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Shelby M. Krafka

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Note

STRATEGIES TO BRING DOWN A GIANT: *AUER* DEFERENCE VULNERABLE AFTER REPRIEVE IN *KISOR v. WILKIE*

SHELBY M. KRAFKA*

> "[A]fter hearing arguments in a case involving judicial deference to agencies, [Justice Scalia] announced that *Auer v. Robbins* was one of the Court's 'worst decisions ever.' Although I gently reminded him that he had written *Auer*, that fact hardly lessened his criticism of the decision or diluted his resolve to see it overruled."[1]

I. TODAY'S DAVIDS ARE ILL-EQUIPPED FOR BATTLE: HOW DEFERENCE CAN STALL THE WILL OF THE PEOPLE

The New Deal's activist policies, which valued governmental efficiency, created the modern administrative state that has only grown and expanded over the last eight decades.[2] The public's expectations of agencies also increased in the 1960s and 1970s, due to increased liberal activism, which consolidated power to federal regulators.[3] Agencies now have vast and overlapping functions in rulemaking, enforcement, and adjudication.[4] In promulgating rules, agencies must act in accordance with con-

* J.D. Candidate, 2021, Villanova University Charles Widger School of Law; B.A. 2014, University of Texas at Austin. I would like to thank Professor Tammi Etheridge for sparking my interest in the administrative state and providing mentorship and guidance. I would also like to thank the staff of the *Villanova Law Review* for their thoughtful feedback and assistance in the publication of this Note.

1. Jonathan H. Adler, Auer *Evasions*, 16 GEO. J. L. & PUB. POL'Y 1, 2 n.12 (2018) (quoting Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1603 (2017)); *see* Auer v. Robbins, 519 U.S. 452, 461 (1997) (providing judicial deference to agency interpretations of its own ambiguous regulations); *see, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 111–12 (2015) (Scalia, J., concurring) (questioning validity of *Auer* deference given judiciary's constitutional role in interpreting law).

2. *See* Jerry L. Mashaw, *Explaining the Administrative Process: Normative, Positive, and Critical Stories of Development,* 6 J. L. ECON. & ORG. 267, 272–73 (1990) (reasoning New Deal era legal theorists recognized agencies' role as a pragmatic approach to resolve growing social issues).

3. *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 67 (Harvard U. Press 1990) (crediting passage of Motor Vehicle Safety Act of 1966 to public's growing awareness of social problems created by industry leaders resistant to regulation).

4. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 638 (1996) (explaining well-

gressional authorization and obtain guidance from the rulemaking procedures of the Administrative Procedure Act (APA).[5] Agencies, unlike the Legislature, have subject-matter expertise that has been widely credited with increasing governmental efficiency.[6] Additionally, the public often demands changes to regulated areas, such as consumer product safety, workplace safety, or automobile safety, and agencies are often able to promulgate rules more quickly than Congress by employing agency resources.[7] While agency rules may protect and promote the interests of the general public, agencies, like Congress, are also subject to the rent-seeking and lobbying efforts of special interest groups.[8]

After an agency promulgates a rule, that agency generally has the power to interpret any ambiguity by issuing informal guidance to clarify the rule's meaning.[9] Ambiguity in regulations occurs for a variety of reasons, including (1) careless drafting; (2) the drafters' inability to capture every detail of the regulated area; or (3) new applications of the rule that

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established assumptions that modern administrative agencies effectively exercise law-making power to both adopt rules and enforce them).

5. *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 81 (Princeton U. Press ed., 2008) (detailing congressional process of authorizing agencies; Congress enacts statutes to create agencies and confer jurisdiction). Under the APA, agencies are authorized to issue rules by: (1) providing notice of its contemplated rule in the *Federal Register*; (2) allowing interested parties the opportunity to comment, propose alternative language, and provide relevant data; and (3) publishing its final rule thirty days before implementation and summarizing changes, if any, to the rule. *See* 5 U.S.C. § 553 (2018); CROLEY, *supra*, at 82–83. After authorizing rulemaking power to agencies, Congress still retains oversight and provides input to regulated areas. *See* CROLEY, *supra*, at 116.

6. *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (noting agency expertise comes from experience administering "complex and highly technical regulatory program[s]" (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991))); *see also* Mashaw, *supra* note 2, at 273 (theorizing administrative law's goal is to provide flexibility and enable problem-solving).

7. *See* CROLEY, *supra* note 5, at 115–16 (recognizing agencies promulgate about five times as many rules as Congress passes bills in a given year). Agency resources include the institutional knowledge of its administrators, consultations from neutral policy experts, and credible data provided by public comments. *See id.* at 136, 146, 297.

8. *See* Donald J. Kochnan, *The Mask of Virtue: Theories of Aretaic Legislation in a Public Choice Perspective*, 58 ST. LOUIS L.J. 295, 325 (2014). Rent-seeking is the process of interest groups seeking favorable regulation for their cause from regulators, who in return receive benefits for their future political and economic success. *See id.* For an analysis of regulators' motivations in agency decision-making, see *infra* Section V.A.

9. *See* Deborah T. Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1225 (2013). In stark contrast to formal rulemaking, informal rulemaking can include agency guidelines, dear colleague letters, amicus briefs filed during litigation, press releases, and explanatory statements in the *Federal Register*. *See id.*; CROLEY, *supra* note 5, at 111–12 (acknowledging agencies issue "tens if not hundreds of thousands" informal guidelines per year).

the drafters could not have reasonably foreseen at the time of drafting.[10] As agencies' interpretive function has grown to clarify ambiguities, courts have wrestled with what standard of review is appropriate for agency interpretations.[11] Over the last thirty years, courts have applied a standard of review mandating deference to reasonable agency interpretations of its own ambiguous regulations, which the United States Supreme Court announced in *Auer v. Robbins*.[12] Courts have applied *Auer* deference to regulations that impact the daily lives of Americans, including in employment, education, and access to safe food and medication.[13]

Critics of *Auer* deference argue that agencies abuse the doctrine by intentionally drafting ambiguous regulations.[14] The recent public battle over whether transgender students are entitled to use bathrooms corresponding with their gender identity illustrates *Auer*'s application and faults.[15] First, the issue exemplifies how regulatory ambiguity can arise

10. *See* LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 484 (2d ed. 2013) (acknowledging complexities in drafting clear statutory language).

11. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 564–67 (1985) (discussing analogous precedent for statutory ambiguity). *See generally* CROLEY, *supra* note 5, at 99–100 (noting judicial review of agency decision-making takes place only after a regulated party brings litigation). For a further discussion of the Supreme Court's precedent on judicial deference to agency interpretations of ambiguous regulations, see *infra* Sections II.A, IV.A.

12. 519 U.S. 452, 460–62 (1997). The deferential standard of review now known as "*Auer* deference" was first articulated in *Bowles v. Seminole Rock & Sand Co.*, so it is often also referred to as "*Seminole Rock* deference." *See, e.g.*, Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defect*, 87 FORDHAM L. REV. 531, 569 (2018) (referring to deference doctrine as "*Seminole Rock–Auer* deference"); Manning, *supra* note 4, at 614 (using term "*Seminole Rock* deference" to refer to deference granted to agency interpretations of ambiguous regulations). *See generally* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (holding agency interpretations of ambiguous regulations should be afforded "controlling weight" even if interpretation is not regulation's most natural reading).

13. *See, e.g.*, PLIVA, Inc. v. Mensing, 564 U.S. 604, 613–14 (2011) (providing *Auer* deference to Food and Drug Administration's interpretation of generic drug labeling regulations where respondents argued less stringent standard resulted in development of severe neurological disorder); Long Island Care at Home Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) (providing *Auer* deference to Department of Labor interpretation excluding companionship service providers, including certified nursing aids, home caregivers, and personal care assistants, from receiving overtime and minimum wage protections generally provided under Fair Labor Standards Act).

14. *See generally* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 555 (2000) (commenting allowing agencies to gap-fill encourages drafting of ambiguous rules that can be interpreted at a later time without following formal APA rulemaking procedure); *see also* John M. Scheib, *Oyez, Oyez, The Administrative Agency is in Session: A Look at the Role of Agencies and Courts in Recent Cases Applying the* Chevron *Doctrine*, 61 VILL. L. REV. TOLLE LEGE 37, 39 (2016) (arguing judiciary is insulated from political concerns and therefore proper venue to interpret ambiguity).

15. *See* Matt Stevens, *Transgender Student in Bathroom Dispute Wins Court Ruling*, N.Y. TIMES (May 22, 2018), https://www.nytimes.com/2018/05/22/us/gavin-grimm-transgender-bathrooms.html [https://perma.cc/3D2J-6VTJ] (discussing lengthy court battle initiated by Gavin Grimm that brought transgender rights to

from a novel application that a regulation's drafter did not anticipate.[16] Second, it shows how agency interpretations may be used to avoid timely formal rulemaking procedures and promote an administration's political goals.[17]

In *G.G. ex rel. Grimm v. Gloucester County School Board*,[18] the United States Court of Appeals for the Fourth Circuit found the Department of Education's (DOE) regulations implementing Title IX's ban on sex discrimination silent towards an accommodation of transgender students.[19] During litigation, the DOE under the Obama administration articulated a novel interpretation extending Title IX regulatory protections to transgender students.[20] Applying *Auer* deference, the Fourth Circuit deferred to the DOE's interpretation and ruled in favor of the student.[21] While on appeal to the Supreme Court, the DOE under the Trump administration issued a contradictory interpretation excluding transgender students from Title IX protections.[22] Due to this change in interpretation, the Supreme Court remanded the case for further consideration by the lower courts.[23] The U.S. District Court for the Eastern District of Virginia, without the use of *Auer* deference, proceeded with an independent review of the regula-

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nation's attention and hinged on application of *Auer* deference by courts to Department of Education (DOE) interpretations of its regulations).

16. *See* Michael S. Leonard, *School District Fires First Volley in Supreme Court's 'Transgender Bathroom Case'* Gloucester County School Board v. G.G., 31 WESTLAW J. EMP. 3, 3 (2017) (noting at time Congress adopted regulatory sex protections under Title IX, DOE administrators' intent was to eliminate sex discrimination against women).

17. *See infra* notes 20–23 and accompanying text.

18. 822 F.3d 709 (4th Cir. 2016).

19. *See id.* at 720 (noting DOE had not provided an interpretation of Title IX regulation for circuit court to defer to when litigation commenced).

20. *See* Leonard, *supra* note 16, at 3 (stating agency's interpretation, which was issued during litigation in a dear colleague letter, afforded Title IX protections to transgender students).

