off Autonomous Tech in the U.S.*, CAR AND DRIVER, May 14, 2018, <https://www.caranddriver.com/news/2019-audi-a8-wont-offer-hands-off-autonomous-tech-in-the-us>.

⁵³ *See* Hagemann et al., *supra* note 1.

⁵⁴ *See id.*

⁵⁵ *See Skidmore*, 323 U.S. at 139-40.

⁵⁶ *See* Robert A. Hoerr, *Regulatory Uncertainty and the Associated Business Risk for Emerging Technologies*, 13 J. OF NANOPARTICLE RES. 1514 (2011); *Regulatory Reform and Innovation*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/sti/inno/2102514.pdf>.

guidelines have been promulgated, such as NHTSA's autonomous vehicles safety guidelines, a company may still be able to argue reasonable reliance on the prior guidelines. This can be difficult to prove, however, when these guidance documents are not considered final agency conclusions, and therefore do not bind later actions and subsequent interpretations.⁵⁷ If, for example, later NHTSA guidance were to undermine previous statements on connected cars, and a challenge were to reach courts, manufacturers would likely be forced to adapt to the new standards even if these statements were not subject to the typical APA rulemaking process.⁵⁸

This uncertainty may unnecessarily limit innovation and direct funding and innovation towards other areas.

So far when NHTSA has pursued action against autonomous vehicles it has done so via mechanisms other than the issued guidance documents.⁵⁹ For example, Comma AI pulled its autonomous vehicle after NHTSA issued a letter claiming it violated existing standards for after-market upgrades.⁶⁰ Similarly, in 2018, NHTSA shutdown an autonomous shuttle program in Florida for violating FMVSS regarding school buses and failing to disclose that the shuttle would be used for school transportation.⁶¹ Some evasive entrepreneur may be able to comply with the existing regulations and still choose to avoid some of the soft language in the current Autonomous Vehicle framework.⁶² If that occurs, then the courts deference to the agency could make even the softest of soft law quite enforceable if they continue to give agencies such significant deference under *Skidmore*.

B. Agency Interpretations of Existing Regulations to Apply to a Disruptive Technology

Suppose an agency interprets an existing regulation to include an emerging technology and subjects the technology to the requirements of all other items included in this interpretation. For example, the Federal Aviation Administration (FAA) interprets its definition of common carriers to including private pilots offering a small number of seats via an online cost-sharing service despite previous analog equivalents not be considered under the definition.

While the scenario proposed in Section III.A was purely speculative, this scenario is based on Flytenow's challenge to FAA's legal interpretation of the company's compliance with existing federal aviation regulations.⁶³ The legal challenge by FlyteNow regarding the FAA's

⁵⁷ See, e.g., *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030 (D.C. Cir. 2008).

⁵⁸ See Luke A. Stewart, *The Impact of Regulation in the United States: A Cross-Industry Literature Review*, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, June 2010, available at <https://www.itif.org/files/2011-impact-regulation-innovation.pdf>.

⁵⁹ E.g. Press Release, National Highway Traffic Safety Administration, NHTSA Directs Driverless Shuttle to Stop Transporting School Children in Florida (Oct. 19, 2018), <https://www.nhtsa.gov/press-releases/nhtsa-directs-driverless-shuttle-stop-transporting-school-children-florida>.

⁶⁰ Darrell Etherington, *Comma.ai cancels the Comma One following NHTSA letter*, TECH CRUNCH, Oct. 28, 2016, <https://techcrunch.com/2016/10/28/comma-ai-cancels-the-comma-one-following-nhtsa-letter/>

⁶¹ See Sean O'Kane, *Self-driving School Bus Project Stopped After Government Intervenes*, THE VERGE, Oct. 22, 2018, <https://www.theverge.com/2018/10/22/18008828/self-driving-school-bus-nhtsa-transdev-stopped>; see also Press Release, *supra* note 59.

⁶² See Huddleston Skees & Mitchell, *supra* note 30.

⁶³ Stewart B. Herman & Timothy J. Lynes, *Flytenow v. FAA Decision: Flight-Sharing Requires FAA Part 119 Certification*, THE NAT'L L. REV., Mar. 1, 2016, <https://www.natlawreview.com/article/flytenow-v-faa-decision-flight-sharing-requires-faa-part-119-certification>.

reinterpretation of its definition of common carriage to be more expansive that effectively rendered its business model illegal provides one of the few examples of the collision of disruptive technology and judicial deference that has come to fruition in the courts.⁶⁴

Unfortunately, the D.C. Circuit Court ruled that because the FAA was providing a reinterpretation of existing regulations, the agency was entitled to *Auer* deference and as a result FlyteNow was subject to the definition despite decades of history and usage of the definition otherwise.⁶⁵ The agency's interpretation of its own regulations were given controlling weight under *Auer* since the interpretation was neither clearly erroneous nor inconsistent with the regulations.⁶⁶ As this case illustrates, under *Auer* deference agencies are given broad power to determine reasonable interpretations of their own actions and terms including the ability to reinterpret definitions that had previously been established or interpreted differently.⁶⁷

More recently in *Kisor v. Wilkie*, the Supreme Court sought to limit the use of *Auer* deference by creating further guidelines for its use, but falling far short of undoing the doctrine.⁶⁸ In *Kisor*, the Court held that *Auer* deference should “arise only if a regulation is genuinely ambiguous,” and that not agency interpretations are automatically entitled to deference.⁶⁹ This instructed lower courts to restrain from assuming that an agency's interpretation should always apply but rather the court should traditional tools' of construction and “make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.”⁷⁰ Still, as other justices pointed out in their separate decisions still allows to bias to agencies even when such interpretations were not “the best and fairest reading.”⁷¹ Ideally, *Kisor* should limit the application and broad deference agencies have typically received when facing challenges to those cases when an interpretation was truly necessary. However, how *Kisor* truly impacts lower court consideration of agency interpretations will remain to be seen as courts are just beginning to encounter such issues in a post-*Kisor* world.

The result of such broad deference to agency interpretations designed to make technology fit into existing regulatory schemes could be highly damaging for technology for several reasons. Innovators, like FlyteNow, cannot predict how an agency will reinterpret existing regulations and may be unable to determine which actions they may undertake and remain compliant.⁷² For example, FlyteNow's service was not significantly different from physical bulletin boards in many airports other than its online platform, but was found to be subject to different regulations than the physical bulletin boards.⁷³ This case also illustrates agencies' abilities to use such reinterpretations to shoehorn a new technology into a category in which it does not fit. In *FlyteNow*, because the agency desired to regulate the technology, but did not wish or could not establish new guidance or regulations, the resulting interpretation not only shutdown the

⁶⁴ Christopher Koopman, *Defining Common Carriers: Flight Sharing, the FAA, and the Future of Aviation*, MERCATUS WORKING PAPER, available at <https://www.mercatus.org/system/files/mercatus-koopman-common-carriers-flight-sharing-v1.pdf>.

