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NOTE
**SUPPORTIVE YET SKEPTIC: KISOR V. WILKIE CASTS
FURTHER DOUBT ON DEFERENCE DOCTRINE’S LONGEVITY**

MICHAEL SAMMARTINO*

“The power of judicial review . . . lies with the courts because of a deep belief that the heritage they hold makes them experts in the synthesis of design. Such difficulties as have arisen have come because courts cast aside that role to assume to themselves expertness in matters of industrial health, utility engineering, railroad management, even bread baking. The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts.”¹

“We managed to live with the administrative state before Chevron. We could do it again. Put simply, it seems to me that in a world without Chevron very little would change—except perhaps the most important things.”²

In *Kisor v. Wilkie*,³ the United States Supreme Court considered whether to retain its practice of deferring to an administrative agency’s interpretations of its own regulations. Despite decades-long conservative criticism of *Auer v. Robbins*⁴ deference’s⁵ constitutionality and appropriateness, the *Kisor* Court voted to retain *Auer*’s deference doctrine. While the Court’s decision reads as a fervent defense of administrative expertise, *Kisor* stops short of

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1. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 154–55 (1938).

2. Gutierrez-Brizuela v. Lynch, 834 F.3d. 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

3. 139 S. Ct. 2400 (2019).

4. *Auer v. Robbins*, 519 U.S. 452 (1997).

5. *Auer* deference is a doctrine under which courts may grant deference to an executive agency’s interpretation of an ambiguity in its own regulations. *Id.*; see *infra* Section II.D.2.

settling the question of whether the deference doctrine as a whole will ultimately survive the Roberts Court in a workable form. *Kisor*'s framework indicates an underlying distrust of the administrative state and suggests a further retreat from the Court's more deferential administrative jurisprudence.⁶

Despite upholding *Auer* deference, *Kisor*'s implications suggest further erosion of the Court's deference doctrine. Part I will discuss *Kisor*'s procedural history. Part II will trace the history of the Court's deference doctrine and the diverging historic precedents of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*⁷ and *Auer*, with particular attention placed on the recent efforts to call deference doctrine into question. Part III will review Justice Kagan's majority opinion, which upholds *Auer* deference, and Justice Gorsuch's concurrence, which argues for *Auer*'s complete abandonment. Lastly, Part IV will argue that the Court's decision realigns *Auer* deference with its historic precedent and redresses the constitutional issues on which *Auer*'s criticisms are based.⁸ *Kisor*'s framework, however, suggests how the Court may further narrow its deference doctrine, and, given the current ideological makeup of the Court, *Kisor* casts further doubt on deference doctrine's longevity.⁹

I. THE CASE

In 1982, petitioner *Kisor* applied for disability benefits from the Department of Veterans Affairs ("VA").¹⁰ He claimed that he had developed post-traumatic stress disorder ("PTSD") due to his participation in combat operations during the Vietnam War.¹¹ However, the VA Regional Office's ("RO") evaluating psychiatrist determined *Kisor* had a personality disorder, not PTSD, and denied *Kisor* his benefits.¹²

On June 5, 2006, *Kisor* reopened his claim, requesting benefits extending back to the date of his 1982 application.¹³ While his request was pending, *Kisor* provided additional service records to the VA, including a recent diagnosis of PTSD and other records documenting his participation in combat.¹⁴ In response to the reopened claim, the RO agreed that *Kisor* suffered from PTSD, and granted him benefits in September 2007.¹⁵ The

6. See *infra* Section IV.C.

7. 467 U.S. 837 (1984).

8. See *infra* Section IV.A–B.

9. See *infra* Section IV.D.

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

11. *Id.*

12. *Kisor v. Shulkin*, 869 F.3d 1360, 1361 (Fed. Cir. 2017) (quoting J.A. 21), *aff'g* *Kisor v. McDonald*, No. 14-2811, 2016 WL 337517 (Vet. App. Jan. 27, 2016).

13. *Id.* at 1362.

14. *Id.*

15. *Id.*

benefits, however, only extended from the date of his 2006 request to reopen, rather than from the date of his 1982 application.¹⁶

Kisor subsequently filed a Notice of Disagreement¹⁷ in November 2007, arguing that the effective date of his benefits should have been earlier than June 5, 2006.¹⁸ The Board of Veterans' Appeals affirmed the RO's decision.¹⁹ First, the Board ruled that the decision was final and unreviewable since Kisor failed to appeal the 1982 decision.²⁰ Second, the Board explained that under VA regulations,²¹ retroactive benefits could only be awarded if it found "relevant official service department records that . . . had not been associated with the claims file when VA first decided the claim."²² The Board then determined Kisor's additional "records were not 'relevant'" because they related only to a current disability rather than a prior diagnosis.²³ Kisor sought review in the Court of Appeals for Veterans Claims, which affirmed the Board's decision for generally the same reasons.²⁴

Kisor then appealed to the United States Court of Appeals for the Federal Circuit.²⁵ The court rejected Kisor's argument that a "relevant" record could concern other criteria for receiving disability benefits instead of having to relate to the basis of a prior denial.²⁶ Finding the VA regulation "ambiguous as to the meaning of the term 'relevant,'" the Federal Circuit explained that it "defer[s] to an agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent.'"²⁷ In the court's view, the Board's ruling was based on the premise that "'relevant' mean[t] noncumulative and pertinent to the matter at issue in the case."²⁸ Finding the

16. *Id.* at 1363.