21. *See G.G. ex rel. Grimm*, 822 F.3d at 721–23 (finding agency's regulation was silent and its interpretation, providing an accommodation, was reasonable). *But see* Texas v. United States, 201 F. Supp. 3d 810, 833–34 (N.D. Tex. 2016) (rejecting DOE's interpretation and not affording *Auer* deference in holding that separate housing and sexual educational instruction for male and female students for personal privacy reasons was consistent with structure and purpose of Title IX).

22. *See* Grimm v. Gloucester County School Board, ACLU, https://www.aclu.org/cases/grimm-v-gloucester-county-school-board [https://perma.cc/3FGB-URZN] (last updated Nov. 27, 2019) (noting Trump-era Department of Education revoked Obama-era guidance on Title IX rights of transgender students).

23. *See* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239, 1239 (2017). *Auer* deference generally restricts courts' ability to defer to agency interpretations that conflict with prior interpretations. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994). In these circumstances, an agency's conflicting interpretation does not implicate the agency's "fair and considered" judgment of the regulatory issue. *See infra* notes 126–29 and accompanying text.

tion and determined it covered transgender students.[24] If the initial court had independently reviewed the regulation, instead of deferring to the agency's interpretation, the court could have determined whether the individual's rights had been violated while they were still a student.[25]

In 2019, the Supreme Court in *Kisor v. Wilkie*[26] surveyed its precedent and fashioned a five-part test providing lower courts with guidance on applying *Auer* deference.[27] This Note argues the Court's guidance in *Kisor* will not result in a meaningful change to the way lower courts apply *Auer* deference.[28] Thus, agencies will continue to apply the deference doctrine as a work-around for formal rulemaking.[29] Further, the *Kisor* test does not combat agencies' encroachment on the judiciary's role as interpreter of law.[30] Instead, the Court should replace *Auer* with a more flexible standard that imposes an independent judicial review while still providing some weight to agency interpretations.[31] Part II of this Note surveys the deference doctrine's creation, separation of powers issues, and prior constraints by the Supreme Court. Part III explains the facts and procedural history of *Kisor*. Part IV examines the Court's reasoning for limiting the scope of *Auer* deference and observes similarities to existing Supreme Court precedent. Part V applies the public interest theory to analyze motives of agency actors and provides possible alternatives to the deference doctrine. Finally, Part VI examines the long-term impact of *Kisor*.

II. THE COURT ARMS AGENCIES AND CREATES A GIANT

When interpreting regulatory language, lower courts enjoy a wealth of Supreme Court jurisprudence to provide guidance on resolving ambi-

24. *See* Grimm v. Gloucester Cty. Sch. Bd., 400 F. Supp. 3d. 444, 464 (E.D. Va. 2019) (finding school district's policy violated Title IX and Equal Protection Clause).

25. *Compare G.G. ex rel. Grimm*, 822 F.3d at 721–23 (deferring to DOE's interpretation while Grimm was a student), *with Grimm*, 400 F. Supp. 3d at 456–58 (conducting independent analysis of Title IX's regulation after Grimm had graduated and affording protections to transgender students, including providing cause of action to students demonstrating prima facia cases of discrimination). *See* Erica J. Shell, *The Final* Auer*: How Weakening the Deference Doctrine May Impact Environmental Law*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10,954, 10,963 (2015) (noting formal rulemaking, promulgated through notice-and-comment rulemaking, cannot be reversed as easily as informal rulemaking).

26. 139 S. Ct. 2400 (2019).

27. For the Court's five-part *Kisor* test, see *infra* note 102 and accompanying text.

28. For an analysis of *Kisor*'s impact on the utility of *Auer* deference, see *infra* Part VI.

29. For a discussion on agency motivation post-*Kisor*, see *infra* Section V.A.

30. For a discussion of remaining separation of power issues, see *infra* Section IV.B.

31. For a discussion of possible solutions, including eliminating *Auer*'s binding deference, see *infra* Section V.B.

guity.[32] When courts encounter ambiguity, they generally apply a single, broad presumption that Congress intended agencies to resolve the ambiguity by "gap-filling" the regulatory scheme.[33] Proponents of the deference doctrine argue it provides political accountability and increases governmental efficiency by unifying lower court decisions and utilizing agency expertise.[34] Nevertheless, critics of *Auer* deference argue that allowing agencies to create, enforce, and adjudicate their own rules violates the United States Constitution.[35]

A. *Fashioning a Weapon: How the Court Revived* Seminole Rock *and Borrowed from* Chevron

While now a behemoth, the deference doctrine started modestly in 1944 in *Skidmore v. Swift & Co.*[36] In *Skidmore*, the Court held that lower tribunals should consider agency interpretations when resolving regulatory ambiguities.[37] Just a year later, in *Bowles v. Seminole Rock & Sand Co.*,[38] the Court held that agency interpretations of their own ambiguous regula-

32. *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 461–62 (1997) (holding agencies' interpretations of their own ambiguous regulations are controlling unless plainly erroneous or inconsistent with the regulations); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (finding agency interpretation acquires controlling weight unless erroneous or inconsistent with regulation); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding agency interpretations may persuade reviewing courts but does not necessarily bind); United States v. Eaton, 169 U.S. 331, 343 (1898) (holding agencies charged with executing regulations should receive "greatest weight" in their interpretation).

33. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) (reasoning Congress authorizes agencies to interpret ambiguity because agency regulations are typically complex and require agency's "unique expertise"). In Gavin Grimm's case, the Obama-era DOE gap-filled the regulation's ambiguity in determining its sex protections extended to transgender students. For a further discussion of the Obama-era interpretation, see *supra* notes 20–21 and accompanying text.

34. *See* Kristen E. Hickman & Mark R. Thomson, *The* Chevron*ization of* Auer, 103 MINN. L. REV. HEADNOTES 103, 104 (2019) (noting advocates argue *Auer* standardizes regulations' meaning across jurisdictions, thereby providing notice and predictability to regulated entities).

35. *See, e.g.*, Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2016 (2011) (noting inconsistencies with APA and constitutional principle of separation of powers); Manning, *supra* note 4, at 639–40 (arguing judiciary should interpret the law, not agencies); *see also* U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1 (providing foundation for separation of powers doctrine by granting each branch its own enumerated powers). For a discussion surveying arguments that *Auer* deference violates the separation of powers, see *infra* Section II.B.

36. 323 U.S. 134 (1944).

37. *See id.* at 140 (announcing standard of review for agency interpretations depends upon persuasiveness and thoroughness of an agency's consideration and consistency with earlier interpretations).

38. 325 U.S. 410 (1945).

tions were entitled to "controlling weight."[39] The Court in *Seminole Rock* did not provide a rationale or legal support for its holding, and lower courts interpreted the case to be consistent with *Skidmore* deference.[40] Congress's subsequent enactment of the APA in 1946 also contributed to lower courts' perceptions that *Seminole Rock* fell within *Skidmore*.[41] Namely, that courts must weigh agency interpretations among other considerations.[42] In the APA, Congress expressly stated that courts are to "decide all relevant questions of law," including weighing into the meaning of agency regulations.[43]

After sitting idly for years, in the 1960s, the Court cited *Seminole Rock*'s holding and subsequently limited courts' abilities to resolve regulatory ambiguity in *Udall v. Tallman*.[44] After *Udall*, agency administrators dramatically increased their use of *Seminole Rock* in litigation involving regulatory ambiguity.[45] Simultaneously, courts and scholars began advancing practi-

39. *Id.* at 414 (providing controlling weight to agency interpretation of ambiguous regulation unless plainly erroneous or inconsistent). In *Seminole Rock*, the Court stated that the drafter's intent may also be relevant in the first instance of interpreting competing constructions. *See id.* at 413–14.

40. *See id.* at 415–19 (giving weight to administrative construction but failing to identify legal authority); Conor Clarke, *The Uneasy Case Against* Auer *and* Seminole Rock, 33 YALE L. & POL'Y REV. 175, 180 (2014) (describing how Supreme Court cited to no specific authority for standard articulated in *Seminole Rock*); *see also* Adler, *supra* note 1, at 7 (recounting scholars and courts interpreted *Seminole Rock*'s holding as following precedent of *Skidmore* deference).

41. *See* Adler, *supra* note 1, at 7 (explaining scholars during enactment noted APA's plain language requires judicial interpretation of regulatory ambiguity).

42. *See* Manning, *supra* note 4, at 622–23 n.58 (focusing on APA's announcement that courts decide "all relevant questions of law . . . [including] determin[ing] the meaning or applicability of the terms of any agency action" (internal quotation marks omitted) (quoting Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 258 (1955))).

43. 5 U.S.C. § 706 (2018). *See generally* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 106 (1998) (describing APA as agencies' "procedural rulebook" that guides agencies where Congress has not otherwise provided guidance). Congress, in enacting the APA, attempted to counteract the growth of the administrative state during Roosevelt's administration and the New Deal. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring) (arguing APA provided a check upon administrators to ensure they act within the scope of their statutory authorizations).

44. 380 U.S. 1 (1965). Before *Udall*, the Court cited *Seminole Rock* in only one other case, and it was not a central tenant of administrative law. *See* Manning, *supra* note 4, at 614. The Court in *Udall* did not provide any rationale for its limitation beyond citing to *Seminole Rock*. *See Udall*, 380 U.S. at 16–17 (claiming deference under *Seminole Rock* limited judiciary's role to interpret ambiguity); *see also* Adler, *supra* note 1, at 7 (highlighting that *Udall*, like *Seminole Rock*, did not articulate rationale for limiting courts' role in interpreting ambiguity).

45. *See* Adler, *supra* note 1, at 8 (noting after *Udall*, lower courts provided deference to agencies' interpretations of regulatory ambiguity); *see, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (providing controlling weight according to *Seminole Rock*); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) (relying on *Seminole Rock*); Nat'l Indus. Sand Ass'n Corp. v. Marshall, 602 F. 2d 689, 704 (3d Cir. 1979) (discussing *Udall* to determine if interpretation was within scope of agency's congressional authorization); Rust Broad. Co. v. FCC, 379

cal and legal rationales for providing agency interpretations controlling weight.[46] A separate analysis geared towards *statutory* ambiguity in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[47] further fueled this expansion of regulatory deference.[48] The Court in *Chevron* created an analytical framework that requires lower courts to determine if the agency's interpretation is a reasonable reading of the ambiguous statute.[49] The Court reasoned that deference to agency interpretations of statutes is proper because Congress implicitly or explicitly authorized those agencies to gap-fill the statutory scheme.[50]

The Supreme Court in *Auer*, borrowing from *Chevron*, ruled that Congress implicitly delegates the task of interpreting regulatory ambiguity to agencies.[51] In *Auer*, the Court held that lower courts must give effect to agency interpretations of ambiguous regulations, unless "plainly erroneous or inconsistent with the regulation."[52] Under *Auer*, the role of judicial

F.2d 480, 482 (Fed. Cir. 1967) (holding interpretation was reasonable under *Seminole Rock*).

