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# Judicial Deference Doctrines: Whither Goest *Chevron*, *Auer*, and *Skidmore* Deference?

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We are all aware of the metronomic debate about the validity and role of federal and state administrative agencies during the Twentieth Century. Fifty years ago, Harvard Professor Louis Jaffe sparred with Professor Kenneth Culp Davis who held appointments at Harvard, the University of Chicago, and the University of San Diego. Today, the debate is carried forward by Columbia Professor Phillip Hamburger and Harvard Professor Adrian Vermeule. Perhaps indicative of the breadth of Harvard's academic horizon, it has produced scholars on both sides of the debate.

It is not my purpose today to enter the lysts to take sides regarding the legality or advisability of administrative agencies or, as Justice Jackson referred to them, the "fourth branch of [g]overnment."[1] However, this continuing debate frames the issue I have been invited to address – the *Chevron* and the *Auer* doctrines.

The chief concerns about current administrative agencies include: (1) administrative agencies as they currently exist were not envisioned by the Framers;[2] (2) the aggregation and concentration of executive, legislative, and judicial powers in administrative agencies triggers constitutional questions;[3] and the courts have been hesitant to exercise proper judicial oversight over the Congress's creation of administrative agencies or over the actions of the agencies themselves.[4]

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[1] *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (stating that "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century . . . The [administrative agencies] have become a veritable fourth branch of the Government.)).

[2] *City of Arlington, Texas v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J. dissenting) ("The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities.").

[3] *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. ____, 135 S. Ct. 1225 (2015) (Thomas, J. concurring in the judgment); *FTC v. Ruberoid Co.*, 343 U.S. at 487-88 (Jackson, J., dissenting).

[4] Charles J. Cooper, *Confronting the Administrative State*, Nat'l Affairs, Fall 2015, at 96, 100-104); Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent With the Rule of Law*, 3 N.Y.U. J.L. & Liberty 491, 499-503 (2008).

The debate regarding the courts' oversight of administrative agencies focuses on three topics – the demise of the Nondelegation Doctrine,[5] *INS v. Chadha's* invalidation of the legislative veto,[6] and the courts' deference to agency actions. I will leave the first two topics for another day and now turn my attention to the judicial deference doctrines.

Judicial Oversight under *Chevron*

Prior to 1984, the United States Supreme Court's decisions regarding the deference afforded to an administrative agency's interpretation of statutes, Janus-like, pointed in two directions. In *Skidmore v. Swift*,[7] the Court was called upon to address the degree of deference to be given to an interpretative bulletin of the Wage and Hour Division of the Administrator of Labor presented in an appellate brief. Noting that the administrator's interpretation "was made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case,"[8] Justice Jackson, writing for the Court, said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[9]

However, twenty-five years later, the Court took a different tack in *Red Lion Broadcasting Co. v. FCC*.[10] After the Federal Communications Commission conditioned the renewal of its broadcasting license on complying with its "fairness doctrine" which required radio and television broadcasters to present a fair and balanced discussion of public issues on the airwaves, Red Lion Broadcasting challenged the doctrine on First

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[5]*Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. at ____, 135 S. Ct. at 1240-55 (2015) (Thomas, J. concurring in the judgment).

[6]*INS v. Chadha*, 462 U.S. 919 (1983).

[7]*Skidmore v. Swift*, 323 U.S. 134 (1944).

[8]*Skidmore v. Swift*, 323 U.S. at 139.

[9]*Skidmore v. Swift*, 323 U.S. at 140.

[10]*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Amendment grounds . After noting that the fairness doctrine was consistent with earlier and subsequent legislation, Justice White stated:

> Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.[11]

*Red Lion* and the cases following it appeared to bar the courts from interpreting statutes creating administrative agencies or defining their powers de novo.

Fifteen years after the *Red Lion* decision, the Court was presented with an opportunity to resolve the inconsistencies between *Skidmore* and *Red Lion*. The case involved a regulations promulgated by the Environmental Protection Agency ("EPA") based on its interpretation of the 1977 amendments to the Clean Air Act. The Act required states that had not yet achieved national air quality standards to regulate new or modified major stationary sources of air pollution such as manufacturing plants.