⁶⁵ *Flytenow v. FAA*, 808 F.3d 882, 884 (D.C. Cir. 2015).

⁶⁶ *Auer*, 519 U.S. at 462-63.

⁶⁷ *See Flytenow*, 808 F.3d at 889-90.

⁶⁸ *Kisor v. Wilkie*, No. 18-15, slip op. (Jun. 29, 2019).

⁶⁹ *Id.* at *11.

⁷⁰ *Id.* at *15.

⁷¹ *Id.* at *37 (J. Gorsuch concurring).

⁷² *See Koopman*, *supra* note 64 at 3.

⁷³ *See id.*

disruptive technology but could limit the use of mainstream technologies for longstanding practices.⁷⁴

In reinterpreting rules to limit new and disruptive technologies, agencies are sending the message that innovation that might disrupt the existing system is not welcome.⁷⁵ When the courts give such agency reinterpretations deference, they are only further amplifying this message. As Christopher Koopman, Senior Director of Strategy and Research at the Center for Growth and Opportunity, has discussed, the courts will likely defer to the FAA's continued reinterpretations unless there is a statutory intervention by Congress to formalize long-standing ambiguous definitions such as common carriage that may or may not have had time to evolve with technology.⁷⁶ Courts could play a role in the meantime by subjecting such agency reinterpretations to notice-and-comment rather than the current high level of deference. This would provide a robust debate on the usefulness of the original regulation or definition and would help insure that such novel interpretations are consistent with legislative intent and democratic ideals.⁷⁷ This discussion will likely only become more pressing as the drone and electric vertical takeoff and landing device (eVTOL) industries develop if the U.S. wishes to continue to be an innovation leader in such fields.⁷⁸

Without reform from Congress or the courts to insure that such decisions are subject to appropriate scrutiny, and considering the potential ramifications of currently ambiguous terms, innovative technologies are likely to be shoehorned into improper regulatory categories. If the purpose of delegation is to allow experts to make decisions, then those experts need to be able to properly address and adapt to the potential concerns of a novel technology rather than trying to create one size fits all regulation.⁷⁹

C. Agency Claims of Statutory Authority Over Disruptive Technology Without Express Congressional Delegation

Consider what might happen when an agency (or agencies) and a technologically innovative company disagree about whether the agency (or which agency) has the statutory authority to enforce regulations and guidance upon it. For example, a developer of a health app might view itself as an information technology subject to privacy, communications, and data security requirements of agencies such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC), while the Food and Drug Administration (FDA) might classify it as a provider of a regulated medical device, based on the agency's interpretation of potential risks to users.

⁷⁴ See *id.* at 3-4.

⁷⁵ Eli Dourado, *The FAA Is Constantly Thwarting Innovation*, SLATE, Feb. 17, 2016 10:24 a.m., http://www.slate.com/articles/technology/future_tense/2016/02/the_faa_is_constantly_thwarting_aviation_innovation.html.

⁷⁶ Koopman, *supra* note 64.

⁷⁷ See John D. Graham & Cory R. Liu, *Regulatory and Quasi-Regulatory Activity Without OMB and Cost-Benefit Review*, 37 HARV. J. OF L. & PUB. POL'Y 425, 430 (2014).

⁷⁸ See Joan Lowy, *Other countries are surpassing the U.S. in Commercial Drone Flights*, PBS NEWSHOUR, Dec. 10, 2014, <https://www.pbs.org/newshour/nation/countries-surpassing-us-commercial-drone-flights>.

⁷⁹ See Hester Peirce, *Regulating through the Back Door at the Commodity Futures Trading Commission*, HARV. J. OF L. & PUB. POL'Y, Federalist Edition, Vol. 2, No. 2, (2014): 321-393, available at http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Peirce_7.pdf (discussing similar issues in the context of financial regulation).

New, innovative product and services rarely fit neatly into boxes. In this scenario, the FDA has already provided guidance regarding software apps that will be subject to FDA regulation and those apps that the FDA will not regulate as medical devices.⁸⁰ This guidance is significant in the smartphone era as mobile devices increasingly incorporate various health and fitness applications.⁸¹

Much of the FDA guidance focuses on the purpose of the app.⁸² Inevitably, a regulator and an app's developer may disagree on the technology's purpose, as well as the scope of regulation applicable to the product because many technologies have a variety of purposes (intended or otherwise) and do not fit nicely into any agency's traditional regulatory playbook.

In its guidance, the FDA attempts to divide mobile medical apps into two buckets: (1) "those that can pose a greater risk to patients," and which will need to be premarket approved by the agency; and, (2) those that "pose minimal risk to patients and consumers," which the agency will forbear from regulating preemptively.⁸³ Of course, those are broad classifications and a large gray zone exists between them. Furthermore, the FDA definitions have not kept pace with technology and the definitions of software and apps lack any information about their applicability to artificial intelligence or machine learning components for diagnostics.⁸⁴ As more health and medical apps are introduced, this could lead to legal challenges if the FDA acts to restrict new innovations.

Even more uncertain is how to address these concerns when it is unclear whether the interpretation is within the agency's jurisdiction or not. In *City of Arlington v. FCC*, the Supreme Court held if there is ambiguity in the grant of an agency's jurisdiction over a matter, then an agency's interpretation of the scope of its jurisdiction in the matter is subject to *Chevron* deference.⁸⁵ However, in his dissent, Chief Justice Roberts sought to distinguish such questions from *Chevron* deference, arguing that it was for the courts to determine if an agency was entitled to interpretive authority, "because Congress has conferred on the agency interpretive authority over the question at issue."⁸⁶ "An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, *without deference to the agency*,"⁸⁷ Roberts argued in his dissent. The late Justice Antonin Scalia, writing for the majority, rejected this distinction arguing that it was too broad of a scope for *de novo* judicial review of agency jurisdiction and would result in the enforceability of agency actions becoming unpredictable under *Chevron* deference.⁸⁸ As a result, agencies retain rather significant deference when it comes to interpreting their own authority provided there is an

⁸⁰ *Mobile Medical Applications*, U.S. FOOD & DRUG ADMIN., Sep. 22, 2015,

<https://www.fda.gov/MedicalDevices/DigitalHealth/MobileMedicalApplications/default.htm>.

⁸¹ *See id.*; Satish Mira, *New Report Finds More Than 165,000 Mobile Health Apps Now Available, Takes Close Look at Characteristics and Use*, IMEDICALAPPS MEDPAGE TODAY, Sep. 17, 2015, <https://www.imedicalapps.com/2015/09/ims-health-apps-report/>.

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See* Ryan Hagemann & Anastasia Greenberg, *Powering the Future of Precision Medicine with Artificial Intelligence*, NISKANEN CENTER, Jul. 19, 2018, <https://niskanencenter.org/blog/powering-the-future-of-precision-medicine-with-artificial-intelligence/>.

⁸⁵ 569 U.S. 290 (2013). 133 S.Ct. 1863 (2013).