46. *See generally* Clarke, *supra* note 40, at 180 (noting popular justification for *Auer* was that current agency administrators provide greatest insight into meaning of their predecessors' regulations); Manning, *supra* note 4, at 629–30 (listing rationales including political accountability, expertise, and historical familiarity with regulation).

47. 467 U.S. 837 (1984).

48. *See generally* Adler, *supra* note 1, at 10 (describing Supreme Court's development of regulatory deference doctrine by borrowing *Chevron*'s rationale).

49. *See Chevron*, 467 U.S. at 865 (outlining two-part analysis for providing deference to agency interpretations of ambiguous statutes). Under *Chevron*, if congressional intent is clear from the statutory language, then the agency and courts must defer to Congress's intended meaning. *Id.* at 842–43. Second, if the statutory language is silent or ambiguous as to Congress's intent, the court must determine if the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843–44.

50. *See id.* at 844; *see also* King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (holding that before applying *Chevron*, courts must determine if congressional delegation occurred); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 754 (2002) (arguing *Chevron*'s inquiry into congressional delegation departed from prior rationalizations that deference was proper because it implicated agency expertise).

51. *See* Auer v. Robbins, 519 U.S. 452, 460–62 (1997) (applying principles of *Chevron* to regulatory scheme). *Auer* is recognized as a "close cousin" to *Chevron*. Hickman & Thomson, *supra* note 34, at 107. A recent study of agency administrators that drafted regulations found only half of the drafters were familiar with *Auer*. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 309 (2017) (citing Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1061–66 (2015)). This indicates administrators had substantially less familiarity with *Auer* as compared to *Chevron* and *Skidmore*. *See id.* Notably, the study did not address whether name recognition caused this difference or if administrative drafters did not consider ambiguity in drafting regulations. *See id.*

52. *Auer*, 519 U.S. at 461 (internal quotation marks omitted) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)); *see also* Manning, *supra* note 4, at 657–59 (detailing how courts' "plainly erroneous" analysis requires fact-specific investigation of regulation's meaning, but allows agencies to provide

review is to keep agency administrators within their jurisdictions and committed to the values and purposes expressed during the legislation process.[53] If a court determines that the regulation or agency interpretation does not meet *Auer* deference's standard, it can employ *Skidmore*, a less deferential standard that resolves ambiguity by weighing agency expertise.[54]

Proponents of *Auer* deference argue it enhances governmental efficiency, utilizes agency expertise, and provides political accountability for policy decisions.[55] They also argue that agencies, which promulgate regulations, are better positioned than courts to reconstruct the original meaning of the regulation.[56] They claim *Auer* deference is simple and easy for lower courts to apply.[57] But since deciding *Auer*, the Court has provided numerous limitations on the doctrine that make its application more onerous for lower courts.[58] Thus, the argument that *Auer* deference is straight-

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interpretations that deviate substantially from regulation's fairest reading). For further discussion of how courts have grappled with whether a regulation is plainly erroneous, see *infra* note 117 and accompanying text.

53. *See* CROLEY, *supra* note 5, at 100 (noting rules that deviate from goal of legislative authorization will likely be invalidated). By applying the "plainly erroneous" analysis, courts determine if agency administrators' interpretations align with congressional authorization. *See* Mashaw, *supra* note 2, at 279 ("The role of courts has not been so much reduced as shifted, from the control of administrators' *substantive* discretion to control of their *procedural* discretion.").

54. *See, e.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012) (applying *Skidmore* after determining *Auer* was inapplicable). Under *Skidmore*, agencies receive deference proportional to the persuasiveness of its interpretation. *See id.* Although the Court anticipates use of *Skidmore* when *Auer* deference is inappropriate, it does not indicate when courts should apply *Skidmore* or, in the alternative, provide independent judicial review. *See* Hickman & Thomson, *supra* note 34, at 106.

55. *See* Hickman & Thomson, *supra* note 34, at 103–04 (recounting practical rationales for *Auer* deference, including uniformity among courts, certainty in results, and predictability to litigants and administrators); Shell, *supra* note 25, at 10,957 (noting recent congressional gridlock has increased reliance on agency rulemaking); Sunstein & Vermeule, *supra* note 51, at 307 (arguing deference to agency administrators increases governmental efficiency by using agency's subject-matter expertise).

56. *See* Adler, *supra* note 1, at 26 (discussing "common sense" rationale that agencies, as drafters, are in better position than courts to interpret ambiguity).

57. *See* Hickman & Thomson, *supra* note 34, at 104 (advocating that *Auer* supplies predictability to lower court rulings).

58. *See, e.g.*, *Christopher*, 567 U.S. at 155 (limiting use of *Auer* if its application causes an unfair surprise to regulated entities); Gonzalez v. Oregon, 546 U.S. 243, 256–57 (2006) (declining to follow *Auer* when regulatory language mimics statutory language, known as the "anti-parroting canon"); Christiansen v. Harrison County, 529 U.S. 576, 588 (2000) (limiting use of *Auer* to truly ambiguous regulations); Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 702 (1991) (requiring courts to accept plausible constructions even if it is not best or most natural interpretation); Aqua Prods., Inc. v. Matal, 872 F.3d 1290, 1318 (Fed. Cir. 2017) (en banc) (declining *Auer* if agency's interpretation was developed in non-binding discussion); Lezama-Garcia v. Holder, 666 F.3d 518, 532 (9th Cir. 2011) (declining to apply *Auer* deference in non-precedential decision). *See generally* Hickman &

forward to apply has become less persuasive as the doctrine has become increasingly complicated.[59] Moreover, the doctrine's presumed benefits cannot outweigh its constitutional implications because "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."[60]

B. *Positioning the Battlefield:* Auer *Deference Raises Constitutional and APA Concerns*

Critics of *Auer* deference contend that it creates a lack of notice to regulated parties and allows agency interpretations to intrude on the judiciary's role.[61] First, critics argue *Auer* encourages agencies to promulgate ambiguous regulations because agency rulemaking is not subject to oversight by a separate branch of government.[62] Therefore, agencies have less incentive to promulgate clear regulations when its interpretations of ambiguity can receive binding deference.[63] Instead, agencies can leave gaps in rules to be filled later through informal rulemaking that clarifies ambiguity depending on the political environment and desired regulatory outcome.[64] Because ambiguous regulations can have more than one meaning, regulated entities do not receive adequate notice of how an agency will apply its rule, and without sufficient notice, entities cannot ensure their activities comply with agency regulations.[65] Thus, if courts

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Thomson, *supra* note 34, at 103–05 (stating *Auer*'s various limitations has made it more difficult for courts to apply).

59. *See* Hickman & Thomson, *supra* note 34, at 105. For a further discussion of limitations on *Auer* deference, see *infra* Section IV.A.

60. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983) (holding governmental efficiency alone will not cure laws or procedures of their constitutional issues).

61. *See, e.g.*, Bressman, *supra* note 35, at 2016 (noting *Auer*'s inconsistencies with rulemaking procedures of APA and constitutional principle of separation of powers).

62. *See generally* Manning, *supra* note 4, at 617 (arguing agencies are able to self-interpret regulations and are only constrained from "plainly erroneous" readings). *Auer* grants agencies authority to interpret, or reinterpret, their own regulations. *See id.* at 626. Whereas, in the statutory scheme, Congress cedes control of interpretations to agencies. *See id.* Unlike agency rule promulgation, Congress, in drafting statutory language, has an incentive to minimize ambiguity. *See* Adler, *supra* note 1, at 12.

63. *See* Clarke, *supra* note 40, at 181 (arguing that agencies intend to promulgate ambiguous regulations and later issue clarifying interpretations).

64. *See* Manning, *supra* note 4, at 669 (arguing judicial deference cuts against central goal of rulemaking: to provide public with "reasonable opportunity to know what is prohibited, so that [they] may act accordingly" (alteration in original) (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972))).

65. *See* Mashaw, *supra* note 2, at 291 (detailing that APA's purpose was to provide notice of anticipated rulemaking and reasoning of final rule to regulated entities). The Supreme Court has expressly restricted courts' ability to employ *Auer* when an agency's interpretation would cause regulated parties "unfair surprise." Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012) (internal quo-

afford novel agency interpretations with the weight of law, then the public loses its opportunity to participate in formal rulemaking.[66]

Second, critics and numerous Supreme Court Justices have argued that *Auer* deference infringes on the judiciary's power to interpret the law.[67] Specifically, they contend that deference violates the nondelegation doctrine—a central tenant of separation of powers that asserts one branch of government cannot permit another branch to substantially exercise its powers.[68] Critics argue that the judiciary tolerates an intrusion of its powers by allowing agencies to interpret regulatory ambiguity.[69] Conversely, proponents of *Auer* argue that judges interpreting regulatory ambiguities constitutes policymaking and likewise violates separation of

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tation marks omitted). For a further discussion of this limitation, see *infra* notes 126–29 and accompanying text.

66. *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (Thomas, J., dissenting) (advocating for rigors of notice-and-comment rulemaking and arguing deference provides agencies with less demanding rulemaking process); *see also* 5 U.S.C. § 553 (2018) (contemplating public input as central tenant in agency rulemaking); Croley, *supra* note 43, at 116–17 (noting APA comment period is open to all interested parties).

67. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 110 (2015) (Scalia, J., concurring) (questioning validity of *Auer* deference given courts' constitutional role in interpreting law); *Perez*, 575 U.S. at 132–33 (Thomas, J., dissenting) (raising concerns on deferring to positions adopted through means outside formal rulemaking and commenting "serious constitutional questions lurk[ ] beneath" *Auer* deference); Decker v. Nw. Envtl. Def. Ctr., 588 U.S. 597, 621 (2013) (Scalia, J., dissenting) (arguing *Auer* contradicts separation of powers and has no meaningful justifications); Talk Am., Inc. v. Mich. Bell. Tel. Co., 564 U.S. 50, 68 (2001) (Scalia, J., concurring) (arguing it "seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well"); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and *interpret* that rule." (emphasis added)); Manning, *supra* note 4, at 632–38 (noting inconsistencies with courts providing binding deference to agency interpretation of ambiguous regulations and judiciary's requirements under APA and Constitution).

68. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 82 (1985) (detailing nondelegation doctrine's historical foundations). Further, powers of the government should be spread across the branches of government and not concentrated in a single branch. *See* Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303 (1989) (outlining two diametrically opposed explanations for separating powers: (1) to promote governmental efficiency; and (2) not to promote efficiency but to preclude exercise of arbitrary power); *see also* THE FEDERALIST NO. 47 (James Madison) (warning against one branch holding all powers of government).