17. A Notice of Disagreement is an appeal of an agency's decision in the form of "a written communication from the claimant or the claimant's representative expressing dissatisfaction or disagreement with an adjudicative determination of an agency of original jurisdiction." 33 Fed. Proc., L. Ed. § 79:210 (2020); 38 C.F.R. § 20.201 (2019).

18. *Kisor*, 869 F.3d at 1362.

19. *Id.*

20. *Id.*

21. *See* 38 C.F.R. § 3.156(c) (2019) (permitting the VA to reconsider a claim "if [the] 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").

22. *Kisor*, 869 F.3d at 1363.

23. *Id.* at 1364.

24. *Id.*

25. *Id.* at 1365.

26. *Id.* at 1366.

27. *Id.* at 1367; *see Auer v. Robbins*, 519 U.S. 452, 461 (1997) (explaining the agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation'" (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))).

28. *Kisor*, 869 F.3d at 1368.

Board's interpretation not "plainly erroneous or inconsistent" with the VA regulation, the court accordingly affirmed the Board's decision.²⁹

Kisor petitioned to the Supreme Court, which subsequently granted certiorari solely "to decide whether to overrule *Auer* and . . . *Seminole Rock*."³⁰

II. LEGAL BACKGROUND

While there is disagreement and uncertainty as to the legal foundations of deference doctrine, courts have historically given executive agencies a degree of leeway in interpreting their governing statutes and regulations.³¹ The Court's modern deference doctrine emerged out of the administrative state's expansion in size and scope during the New Deal and World War II.³² It would take, however, an additional fifty years for the doctrine to ripen into the highly deferential, and contentious standard at issue in *Kisor*.³³ After decades of deference doctrine's expansion, the Court's conservative justices endeavored to chip away at the doctrine, gradually calling into question the appropriateness, basis, and justification of deference.³⁴ These critiques frame the competing views of deference presented by Justices Kagan and Gorsuch in *Kisor*.

Section A discusses the historical origins of deference. Section B discusses the emergence of the Court's modern deference doctrine in the 1940s. Section C traces *Seminole Rock*'s expansion into *Auer*'s highly deferential standard. Lastly, Section D describes the conservative pushback against deference and the calls to abrogate *Auer* and *Seminole Rock*.

A. Deference's Historic Roots Emerged During the Nineteenth Century and Through the New Deal.

Courts have long granted varying degrees of deference to the other branches' statutory and regulatory interpretations. Early courts recognized that the views of those who drafted, enacted, and implemented the law were of value when tasked with interpreting a textual ambiguity.³⁵ Though courts

29. *Id.* at 1368–69.

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

31. *See infra* Section II.A.

32. *See infra* Section II.B.

33. *See infra* Section II.C.

34. *See infra* Section II.D.

35. *See, e.g., Edwards' Lessee v. Darby*, 25 U.S. 206, 209–10 (1827) (explaining that "the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect"); *see also McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) (explaining that longstanding "exposition[s] of the constitution, deliberately established by legislative acts . . . ought not to be lightly disregarded"); *Stuart v. Laird*, 5 U.S. 299, 306, 309 (1803) (holding that the "practice" of judges riding circuit without "distinct commissions" constituted a strong "contemporary interpretation" of the Constitution).

began affording greater controlling weight to executive interpretations around the turn of the twentieth century,³⁶ there was still no general doctrine of deference. Though willing to grant great weight to an agency's conclusions of fact and law, courts still enjoyed wide discretion over how much weight to give to an agency's determinations.³⁷ During the New Deal, deference doctrine was somewhat unpredictable and multifarious: Courts were more inclined to defer on questions of fact, but courts were still unsure as to the appropriate weight that should be afforded to questions of law.³⁸

A series of decisions from 1936 to 1944 affirmed the Court's reluctance to disturb agency interpretations provided in specific, adjudicatory applications. This reluctance stemmed both from acknowledgement of an agency's technical expertise and from Congress's delegation of authority to the agency. The Court recognized that an agency's administrative experience necessarily implied subject matter expertise which warranted limited judicial interference in an agency's decision.³⁹ Further, the Court recognized deference as a means to respect Congress's legislative choices to delegate administrative power and decision-making discretion.⁴⁰

36. See, e.g., *Bates & Guild Co. v. Payne*, 194 U.S. 106, 108–110 (1904) (deferring to the Postmaster General's interpretation of new postal regulations because the interpretation "carr[ie]d with it a strong presumption of its correctness" and was a reasonable exercise of discretion); *United States v. Eaton*, 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution, and by the official who has the power . . . to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness.").