⁸⁶ *Id.*

⁸⁷ *Id.* (emphasis added).

⁸⁸ *Id.* at 1874.

ambiguity that could allow that authority to be considered reasonable and there is nothing to clearly indicate that it is contrary to the agency's authority or granted to another agency.

This issue is particularly important for disruptive technologies such as robotics or artificial intelligence where Congress has not yet delegated authority to any agency, but aspects or applications of the technology could be claimed by many.⁸⁹ An agency may not egregiously overstep its bounds or claim authority over technology clearly delegated to another agency (the FAA cannot declare itself the regulator of high-speed rail for example); however, when there is ambiguity regarding the authority, the agency's own interpretation is likely to prevail.⁹⁰ As a result any one of a number of agencies could try to claim authority over a technology such as AI based on its potential application and their existing authority.

Once claimed, however, this expansion of authority is still subject to analysis under *Chevron* deference. *Chevron* deference requires two steps. First there must be ambiguity in the Congressional intent at issue and then the agency interpretation of the ambiguity be reasonable.⁹¹ For example, if the FDA has been delegated to regulate medical devices and medical devices has not been clearly defined or provided with a catchall, the agency's interpretation of its own authority including certain mobile medical apps is likely to be valid in accordance with *City of Arlington*.

With new mobile health apps multiplying so rapidly, it raises the question of how quickly and effectively the FDA will be apply to "classify on the fly" without significantly disrupting the advent of new life-enriching, and potentially even life-saving technologies.⁹² Whether innovators challenge regulatory designations probably depends on their own benefit-cost calculus regarding the cost and resources consumed fighting in court versus working with the agency in even "softer" soft law ways (i.e., consultations and negotiations) to win at least a small degree of regulatory leeway.⁹³

Perhaps another interesting twist might be how an agency could use *Chevron* deference to force otherwise voluntary compliance based on the actions of others. For example, the FDA approved the first app to prevent pregnancy,⁹⁴ yet several similar apps are available unregulated and without agency approval. Could the approval of one app mean the rest now are non-compliant medical devices or is it merely an additional certification? Similarly, the meditation app Headspace has also been seeking FDA approval despite other mindfulness apps on the market without it.⁹⁵ These decisions to seek approval appear to be an effort to distinguish in an increasingly crowded market as well as to indicate the efficacy, or superiority, of a particular

⁸⁹ See Ryan Calo, *The Case for a Federal Robotics Commission*, BROOKINGS INSTITUTE, Sep. 15, 2014, <https://www.brookings.edu/research/the-case-for-a-federal-robotics-commission>.

⁹⁰ See *City of Arlington*, 133 S.Ct. at 1874.

⁹¹ *Chevron*, 467 U.S. at 842-43.

⁹² See Julie Davis, *FDA Regulation of Mobile Medical Apps*, AM. BAR ASS'N, Nov. 7, 2018, <https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2017/fda-regulation-of-mobile-medical-apps/>.

⁹³ See Shi-Ling Hsu, *A Game-Theoretic Approach to Regulatory Negotiation and a Framework for Empirical Analysis*, 26 HARV. ENVTL. L. REV. 33 (2002).

⁹⁴ Rachel Siegel, *The FDA Approved an App to Prevent Pregnancy. Can an App do That?*, WASH. POST, Aug. 14, 2018, https://www.washingtonpost.com/business/2018/08/14/fda-approved-an-app-prevent-pregnancy-can-an-app-do-that/?utm_term=.77851097f44e.

⁹⁵ Gali Katznelson, *Meditation? There's an (almost FDA-approved) App for That*, BILL OF HEALTH, Jul. 16, 2018, <http://blog.petrieflom.law.harvard.edu/2018/07/16/meditation-theres-an-almost-fda-approved-app-for-that/>.

app. However, given the rather broad framework that the FDA is currently considering mobile medical apps under, it is possible that these efforts could result in regulation of the non-approved competitors when previously they would not have required such approval.

23andMe provides an instructive case study in that regard. As Robert F. Graboyes and Jordan Reimschisel have documented, the genetic testing company originally offered a broad-based direct-to-consumer test to screen for roughly 250 genetic conditions.⁹⁶ But following a 2013 warning letter from the FDA, 23andMe was ordered to stop marketing its kits, to reapply for permission to operate, and then reintroduce a more limited product that only screens for 10 genetic conditions.⁹⁷ The company chose to negotiate with the FDA instead of pushing its case in court, where it might have raised both procedural issues associated with APA compliance as well as potential First Amendment issues relating to the right of consumers to gain access to such information about their health.⁹⁸ Yet, the firm obviously conducted its own internal benefit-cost calculus and concluded it made more sense to negotiate instead of push the legal questions in play.⁹⁹ Part of that calculus probably comes down to an expectation that the FDA would have been granted broad deference under any standard the court chose to apply in this matter and that challenging a regulator might actually result in an even less favorable ruling than the current uncertainty.¹⁰⁰ Regardless, other innovators might choose to push the envelope and test these questions in similar classification disputes in the future. Additionally, with such matters typically being handled without court proceedings or an administrative record, no precedent is established to lessen the regulatory uncertainty of future innovators.

Another issue could emerge for companies who straddle multiple regulated industries: relying on guidance from the wrong regulator for guidance. For example, a company could be following FTC guidelines for privacy and security best practices for its product only to find that the FDA has now considered it a medical device subject to new and different guidance and regulation that may have a different view of safety.

This same scenario could unfold for driverless car innovators if a regulatory turf war develops between the FTC and NHTSA over which agency's guidance documents should be followed. Or, even when two agencies worked closely together on guidance, there is no guarantee that confusing "middle" issues won't muddle that enforcement picture.¹⁰¹ For example, the cybersecurity concerns surrounding connected cars could give rise to both safety standards governed by NHTSA and privacy concerns covered by the FTC's authority. In such a complicated situation, whose guidance trumps and how would challenges to it be handled without a clear Congressional directive regarding authority? It seems unlikely the courts would merely accept that none of the guidance is valid in such circumstances based on current

⁹⁶ Robert F. Graboyes & Jordan Reimschisel, *Opening the Door for Medical Innovation*, U.S. NEWS, Apr. 24, 2017 10:45 a.m., <https://www.usnews.com/opinion/economic-intelligence/articles/2017-04-24/23andme-the-fda-and-the-case-of-easing-medical-innovation>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Hoerr, *supra* note 56.

¹⁰¹ See *Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles*, FEDERAL TRADE COMMISSION, Jun. 28, 2017, <https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected>.

deference standards and each likely has a claim that the ambiguities in their broad congressional mandates allows them to govern the issues.

In order to prevail, a company would need to prove that either the grant of authority to the agency justifying its action was unambiguous in its grant or that the agency interpretation is unreasonable or clear beyond the statutory grant given the circumstances.¹⁰² This makes it clear that the best solution would be for Congress to better clarify agency authority going forward and provide more limited and specific power, thus allowing both innovators and regulators to know at least what agency is controlling for specific matters. This issue would also be addressed by broader examination of delegation and the administrative state generally.