69. *See* Manning, *supra* note 4, at 631 (describing administrative agency's ability to create and interpret regulations as unifying two powers of government the Constitution's framers intended to be separated). Justice Jackson referred to the practice of judicial deference to agencies as "administrative authoritarianism" and argued it diminished courts' ability to interpret the law. SEC v. Chenery Corp., 332 U.S. 194, 216 (1947) (Jackson, J., dissenting). He argued judicial deference would not be "fair and equitable" if it is counter to a regulation's plain meaning. *Id.* at 215 (Jackson, J., dissenting).

powers.[70] Critics, joined by several Supreme Court Justices, also have noted *Auer*'s contradiction with the APA's requirement that courts decide questions of law.[71] In contrast, *Auer* proponents argue courts comply with the APA because Congress implicitly delegates agencies the authority to interpret ambiguity.[72]

Interestingly, the Court, which first supported an implied congressional delegation in *Chevron*, has since found its rationale unpersuasive in the realm of statutory ambiguity.[73] The Court incorporated this concern into *Chevron* deference's two-part analysis for statutory ambiguity, in what is called *Chevron*'s "step zero."[74] Under step zero, the Court determined that ambiguity alone in statutory language is insufficient to infer that a delegation of authority occurred; instead, courts must find that an actual delegation by Congress occurred.[75] There is no step zero equivalent in *Auer* deference, and resolving regulatory ambiguity still rests on a presumption of an implied delegation by Congress.[76] In recent years, numerous Supreme Court Justices have signaled their willingness to revisit *Auer*,

70. *See* Manning, *supra* note 4, at 626 (arguing policymaking should be handled by representative institutions and not the judiciary).

71. *See, e.g.*, *Perez*, 575 U.S. at 109 (Scalia, J., concurring) (commenting that APA has no statutory provision suggesting Congress intended to give agencies deference to interpret ambiguity of their own regulations). For further discussion of the APA, see *supra* notes 41–43 and accompanying text.

72. *See, e.g.*, Manning, *supra* note 4, at 622. The text of the APA exempts actions committed to agency discretion from judicial review. *See* 5 U.S.C. § 706 (2018). Further, in circumstances where agencies have discretion, the APA limits review to "abuse of discretion." *See* Manning, *supra* note 4, at 622–23 n.58 (internal quotation marks omitted) (quoting Jaffe, *supra* note 42).

73. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 243–44 (2006) (noting renewed interest by Supreme Court in whether agencies had authority to interpret ambiguity as opposed to inquiring only into agency expertise).

74. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (establishing requirement that Congress must explicitly delegate power to agencies to act with force of law, through formal adjudication or rulemaking procedure, under APA); *see also* Clarke, *supra* note 40, at 189–90 (finding step zero requirement limited use of deference doctrine by requiring initial determination on whether Legislature made affirmative choice to delegate to agencies).

75. *See* City of Arlington v. FCC, 569 U.S. 290, 321–22 (2013) (Roberts, C.J., dissenting) (indicating that before courts may apply *Chevron*, they must first look to whether an agency interpretation warrants deference by determining if Congress directly delegated authority to interpret ambiguity). Further, the Court elaborated that courts are able to determine whether Congress intended to grant deference to agency actors. *See id.* at 322.

76. *See* Manning, *supra* note 4, at 639 ("[W]hereas *Chevron* retains one independent interpretive check on lawmaking by Congress, *Seminole Rock* leaves in place no independent interpretive check on lawmaking by Congress."). Some proponents of *Auer* argue it does in fact have a step zero because the courts ask whether the regulation is actually ambiguous. *See, e.g.*, Clarke, *supra* note 40, at 190. This is not the same question as *Chevron*'s step zero, which asks whether Congress intended for the agency to interpret the particular ambiguity. *See* Adler, *supra* note 1, at 12–13.

therefore it is unsurprising that *Kisor v. Wilkie* came before the Court to challenge the deference giant.[77]

III. PULLING BACK THE SLING SHOT: THE FACTS OF *KISOR*

In *Kisor*, the petitioner asked the Supreme Court to reconsider the regulatory deference doctrine and to overturn *Auer* and *Seminole Rock*.[78] Although the Court admitted that the question of overturning *Auer* and *Seminole Rock* did not fully rest on *Kisor*'s facts,[79] a brief summary illuminates how the issue came before the Court. First, Section III.A discusses the facts of the case to explain the regulation in question and its ambiguity.[80] Next, Section III.B examines the procedural history, analyzes how lower courts interpreted the issue, and discusses what role, if any, *Auer* deference played.[81]

A. *Drafting a Soldier: Making Kisor's Case*

In 2006, James Kisor, a Vietnam War veteran, moved for the Department of Veterans Affairs (VA) to reopen his claim for disability benefits.[82] Kisor first sought disability benefits in 1982, alleging that he developed post-traumatic stress disorder (PTSD) from his participation in a military action, Operation Harvest Moon.[83] At the time, the VA found Kisor did not suffer from PTSD and denied his request for benefits.[84] In reopening his claim, Kisor sought retroactive coverage from the date of his initial

77. *See, e.g.*, Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting) (disagreeing with majority's decision to deny certiorari on whether to overturn *Auer*); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 133 (2015) (Thomas, J., concurring) (stating willingness to revisit *Auer*'s premises when constitutional questions exist in applying APA provisions); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part) (emphasizing constitutional flaws in *Auer* as it violates "one of the great rules of separation of powers: He who writes a law must not adjudge its violation"); Talk Am., Inc. v. Mich. Bell. Tel. Co., 564 U.S. 50, 67–68 (2001) (Scalia, J., concurring) (noting defects in *Auer*, such as issues with tasking an agency to both promulgate and implement rules).

78. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

79. *See id.* at 2409 (indicating the question of whether courts appropriately applied deference doctrine in a particular case would not impact Supreme Court's reasoning on whether to overturn *Auer*).

80. For a further discussion of Kisor's claim, see *infra* Section III.A.

81. For a further discussion of procedural posture of Kisor's case and lower courts' holdings, see *infra* Section III.B.

82. *See* Kisor v. Shulkin, 869 F.3d 1360, 1361 (Fed. Cir. 2017) (explaining requirements to reopen Kisor's claim included submitting new documentary evidence), *vacated and remanded sub nom.* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

83. *Id.*

84. *Id.* at 1361–62. Kisor, while not diagnosed with PTSD, was diagnosed with intermittent explosive disorder and atypical personality disorder. *Id.* at 1361 (noting diagnosed conditions did not qualify as basis for disability claims).

application.[85] After conducting a new VA evaluation, the agency determined that Kisor did in fact suffer from PTSD and granted benefits from the date the VA reopened his case.[86] The VA denied Kisor retroactive benefits pursuant to a regulation requiring veterans to provide "relevant" service records not considered in the agency's initial denial of benefits.[87] Kisor presented two new service records, both confirming his participation in Operation Harvest Moon.[88] The VA found Kisor's records irrelevant because the documents did not address the reason for its initial denial, that he had suffered from PTSD.[89]

B. *A Rock Gliding Through the Air: Kisor's Case*

The Board of Veterans' Appeals affirmed the VA's retroactivity decision, finding that the documents related to Kisor's participation were not "relevant" under the regulation.[90] The Board agreed that Kisor's new documents did not relate to the reason for its initial denial.[91] The Court of Appeals for Veterans Claims affirmed, also finding the documents were not "relevant."[92] It expressly rejected the need for an *Auer* deference

85. *See id.* at 1363 (recounting Kisor's argument that he was entitled to benefits spanning back twenty years because VA erred in its previous decision and failed in its general duty to assist veterans).

86. Kisor v. Wilkie, 139 S. Ct. 2400, 2409 (2019).

87. *Id.* (internal quotation marks omitted) (indicating VA could have granted retroactive benefits to Kisor if it found his new service records were "relevant" under its regulation). The regulation stated:

> [A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim . . . . An award made based all or in part on the records . . . is effective on the date entitlement arose or the date the VA received the previously decided claim, whichever is later . . . .

38 C.F.R. § 3.156(c)(1), (3) (2019) (emphasis added).

88. *Kisor*, 869 F.3d at 1364 (noting Kisor's submission included service personnel records and daily logs created during Operation Harvest Moon).

89. *Id.*

90. *Kisor*, 139 S. Ct. at 2409. The case was brought before a single Administrative Law Judge (ALJ). *See id.* ALJs are members of the Executive Branch and do not enjoy the same independence as Article III judges. *See* Karen S. Lewis, *Administrative Law Judges and The Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 938 (1990). Parties to the agency adjudication, after exhausting the agency appeal process, may seek judicial review by an Article III court, as provided in the APA. *See* 5 U.S.C. § 556(c)–(d) (2018) (setting formal adjudication process for administrative agencies); 5 U.S.C. § 702 (2018) (addressing right to appeal agency action for judicial review).

91. *See Kisor*, 139 S. Ct. at 2409 (referring to VA's argument that Kisor's new service records had to relate to VA's May 1983 decision for denial: whether Kisor had PTSD). Instead, the Board found that Kisor's documents went to whether he engaged in combat. *Id.*

92. Kisor v. McDonald, No. 14-2811, 2016 WL 337517, at *2–3 (Vet. App. Jan. 27, 2016) (finding petitioner's argument, that an earlier effective date was warranted, unpersuasive based on regulatory language), *aff'd sub nom.* Kisor v. Shulkin,

analysis to address whether the pertinent regulatory language was ambiguous.[93]

Kisor then appealed to the United States Court of Appeals for the Federal Circuit, which conducted an *Auer* deference analysis by first assessing whether the regulation was ambiguous.[94] The VA interpreted its regulation to mean that "relevant" documents must go to the *reason* for the agency's initial denial of benefits.[95] Kisor instead argued the regulation only called for documents to *relate* to some requirement for obtaining benefits.[96] The Federal Circuit found the term "relevant" ambiguous and, notably, stated both parties provided reasonable interpretations.[97] Nevertheless, the court applied *Auer* and gave effect to the VA's interpretation.[98] Kisor appealed for a panel rehearing and rehearing en banc, but the Federal Circuit denied both.[99] Kisor then appealed to the Supreme Court and asked it to overrule *Auer* and *Seminole Rock*.[100]

869 F.3d 1360 (Fed. Cir. 2017), *vacated and remanded sub nom.* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

93. *Id.*

94. *See Kisor*, 869 F.3d at 1361 (stating regulation was ambiguous and Kisor's case rested on VA's interpretation of term "relevant"). The Federal Circuit has jurisdiction to review whether an administrative court misinterprets a regulation. *Id.* at 1365 (citing 38 U.S.C. § 7292(c) (2018)).

95. *See id.* at 1366–67 ("[R]ecords 'include, but are not limited to: . . . [s]ervice records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name . . . .'" (second alteration in original) (quoting Appellant's Br. at 8–9, *Kisor*, 869 F.3d 1360 (No. 2016-1929)); *see also* 38 C.F.R. § 3.156(c)(1)(i) (2019) (defining service records).