37. See, e.g., *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921) (holding that an agency's interpretation of an ambiguous statute "is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons").

38. Compare *Crowell v. Benson*, 285 U.S. 22, 64–65 (1932) (upholding the judiciary's ability to review agency findings of fact *de novo*), with *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 54 (1936) (holding that agency findings of fact should be undisturbed), and *Norwegian Nitrogen Prods. v. United States*, 288 U.S. 294, 315–316, 321 (1933) (holding that past "administrative practice, consistent and generally unchallenged, will not be overturned" unless "shown to be arbitrary").

39. See *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 236 (1936) ("[The] [C]ourt is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers."); see also *Nat'l Labor Relations Bd. v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130–31 (1944) (explaining that "[e]veryday experience in the administration of the statute" justifies granting deference, so long as an agency's determination is supported by the record and has "a reasonable basis in law").

40. See *Gray v. Powell*, 314 U.S. 402, 403, 412–14 (1941) (deferring to the Bituminous Coal Commission's finding that a railroad which contracted out the mining of coal exclusively to provide fuel for its own use was subject to a tax based on the Commission's interpretation of the term "producer-consumer" on grounds that deference was necessary to respect Congress's express delegation of interpretive authority to the Commission); see also *Fed. Comm'n Comm'n v. Pottsville Broad. Co.*, 309 U.S. 134, 146 (1940) (holding that reviewing courts could not overrule an agency's procedural rules since "[i]nterference by the courts is not conducive to the development of habits of responsibility in administrative agencies").

B. The Development of Deference Doctrine's Modern Framework

Although the Court entrenched and expanded deference doctrine during the late 1930s and early 1940s, courts generally lacked a framework to guide the doctrine's application. In *Skidmore v. Swift*⁴¹ and *Bowles v. Seminole Rock & Sand Co.*,⁴² the Court's efforts to establish such a framework laid the foundation of modern deference doctrine.

1. Modern Deference Doctrine Emerges from the Court's Decisions in Skidmore v. Swift and Seminole Rock v. Bowles

In *Skidmore*, the Court endeavored to address the lack of statutory guidance as to whether and to what degree deference was warranted.⁴³ Although the agency's conclusions stemmed from its accumulated experience, knowledge, and expertise, Justice Jackson explained that the agency's conclusions "do not constitute an interpretation of the Act or a [judicial] standard," that would be binding on the lower courts.⁴⁴ The Court also noted that interpretative documents and prior enforcement actions serve as a practical guide and provide notice as to how a statute will be applied.⁴⁵ In light of this paradox, Justice Jackson established a test to guide courts in determining how much weight courts should afford to an agency's legal conclusions.⁴⁶ Whether deference is warranted "depend[s] [on] 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."⁴⁷

Following *Skidmore*, inconsistencies plagued the lower courts as to the circumstances and degree of deference given to agency interpretations of

41. 323 U.S. 134 (1944).

42. 325 U.S. 410 (1945).

43. 323 U.S. at 139 ("[T]here is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions."). In *Skidmore*, despite a Wage and Hour Division Bulletin interpreting "[h]ours worked" to include any "time given by the employee to the employer," the district court concluded that time spent waiting on-call "does not constitute hours worked, for which overtime compensation [was] due." *Id.* at 136–38. The United States Court of Appeals for the Fifth Circuit affirmed the district court, but the Supreme Court reversed, relying on the Wage and Hour Division's interpretation of the text provided in the Bulletin. *Id.* at 140.

44. *Id.* at 139.

45. *Id.* at 137–138.

46. *Id.* at 140.

47. *Id.*

statutes and regulations.⁴⁸ The following year, the court sought to resolve the lower court confusion in *Bowles v. Seminole Rock & Sand Co.*⁴⁹

Seminole Rock concerned the meaning of “highest price” within the context of Maximum Price Regulation No. 188.⁵⁰ The Office of Price Administration (“OPA”) sought to enjoin Seminole Rock from selling crushed stone at a rate above the regulation’s established maximum rate.⁵¹ Writing for the Court, Justice Murphy explained that, for issues of statutory interpretation of administrative regulations, “a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.”⁵² Though he noted that congressional intent and constitutional issues may be relevant for resolving an ambiguity, “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁵³ According to Justice Murphy, the “only tools” available to the Court were the regulation’s text and the “relevant interpretations of the Administrator.”⁵⁴

Engaging with the text of the regulation, Justice Murphy found the term “highest price” susceptible to three potential meanings, but found the only appropriate meaning to be the price charged for actual delivery of an article.⁵⁵ Justice Murphy then concluded that since OPA had uniformly taken the same position in defining “highest price,” OPA’s interpretation controlled.⁵⁶ Thus, in *Seminole Rock*, the Court’s attempt to resolve inconsistencies in the lower courts resulted in a new standard of deference that provided controlling weight to agency actions with a more limited scope of judicial review than of *Skidmore*.