During the Carter administration, the EPA had broadly defined a "source" as any device in a manufacturing plant that produced pollution. In 1980 and 1981, during the Reagan administration, the EPA, now headed by Anne M. Gorsuch,[12] adopted a new definition allowing states to treat all pollution-emitting devices in the same plant as though they were encased in a single "bubble." Under this new regulation, existing plant could obtain permits for new equipment that did not meet the standards as long a the total emissions from the plant itself did not increase.

Several environmental groups, including the Natural Resources Defense Council, challenged the "bubble" provision on the ground that it was contrary to the Clean Air Act. The United States Court of Appeals for the District of Columbia, widely known for second-guessing federal agencies' interpretation of statutes, invalided the rule.[13] The court based its decision on two of its prior decisions concerning the application of the "bubble concept" to other clean air programs.

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[11] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380-82.

[12] Director Gorsuch now deceased, was Justice Neil Gorsuch's mother.

[13] *Nat'l Res. Def. Council v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

The United States Supreme Court granted writs of certiorari in three cases, consolidated them for argument, and handed down its decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* on June 25, 1984.[14] Writing for a unanimous court, Justice Stevens held that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[15] Most importantly, Justice Stevens then articulated the standard federal courts should use to review an administrative agency's interpretation of a statute it administers:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[16]

In a footnote, the Court added "[t]he court need not conclude that the agency construction is the only one it permissively could have adopted to uphold the construction, or even the reading of the court would have reached if the question initially had arisen in a judicial proceeding."[17]

The Court articulated three justifications for deferring to an agency's construction of statutes its administers. First, the Court stated that statutory ambiguity represents an implicit delegation by Congress to an agency to interpret statutes it administers.[18] Second,

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[14]*Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984) ("*Chevron*).

[15]*Chevron*, 467 U.S. at 842.

[16]*Chevron*, 467 U.S. at 842-43.

[17]*Chevron*, 467 U.S. at 843 n.11.

[18]Specifically, the Court stated:

> The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If

the Court emphasized the greater institutional competence of administrative agencies, as compared to the courts, to resolve the "policy battle" being waged by the litigants.[19] Third, the Court cited concerns about the constitutional separation of powers.[20]

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> Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Chevron*, 467 U.S. at 843-44 (citations and quotation marks omitted); *see also Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 740-41 (1995); *SAS Inst., Inc. v. Iancu*, 584 U.S. ____, ____, 138 S. Ct. 1348, 1360 (2018) (Breyer, J., dissenting) (("I would look to see whether the relevant statutory phrase is ambiguous or leaves a gap that Congress implicitly delegated authority to the agency to fill.").

[19]The Court stated:

> The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.

*Chevron*, 467 U.S. at 864.

[20]The Court stated

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the political branches.

*Chevron* changed the law by explicitly assuming that legislation's ambiguity or silence on a given issue generally would be seen as Congress granting the agency responsible for implementing the law discretion to take any action – to make any policy choice – as long as it is reasonable and within the scope of the law's grant of discretion.[21] As predicted, Chevron has become a "pillar in administrative law."[22] Since 1984, the *Chevron* decision has been the Court's most cited administrative law decision and "has spawned legions of law review articles analyzing its numerous twists and turns."[23]

Federal courts initially construed *Chevron* as instructing them to use a two-step analysis when review an agencies interpretation of a statute its administers. The first step required the courts to consider the language, structure, legislative history, and purpose of the statute to determine whether Congress's intent is clear. If it is, then the court must reject an alternative agency interpretation.[24] If Congress's intent is ambiguous, Step Two requires the courts to defer to the agency's interpretation of the statute if it is reasonable.

With the passage of time, and intervening decisions by the Court and the United States Court of Appeals for the District of Columbia, *Chevron* has "created a cottage industry in choreography."[25] In *United States v. Mead Corporation*, the Court appeared to add a step preceding Step One ("Step Zero") that required the courts to determine whether "Congress [has] delegated authority to the agency generally to make rules carrying the force of law and whether the agency's interpretation claiming deference was

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*Chevron*, 467 U.S. at 866 (citations and quotation marks omitted); *see also City of Arlington, Texas v. FCC*, 569 U.S. at 327 (Roberts, C.J., dissenting) ("*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.").

[21]*Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. at 740-41.

[22]Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2071, 2075 (1990).

[23]Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 Fordham L. Rev. 731, 731 (2014); see also Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 2 (2017) (noting that since 1984, *Chevron* has been cited roughly 15,000 times in judicial decisions).