96. *See Kisor*, 869 F.3d at 1366 (outlining Kisor's argument that regulation at issue is silent as to whether records must relate to denial).

97. *Id.* at 1368.

98. *See id.* (holding *Auer* deference was proper because VA's interpretation was reasonable and not plainly erroneous).

99. *See* Kisor v. Shulkin, 880 F.3d 1378, 1378 (Fed. Cir. 2018) (per curiam). A dissenting judge argued the Federal Circuit should have applied the pro-veteran canon. *See id.* at 1379 (O'Malley, C.J., dissenting). This canon comes from Supreme Court precedent holding regulations and statutes concerning veterans should be "construed liberally in favor of the veteran." *Id.* (O'Malley, C.J., dissenting). The judge argued the proper order would have been for the pro-veteran canon to supersede *Auer* deference. *See id.* (O'Malley, C.J., dissenting) (first citing Henderson v. Shinseki, 562 U.S. 428, 441 (2011); then citing Brown v. Gardner, 513 U.S. 115, 117–18 (1994)). The Supreme Court did not pick up this order of operations question on appeal and it remains unanswered. *See generally* Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

100. *See* Kisor v. Wilkie, 139 S. Ct. 657 (2018) (granting certiorari but limiting issue to whether Court should overrule *Seminole Rock* and *Auer* deference).

IV. RELOADING THE SLING SHOT: THE COURT ADOPTS A FIVE-PART ANALYSIS TAKEN FROM EARLIER LIMITS ON *AUER*

Instead of overturning *Auer*, the *Kisor* Court surveyed its precedent and created a five-part analysis for courts to use when applying *Auer*.[101] Before affording *Auer* deference: the regulation must (1) be "genuinely ambiguous" after applying all "traditional tools of interpretation"; and the interpretation must (2) be "reasonable"; (3) be an "authoritative" or "official position"; (4) implicate the agency's substantive expertise; and (5) reflect the agency's "fair and considered judgment."[102] The majority argued the five-part test would provide guidance for lower courts to determine when an agency's interpretation warrants deference.[103] Despite this, Justice Gorsuch's concurring opinion contended the majority's holding does not go far enough to rectify *Auer*'s faults.[104]

A. *Doing the Same Thing, Expecting Different Results:* Kisor*'s Reliance on Stare Decisis*

The majority in *Kisor* candidly admitted that much of its five-part analysis is a restatement of established Supreme Court precedent limiting *Auer*.[105] Significantly, the first two steps of the new *Kisor* scheme are analogous to the two-part *Chevron* analysis.[106] First, the Court stated regulations must be "genuinely ambiguous" where there is a fundamental doubt as to the regulation's meaning.[107] This is not a novel limitation on *Auer* deference; in fact, as early as *Seminole Rock*, the Court specified lower courts should not provide deference to clear regulatory language.[108]

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101. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2410–18 (2019) (explaining Supreme Court precedent applied varying levels of stringency to *Auer* deference).

102. *See id.* at 2414–18.

103. *See id.* at 2414.

104. *See id.* at 2425 (Gorsuch, J., concurring) (rejecting majority's decision to uphold *Auer* and claiming it should have been "easy" to overturn).

105. *See id.* at 2414. The Court expanded on its prior guidance to lower courts and compared the new five-part test to standards employed by courts in the past. *See id.* The Court emphasized that, under all standards, courts have always been obligated to perform a "reviewing and restraining function." *Id.* at 2415.

106. *See id.* at 2414–15 (comparing *Kisor*'s approach to *Chevron*). For a further discussion of *Chevron*'s two-part analysis, see *supra* notes 47–50 and accompanying text.

107. *See Kisor*, 139 S. Ct. at 2415 (rationalizing limits of *Auer*). The Court warned if a regulation is clear on its meaning or provides for only one reasonable interpretation, then the courts should not defer to any other interpretation. *Id.* Further, the Court stated providing deference in such a situation would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* (internal quotation marks omitted) (quoting Christensen v. Harris County, 529 U.S. 576, 588 (2000)).

108. *See id.* (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). For further discussion of *Seminole Rock*'s limitation that interpretations be provided controlling weight only if regulation is ambiguous, see *supra* notes 39–46 and accompanying text.

For the first time, however, the Court in *Kisor* articulated how to determine whether a regulation is ambiguous.[109] Courts must conduct a separate analysis using all traditional tools of interpretation, including examining the text, structure, history, and purpose of the regulation.[110] This analysis should occur as if the courts were reviewing the ambiguity on first impression, without an agency's interpretation to review.[111] The Court explained that lower courts could resolve ambiguities without resorting to *Auer* deference by applying traditional tools of interpretation in good faith.[112]

Under *Kisor*, the second step requires courts to determine whether the agency's interpretation is a "reasonable" construction of the ambiguous regulation.[113] The Court explained reasonable agency interpretations must fall within "the zone of ambiguity," as identified through the court's own efforts in employing traditional tools of interpretation in *Kisor*'s first step.[114] By employing traditional tools of interpretation, courts independently determine the range of permissible interpretations.[115] *Kisor*'s reasonableness step clarifies earlier confusion regarding the level of scrutiny

109. *See Kisor*, 139 S. Ct. at 2415. Before *Kisor*, the Court established *Auer* deference was proper only if the regulation was genuinely ambiguous, but it did not provide the tools or forms of analysis courts should use to determine ambiguity. *See* Hickman & Thomson, *supra* note 34, at 105–06 (finding precedent unclear as to what tools courts should deploy to analyze ambiguity); *see also Christiansen*, 529 U.S. at 588 (holding *Auer* deference improper if used to interpret unambiguous regulations).

110. *See Kisor*, 139 S. Ct. at 2415 (announcing courts must utilize "all the 'traditional tools' of construction . . . before concluding that a rule is . . . ambiguous") (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S 837, 843 n.9 (1984)).

111. *See id.* (emphasizing courts must diligently analyze complex regulations and not "wave the ambiguity flag" just because they do not have prior familiarity with its subject matter). The Court in *Kisor* clarified that a court can only continue in the five-step analysis after exhausting all tools of interpretation. *Id.*

112. *Id.* (asserting courts are capable of understanding legal and technical complexities in regulatory schemes without needing to defer to agency expertise).

113. *Id.* at 2415–16 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

114. *Id.* (recognizing deploying traditional tools of interpretation allows courts to determine whether regulations are ambiguous and if an agencies' interpretation are reasonable).

115. *See id.* The second step of *Kisor* is similar to the "fairest reading" approach advocated by Justice Scalia. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 622 (2013) (Scalia, J., concurring in part and dissenting in part). In *Decker*, Justice Scalia advocated for utilizing traditional tools of interpretation to determine the regulation's fairest reading. *Id.* (Scalia, J., concurring in part and dissenting in part). Unlike *Kisor*, Justice Scalia argued once the fairest reading was determined, courts do not need to look to agency interpretations. *See id.* at 626 (Scalia, J., concurring in part and dissenting in part). The *Kisor* majority instead argued that an agency's interpretation is still relevant as long as it "fall[s] 'within the bounds of reasonable interpretation.'" *Kisor*, 139 S. Ct. at 2416 (quoting Arlington v. FCC, 569 U.S. 290, 296 (2013)). For a further discussion of the "fairest reading" approach, see *infra* Section V.B.1.

courts should use to determine whether an agency's interpretation was "plainly erroneous."[116] Before *Kisor*, courts were uncertain whether the "plainly erroneous" construction of *Seminole Rock* and *Auer* suggested a higher level of deference to an agency's interpretation of regulations than statutes receive under *Chevron*.[117]

Courts use the next three *Kisor* steps to determine whether the "character and context" of the interpretation supports a presumption that Congress intended the agency's interpretation to have controlling weight.[118] First, the interpretation must be an "authoritative" or "official [agency] position," which excludes low-level or informal statements given in the day-to-day administration of the agency.[119] The Court emphasized interpretations do not have to be authorized by an agency's head to have the backing of the agency, but the interpretation must be more than the words of an administrator or an informal office memorandum.[120] While unmentioned by the *Kisor* majority, earlier cases addressed this notion and held deference is improper for unofficial statements by administrators and non-precedential agency decisions.[121]

Second, the interpretation must demonstrate the agency's substantive expertise.[122] The Court elaborated that agency expertise weighs heavily in favor of the presumption that Congress delegated interpretive authority to the agency.[123] The Court reasoned if an agency does not have expertise relating to the regulated area, then Congress "presumably" would not have

116. *See Kisor*, 139 S. Ct. at 2416 (equating *Kisor*'s reasonableness standard to the second prong of *Chevron*).

117. *Id.* ("Some courts have thought . . . that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. . . . But that is not so. (citation omitted)).

118. *Id.* (establishing courts must test presumption of congressional intent). To do so, the Court provided *Kisor* steps three through five to aid courts in determining whether Congress would have wanted the agency's interpretation to receive binding deference. *Id.*

119. *Id.* (internal quotation marks omitted) (discussing imprecision of Supreme Court jurisprudence regarding what is considered an agency's "official position" (internal quotation marks omitted)).

120. *See id.* (requiring interpretations to originate from administrative actors with power to make policy in regulated area and through channels indicating actor's authority).

121. *See, e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 n.9 (1980) (deferring to official staff memoranda, published in *Federal Register* without agency head's approval, after finding memoranda utilized agency's substantive expertise); Lezama-Garcia v. Holder, 666 F.3d 518, 532 (9th Cir. 2011) (declining to defer to non-precedential, one-time, agency decision).

122. *Kisor*, 139 S. Ct. at 2417 (noting agencies' substantive expertise and technical knowledge provide guidance for courts).

123. *Id.* To support this notion, the Court examined precedent on determining which agency interpretation to defer to when regulatory power is divided between two agencies. *Id.* Under these circumstances, the Court provided deference to the agency in the best position based on their level of subject-matter expertise. *Id.*

delegated authority.[124] This step, requiring that agency interpretations demonstrate subject-matter expertise, is not a new limitation to *Auer* deference.[125]

Lastly, the interpretation "must reflect [the agency's] 'fair and considered judgment.'"[126] The Court explained lower courts should avoid deference when an interpretation conflicts with an earlier one, or when it seems to be nothing more than a "convenient litigating position" or "*post hoc* rationalizatio[n]."[127] Further, *Kisor* prohibits deference if it would cause an "unfair surprise" to regulated parties.[128] The Supreme Court acknowledged this is not a new limitation to *Auer* deference and conceded that courts rarely grant deference to conflicting interpretations.[129]

Despite its thorough examination of precedent, the Court ultimately upheld *Auer* on stare decisis grounds.[130] Stare decisis mandates a "special justification" for overturning settled law that is more than arguing the Court wrongly decided the issue initially.[131] Instead, overturning prece-

124. *See id.*

125. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (denying *Auer* deference where an agency's interpretation did not implicate the agency's substantive expertise). Commentators argue this limitation is an effective way to limit courts' deference to agency actors. *See, e.g.*, Adler, *supra* note 1, at 24–25 (explaining win rates for agencies seeking *Auer* deference decreased after *Gonzalez* limitation).