48. Compare *Bowles v. Nu Way Laundry Co.*, 144 F.2d 741, 746 (10th Cir. 1944) (finding that the OPA Administrator’s interpretations of regulations, “if not controlling, [were] entitled to great weight so long as they d[id] not distort or pervert the plain intendment of the Act”), with *Bowles v. Simon*, 145 F.2d 334, 337 (7th Cir. 1944) (concluding that courts may follow the Administrator’s interpretations, but rejecting the argument that such interpretations are controlling), and *Lubin v. Streg*, 56 F. Supp. 146, 147 (E.D.N.Y. 1944) (stating that while OPA interpretations are entitled to respect, “they are not binding authority”).

49. 325 U.S. 410 (1945).

50. *Id.* at 412. The OPA promulgated Maximum Price Regulation No. 188 under the Price Adjustment Act. *Id.* at 413. This regulation established a nationwide price freeze and prohibited a seller of specified building materials and consumer goods (including crushed stone) from charging more than the price charged during the specified base period of March 1–31, 1942. *Id.* at 411–13.

51. *Id.* at 412.

52. *Id.* at 414.

53. *Id.*

54. *Id.*

55. *Id.* 414–15 (quoting Maximum Price Reduction No. 188 § 1499.153(a)(2)(i)).

56. *Id.* at 417–18 (“Any doubts concerning this interpretation . . . are removed by reference to the administrative construction of this method of computing the ceiling price [provided in an OPA issued bulletin].”).

2. *The Administrative Procedure Act Restates the Law of Judicial Review*

Three years after *Seminole Rock*, Congress enacted the Administrative Procedure Act (“APA”).⁵⁷ Section 702 of the APA confers the right to judicial review to any person harmed, “adversely affected or aggrieved by agency action.”⁵⁸ Section 706 codifies the scope of judicial review.⁵⁹ Under section 706, a “reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”⁶⁰ The Attorney General’s Manual, issued immediately after the APA’s passage, described section 706 as a restatement of the law of judicial review with respect to agency actions.⁶¹ Though there is little evidence in the legislative history as to whether Congress intended section 706 to speak to the issue of judicial deference to agency decisions, the Court has generally interpreted section 706 to permit agency deference.⁶² More recently, however, the Court’s conservatives have called into question whether deference is permissible under section 706 and whether section 706 only permits *de novo* review.⁶³

57. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended 5 U.S.C. §§ 500–596) (1966).

58. 5 U.S.C. § 702 (2018).

59. *Id.* § 706(2)(A)–(F) (“[Courts may] hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 U.S.C. §§ 556–57] or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”).

60. *Id.*

61. TOM C. CLARK, ATTORNEY GENERAL, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 94 (1947) (“The intended result of the introductory clause of [section 706] is to restate the existing law as to the area of reviewable agency action.”).

62. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (citing section 706 in holding that deference is appropriate given an explicit or implicit delegation of interpretive authority from Congress); *Fed. Comm’n Comm’n v. Fox Television Studios*, 556 U.S. 502, 513–14 (2009) (explaining that, under the narrow standard of review established in section 706(2)(A), “‘a court is not to substitute its judgment for that of the agency,’ and should ‘uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned’” (internal citation omitted) (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974))).

63. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151–58 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that the APA requires *de novo* review, rather than permits *Chevron* deference).

C. Deference Doctrine Gradually Expanded over the Last Half of the Twentieth Century

Though *Seminole Rock* introduced a new standard of deference, the case saw little application during the 1940s and 1950s.⁶⁴ Beginning with *Udall v. Tallman*,⁶⁵ however, the Court “rediscovered” *Seminole Rock* and ushered in the era of deference doctrine’s expansion, which ultimately culminated in the *Auer v. Robbins* decision.⁶⁶ The Court, nonetheless, refined the deference doctrine by distinguishing the agency’s interpretation of a statute from the agency’s interpretation of its regulations.⁶⁷

1. Rediscovering Seminole Rock’s “Controlling Weight” Language

The Court’s decision in *Tallman* began the era of deference doctrine’s expansion.⁶⁸ In *Tallman*, the Court deferred to the Secretary of the Interior’s interpretation of a Bureau of Land Management order regulating oil and gas leasing.⁶⁹