[24]Note, *"How Clear is Clear" in* Chevron's *Step One?*, 118 Harv. L. Rev. 1687, 1687 (2005).

[25]Daniel J. Hemel & Aaron Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. 757, 758-59 (2017) ("Hemel & Nielson").

promulgated in the exercise of that authority."[26] Other commentators have asserted that the United States Court of Appeals for the District of Columbia has inserted a step between Steps One and Two ("Step One-and-a-Half") in which the court will decline to proceed to Step Two unless the agency has explicitly recognized that the statutory provision at issue in ambiguous.[27]

Because of the various articulations of *Chevron* review, commentators have noted that "[t]he number of steps in *Chevron* in any given case may turn out to depend on who writes the Court's opinion."[28] The legal community has reached a point where some judges suggest that the number of steps required by *Chevron* does not matter much;[29] while other judges, notably Justice Kavanaugh, ponder the propriety of eliminating the *Chevron* inquiry as a threshold trigger. Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2110, 2154 (2016).

Since 1984, *Chevron* has spawned "increasingly elaborate and confusing canons" regarding its application.[30] Courts now decline to apply *Chevron* in the following circumstances:

- In "extraordinary cases" or "major questions" where an agency's interpretation of a statute carries special economic or political significance.[31]

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[26] *United States v. Mead Corp.*, 533 U.S. 218, 226-27(2001). *See also* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 190-92 (2006); Lisa S. Bressman, *How* Mead *Has Muddied the Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443, 1445 (2005) (noting that *Mead* has generated substantial confusion in the lower courts). At least one commentator has subdivided Step Zero into two steps of its own. William S. Jordan III, *Judicial Review of Informal Statutory Interpretations: The Answer Is* Chevron *Step Two, Not* Christensen *or* Mead, 54 Admin. L. Rev. 719, 725 (2002).

[27] Hemel & Nielson, 84 U. Chi. L. Rev. at 760.

[28] Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 834 n.218 (2010).

[29] *See, e.g., Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013).

[30] Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 Admin. L. Rev. 673, 677 (2007) ("Foote").

[31] *King v. Burwell*, 576 U.S. ___, ___, 135 S. Ct. 2480, 2488-89 (2015); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324-25 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000). *See also* Congressional Research Serv., Chevron *Deference: A Primer*, Report 8-13 (Sept. 19, 2017), https://fas.org/sgp/crs/misc/R44954.pdf.

- When an agency is interpreting a statute it does not administer.[32]
- When the agency's interpretation involves a statute that applies to multiple agencies (i.e. the Freedom of Information Act).[33]
- When the agency's interpretation is not made in the context of notice-and-comment rulemaking.[34]
- When the agency's rule-making is procedurally defective.[35]
- When the statute interpreted by the agency imposes criminal sanctions.[36]
- When the agency's interpretation conflicts with a controlling judicial decision.[37]
- When the agency fails to state its reasons for changing its position in a rule.[38]
- When the interpretation is made by a state agency without special delegated powers.[39]
- When the interpretation is included in informal letters not otherwise part of a formalized policy declaration.[40]

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[32] *Epic Sys. Corp. v. Lewis*, 584 U.S. ____, ____, 138 S. Ct. 1612, 1629 (2018).

[33] *Aronson v. IRS*, 973 F.2d 962, 965 (1st Cir. 1992) (Breyer, P.J.); William Weaver, Note, *Multiple-Agency Delegations and On-Agency* Chevron, 67 Vand. L. Rev. 275 (2014).

[34] *United States v. Mead Corp.*, 533 U.S. at 226-27.

[35] *Encino Motorcars, LLC v. Navarro*, 584 U.S. ____, ____, 136 S. Ct. 2117, 2125 (2016).

[36] *United States v. McGoff*, 871 F.22d 1071, 1077 (D.C. Cir. 1987); *see also* Nicholas R. Bednar, *The Clear-Statement* Chevron *Canon*, 66 DePaul L. Rev. 819, 861 (2017)

[37] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005).

[38] *Encino Motorcars, LLC v. Navarro*, 584 U.S. at ____, 136 S. Ct. at 2215-2216.

[39] *MCI Telecomm. Corp. v. Bell Atl. Penn.*, 271 F.3d 491, 516 (3d Cir. 2001); *Christensen v. Harris Cnty.*, 529 U.S. 576, 586 (2000).

[40] *Am. Fed. of Governmental Emps. v. Rumsfeld*, 262 F.3d 649, 656 (7th Cir. 2001).