IV. The Proper Role of Deference and Soft Law to Promote Innovation

The usefulness and proper role of agency deference is an ongoing debate among judges, politicians, and scholars.¹⁰³ However, for emerging technologies that rapidly develop and escape traditional classifications, such deference may be inappropriate. Any changes to these doctrines will require intervention from the courts or Congress as the administrative state continues to embrace soft law as *modus operandi* for governance.¹⁰⁴ A change in deference may not impact agency decisions regarding when and how to regulate as few agencies are aware of, or consider, the level of deference likely applicable to their decision when determining the appropriate course of action.¹⁰⁵

A. The Slippery Slope of Soft Law

Current administrative law gives agencies broad deference to agency actions and interpretations, which puts innovators at risk. Allowing guidance to be challenged in the courts on a broader scale would increase the burden on agencies but alleviate some of the uncertainty and provide a more certain remedy than under existing soft law. In *Appalachian Power Co. v. EPA*, the D.C. Circuit found expanding the scope of standards sufficiently via guidance could be a violation of rulemaking procedures under the APA.¹⁰⁶ Challenging rapid changes that are clearly intended to be pseudo-rulemaking under this standard would at least provide innovators with the protections of the APA process for soft law that was being enforced as if it was hard law.

Generally speaking, agencies should follow the formalities set out under the APA, even when engaging in “softer” forms of policymaking such as guidance, working groups, or sandboxing.¹⁰⁷

¹⁰² See Jonathan H. Adler, *No Chevron Deference for Agency Interpretation of Court’s Jurisdiction*, THE VOLOKH CONSPIRACY, Aug. 10, 2013 2:58 p.m., <http://volokh.com/2013/08/10/no-chevron-deference-for-agency-interpretation-of-courts-jurisdiction/>.

¹⁰³ Rebecca Wilhelm, *Democratic Senators Grill Gorsuch on Agency Deference*, BLOOMBERG BNA, Mar. 21, 2017, <https://www.bna.com/democratic-senators-grill-n57982085518/>; *Reflections on Seminole Rock and the Future of Judicial Deference to Agency Regulatory Interpretations*, NOTICE & COMMENT, Sep. 23, 2016, <http://yalejreg.com/nc/category/symposia/reflections-on-seminole-rock-and-the-future-of-judicial-deference-to-agency-regulatory-interpretations/>.

¹⁰⁴ See Hagemann et al., *supra* note 1.

¹⁰⁵ Chris Walker, *Auer Deference Inside the Regulatory State: Some Preliminary Findings*, NOTICE & COMMENT, Sep. 14, 2016, <http://yalejreg.com/nc/category/symposia/reflections-on-seminole-rock-and-the-future-of-judicial-deference-to-agency-regulatory-interpretations/>.

¹⁰⁶ 208 F.3d 1015, 1024 (D.C. Cir. 2000).

¹⁰⁷ See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 16, 3432-40 (Jan. 25, 2017).

It is not that hard for an agency to incorporate a notice-and-comment procedure into their soft law activities and many already do on at least an *ex post facto* basis.¹⁰⁸ Posting notices or agency determinations in the *Federal Register* does not seem like too much to ask if agencies intend to use soft law actions as their primary form of governance for these disruptive emerging technologies.¹⁰⁹ In fact, many of them have already been doing both these things for agency workshops and multistakeholder processes.¹¹⁰ While much has been made about the perceived abuse of the comments process for some contentious issues,¹¹¹ it remains a way to insure that agency action maintain some sense of democratic processes and provide necessary checks to consider the concerns of innovators and civil society advocates in addition to those of regulators.¹¹²

Agencies need to be more careful about the use of the most informal governance mechanisms. On one hand, the use of social media platforms (such as Twitter) by agencies can be applauded as an admirable way of informing the public of new agencies activities. Yet, when commenting publicly via social media about new agency reports and documents, it is unclear whether those statements should be construed as agency interpretations and what force these statements may have later.¹¹³

At least under the APA, these are not clearly defined policy vehicles or legal instruments and agencies should understand that noble attempts to “clarify” new standards via social media may actually make things more confusing.¹¹⁴ It can be unclear whether these are official agency interpretations as should be given deference under *Skidmore* and *Perez*, or in the moment answers that lack interpretative formality beyond the specifics of the circumstances in that particular interaction.¹¹⁵ It would be better for agencies to clarify if social media posts are not legally binding agency statements of the agency or something that should be clarified through more formal avenues and more generally what the nature of such forums and interactions are with regards to notice-and-comment or other administrative procedures.¹¹⁶ After all, the FDA has

¹⁰⁸ See Hagemann et al., *supra* note 1.

¹⁰⁹ See *id.*

¹¹⁰ See, Crews, *supra* note 2; see also, e.g., *Food and Drug Administration Report on Good Guidance Practices: Improving Efficiency and Transparency*, FOOD & DRUG ADMIN., Dec. 2011, available at <https://www.fda.gov/downloads/AboutFDA/Transparency/TransparencyInitiative/UCM285124.pdf>.

¹¹¹ James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many are Fake.*, WALL ST. J., Dec. 12, 2017, <https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188>.

¹¹² See *Public Comments Make a Difference*, REGULATIONS.GOV, https://www.regulations.gov/docs/FactSheet_Public_Comments_Make_a_Difference.pdf, last accessed Jul. 30, 2018.

¹¹³ See Hagemann et al., *supra* note 1; Dahlia Lithwick, *Trump's Tweets Must Now Be Taken Seriously*, SLATE, Jun. 12, 2017 6:36 P.M., http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/the_9th_circuit_just_decreed_that_trump_s_twitter_feed_must_be_taken_seriously.html; Elizabeth Landers, *White House: Trump's Tweets are 'Official Statements'*, CNN, Jun. 6, 2017 4:37 p.m. ET, <http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>.

¹¹⁴ See *A Guide to the Rulemaking Process*, OFFICE OF THE FEDERAL REGISTER, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf, last accessed Aug. 29, 2017.

¹¹⁵ See Landers, *supra* note 113.