First, the Court noted that Tallman had notice of the Secretary’s interpretation prior to submitting his application.⁷⁰ The Court then emphasized the principle that long-standing interpretations of textual ambiguities made by those delegated administrative authority are “entitled to great respect” and should “not be disturbed except for cogent reasons.”⁷¹ In the context of ambiguous regulations, the Court determined deference to be “even more clearly in order.”⁷² Relying on *Seminole Rock*, the Court determined that so long as the agency’s “interpretation is not unreasonable,” then the agency’s interpretation of the regulation warranted controlling weight.⁷³ After *Tallman*, the Court began employing *Seminole Rock*’s “controlling weight” language with greater frequency, further solidifying the

64. Between 1945 and 1965, the Court cited *Seminole Rock* only twice. See *M. Kraus & Bros. Inc. v. United States*, 327 U.S. 614, 622 (1946) (citing *Seminole Rock* in relation to a timing issue concerning a conviction under Maximum Price Regulation No. 269); *Peters v. Hobby*, 349 U.S. 331, 355 (1955) (Reed, J., dissenting) (“Such reasonable interpretation promptly adopted and long-continued by the President and the Board should be respected by the courts. That has been judicial practice heretofore.”).

65. 380 U.S. 1 (1965).

66. 519 U.S. 452 (1997); see *infra* Section II.C.1, C.3.

67. See *infra* Section II.C.2.

68. *Tallman*, 380 U.S. at 22–23.

69. *Id.* at 16–18. After initially suspending oil and gas leases in a part of Alaska, the Bureau of Land Management issued an order reopening the lands to leasing. *Id.* at 7. Tallman applied, but Interior rejected his application. *Id.* at 2–3. The Secretary interpreted the suspension order as to have not expressly barred future oil and gas leasing, thereby permitting consideration of any pending applications filed during the suspension period. *Id.* at 6.

70. *Id.* at 17 (explaining that “[t]he Secretary’s interpretation had . . . been a matter of public record”).

71. *Id.* at 18 (citing *McLaren v. Fleischer*, 256 U.S. 477, 480–81 (1921)).

72. *Id.* at 16.

73. *Id.* at 18.

doctrine and applying it to agency interpretations of statutes in addition to interpretations of regulations.⁷⁴

2. *Chevron Leads to a Distinction Between Deference to Statutory Interpretations and Deference to Interpretations of Regulations*

By the early 1980s, though the core tenants of deference doctrine were entrenched, the Court still lacked a general guiding framework as to when deference applied.⁷⁵ In 1984, the Court provided such a framework in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.⁷⁶ In *Chevron*, the Court held that the United States Court of Appeals for the District of Columbia erred by ignoring the EPA's definition of the term "source" to strike down an EPA regulation.⁷⁷ Noting a "long recognized" tradition of deference to agency statutory interpretations,⁷⁸ the Court established a two-step test to guide judicial review of an agency's interpretation of a statute.⁷⁹ First, courts must evaluate "whether Congress has directly spoken to the precise question at issue."⁸⁰ If so, then the court "must give effect to the unambiguously expressed intent of Congress."⁸¹ Second, "if the statute is silent or ambiguous with respect to the specific issue," the Court must consider whether the agency's interpretation is a "permissible construction

74. See, e.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (deferring to the Federal Reserve Board's interpretation of the Truth in Lending Act because "[t]he Act is best construed by those who gave it substance in promulgating regulations thereunder"); *United States v. Larionoff*, 431 U.S. 864, 872–73 (1977) (accepting the government's interpretation as correct since it "[was] not plainly inconsistent with the wording of the regulations"); *Ehlert v. United States*, 402 U.S. 99, 105 (1971) (explaining that, in light of an ambiguity, the Court was "obligated to regard as controlling a reasonable, consistently applied administrative interpretation"); *United States v. Chicago*, 400 U.S. 8, 10 (1970) (deferring to the Interstate Commerce Commission's interpretation of the word "train" in the Interstate Commerce Act); *Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969) ("[W]e find it dispositive that the agency responsible for promulgating and administering the regulation has interpreted it to apply even when the vessel has departed."); *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 276 (1969) (deferring to a Housing and Urban Development circular issued while the related case was pending before the Court).

75. Compare *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31–32 (1981) (explaining that while courts are obligated to "reject administrative constructions . . . inconsistent with the statutory mandate" or legislative purpose, deference is warranted so long as the construction is reasonable), with *Sec. & Exch. Comm'n v. Sloan*, 436 U.S. 103, 118 (1978) (rejecting the Securities and Exchange Commission's interpretation on grounds that "the mere issuance of consecutive summary suspension orders, without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority" and that prior administrative practice does not relieve the Court of its "responsibility to determine whether that practice is consistent with the agency's statutory authority"); see also *supra* Section II.A (describing deference doctrine's core tenants).

76. 467 U.S. 837 (1984).

77. *Id.* at 866.

78. *Id.* at 844; see also *supra* notes 35–37.