- When the interpretation is in an internal guidance memorandum.[41]
- When the interpretation is contained in an argument in a legal brief and was not the result of a formal adjudication or notice-and-comment rulemaking.[42]
- When the interpretation represents an agency's current litigating position rather than a more definitive expression.[43]
- When the interpretation conflicts with its prior position.[44]
- When the agency's interpretation of a statute raises serious constitutional problems.[45]
- When the statute provides for de novo review in the courts.[46]
- When the agency interprets a statute it is not charged with administering.[47]
- When the agency's interpretation is simply a restatement of the statute.[48]

While the Court itself has not addressed the question of waiver, a majority of the circuit courts addressing the question have held that agencies that do not claim *Chevron* deference waive it.[49] Similarly, when a non-agency party fails to object to Chevron deference during litigation, the reviewing court will assume that *Chevron* applies.[50]

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[41]*Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S.461, 487-88 (2004).

[42]*Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 911 (2000) (Stevens, J., dissenting)

[43]*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

[44]*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994).

[45]*Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001).

[46]*Aronson v. IRS*, 973 F.22d at 965.

[47]*Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1280 n.5 (D.C. Cir. 2004).

[48]*Fogo De Chao (Holdings), Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1136 (D.C. Cir. 2014).

[49]Note, *Waiving* Chevron *Deference*, 132 Harv. L. Rev. 1520, 1525 (2019) ("*Waiving* Chevron *Deference*").

[50]*Waiving* Chevron *Deference*, 132 Harv. L. Rev. at 1520 n.4.

*Chevron* deference has been questioned since its inception. In 1989, Professor Kenneth Culp Davis characterized the doctrine as "repulsive," exceeding the constitutional power of the Court, and violating a "fundamental principle of democratic government."[51] More recently, others have labeled it "an unpredictable legal doctrine that does not satisfactorily mediate between judicial interpretative autonomy and deference to agency interpretations."[52]

The following points have been made regarding *Chevron* decision itself:

- The decision is inconsistent with the Administrative Procedures Act [5 U.S.C. § 706] which states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the agency action."[53]

- *Chevron* deference rests on a fiction – that Congress implicitly delegates interpretative authority to administrative agencies.[54]

- *Chevron* deference undermines the separation of powers.[55]

- Chevron deference raises non-delegation concerns because Article I of the United States Constitution vests Congress with "[a]ll legislative powers" which cannot be delegated.[56]

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[51]Kenneth C. Davis, *Administrative Law of the Eighties* Ch. 2 (1989).

[52]Brian G. Slocum, *Replacing the Flawed* Chevron *Standard*, 60 Wm. & Mary L. Rev. 195, 200 (2018) ("Slocum").

[53]*See* Brett M. Kavanaugh, Keynote Address, *Two Challenges for the Judge As Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907, 1912 (2017) ("Kavanaugh Keynote Address").

[54]*Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) ("The fact is, *Chevron's* claim about legislative intentions is not more than a fiction – and one that requires a pretty hefty suspension of disbelief at that."); *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); Lisa S. Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 Va. L. Rev. 2009, 2009 (2011).

[55]Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. R. Rev. 421, 466-69 (1987).

[56]*Phillip Hamburger*, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1198 (2016).

Addressing how *Chevron* has been applied since 1984, commentators observed "mission creep" as the courts have come to invoke *Chevron* in virtually all cases of judicial review of agency action.[57] Others have noted that the decision

- "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints;"[58]

- encourages Congress to duck hard questions by writing ambiguous statutes and leaving their resolution to agencies without political accountability; and[59]

- undermines the integrity of the rulemaking process because ambiguity strengthens an agency's litigating position.[60]

*Chevron* deference has entered a period of uncertainty after seeming to enjoy a long period of consensus on the Court.[61] Justice Alito recently characterized Chevron as "an important, frequently invoked, once celebrated, and now increasingly maligned precedent."[62] In his last writing as a Justice on the Court, Justice Kennedy observed that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that

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[57]Foote, 59 Admin. L. Rev. at 676.

[58]Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) ("Kavanaugh Book Review"). See also Kavanaugh Keynote Address, 92 Notre Dame at 1911 ("Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes."). Kavanaugh Book Review, 129 Harv. L. Rev. at 2150.