¹¹⁶ See Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301 (2013).

issued guidance and admonishment over how regulated companies use social media and there is no reason why they cannot issue guidance for their own use.¹¹⁷

Of course, things get even more problematic when agency officials engage in “jawboning” strategies or other types of highly informal “agency threats.”¹¹⁸ In such “regulatory” actions, agencies do not issue restrictive rules, but rather off-the-record suggestions of behavior under threat of more formal or informal regulation.¹¹⁹ These tactics are not new. For many decades, the Federal Communications Commission (FCC) effectively used letters of inquiry and other public and private jawboning tactics to engage in what became known within that field as “regulation by raised eyebrow.”¹²⁰ These were subtle but clear warnings to encourage media programmers to modify content so that the agency did not need to pursue direct censorship strategies that would have been far more likely to be litigated by the regulated entities and struck down under the First Amendment.¹²¹

Threats are still a feature of tech policymaking today. “Jawboning of Internet intermediaries is increasingly common,” notes University of Arizona law professor Derek E. Bambauer, “and it operates beneath the notice of both courts and commentators.”¹²² Jerry Brito, executive director of Coin Center, has also documented the continued use of threats by various agencies, which use these strategies “to avoid executive regulatory review and other accountability measures that ostensibly slow the regulatory process.”¹²³ Recent Congressional hearings involving social media and other “Big Tech” executives involved less formal examples of this with many lawmakers indicating that if internal policies did not change to their liking than formal regulation might follow.¹²⁴ While these threats may prevent formal highly restrictive regulations, that is not a good excuse for such heavy-handed behavior without proper recourse for remedy.¹²⁵ If courts continue to give even the most informal agency interpretations significant deference, then it is likely such regulatory threats will only continue or escalate.

As soft law mechanisms become more and more informal the available avenues for remedy and challenge also become more limited. In some ways agencies can build their own set of

¹¹⁷ Warning letter from Robert Dean, Division Director, Office of Prescription Drug Promotion, Food and Drug Administration to Eric Gervais, Executive Vice President Duchesnay, Inc., (Aug. 7, 2015), *available at* <https://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM457961.pdf>; Thomas Abrams, *FDA Issues Draft Guidances for Industry on Social Media and Internet Communications about Medical Products: Designed with Patients in Mind*, FDA VOICE, Jun. 17, 2014, <https://blogs.fda.gov/fdavoiced/index.php/2014/06/fda-issues-draft-guidances-for-industry-on-social-media-and-internet-communications-about-medical-products-designed-with-patients-in-mind/>.

¹¹⁸ Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 128 (2015).

¹¹⁹ *See id.*

¹²⁰ *See, e.g.*, David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 216-18 (1975).

¹²¹ *See* John Greenya, *Can They Say That on the Air? The FCC and Indecency*, WASH. LAWYER (2005), *available at* <http://www.dcb.org/bar-resources/publications/washington-lawyer/articles/november-2005-indecency.cfm>.

¹²² Bambauer, *supra* note 118 at 128.

¹²³ Jerry Brito, “Agency Threats” and the Rule of Law: An Offer You Can’t Refuse, 37 HARV. J. OF L. & PUB. POL’Y 553, 553 (2014).

¹²⁴ *See* Addam Thierer, *The Week Facebook Became a Regulated Monopoly (and Achieved Its Greatest Victory in the Process)*, TECH LIBERATION FRONT, Apr. 10, 2018, <https://techliberation.com/2018/04/10/the-week-facebook-became-a-regulated-monopoly-and-achieved-its-greatest-victory-in-the-process/>.

¹²⁵ *See* Brito, *supra* note 123; Bambauer, *supra* note 118.

common law by continually using extra-judicial actions that build a framework for dealing with violations of either hard or soft law but still clearly involve an imbalance of power and knowledge between the innovator and the regulator.¹²⁶ One protection from constant changes may exist in the Court's "hard look" review for insuring that agency decisions are not arbitrary and capricious.¹²⁷ This type of analysis has been applied to both the enactment and rescindment of hard law APA rules.¹²⁸ But soft law, by its nature often lacks the formalities and may not have the formal changes that would be examined under such review even if the results are similar.

This potential devolution of soft law into soft despotism could be addressed through a renewed balancing of separation of powers and a shift in Congressional and judicial oversight of agency actions that provided a more balanced form of redress while maintaining the benefits of flexible policymaking.

B. Possibilities for Congressional Reform of Soft Law and Judicial Deference

1. Congressional Oversight of Agency Actions

Congress has long delegated its authority over technology regulation to the executive and agencies, but it has an important oversight role to address egregious agency threats.¹²⁹ Many of the controversies associated with court deference to agency interpretations come about because of poor congressional drafting of underlying statutes.¹³⁰ Agencies seeking greater power and large budgets unsurprisingly may take advantage of such vagueness to be overly-creative (and expansive) in their reading of their own authority.¹³¹

Ideally, if regulation of emerging technology is necessary, Congress based on Article I powers should be responsible for creating this regulation through the legislative process.¹³² However, despite the basic principles of the nondelegation doctrine, Congress continues to delegate to administrative agencies regulatory authority for matters such as technology that require significant time and expertise to properly regulate.¹³³ Even when Congress acting on such issues itself, most of the legislation introduced on emerging technologies is for the delegation of regulatory authority to new or existing administrative agencies and not to address or promote the regulation of the technology itself.¹³⁴ Congress has generally shown a resistance to act with regards to technology even for more simple matters like formalizing regulatory authority for the

¹²⁶ See Andrea O'Sullivan, *Why We Have to Get FinTech Regulations Right*, THE BRIDGE, Oct. 4, 2018, <https://www.mercatus.org/bridge/commentary/why-we-have-get-fintech-regulations-right>; Jennifer Huddleston Skees, *Unprecedented: The Issue of Agency Action by Consent Order on Innovation*, Sep. 22, 2017, <https://readplaintext.com/unprecedented-the-issue-of-agency-action-by-consent-order-on-innovation-b23ab7b09f42>.

¹²⁷ *Motor Vehicles Manuf. Ass'n v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 42-43 (1983).

¹²⁸ See *id.* (establishing that hard look rule also applied to agency rescinding rules).

¹²⁹ See Margaret H. Lemos, *The Consequences of Congress's Choice to Delegate: Judicial and Agency Interpretation of Title VII*, 63 VANDERBILT L. REV. 363, 372-380 (2010) (discussing issues with such decision delegation in the anti-discrimination context).

¹³⁰ See John F. Manning, *Inside Congress's Mind*, COLUMBIA L. REV. (2017)

¹³¹ See Patrick Louis Knudsen, *Why Congress Needs a New Budget Process*, HERITAGE FOUNDATION, Dec. 5, 2013, <https://www.heritage.org/budget-and-spending/report/why-congress-needs-new-budget-process>.

¹³² U.S. CONST. art. I, § 1.

¹³³ *Id.*; *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928).