79. *Chevron*, 467 U.S. at 844.

80. *Id.* at 842.

81. *Id.* at 842–43.

of the statute.”⁸² Under *Chevron*, statutory gaps are presumed to be delegations of legislative authority to an agency, and reasonable, gap-filling regulations are given “controlling weight.”⁸³

The Court also expressly addressed the role of judicial review with respect to agency deference. It forbade courts from engaging in *de novo* review by independently interpreting a statute in light of an ambiguity.⁸⁴ The Court noted that judges could use the “traditional tools of statutory construction” to construe Congress’s intent “on the precise question at issue.”⁸⁵ *Chevron*’s rule firmly stayed within the boundaries of section 706 by permitting courts to strike down interpretations deemed to be “arbitrary, capricious, or manifestly contrary to the statute.”⁸⁶

Even though *Chevron* and subsequent cases applying it established some limitations on deference to an agency’s interpretations of statutes,⁸⁷ the Court’s deference doctrine with respect to interpretations of agency regulations continued to expand.⁸⁸ In *Martin v. Occupational Safety and Health Review Commission*,⁸⁹ the Court reasoned that Congress assumed courts would defer to an agency’s interpretation of their regulations so long as the interpretation is reasonable since “Congress intended to invest interpretive power in the administrative actor in the best position to develop” such expertise.⁹⁰ In *Thomas Jefferson University v. Shalala*,⁹¹ the Court noted that there were multiple possible interpretations of a regulation promulgated pursuant to the Medicare Act, and the Court stated that it owed “substantial deference” to the Secretary of Health and Human Service’s construction.⁹² The Court explained that it was obligated to defer to an agency’s interpretation that was “as plausible as” other possible

82. *Id.* at 843.

83. *Id.* at 844.

84. *Id.*

85. *Id.* at 843 n.9.

86. *Id.* at 844.

87. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (refusing to grant “[d]eference to what appears to be nothing more than an agency’s convenient litigating position”); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (“The courts may not accept appellate counsel’s *post hoc* rationalizations for agency [orders].”).

88. *See, e.g.*, *Stinson v. United States*, 508 U.S. 36, 45 (1993) (“As we have often stated, provided an agency’s interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))); *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (“[T]he Court of Appeals’ holding runs roughshod over the established proposition that an agency’s construction of its own regulations is entitled to substantial deference.”).

89. 499 U.S. 144 (1991).

90. *Id.* at 153–57 (“[T]he presumption that Congress delegates interpretative lawmaking power to the agency rather than to the reviewing court” rests in the agency’s “historical familiarity and policymaking expertise.”).

91. 512 U.S. 504 (1994).

92. *Id.* at 512.

interpretations⁹³ rather than deciding which possible interpretation “best serves the regulatory purpose.”⁹⁴ *Thomas Jefferson University’s* “plausible” standard, undergirded by the presumption established in *Martin*, expanded deference’s scope further beyond what the Court established in *Tallman*.

3. Deference Reaches Its High Watermark in *Auer v. Robbins*

The expansion of the agency deference doctrine concluded with *Auer v. Robbins*.⁹⁵ The issue in *Auer* concerned whether police officers were exempt from receiving overtime pay under the Fair Labor Standards Act (“FLSA”) because they were salaried workers, not hourly workers.⁹⁶ Petitioners brought suit against the St. Louis Board of Police Commissioners, arguing that because their pay “could be reduced for a variety of disciplinary infractions related to the ‘quality or quantity’ of work performed,” they were not exempt from overtime pay as salaried employees.⁹⁷ The district court ruled in favor of the Police Commissioners, finding that they “were paid on a salary basis,” and the United States Court of Appeals for the Eighth Circuit, in relevant part, affirmed.⁹⁸

Rejecting the petitioner’s argument, the Court deferred to the Secretary of Labor’s interpretation of “salary basis.”⁹⁹ Writing for the majority, Justice Scalia explained that since “the salary-basis test is a creature of the Secretary’s own regulations, [the Secretary’s] interpretation of it is . . . controlling unless ‘plainly erroneous or inconsistent with the regulation.’”¹⁰⁰ Since the plain meaning of the phrase “subject to” could support the Secretary’s interpretation, Justice Scalia, without engaging in an independent inquiry into the ambiguity, concluded that the “deferential standard” was “easily met.”¹⁰¹ That the Secretary provided the interpretation “in the form of a legal brief” did not “make it unworthy of deference,” since it was not “a ‘*post hoc* rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack.”¹⁰² In contrast to *Chevron*, where deference is owed only to “reasonable” interpretations of statutes, *Auer* stood for a separate, higher degree of deference specific only to agency

93. *Id.* at 517 (quoting *Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)).

94. *Id.* at 512.

95. 519 U.S. 452 (1997).

96. *Id.* at 455.