126. *Kisor*, 139 S. Ct. at 2417 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 166 (2012)) (prohibiting courts from deferring to agency interpretations in conflict with prior interpretations).

127. *Id.* (alteration in original) (quoting *Christopher*, 567 U.S. at 155); *see, e.g.*, *Christopher*, 567 U.S. at 155 (declining deference to amicus brief filed in separate litigation); Auer v. Robbins, 519 U.S. 452, 462 (1997).

128. *See Kisor*, 139 S. Ct. at 2417–18 (internal quotation marks omitted) (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007)); *see, e.g.*, *Christopher*, 567 U.S. at 154 (determining "unfair surprise" occurs when new interpretation results in penalties to regulated parties); *Coke*, 551 U.S. at 170–71 (finding "unfair surprise" when agency presents position in litigation counter to earlier agency's interpretations). Further, the Court has explained that agency interpretations are more persuasive when the agency is not a party to the litigation. *See* Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 209 (2011) (indicating that when the agency is not party to litigation, a presumption exists that the agency's interpretation is a product of fair and considered judgment).

129. *See Kisor*, 139 S. Ct. at 2418. Gavin Grimm's case—seeking transgender protections under Title IX—illustrates this proposition. The Eastern District of Virginia did not provide the Trump-era DOE's interpretation deference because it conflicted with Obama-era DOE interpretation. *See supra* notes 18–25 and accompanying text.

130. *See Kisor*, 139 S. Ct. at 2422 (discussing stare decisis's stringent standard against overturning precedent). In *Kisor*, Chief Justice Roberts joined the majority and provided the deciding vote to uphold *Auer* and *Seminole Rock* on stare decisis grounds. *See* Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference: The New Five-Step Deference Doctrine*, YALE J. REG. BLOG (June 26, 2019), https://yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine [https://perma.cc/RKQ5-3UPV].

131. *See Kisor*, 139 S. Ct. at 2422–23 (internal quotation marks omitted) (rejecting Kisor's argument *Auer* violates language of APA and separation of powers as

dent requires either showing the doctrine is "unworkable" or indicating how changes in the field make the doctrine a "doctrinal dinosaur."[132] After declining to overturn *Auer*, the Court signaled congressional action as the appropriate avenue to overturn settled law like *Auer*.[133] As for petitioner Kisor, the Court vacated and remanded his case to be interpreted by lower courts in accordance with its five-step analysis.[134]

B. *War is Far from Over: Justice Gorsuch's Focus on Remaining Errors with* Auer

Justice Gorsuch's concurrence chastised the majority for not adequately considering *Auer*'s dubious legal foundation or mitigating its inconsistencies with the APA and the Constitution.[135] Unlike the majority, Justice Gorsuch argued *Auer* does not fall within the scope of the APA because the Act anticipates judicial review of ambiguity.[136] Justice Gorsuch endorsed a textualist understanding of the APA—requiring courts to independently interpret ambiguity.[137] Justice Gorsuch argued if Congress intended to delegate this broad power to agencies, it would have explicitly done so in the APA.[138] Also, Justice Gorsuch refuted the majority's policy argument that deference to the agency is the best way to determine the

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unpersuasive). Moreover, the Court confronted *Seminole Rock* and *Auer*'s rationale, or lack thereof, and found a lack of initial legal support is not the test for overturning precedent. *See id.*

132. *Id.* at 2423 (internal quotation marks omitted) (first quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989); then quoting Kimbel v. Marvel Entertainment, LLC, 576 U.S. 446, 458 (2015)) (finding Kisor's case did not support these arguments and therefore was unpersuasive against stare decisis).

133. *See id.* at 2422. The majority asserted Congress would be within its power to "amend the APA or any [new] statute to require . . . *de novo* review of regulatory interpretations . . . ." *Id.* at 2422–23 (stating congressional silence, after Supreme Court announced its presumption of congressional intent to gap-fill, indicates Congress accepted and approved of *Auer*'s deference doctrine).

134. *See id.* at 2423–24.

135. *See id.* at 2425 (Gorsuch, J., concurring) (urging Supreme Court to reject *Auer* because of its legal underpinnings as a court-created doctrine and Court's failure to reconcile it with principles of Constitution or APA). Justices Thomas, Kavanaugh, and Alito joined sections of Justice Gorsuch's concurrence discussing the judiciary's role of upholding the APA and Constitution. *See id.*

136. *See id.* at 2432–35 (Gorsuch, J., concurring) (advocating judiciary's role is to determine meaning of laws).

137. *See id.* 2434–35 (Gorsuch, J., concurring) (arguing *Auer* subverts APA by providing agencies with alternative to formal notice-and-comment rulemaking and by granting these informal interpretations with weight of law). For a discussion of the rulemaking procedure outlined in Section 553 of the APA, see *supra* note 5.

138. *See id.* at 2432–33 (Gorsuch, J., concurring) (refuting notion that Congress intended to implicitly defer to agencies on interpreting agency regulations when other sections in APA explicitly delegated power of interpretation to agencies); *see, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 481 n.14 (1951) (discussing how judicial review under Section 706 of the APA as originally proposed would require courts to determine discretionary authority of the agency).

author's intention.[139] Justice Gorsuch argued this practice is misguided because agency administrators change with presidential administrations, as do their policies.[140] *Auer* deference, then, allows agency administrators to interpret their predecessors' intent—conduct clearly forbidden for legislators.[141]

Additionally, Justice Gorsuch argued the Court preserved the deference doctrine by a misplaced reliance on stare decisis.[142] Unlike the majority, Justice Gorsuch discouraged Congress from overturning the doctrine and argued the Court would be the appropriate venue.[143] Justice Gorsuch identified complications for Congress, including whether the current Congress can rebut the presumption of delegation to all past statutes or if repeal must be done on a statute-by-statute basis.[144] Instead, Justice Gorsuch would have had the Court overturn *Auer*.[145]

V. REENTERING BATTLE: EMPHASIZING COURTS' ROLE TO INTERPRET THE LAW

Because much of the Court's guidance in *Kisor* was a restatement of existing limitations, the five-part test is unlikely to result in a meaningful change to the way lower courts apply *Auer* deference. This Note uses the public interest theory to understand regulators' motives and to highlight lingering issues with *Auer* deference's assumptions.[146] A public interest theory analysis reveals that *Auer* deference and *Kisor* do not go far enough

139. *See Kisor*, 139 S. Ct. at 2441 (Gorsuch, J., concurring) (finding *Auer*'s purported goal of understanding a regulation's original meaning conflicts with deference to current regulators, whose views may not correspond with original drafter). Justices Thomas and Kavanaugh joined in this part of the concurrence. *Id.* at 2425 (Gorsuch, J., concurring).

140. *See id.* at 2441 (Gorsuch, J., concurring) (arguing independent judicial review of regulation's ambiguity best determines fairest reading).

141. *See id.* at 2441–42 (Gorsuch, J., concurring) (noting courts do not provide weight to statements from legislators on meaning of statute enacted by previous legislative body).

142. *See id.* at 2443 (Gorsuch, J., concurring) (implying majority's creation of a new test for lower courts is inconsistent with its emphasis on stare decisis). Justices Thomas and Kavanaugh joined the discussion on stare decisis. *Id.* at 2425 (Gorsuch, J., concurring).

143. *See id.* at 2444–45 (Gorsuch, J., concurring) (questioning Congress's power to overturn *Auer*).

144. *See id.* (Gorsuch, J., concurring) (questioning current Congress's ability to control application of *Auer* deference on future congressional legislation).

145. *See id.* at 2425 (Gorsuch, J., concurring) (arguing *Kisor*'s majority created "new and nebulous" limitations on *Auer*). Ironically, Gorsuch's opinion is a concurrence to uphold *Auer* on the basis of stare decisis, while he indicated the doctrine is on its last breath. *See id.* ("[T]oday's decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise.").

146. The public interest theory focuses on the public's ability to monitor regulatory decision-makers. Croley, *supra* note 43, at 5. For a further discussion of public interest theory and its application to regulatory actors, see discussion *infra* Section V.A.

to address whether agency interpretations are politically motivated. Instead of supporting a complete break from the deference doctrine, this Note advocates for the Court to return to a *Skidmore*-type analysis when Congress does not explicitly delegate interpretive authority.[147] The Court should preserve *Auer* deference for circumstances where congressional delegation has been verified by a method analogous to *Chevron*'s step zero.[148]

A. *Questioning Allegiances of Allies: Agency Motives in Regulatory Action*

Under the public interest theory, scholars describe regulators as self-interested actors who seek prolonged enjoyment of their positions and who succumb to special-interest bargaining.[149] The theory explains regulatory behavior as dependent upon the environment and considers how regulators balance their self-interests with the desires of special interest groups and the public.[150] Notably, public interest theory exposes that *Auer* deference, even after *Kisor*, cannot identify and limit deference to agency interpretations motivated solely by political initiatives.[151] While the majority in *Kisor* argues interpretations must represent an agency's "fair and considered judgment," agencies can still adopt novel interpreta-

147. *Skidmore* provides deference proportional to 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." *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). For a further discussion of *Skidmore* as an alternative to *Kisor*'s continued reliance on a presumption of implicit congressional intent, see *infra* Section V.B.

148. *Chevron*'s step zero requires courts to first determine whether Congress explicitly delegated an agency with authority to interpret statutory ambiguity before employing the *Chevron* framework. For a further discussion of the differences between *Chevron*'s step zero and *Auer*, see *supra* notes 73–76 and accompanying text.

149. *See* Croley, *supra* note 43, at 66–70 (arguing regulatory actors are self-motivated and applying public interest framework to explain regulatory issues). Croley's article applies other political science theories to explain regulatory actors' behaviors, but this is beyond the scope of this Note. *See id.* (applying regulatory rulemaking to public choice theory, neopluralist theory, civic republican theory, and public interest theory).

150. *See id.* at 152 (finding this balance of interests depends on "principal–agent slack"). Principal–agent slack is the amount of awareness the public is paying to the regulated issue. *See id.* at 68. In a high-slack environment, the regulator is able to escape public scrutiny and favor special interests, which provide direct benefits to the regulator. *See id.* In a low-slack environment, regulators are incentivized to pursue general interests, which are typically more aligned with the public's interests and provide political self-preservation. *Id.* at 69.