¹³⁴ Ali Breland, *Lawmakers Introduce Bipartisan AI Legislation*, THE HILL, Dec. 12, 2017, <http://thehill.com/policy/technology/364482-lawmakers-introduce-bipartisan-ai-legislation>.

creation national standards for autonomous vehicles.¹³⁵ Of the few examples where Congress has recently attempted to regulate emerging technologies, such legislation has typically been to create a more restrictive environment rather than to deregulate agency actions.¹³⁶ For example the recent SESTA/FOSTA legislation passed by Congress limited the application of Section 230 protection and has had significant spillover effects on online speech.¹³⁷ It is likely that other calls for direct regulation such as online privacy or robotics could have similar negative spillover effects if Congress does not adequately understand how the technological ecosystem works.¹³⁸

Fortunately, Congress seems to be increasingly aware of its lack of expertise in, and capability for, appropriately – that is, being able to equitably balance the many competing trade-offs between various courses of action – regulating emerging technologies.¹³⁹ While some have called for increasing the expertise on such matters available to policymakers,¹⁴⁰ overly specific legislation could erode the adaptability benefits of soft law that allow regulation and technology to evolve simultaneously and instead result in restricting whatever the next great innovation in a field might be.¹⁴¹ Still, Congress must not swing too far towards broad actions particularly when delegating authority to agencies. If it is to continue to delegate the authority over emerging technologies to agencies, it must do so in a clear and limited way to prevent agencies from stifling innovation through over regulation.¹⁴²

Even when Congress delegates its authority over technology policy issues, it can still attempt to insure that administrative agencies do not run amuck with their authority or create overly burdensome and innovation deterring processes. One simple check on agency actions is to utilize Congress’s “power of the purse” through its control of agency budgets. Congress’s appropriations power could be used to either reward the positive use of soft law processes like

¹³⁵ *Automakers and More than 100 Organizations Urge U.S. Senate to Pass Bipartisan AV START Act*, AUTO ALLIANCE, Mar. 5, 2018, <https://autoalliance.org/2018/03/05/stakeholders-letter-av-start-act/>.

¹³⁶ See Mike Godwin, *Why Internet Advocates are Against the Anti-Sex Trafficking Bill*, SLATE, Mar. 14, 2018, <https://slate.com/technology/2018/03/the-antisex-trafficking-bill-sesta-fosta-will-hurt-the-internet.html> (discussing the recent SESTA legislation that modified Internet intermediary liability).

¹³⁷ See Jennifer Huddleston Skees, *4 Possibilities for the Future in a Post-SESTA World*, TECH LIBERATION FRONT, Mar. 27, 2018, <https://techliberation.com/2018/03/27/4-possibilities-for-the-future-in-a-post-sesta-world/>.

¹³⁸ See Alec Stapp, *Beware the Moral Panic of Privacy Fundamentalism*, CAP X, Nov. 26, 2018, <https://capx.co/beware-the-moral-panic-of-privacy-fundamentalism/>; Adam Thierer, *Problems with Precautionary Principle-Minded Tech Regulation & a Federal Robotics Commission*, TECH LIBERATION FRONT, Sep. 22, 2014, <https://techliberation.com/2014/09/22/problems-with-precautionary-principle-minded-tech-regulation-a-federal-robotics-commission/>.

¹³⁹ See Alan Boyle, *Policymakers Admit They Need to Get More Intelligent About Artificial Intelligence*, GEEKWIRE, Mar. 20, 2018, <https://www.geekwire.com/2018/policymakers-acknowledge-need-get-intelligent-ai/>; see also Zach Graves and Kevin Kosar, *Bring In the Nerds: Reviving the Office of Technology Assessment* (R Street, Policy Study No. 128, Jan. 2018), available at <https://2o9ub0417chl2lg6m43em6psi2i-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/Final-128-1.pdf>.

¹⁴⁰ See Will Rinehart, *Should Congress Revive the Office of Technology Assessment*, AM. ACTION FORUM, Oct. 29, 2018, <https://www.americanactionforum.org/insight/should-congress-revive-the-office-of-technology-assessment/>; Zach Graves & Daniel Schuman, *The Decline of Congressional Expertise Explained in 10 Charts*, TECHDIRT, Oct. 18, 2018, <https://www.techdirt.com/articles/20181018/10204640869/decline-congressional-expertise-explained-10-charts.shtml>.

¹⁴¹ See Hagemann et al., *supra* note 1.

¹⁴² See Elizabeth Slattery & John-Michael Seibler, *This Case Could Help Prevent Congress From Outsourcing Its Power*, THE HERITAGE FOUNDATION, Mar. 8, 2018, <https://www.heritage.org/courts/commentary/case-could-help-prevent-congress-outsourcing-its-power> (discussing the question of reining in over-delegation in other administrative law contexts prior to the decision in *Gundy*).

multistakeholder conversations and sandboxing or punish agencies that continue to use overly broad interpretations or guidance resulting in a stifling of innovation.¹⁴³ Such actions would not be unprecedented as Congress previously engaged in an attempt to rein in overly broad FTC interpretations through appropriations in the 1970s.¹⁴⁴ When the FTC took an overly broad approach to its definition of unfair and deceptive trade practices in the 1970s and 1980s, a Democrat-controlled Congress restricted its budget in the appropriations process and required the agency to issue a formal policy statement on the use of its unfair trade practices power before returning additional funding.¹⁴⁵

Yet, it remains unlikely to provide meaningful, long-term reform to either agency actions or deference to such actions, and so Congress should seriously consider more formal actions to insure it regains and retains its appropriate Article I authority. Congress has considered several general regulatory reforms, such as the Regulatory Accountability Act¹⁴⁶ and the REINS Act,¹⁴⁷ which would provide Congressional oversight for significant regulatory actions and has become more comfortable using existing regulatory review mechanisms such as the Congressional Review Act¹⁴⁸. While such regulatory reforms may help to rein in agency hard law actions, they are less likely to have a significant impact on soft law actions.¹⁴⁹ As soft law becomes the increasingly dominant form of administrative governance particularly for disruptive technology, real regulatory reform that can potentially prevent the worst excesses of such actions will need to counterbalance some of the potential abuses by providing clearer limits on agency use of such actions or recourse for those subject to them.¹⁵⁰ Similar actions for review by OIRA have previously been instated at an executive level since the Reagan administration and agencies still regularly find ways to avoid review.¹⁵¹ If anything attempts to reform the administrative by requiring Congressional review may result in more soft law not less.¹⁵²

Despite their limitations regarding the growing use of soft law, Congressional attempts to regain authority over regulatory decision-making would likely control the most egregious innovation limiting overreaches of agency power.¹⁵³ Still, a more impactful reform would be a Congressional legislative efforts aimed at limiting the application of existing administrative deference doctrines by legislatively establishing significantly more limited scenarios under

¹⁴³ See Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON REG. 501 (1996).

¹⁴⁴ Geoffrey Manne & Berin Szoka, *Time for Congress to Stop the FTC's Power Grab on Antitrust Enforcement*, FORBES, Dec. 20, 2012 2:24 P.M., <https://www.forbes.com/sites/beltway/2012/12/20/time-for-congress-to-stop-the-ftcs-power-grab-on-antitrust-enforcement/#16c3bb751fc8>.

¹⁴⁵ *Id.*

¹⁴⁶ H.R.5, 115th Cong. (2017).

¹⁴⁷ H.R.26, 115th Cong. (2017).

¹⁴⁸ See Stephen Dinan, *GOP Rolled Back 14 of 15 Rules Using Congressional Review Act*, WASH. TIMES, May 15, 2017, <https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congres/>.

¹⁴⁹ See *id.*; H.R.5, *supra* note 102.

¹⁵⁰ See Hagemann et al., *supra* note 1.