97. *Id.*

98. *Id.* at 455–56; *see Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995) (affirming the holding that certain police officers were exempt from overtime pay and reversing the holding finding two categories of police sergeants partially non-exempt).

99. *Id.* at 461.

100. *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

101. *Id.*

102. *Id.* at 462 (alteration in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

interpretations of regulations provided in guidance documents, adjudications, or briefs.¹⁰³

D. Conservatives Push Back Against Deference's Expansion

Auer marked the last major expansion of the Court's deference doctrine. While in subsequent cases the Court attempted to refine its application of *Auer* deference,¹⁰⁴ the Court's standard of review for an agency's interpretation of its regulations remained highly deferential.¹⁰⁵ The Court's conservatives, recognizing *Chevron's* distinction between interpretations of statutes and regulations, began to reevaluate deference doctrine's legal foundation and potentially do away with it altogether.

1. Attempts to Refine Deference Incite a Broader Call to Reexamine Deference as a Whole

The first major case concerning *Auer* deference, *Christensen v. Harris County*,¹⁰⁶ happened to be the only time the Court refused to grant an agency deference under *Auer*.¹⁰⁷ In *Christensen*, the Court considered whether to defer to a Department of Labor opinion letter interpreting regulations promulgated under the FLSA.¹⁰⁸ Explaining that interpretations provided in opinion letters "lack the force of law," the Court found *Skidmore*, rather than *Auer*, to be the appropriate standard.¹⁰⁹ Justice Thomas cautioned that granting deference would permit the agency "to create *de facto* a new regulation."¹¹⁰ Justice Scalia disagreed. In Justice Scalia's view, such opinion letters warranted deference so long as "it represent[ed] the

103. The Court, however, has declined deference to interpretations it classifies as post-hoc rationalizations and "convenient litigating position[s]." See *Bowen*, 488 U.S. at 212–13.

104. See, e.g., *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous. . . . To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.>").

105. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part and in judgment) ("I do not believe . . . that 'particular deference' is owed 'to an agency interpretation of 'longstanding' duration' . . . so long as the most recent interpretation is reasonable its antiquity should make no difference.>").

106. 529 U.S. 576 (2000); see Peter M. Torstensen Jr., *The Curious Case of Seminole Rock: Revisiting Judicial Deference to Agency Interpretations of Their Ambiguous Regulations*, 91 NOTRE DAME L. REV. 815, 826 (2015) ("Three years later, in *Christensen v. Harris County*, the Court, for the first and only time, declined to apply *Seminole Rock* to an agency interpretation of a regulation on the ground that the interpretation was plainly erroneous.>").

107. *Christensen*, 529 U.S. at 588.

108. *Id.*

109. *Id.* at 587.

110. *Id.* at 588. Justice Thomas reasoned that since the regulation in question was not ambiguous, allowing informal interpretive documents to change its meaning allowed the agency to establish a new regulation altogether. *Id.*

authoritative view” of the agency, irrespective of the means by which it is expressed.¹¹¹

The following year, the Court refined and narrowed *Chevron*’s framework in *United States v. Mead*.¹¹² Finding that *Chevron* deference did not apply to the ruling letters issued by the United States Customs changing the tariff classification of Mead’s day planners,¹¹³ the Court held that before applying *Chevron*’s first step, the judge must determine whether Congress appeared to delegate interpretative authority to the agency.¹¹⁴ Under *Mead* agency interpretations warrant deference only if they are promulgated under the agency’s congressionally delegated authority and have the effect of law.¹¹⁵ An interpretation that fails under *Mead* is only entitled to persuasive weight under *Skidmore*.¹¹⁶

In a fierce dissent, Justice Scalia argued the Court “collapse[d]” *Chevron*, by “announcing . . . a presumption” against deference.¹¹⁷ In his view, *Mead*’s “background rule” required judges, rather than the agencies, to evaluate legislative ambiguities.¹¹⁸ This, in turn contravenes *Chevron*’s “legal presumption” that the only legal question is whether an interpretation exceeds “the scope of discretion” conferred by the statutory ambiguity.¹¹⁹ By delegating interpretative authority to the agencies, Congress intended to confer them with “the flexibility of interpreting [an] ambiguous statute.”¹²⁰ Permitting the courts to authoritatively and definitively construe the meaning of a statute would frustrate the entire purpose behind the APA’s rulemaking exemptions.¹²¹

2. Mounting Conservative Criticism Calls Auer Into Question.

The Court’s first consequential examination of *Auer* occurred in *Talk America, Inc. v. Michigan Bell Telephone Co.*,¹²² where the Court granted *Auer* deference to a Federal Communications Commission (“FCC”) interpretation of regulations promulgated pursuant to the

111. *Id.* at 591 (Scalia, J., concurring in part and concurring in judgment). Justices Breyer and Ginsburg took issue with Justice Scalia’s dismissal of *Skidmore*, arguing that it “retain[ed] legal vitality” and that, where *Chevron* did not apply, courts were still obligated to “pay particular attention to the views of an expert agency.” *Id.* at 596–97 (Breyer, J., dissenting).