[59]*City of Arlington, Texas v. FCC*, 569 U.S. at 1879, (Roberts, C.J., dissenting); James A. Lastowka & Arthur G. Sapper, The Effects of *Chevron*-Style Deference, § 3.05[2] (Energy & Mineral L. Found. Twentieth Annual Institute May 1999), found at http://www.emlf.org/clientuploads/directory/whitepaper/Lastowka_00.pdf.

[60]*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

[61]Slocum, 60 Wm. & Mary L. Rev. at 202.

[62]*Periera v. Sessions*, 585 U.S. ___, ___, 138 S. Ct. 2015, 2121 (2018) (Alito, J., dissenting) (noting that "I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*."). Justice Alito also noted that while "several members of the Court had questioned *Chevron's* foundations," it remains good law "unless the Court has overruled *Chevron* is a secret decision that has somehow escaped my attention." *Periera v. Sessions*, 138 S. Ct. at 2129.

underlie *Chevron* and how courts have implemented that decision."[63] Justice Thomas has expressed concern about the "erosion of the judicial obligation to serve as a check on the judicial obligation to serve as a 'check' on the political branches."[64] He has also warned that the Court "seem[s] to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency 'interpretations' of federal statutes."[65] Finally, in 2016, Justice Thomas stated that "[i]n an appropriate case, this Court should reconsider the legal fiction of *Chevron* and its progeny."[66]

Even though Justice Gorsuch observed in 2018 that "whether Chevron should remain" should be left for another day,[67] while a member of the United States Court of Appeals, he stated in an unusual concurrence to his own opinion that "*Chevron* seems no less than a judge-made doctrine for the abdication of judicial duty."[68] Similarly, while Justice Kavanaugh has not yet confronted *Chevron* as a Justice, he has expressed in other writings a concern that the *Chevron* doctrine is inconsistent with the Administrative Procedures Act[69] and that it "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[70]

A recent survey of active federal circuit court judges found that a majority did not favor *Chevron* deference, even though they were bound to apply it.[71] Similarly, legal scholars are debating whether the Court itself is invoking *Chevron* deference when it

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[63] *Periera v. Session*s, 585 U.S. at ___, 138 S. Ct. at 2121.

[64] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. ___, ___, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgement).

[65] *Michigan v. EPA*, 576 U.S. ___, ___, 135 S. CT. 2699, 2713-14 (2015) (Thomas, J., concurring).

[66] *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. ___, ___, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring).

[67] *SAS Inst., Inc. v. Iancu*, 584 U.S. ___, ___, 138 S. Ct. 1348, 1358 (2018).

[68] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016).

[69] Kavanaugh Keynote Address, 92 Notre Dame L. Rev. at 1912.

[70] Kavanaugh Book Review, 129 Harv. L. Rev. at 2150.

[71] Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation On the Bench: A Survey of Forty-Two Judges On the Federal Courts of Appeals*, 131 Harv. L. Rev 1298, 1348 (2018).

should.[72] Rather than avoiding *Chevron* or revisiting it directly, the Court has, of late, narrowed *Chevron's* application in two ways. First, it has more assiduously used the rules of statutory construction to avoid deciding that a statute is ambiguous. In the absence of ambiguity, the Court has enforced its view of the plain meaning of the statute, without proceeding to Step Two of *Chevron*. Second, the Court has more frequently invoked the "major question exception" to *Chevron* deference.[73]

What does the future hold in store for *Chevron* deference? As a practical matter, some deference is likely to continue because the Executive and Legislative Branches have been relying on *Chevron* for years. Overruling *Chevron* could jeopardize many regulations promulgated in reliance on *Chevron*.[74] Scholars and commentators have suggested the following possibilities:

- Disregard the objections and continue *Chevron* in its present form;[75]
- Eliminate *Chevron* deference but require courts to interpret statutes de novo using *Skidmore*;[76]
- Recasting *Chevron* as a limitation on the remedial power of the courts instead of a doctrine of interpretation;[77]

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[72]*Compare* William Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083 (2008) (concluding that the Court did not invoke *Chevron* deference in three-quarters of the cases where it would appear applicable) with Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, 57 Int'l Rev. of Law & Econ. 81 (2019), https://www.sciencedirect.com/science/article/pii/S0144818818302497?via%3Dihub (finding that the fraction of the cases is closer to zero).