151. *See generally id.* at 67 ("[R]egulators pursue special-interest regulatory outcomes when doing so furthers their self-preservation, and they pursue more general interests . . . when doing that furthers their political self-preservation." (footnote omitted)); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2432–33 (2019) (Gorsuch, J., concurring) (arguing *Kisor*'s analysis does not address agency actors' own interests and policy goals).

tions as parties to the litigation or after litigation has begun.[152] The Court's limitation, though aimed at protecting regulated parties from "unfair surprise," does not account for interpretations motivated by political initiatives or ones that are not the fairest reading of the regulation.[153]

Further, a recent increase in the number of amicus briefs submitted by agencies during litigation suggests *Auer* deference incentivizes agencies to promulgate broad and ambiguous regulations.[154] The majority in *Kisor* assumes agency expertise provides a neutral and objective basis for the agency's interpretations.[155] Proponents of *Auer* argue reliance on subject-matter expertise will limit regulators from using *Auer* for political objectives.[156] Nevertheless, this viewpoint by *Auer*'s proponents does not fully account for agency administrators' political and personal motives.[157] In hearing *Kisor*, the Supreme Court may have been more strategic than it

152. *See Kisor*, 139 S. Ct. at 2417–18 (restricting deference if agency's interpretation "conflict[s] with a prior" interpretation (internal quotation marks omitted) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)). Returning to Gavin Grimm's case, the current *Kisor* test denies deference to contradictory positions, such as the one adopted by Trump-era DOE, to limit political motivation. Although, the limitation does not ask if the DOE under Obama implemented its novel interpretation—to provide transgender students protection under Title IX—for political reasons. *See supra* notes 20–23 and accompanying text.

153. *See Kisor,* 139 S. Ct. at 2418; Croley, *supra* note 43, at 119 (noting lobbyists regularly interface with the White House to influence agency decision-making); *id.* at 152 (commenting public interest theory finds judicial review "likely reduces regulatory slack by subjecting agency decisionmaker's behavior to scrutiny by an institution not directly involved in the development of regulatory policy and thus not vulnerable to whatever pressures otherwise affect regulatory outcomes").

154. *See* Kristin Lustila, *Ethical Duties of Expert Supreme Court Counsel*, 24 GEO. J. LEGAL ETHICS 659, 665 (2011) (finding amicus brief submissions by government and private groups increased more than forty percent from 1982 to 2002). In recent years, there has been an increase in the use of amicus briefs in litigation as a work-around for more formal APA rulemaking procedures. *See* Eisenberg, *supra* note 9, at 1223 (highlighting use of amicus curiae briefs to advance presidents' political agendas). Because the courts provide deference to amicus briefs, agencies have less incentive to promulgate rules through notice-and-comment procedures. *See id.* Proponents of *Auer* claim any incentive to agencies is merely theoretical. *See* Brief of Administrative Law Scholars in Support of Affirmance at 2, *Kisor*, 139 S. Ct. 2400 (No. 18-15), 2019 WL 1057906, at *3. Further, they argue there is no evidence any theoretical incentive to agencies has come to fruition. *See id.* at *12 n.5 (citing William Yeatman, Note, *An Empirical Defense of* Auer *Step Zero*, 106 GEO. L. J. 515, 519–20 (2018)) (detailing methodology of empirical research on rate agencies prevailed when invoked *Auer* over a twenty-year period and found the win rate fell significantly).

155. *See Kisor*, 139 S. Ct. at 2413 (noting expertise as an agency advantage when making policy judgments); *see, e.g.*, Diver, *supra* note 11, at 589–90 (arguing agency experience and expertise justify judicial deference).

156. *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (denying *Auer* deference where an agency's promulgated rule does not implicate the agency's substantive expertise).

157. *See* Croley, *supra* note 43, at 110 (noting agencies have incentive to seem impartial to special interests during formal notice-and-comment period because comments provide basis for judicial review).

chose to recognize, because the case did not raise questions on the politicization of agencies.[158]

Additionally, *Auer* limits public participation in rulemaking by deferring to interpretations rendered outside typical notice-and-comment rulemaking.[159] Therefore, the public does not have the opportunity to voice its concerns with the policy decision.[160] The public interest theory explains this behavior through the concept of a "Burkean" regulator: someone who acts in a paternalistic manner to promote an agency's ideological commitment to a regulatory goal.[161] Due to the public's inability to participate in the agency's interpretations, regulatory actors under *Auer* can make policy decisions in a paternalistic and politically motivated manner.[162] Therefore, *Auer* deference, even after *Kisor*, allows agencies to make policy changes in an artificial "Burkean" environment where regulators are immune from even heightened public interest on a regulated issue.[163]

The majority opinion in *Kisor* contends agencies are politically accountable to the President and have to face the public if they do not up-

158. *Compare Kisor*, 139 S. Ct. at 2409 (noting the VA's interpretation remained consistent throughout litigation), *with* G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 718–19 (4th Cir. 2016) (acknowledging the DOE interpretation drastically shifted during litigation), *and* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) (finding an agency memorandum entitled to *Auer* deference despite recognizing agency had "struggled" with interpretation for almost thirty years depending on political party of administration in office).

159. *See* 5 U.S.C. § 553 (2018) (delineating agency notice-and-comment rulemaking requirements under the APA). The statute requires agencies to provide notice and an opportunity for all interested persons to participate in rulemaking. *See* § 553(b)–(c). The public participates in this process by submitting comments, data, views, or arguments. *See* § 553(c).

160. *See* Clarke, *supra* note 40, at 181 (arguing *Auer* does not afford the public an opportunity to voice its opinions when agencies later clarify vague regulations passed under notice-and-comment rulemaking).

161. *See* Croley, *supra* note 43, at 67 (establishing agency actors can be motivated to do what is "best" for the public (internal quotation marks omitted)). Under public interest theory, agency administrators acting in a "Burkean" manner are acting in a high-slack environment, where the public is unaware or uninformed about regulatory initiatives. For further description of high-slack environment, see *supra* note 150 and accompanying text.

162. *See* Cary Coglianese, *Administrative Law: The U.S. and Beyond*, PENN LAW: FAC. SCHOLARSHIP 3–4 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2657&context=faculty_scholarship [https://perma.cc/HZ6C-YESS] (discussing enormous amount of discretion given to agency administrators).

163. *See* Croley, *supra* note 43, at 120–22 (outlining economic costs of public participation in agency rulemaking is less than barriers to Legislature's adjudication). To participate in rulemaking, interested members of the public need to be aware of agency's interest and prepare and submit a comment. *See id.* at 121 (recognizing that in highly technical regulated areas, interested parties must engage with technical data used to support agency's proposed rule, and parties may need to supply its own data to influence rulemaking).

hold the existing regulatory framework.[164] This contention seems doubtful because agency administrators are unelected officials, either career administrators or officials appointed by the Executive.[165] It remains unclear what legal remedy the public would have beyond using the political system to vote the President out of office.[166]

B. *Dusting Off a Weapon of Last Resort:* Skidmore *and* Chevron *Provide Solutions in Replacing* Auer

Lingering constitutional and policy issues associated with *Auer* make it unclear which branch of government can overturn the doctrine.[167] As set forth by the *Kisor* majority, Congress could correct the issues with *Auer*, but in contrast, Justice Gorsuch argued the judiciary should resolve *Auer*'s issues.[168] Practically speaking, the Court's ability to simultaneously overturn *Auer* and implement a new standard makes it the most effective venue for change.[169] In debating a standard to replace *Auer*, critics and Supreme Court Justices disagree whether it should be a "fairest reading" standard or a reversion to *Skidmore* deference.[170] This Note advocates for

164. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019) (advocating agencies are politically accountable to the public because they are supervised by President).

165. *See* Coglianese, *supra* note 162, at 3 (commenting agencies are usually staffed by unelected officials and arguing it is dubious to expect the public to hold the President politically accountable for agency actions).

166. *See id.* (emphasizing legal scholarship lacks empirical research on democratic accountability of agency administrators).

167. *Compare Kisor*, 139 S. Ct. at 2422 (advocating Congress can overturn *Auer*), *with id.* at 2444–45 (Gorsuch, J., concurring) (advocating Supreme Court is proper venue to overturn *Auer*).

168. Furthermore, Justice Gorsuch argued stare decisis is not as rigidly formulated as the *Kisor* majority suggested. *See id.* (Gorsuch, J., concurring). For a further discussion of the majority opinion's reasoning that stare decisis prevents the Court from overturning *Auer* deference, see *supra* notes 130–34 and accompanying text. For a further discussion of Justice Gorsuch's reasoning that the majority's reliance on stare decisis is misplaced, see *supra* notes 142–45 and accompanying text.

169. *See* Manning, *supra* note 4, at 691 (arguing removing binding deference would result in uncertainty among lower courts on when to provide ambiguous language independent judicial review).

170. *See, e.g.*, *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., concurring) (commenting overturning *Auer* would revert judicial review to *Skidmore* standard); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 622 (2013) (Scalia, J., dissenting) (advocating for independent judicial review, known as "fairest reading" approach); Clarke, *supra* note 40, at 177 (arguing both *Skidmore* and "fairest reading" approach would be inadequate to replace *Auer*); Manning, *supra* note 4, at 686–90 (advocating for *Skidmore* review). In *Decker*, Scalia advocated for utilizing traditional tools of interpretation to determine the regulation's fairest reading. *Decker*, 568 U.S. at 622. (Scalia, J., dissenting). Unlike *Kisor*'s second step, after a court determines a regulation's fairest reading, it does not need to weigh an agency's interpretation. *See id.* at 626.

inputting *Chevron*'s step zero and *Skidmore* into the *Auer* deference analysis.[171]

1. *Independent Judicial Review: "Fairest Reading" Standard*

One alternative to *Auer* deference would be to deny courts the ability to consider agency interpretations entirely.[172] Under this approach, regulatory ambiguity would be resolved by courts' independent determinations of a regulation's fairest reading.[173] The "fairest reading" approach emphasizes that, as in other areas of law, courts have the ability to grapple with complex issues of ambiguity, and regulatory interpretation should be no different.[174] While this solution resolves delegation issues under separation of powers and the APA, it also eliminates the benefits of agency expertise that act as guideposts for courts.[175]

2. Skidmore*'s Balancing Test*

Another approach to replace *Auer* would be to revert to a *Skidmore* analysis.[176] Under this approach, courts retain the benefits of agency expertise and provide deference appropriate to the persuasiveness of an agency's interpretation.[177] *Skidmore* allows courts to resolve ambiguities without requiring agencies to go through lengthy traditional notice-and-comment rulemaking.[178] Critics of *Skidmore* argue it discourages regu-

171. For a further discussion of *Chevron*'s step zero, see *supra* notes 73–76 and accompanying text.

172. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 122–23 (2015) (Thomas, J., concurring) (advocating independent judicial review is required in interpreting ambiguous regulations).