¹⁵¹ See Thierer & Huddleston Skees, *supra* note 43.

¹⁵² See *Regulatory Reform Task Force Check-In Hearing Before the H. Comm. on Oversight and Gov't Reform*, 115th Cong. (2017)(statement of Clyde Wayne Crews, Jr., Vice-President for Policy/Director of Technology Studies, Competitive Enterprise Institute)(discussing how agencies are able to utilize "regulatory dark matter" to avoid OIRA review).

¹⁵³ See Philip A. Wallach & Nicholas W. Zeppos, *How Powerful is the Congressional Review Act?*, BROOKINGS, Apr. 4, 2017, <https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/>.

which agency interpretations would be given deference.¹⁵⁴ Notably these efforts could not only address the issues of hard law under *Chevron* deference, but could also address *Skidmore* and *Auer* deference.¹⁵⁵ In 2016, Senator Orrin Hatch introduced the Separation of Powers Restoration Act that would require de novo review for all questions of law arising under the APA including agency interpretations.¹⁵⁶ While the legislation references agency actions under the APA, this proposal is clearly broad enough to also address the judicial review of agency actions done through soft law mechanisms.¹⁵⁷ Likely any effort to reform deference to one particular type of agency action would also at least lead the courts to reconsider the appropriate deference given to other agency actions.¹⁵⁸

Unfortunately, the growing dysfunction of Congress and the politicization of *Chevron* make the current probability of such reforms unlikely.¹⁵⁹ Still, it is worth noting concerns over agency power seems to be growing on both sides of the political spectrum albeit for different reasons.¹⁶⁰ Some states are also reassessing their own deference to agency decisions.¹⁶¹ Notably, Arizona became the first state to pass legislation eliminating the use of *Chevron* deference as a standard for review of agency actions in state courts.¹⁶² While such actions by states would be significantly limited in their impact, they could represent enough of a growing concern to encourage Congress to more seriously consider proposed regulatory reforms.¹⁶³

C. The Courts' Ability to Reform and Question Existing Deference Doctrines

Considering the unlikelihood of legislative reformation of either deference or administrative agency overreach and the even more unlikely scenario of a significant change in approaches to their delegated authority by agencies themselves, courts are the most likely source for both checking overly broad expansions of power through soft law and reforming standards of interpretation.¹⁶⁴ With more legal scholars and judges voicing concerns, it appears the current assumptions about the necessity of agency deference may be changing and it is becoming increasingly likely that given the right case the Supreme Court would be willing to reexamine these deference doctrines.¹⁶⁵

¹⁵⁴ See Andrew Hessick, *Legislative Efforts to Overturn Chevron*, NOTICE & COMMENT, Mar. 19, 2016, <http://yalejreg.com/nc/legislative-efforts-to-overturn-chevron-by-andy-hessick/>.

¹⁵⁵ See *id.*

¹⁵⁶ Press Release, Senator Orrin Hatch, Senate, House Leaders Introduce Bill to Restore Regulatory Accountability Through Judicial Review (Mar. 17, 2016).

¹⁵⁷ *Id.*; Hessick, *supra* note 154.

¹⁵⁸ **cite**

¹⁵⁹ See Stein, *supra* note 20.

¹⁶⁰ Susan Dudley, *Senators Express Bipartisan Interest in Restoring Constitutional Balance of Power*, FEDERALIST SOC'Y, Mar. 29, 2016, <https://fedsoc.org/commentary/blog-posts/senators-express-bipartisan-interest-in-restoring-constitutional-balance-of-power>.

¹⁶¹ See Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 McGeorge L. Rev. 977 (2008).

¹⁶² David French, *Arizona Shows How to Combat the Administrative State*, APR. 24, 2018, NAT'L REV., Apr. 24, 2018, <https://www.nationalreview.com/corner/arizona-shows-how-to-combat-the-administrative-state/>.

¹⁶³ See Amanda Reilly, *Will Other States Follow Ariz. In Assault on Chevron*, E & E NEWS, May 9, 2018, <https://www.eenews.net/stories/1060081237>.

¹⁶⁴ See Hagemann et al., *supra* note 1.

¹⁶⁵ See, e.g., Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. L. REV. 103 (2018).

Some individual courts are starting to show more restraint in the deference they give agency interpretations under existing doctrines,¹⁶⁶ but given existing Supreme Court decisions, these courts remain limited in what – if anything – they can do to provide meaningful reform.¹⁶⁷ For example, in the Third Circuit Judge Kent Jordan questioned if *Chevron* and *Auer* deference were negatively impacting proper separation of powers.¹⁶⁸ Still in many circuits, *Chevron* and other deference to administrative agency remains quite common.¹⁶⁹ In fact some legal scholars such as Kent Barnett and Christopher J. Walker have argued that the true purpose of these deference doctrines is not prevent the Supreme Court from interpreting administrative actions and authority when necessary, but rather to provide a framework to their lower courts for the appropriate review of administrative actions.¹⁷⁰

Recent statements from justices and actions by the Supreme Court indicate an increasing openness to re-evaluating current deference doctrines. As mentioned *supra*, in *City of Arlington*, Chief Justice Roberts voiced concerns about the current deference the courts give agency actions.¹⁷¹ In *Decker v. Northwest Environmental Defense Center*, he further questioned the existing deference precedents and alluded to the need to reconsider *Auer* deference as well as *Chevron*.¹⁷² But the Chief Justice is not the only member of the Court to question these doctrines. In *Michigan v. EPA*, Justice Thomas noted that “*Chevron* deference raises serious separation-of-powers questions.”¹⁷³ Justice Kennedy also questioned the “reflexive deference” given to agencies under the Court’s deference doctrines prior to his retirement.¹⁷⁴ It appears a growing number of justices are open to at least re-examining the appropriate balance of powers between agency, legislative, and judicial actions for both traditional rulemaking and more informal soft law.

The most recent Supreme Court appointments of Justices Gorsuch and Kavanaugh make it even more likely the Supreme Court may be open to reevaluating its existing precedent regarding deference to agency actions. Prior to his appointment, Justice Gorsuch had argued as a circuit court judge that the *Chevron* doctrine allowed bureaucracy “to swallow huge amounts of core judicial and legislative power.”¹⁷⁵ In his first term on the bench, Gorsuch, writing for the majority, limited the application of *Chevron* in the context of interpreting the meaning of a statutory term and finding that such interpretive actions were properly limited to the courts and not an administrative law judge.¹⁷⁶ Similarly, now Justice Kavanaugh stated in opinions while on the D.C. Circuit that *Chevron* should be interpreted to have a major rules exception in which if an agency is engaging in “expansive regulatory authority over some major social or regulatory

¹⁶⁶ Jonathan H. Adler, *Another Federal Judge Questions Chevron Deference*, WASH. POST, Mar. 25, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/another-federal-judge-questions-chevron-deference/?utm_term=.9760ea9b82bf.

¹⁶⁷ See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

¹⁶⁸ Adler, *supra* note 166.