[73]Congressional Research Serv., *Deference and Its Discontents: Will the Supreme Court Overrule Chevron?* Legal Sidebar (Oct. 11, 2018), https://fas.org/sgp/crs/misc/LSB10204.pdf. *See also* Note, *Major Questions Objections*, 129 Harv. L. Rev. 2191 (2016); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (Or Why* Massachusetts v. EPA *Got it Wrong*), 60 Admin. L. Rev. 593 (2008)

[74]F. Andrew Hessick, *Remedial* Chevron, 97 N.C. L. Rev. 1, 14 (2018) ("Hessick"); Slocum, 60 Wm. & Mary L. Rev. at 202; Nicholas R. Dednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 Geo. Wash. L. Rev. 1392, 1398 (2017).

[75]Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 Vand. L. Rev. 937 (2018).

[76]Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1013-14 (1992).

[77]Hessick, 97 N.C. L. Rev. at 14-23.

- Replacing Step One of *Chevron* that focuses on ambiguity with an inquiry based on "indeterminacy."[78]

Judicial Oversight Under *Auer v. Robbins*

In 1996, the Court formulated a deference doctrine similar to *Chevron* with regard to an agency's interpretation of its own ambiguous regulations. The decision arose in lawsuit filed by St. Louis police sergeants and lieutenants seeking overtime pay. The police commissioners argued that the Fair Labor Standards Act exempted the plaintiffs from the overtime pay requirement based on the Secretary of Labor's overtime regulations. On appeal, the Court considered whether the overtime regulations, which did not cover employees paid on a salary, as opposed to on an hourly basis, applied to the plaintiffs. In a unanimous opinion, the Court held that the sergeants and lieutenants were exempt as salaried employees.[79]

Citing *Chevron*, Justice Scalia said, "we must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute."[80] After stating that "the Secretary's interpretation of his own regulations is controlling unless "plainly erroneous or inconsistent with the regulation."[81], Justice Scalia observed that "[a] rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute."[82]

In the beginning, *Auer* deference was simple and straightforward – courts must defer to an agency's interpretation of its own regulations unless the interpretation is plainly erroneous or inconsistent with the regulation. However, *Auer* is no longer simple and straightforward because the courts have carved out numerous qualifications and exceptions, including:

- Auer deference does not apply when the agency's regulation is clear.[83]
- *Auer* deference does not apply when the agency's interpretation of its regulation conflicts with its prior interpretation.[84]

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[78]Slocum, 60 Wm. & Mary L. Rev. at 230-236.

[79]*Auer v. Robbins*, 519 U.S. 452 (1997).

[80]*Auer v. Robbins*, 519 U.S. at 457.

[81]*Auer v. Robbins*, 519 U.S. at 461.

[82]*Auer v. Robbins*, 519 U.S. at 463.

[83]*Christensen v. Harris Cnty.*, 529 U.S. at 588 (2000).

[84]*Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

- *Auer* deference does not apply when the agency's interpretation is plainly erroneous or inconsistent with the regulation.[85]

- *Auer* deference does not apply when the agency's interpretation does not reflect the agency's fair and considered judgment on the question.[86]

- *Auer* deference does not apply when the agency's interpretation appears to be nothing more than a convenient litigating position.[87]

- *Auer* deference does not apply to an agency's interpretation of regulations that simply parrot statutory language.[88]

- *Auer* deference does not apply when doing so would result in unfair surprise to regulated parties.[89]

- *Auer* deference does not apply to agency interpretations of regulations that impose penalties.[90]

The legal theories underpinning *Auer* have been questioned.[91] One of its earliest critics was one of Justice Scalia's former law clerks.[92] In 2013, Chief Justice Roberts, joined

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[85]*Chase Bank USA, N.A. v. McCoy*, 562 U.S. 142, 155 (2011).

[86]*Auer v. Robbins*, 519 U.S. at 462.

[87]*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 213.

[88]*Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006).

[89]*Christopher v. SmithKline Beecham Corp.*, 567 U.S. 159; *see also* Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531, 563 (2018).

[90]*Christopher v. SmithKline Beecham Corp.*, 567 U.S. at 154; *see also* Kristin E. Hickman & Mark R. Thomson, *The Chevronization of* Auer, 103 Minn. L. Rev. Headnotes 103, 106 (Spring 2019), http://www.minnesotalawreview.org/wp-content/uploads/2019/03/Hickman_FINAL.pdf.