173. *See, e.g.*, Talk Am., Inc. v. Mich. Bell. Tel. Co., 564 U.S. 50, 67–68 (2001) (Scalia, J., concurring) (finding fairest reading of regulation aligned with agency's interpretation and therefore *Auer* is not needed); *see also Decker*, 588 U.S. at 618 (Scalia, J., dissenting) (arguing courts should be "bound by *what [rules] say*, not by the unexpressed intention" of their drafters).

174. *See Decker*, 588 U.S. at 622 (Scalia, J., dissenting) (advocating "fairest reading" approach by using textual tools to determine reasonable construction of ambiguous regulations). The *Kisor* majority's second step also requires courts to utilize textual tools of interpretation to determine reasonable constructions of the regulation. *See Kisor*, 139 S. Ct. at 2415–16. Unlike *Kisor*, the "fairest reading" approach does not provide deference or weight to agency interpretation. *See Decker*, 588 U.S. at 622.

175. *See* Brief of Administrative Law Scholars in Support of Affirmance, *supra* note 154, at *23–24 (claiming fairest reading would result in conflicting judgments from courts and, without reliance on agency expertise, create uncertainty for regulated entities regarding compliance).

176. *See, e.g.*, Manning, *supra* note 4, at 618 (finding *Skidmore* deference provides solution to *Auer*'s constitutional issues); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1076 (2016) (envisioning a return to *Skidmore* deference).

177. For a further discussion of *Skidmore*'s use of agency expertise, see *supra* note 37–39 and accompanying text.

178. *See* Adler, *supra* note 1, at 26 (arguing, without use of *Auer*, agencies could still persuade courts of the validity of their interpretations). For instance, if

lated parties from participating in formal rulemaking.[179] They claim regulated parties, by remaining silent and not bringing rulemaking concerns to the agency, would be more likely to succeed later in a challenge to ambiguous terms under *Skidmore* than under *Auer*.[180] Nevertheless, an agency would be able to rectify this misuse by promulgating a new rule providing clarity to the ambiguity.[181]

3. *Tiered Approach: Incorporating Step Zero and* Skidmore

This Note proposes employing a tiered approach to *Auer* deference that incorporates step zero and *Skidmore*. Under a tiered approach, courts would first conduct a *Chevron* step zero analysis applied within the regulatory context. This would allow courts to determine whether an explicit authorization from Congress occurred before applying *Auer*.[182] Supporters of the deference doctrine may argue that the final three steps of the *Kisor* analysis attempt to bring *Kisor* closer to step zero in *Chevron*.[183] But this argument fails because differences between statutory and regulatory frameworks result in a lack of agency oversight during and after rule promulgation.[184] By including an explicit congressional authorization step, the courts could continue in a simplified *Auer* analysis that would retain the first two steps of *Kisor*.[185] Like *Chevron*, the first two steps of *Kisor*

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the *Skidmore* standard had been applied in Gavin Grimm's case, the judiciary would have had more leniency to weigh whether the policy violated Title IX. For a further discussion of courts' role in interpreting ambiguity under *Skidmore*, see *supra* note 37 and accompanying text.

179. *See* Clarke, *supra* note 40, at 192 (arguing *Auer*, unlike *Skidmore*, encourages regulated parties to participate in notice-and-comment rulemaking and brings ambiguity to agency's attention, so that they can better anticipate agency's subsequent application and interpretation of the rule). Additionally, Justice Scalia argued reverting to *Skidmore* deference would create uncertainty among courts about how much weight to give to an agency interpretation. *See* United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting) (arguing "*Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation" given current complexity of administrative state).

180. *See* Clarke, *supra* note 40, at 192 (noting regulated parties would be less likely to raise concerns because this would provide clarity to the regulated area, and therefore eliminate ambiguity).

181. For a further discussion of the APA's notice-and-comment rulemaking, see *supra* note 5 and accompanying text.

182. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (limiting review in *Chevron* to exclude economically or politically significant cases); *Mead Corp.*, 533 U.S. at 221 (limiting review in *Chevron* to instances were courts can be certain Congress delegated authority).

183. For further discussion of *Kisor* analysis looking to the "character and context" of *Auer* to determine whether Congress implicitly delegated to the agency, see *supra* notes 118–29 and accompanying text.

184. For further discussion of statutory and regulatory differences in rule promulgation, see *supra* note 62 and accompanying text.

185. Hence, Congress's explicit delegation of interpretive authority would render steps three through five unnecessary. *See supra* Section IV.A.

would be retained to determine whether there is genuine ambiguity and whether the agency's interpretation is a reasonable construction.[186]

But if the courts do not find an explicit congressional delegation under step zero, then courts would apply *Skidmore*. Likewise, if the court finds an explicit congressional authorization—but the agency's regulation was unambiguous or its interpretation unreasonable—the court would apply *Skidmore*. The second tier would mandate a *Skidmore* review to provide deference proportional to the persuasiveness of an agency's interpretations.[187] Courts thereby retain the ability to utilize agency expertise and knowledge of highly technical and specialized areas.[188] Under *Skidmore*, courts can consider agency interpretations as a recommendation among other considerations, including the regulation's fairest reading.[189]

VI. A GIANT OR MERELY A SITTING DUCK: WHAT REMAINS OF *AUER* AFTER *KISOR*

Regardless of doubts about *Kisor*'s lasting impact, its holding is significant in the immediate future because it requires lower courts to apply the five-part test before deferring to agency interpretations.[190] Because much of *Kisor*'s holding is a restatement of existing precedent, it is unlikely its five-part framework will result in any meaningful change to the way lower courts apply the deference doctrine.[191] To date, lower courts have employed varying levels of stringency when applying *Kisor*.[192] Contrary to the

186. For a discussion of *Chevron*'s two-part test, see *supra* notes 48–49 and accompanying text.

187. Requiring this step would resolve the question of when courts should apply *Skidmore*. For a discussion of prior confusion among lower courts about when to employ *Skidmore*, see *supra* note 54 and accompanying text.

188. *See* Adler, *supra* note 1, at 13 (arguing agency expertise does not translate into an authorization by Congress to gap-fill the regulatory scheme). This approach retains utility of agency expertise without divining Congressional authorization from that expertise. *Id.*

189. For further discussion of the five-step analysis reviewing courts must implement before deferring to agency interpretations of ambiguous regulations, see *supra* Section IV.A.

190. *Compare* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) (finding agency's interpretation entitled to *Auer* deference, even though agency struggled with interpretation and question of ambiguity since the 1990s), *with* Spencer v. Macado's, Inc., 399 F. Supp. 3d 545, 552–53 (W.D. Va. 2019) (denying *Auer* deference because agency interpretation reversing thirty-year-old policy during change in political administration constituted an unfair surprise). This could indicate that lower courts may follow *Kisor* to avoid unnecessary use of *Auer*. *See Spencer*, 399 F. Supp. 3d at 552 (finding circumstances surrounding agency's interpretation suggested it was a policy change rather than an effort to determine meaning of regulation).

191. For further discussion of persisting issues with *Auer* after the court's limitation in *Kisor*, see *supra* Part V.

192. *See, e.g.*, Am. Tunaboat Ass'n. v. Ross, 391 F. Supp. 3d 98, 114 (D.D.C. 2019) (finding agency regulations "opaque" but affording deference using *Kisor* test); E. Or. Mining Ass'n v. Dep't of Env't Quality, 445 P.3d 251, 270–73 (Or. 2019) (applying *Kisor* test by analyzing text, structure, and history of regulated in-

Court's intention to simplify and standardize the judiciary's task, some lower courts continue to overrely on agency interpretations.[193] Other courts faithfully execute the Court's test.[194]

Auer deference has encouraged the growth of the administrative state, but *Kisor*'s new articulation of the doctrine did not cure its constitutional faults.[195] Given the Court narrowly decided the case on stare decisis grounds, Justice Gorsuch's concurring opinion will likely lay the groundwork for the Court to overturn *Auer* in the future.[196] The *Kisor* majority suggests the onus is on Congress to set aside *Auer*.[197] However, Congress may heed Justice Gorsuch's warning that a decision to overturn *Auer* "would explode with constitutional questions."[198] The Court may instead realize at a later time that it is the proper venue to decide the legality and wisdom of *Auer* deference. For now, lower courts are left to apply *Kisor*'s five-part test before deferring to an agency's interpretation under *Auer*.

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dustry before establishing whether regulation was ambiguous); Md. Dep't of the Env't v. Cty. Comm'rs of Carrol Cty., No. 06-C-15-068141, 2019 WL 3561897, at *49–50 (Md. 2019) (Getty, J., dissenting) (arguing deference in the case should be limited because majority did not partake in *Kisor* analysis using tools of construction).

193. *See, e.g.*, *Am. Tunaboat Ass'n*, 391 F. Supp. 3d at 112 (determining ambiguous regulation under *Kisor* by looking to text but not employing other interpretation tools); Wolfington v. Reconstructive Orthopedic Assoc. II PC, 935 F.3d 187, 205–06 (3d Cir. 2019) (conducting brief *Kisor* analysis before expeditiously determining regulation was ambiguous and agency's interpretation entitled to deference).

194. *See, e.g.*, Romero v. Barr, 937 F.3d 282, 295–97 (4th Cir. 2019) (conducting lengthy *Kisor* analysis and declining to afford *Auer* deference because it would lead to "unfair surprise"); Belt v. P.F Chang's China Bistro, Inc., 401 F. Supp. 3d 512, 530–31 (E.D. Pa. 2019) (finding regulation ambiguous but denying deference because interpretation was not result of agency's "fair and considered judgement").

195. For further discussion of *Auer*'s remaining separation of powers issues after *Kisor*'s holding, see *supra* Section IV.B.

196. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2444–45 (2019) (Gorsuch, J., concurring) (undermining Court's reliance on stare decisis because precedent is built on *Seminole Rock*'s foundation, which lacked legal support).

197. *See id.* at 2422 (noting Congress has the ability to overturn *Auer* regardless of the Court's holding in *Kisor*). Before the holding in *Kisor*, Congressional representatives introduced a series of legislation attempting, yet failing, to overturn *Auer*. *See* Jowanna N. Oates, *Saying Goodbye to* Chevron *and* Auer*? New Developments in the Agency Deference Doctrine*, 91 FLA. B.J. 43, 44 (2017) (citing 5 U.S.C. § 706 (2018)) (discussing attempts by Congress to statutorily overturn *Auer*); *see also* Regulatory Accountability Act of 2017, H.R. 5, 115 Cong. § 202 (2017); Separation of Powers Restoration Act of 2016, H.R. 4768, 114 Cong. § 3 (2016).

198. *Kisor*, 139 S. Ct. at 2444–45 (Gorsuch, J., concurring) (noting constitutional restraints on Congress may prevent it from overturning *Auer*).