¹⁶⁹ See Barnett & Walker, *supra* note 167.

¹⁷⁰ *Id.*

¹⁷¹ *City of Arlington* 133 S.Ct. at 1877.

¹⁷² 133 S. Ct. 1326, 1339 (2013)(C.J. Roberts, concurring).

¹⁷³ 576 U.S. ____, *19 (2015)(J. Thomas, concurring).

¹⁷⁴ *Pereira v. Sessions*, No. 17-459, slip op. at 26 (Jun. 21, 2018) (J. Kennedy, concurring).

¹⁷⁵ 834 F.3d 1142, 1149 (2016).

¹⁷⁶ *SAS Institute v. Iancu*, No. 16-969, slip op. at 11 (Apr. 24, 2018).

activity” merely having an ambiguous statutory grant related to that activity is insufficient.¹⁷⁷ As a result, the Court seems particularly primed to re-examine its deference doctrine for the right case.

The potential for this greater openness to new reconsideration of deference in light of these shifts can be seen in Justices Gorsuch and Kavanaugh’s opinions in *Kisor*. In Gorsuch’s opinion, he noted that *Auer* survives based on *stare decisis* but “represents no trivial threat to these foundational principles” by telling a judge that rather than using one’s own judgment regarding the interpretation the interpretation of the agency must be accepted in most cases.¹⁷⁸ Justice Kavanaugh was also critical of the decision to retain *Auer* deference in *Kisor* pointing out in his opinion that the current deference doctrines allow agencies to start with an advantage over those challenging their interpretation particularly if there is not a rigorous examination of if an ambiguity truly exists.¹⁷⁹

While most of the judicial calls for reconsideration of existing deference precedents have focused on *Chevron*, it can be reasonably assumed that a re-examination of *Chevron* would either also re-examine deference to agency actions more generally or result in cases that would encourage the courts to address and reconsider other deference doctrines regarding more informal agency actions.¹⁸⁰ Reforming *Chevron* deference would likely have a limited impact on agency actions related to emerging technologies, but the momentum of broader regulatory reform that would likely accompany such a change and the way it would likely impact the courts’ consideration of agency soft law actions under *Auer* and *Skidmore*.

While courts appear to be the best avenue for meaningful reform of deference doctrines and thus yielding greater overarching reform of the administrative state, they too face a pacing problem of sorts regarding the lengthy nature of litigation compared to technological development. First, a regulated industry will likely be required to exhaust all administrative remedies even for non-APA actions before filing in court.¹⁸¹ In many cases of soft law it is unclear what would be necessary to prove such exhaustion, but this is a topic for future work. Then having spent significant time and resources in exhausting administrative remedies, it often takes years to work through lower courts that are likely to be bound by existing deference doctrines to even be able to file for *cert.* at the Supreme Court.¹⁸² For example, home video recordings faced challenges regarding federal copyright law when they initially hit the market in the 1970s.¹⁸³ Initially Universal and other studios filed suit in federal court in 1976, the case did not reach the Supreme Court until 1983 where it won a narrow 5-4 victory.¹⁸⁴ Luckily the innovation was not considered per se illegal during the eight year fight, but other innovations

¹⁷⁷ U.S. Telecomm. Ass’n v. F.C.C., No. 15-1063, slip op. at 9 (D.C. Cir. 2017) (Kavanaugh, dissenting) (denying petition for rehearing *en banc*).

¹⁷⁸ *Kisor* at *61.

¹⁷⁹ *Id.* at *79-80 (J. Kavanaugh, concurring).

¹⁸⁰ See Jowanna Nicole Oates, *Saying Goodbye to Chevron and Auer? New Developments in the Agency Deference Doctrine*, 91 FLA. BAR J. 43, Jun. 2017.

¹⁸¹ See *Darby v. Cisneros*, 509 U.S. 137 (1993).

¹⁸² See Barnett & Walker, *supra* note 152 (discussing the control of deference in the lower courts); Alexis C. Madrigal, *The Court Case That Almost Made It Illegal to Tape TV Shows*, THE ATLANTIC, Jan. 10, 2012, <https://www.theatlantic.com/technology/archive/2012/01/the-court-case-that-almost-made-it-illegal-to-tape-tv-shows/251107/>.

¹⁸³ See *id.*

¹⁸⁴ See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

facing regulatory uncertainty might miss years of research and development and society might lose years of life saving innovation in some cases.¹⁸⁵ In other cases, innovation and soft law responses may advance so rapidly that by the time the courts are able to rule on such matters, innovation has already rendered moot the restrictions.

Requiring agencies to have a more formalized grant of authority and not merely ambiguity to engage in an expansive regulatory activity would also prevent or at least deter agencies from claiming a grant of regulatory authority over a new technology.¹⁸⁶ The risks of delay from the judicial process are no worse than the legislative process and provide a more pragmatic solution to rebalancing separation of powers.¹⁸⁷ Justice Samuel Alito's opinion in *Gundy* noted that it would be "freakish" to single out a specific delegation but that he would support an approach that reconsiders the Court's to delegation more generally.¹⁸⁸ In general, there seems to be an emerging openness by several justices on the court to reconsider the possibility of firmer judicial checks on the administrative state. Yet, there also seems to be an indication that the right case would be needed. As soft law continues to emerge as a primary policymaking tool for emerging technologies and particularly if the interpretations and agency actions prevent beneficial technologies, then it is possible that one of the scenarios outlined above or another emerging technology could provide such an opportunity for the Court to reconsider these doctrines.

While the implications for the administrative soft law governance of technology might not be immediately visible, the courts' reconsideration of deference doctrines would likely provide an opportunity for examining how agencies undertake any regulatory action including the soft law actions that tend to govern disruptive and emerging technologies. Such reexamination might not be limited only to the key doctrines of judicial deference but might also more generally consider issues such as delegation and separation of powers more generally.

V. Conclusion

With soft law becoming the dominant form of modern technological governance, it is increasingly important that greater accountability and transparency be introduced into this process. Even though soft law approaches possess some advantages in terms of flexibility and adaptability during a time a rapid technological change, it does not mean that we allow agencies unlimited to operate "off the books" and well outside constitutional protections. The life-changing advances of innovation that could be lost should administrative action continue without an appropriate means of recourse against agency overreach may provide the appropriate case for disrupting the deference doctrines.

¹⁸⁵ See Madrigal, *supra* note 182.

¹⁸⁶ See *U.S. Telecom. Ass'n v. F.C.C.*, No. 15-1063, slip op. (D.C. Cir. 2017) (denying petition for rehearing *en banc*).

¹⁸⁷ See Tony Francois, *Only Strong Judicial Review Can Restore Separation of Powers*, INVESTOR'S BUS. DAILY, Sep. 18, 2018, <https://www.investors.com/politics/commentary/judicial-review-separation-of-powers/>.

¹⁸⁸ *Gundy v. United States*, No. 17-6086, slip op., at *23 (J. Alito concurring).