[91]Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297 (2017); Conor Clarke, *The Uneasy Case Against* Auer *and* Seminole Rock, 33 Yale L. & Pol'y Rev. 175 (2014); Matthew Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 Geo. Wash. L. Rev. 1449 (2011).

[92]John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996).

by Justice Alito, expressed a willingness to reconsider Auer when the issue has been fully briefed.[93] Even though he had earlier observed that "*Auer* deference makes the job of the reviewing court much easier,"[94] Justice Scalia, differing with the Chief Justice, advocated scrapping *Auer* deference, saying "[e]nough is enough."[95] Two years later, Justice Scalia expanded on his criticism of *Auer* when he said:

> The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes. But an agency's interpretation of its own regulations is another matter. By giving that category of interpretive rules Auer deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.[96]

Accordingly, he "advocated "restor[ing] the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written."[97]

On December 10, 2018, the Court granted certiorari in *Kisor v. Wilkie* solely to reconsider *Auer*.[98] The case involves an appeal from the United States Court of Appeals for the Federal Circuit involving the Board of Veterans Appeals' denial of a United States Marines request for disability benefits because of his post-traumatic stress disorder as a result of his service in Viet Nam. The Board found that the documents Mr. Kisor submitted

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[93] *Decker v. Northwest Envt'l Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring).

[94] *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring).

[95] *Decker v. Northwest Envt'l Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part.)

[96] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. at ___, 1355 S. Ct. at 1212 (Scalia, J., concurring in the judgement).

[97] *Perez v. Mortgage Bankers Ass'n*, 575 U.S. at ___, 135 S. Ct. at 1213.

[98] *Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 657 (2018).

to support of his request to reopen his claim were not "relevant" as defined by regulation because they were not "outcome determinative." Both the Court of Veterans Claims and the Federal Circuit affirmed the Board's decision.[99]

Mr. Kisor argued in his brief that *Auer* deference was inconsistent with the Administrative Procedures Act and with the doctrine of separation of powers. While acknowledging that *Auer* deference "raises significant concerns," the Department of Justice argued in its brief that the doctrine should be clarified and narrowed rather than discarded. Instead, the Department advocated that courts should not defer to an agency's interpretation of its own regulation "if, after applying all the traditional tool of construction, a reviewing court determines that the agency's interpretation is unreasonable – i.e., not within the range of reasonable readings left open by a general ambiguity in the regulation." Even in circumstances where the court finds the agency's interpretation to be reasonable, the Department argued that a court should only defer to the interpretation if (1) it was issued with fair notice to regulated parties, (2) it is not inconsistent with the agency's prior views, (3) it rests on the agency's expertise, and (4) it represents the agency's considered view, as distinct from the views of "mere field officials or other low-level employees."

The Court heard oral arguments in *Kisor v. Wilkie* on March 27, 2019.[100] The questions asked by Justices Sotomayor, Ginsburg, and Breyer reflected skepticism about abandoning *Auer*, emphasizing that an agency is in a better position to interpret highly technical regulations because of their substantive expertise. Justice Kagan appeared to be reluctant to overrule *Auer* when Congress has expressed no interest in reversing the decision. Chief Justice Roberts suggested that overruling *Auer* might not be a significant change since the decision had been significantly narrowed over the years. Justices Gorsuch and Kavanaugh's questions reflected their concerns that *Auer* created regulatory uncertainty and allowed agencies to circumvent notice-and-comment rulemaking.[101]

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[99] *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017).

[100] An audio recording of the argument can be found at https://www.supremecourt.gov/oral_arguments/audio/2018/18-15.

[101] *See* Amy Howe, Argument Analysis: Justices Divided On Agency Deference Doctrine, SCOTUSblog (Mar. 27, 2019, 4:07 PM), https://www.scotusblog.com/2019/03/argument-analysis-justices-divided-on-agency-deference-doctrine/; Barbara S. Miskin, SCOTUS Hears Oral Argument in Case Involving Court Deference to Agency Interpretations, Nat'l L. Rev. (Apr. 10, 2019), https://www.natlawreview.com/article/scotus-hears-oral-argument-case-involving-court-deference-to-agency-interpretations; High Court Could Take First Step to Chevron Doctrine's Demise, Bloomberg Law (Mar. 28, 2019, 3:56 AM), https://news.bloomberglaw.com/us-law-week/high-court-could-take-first-step-to-chevron-doctrines-demise.