112. 533 U.S. 218 (2001).

113. *Id.* at 226–27.

114. *Id.* at 229.

115. *Id.*

116. *Id.* at 235.

117. *Id.* at 240 (Scalia, J., dissenting).

118. *Id.* at 243.

119. *Id.* at 242 n.2.

120. *Id.* at 244.

121. *Id.* at 241–44.

122. 564 U.S. 50 (2011).

Telecommunications Act of 1996.¹²³ Despite the fact that the FCC's interpretation contradicted a previous order and was presented in an amicus brief filed by the Commission, the Court still found deference to be appropriate.¹²⁴ The Court found that the FCC's revised definition of "dedicated transport" was reasonable given the D.C. Circuit's question of the old definition, and that the new definition did not conflict with the established definition of "interconnection."¹²⁵

Justice Scalia objected to the Court's application of *Auer*, expressly calling the doctrine into question.¹²⁶ Though he noted that *Auer* appeared to be a "natural corollary" to *Chevron*, Justice Scalia's skepticism of *Auer*'s validity stems from the key distinction between the doctrines: *Chevron* concerns interpretations by the body tasked with administering a statute, whereas *Auer* involves interpretations by the body that both writes and administers the regulation.¹²⁷ Thus, the separation between the legislative and executive functions in *Chevron* are absent in *Auer*.¹²⁸ In his view, *Auer* deference contravened the "fundamental principles of separation of powers" by allowing "the person who promulgates a law to interpret it as well."¹²⁹ Such comingling of judicial and legislative authority not only cedes power to the executive branch, but would incentivize agencies to pass vague rules, thereby "frustrat[ing] the notice and predictability purposes of rulemaking."¹³⁰

The conservative call to revisit *Auer* gained greater fervor in *Decker v. Northwest Environmental Defense Center*.¹³¹ In *Decker*, the Court applied *Auer* deference to the EPA's interpretation of the Industrial Stormwater

123. *Id.* at 53, 64. Similar to *Auer*, since no statute or regulation addressed the specific issue in question, the agency's amicus curiae brief provided the most authoritative interpretation. *Id.* at 59; see also *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (stating that deference to an agency's interpretation of its own regulation advanced in a legal brief is appropriate if the interpretation is consistent with the regulatory text).

124. *Talk America*, 564 U.S. at 64. ("[A]lthough the FCC concedes that it is advancing a novel interpretation of its longstanding interconnection regulations, novelty alone is not a reason to refuse deference.").

125. *Id.* at 61–63.

126. *Id.* at 68 (Scalia, J., concurring).

127. *Id.*

128. *Id.* (explaining how in *Chevron*, "[t]he legislative and executive functions are not combined," but that in *Auer* both functions are "united in the same person" (quoting MONTESQUIEU, *SPIRIT OF THE LAWS* 151–52 (O. Piest ed., T. Nugent transl. 1949))).

129. *Id.*

130. *Id.* at 69. Three years later, Justice Alito incorporated Justice Scalia's critiques into his opinion in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156, 158 (2012) (explaining that deference "creates a risk that agencies will promulgate vague and open-ended regulations" and that "defer[ring] to the agency's interpretation . . . would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires'" (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986))).

131. 568 U.S. 597 (2013).

Rule.¹³² In dueling footnotes, both parties addressed whether the Court should revisit *Auer*.¹³³ In Chief Justice Roberts' concurring opinion, he suggested *Seminole Rock* would be better reconsidered in a case where "the issue is properly raised and argued," despite noting the "serious questions" raised about *Auer*'s validity.¹³⁴

Again dissenting, Justice Scalia provided several justifications for doing away with the *Auer* doctrine.¹³⁵ He argued that subsequent cases had failed to explain *Seminole Rock*'s "controlling weight" requirement.¹³⁶ Granting agencies both the power to prescribe regulations and the power to interpret those regulations allows them to circumvent notice-and-comment procedures by promulgating vague rules with plans to later issue interpretations.¹³⁷ *Chevron*, unlike *Auer*, is acceptable because a separate body interprets the statutory language.¹³⁸

Two years later, the Court's decision in *Perez v. Mortgage Bankers Association*¹³⁹ would set the stage for revisiting *Auer*. In arguing to uphold precedent that established a right to notice-and-comment procedures when an agency changes its interpretation of a rule,¹⁴⁰ the respondents presented an alternative argument suggesting that since *Auer* entitled deference to interpretive rules, such rules have the force of law.¹⁴¹ The majority did not fully engage with the respondent's argument and held that notice-and-comment procedures were unnecessary for amendments or repeals of interpretative rules.¹⁴² The Court's conservatives, however, viewed the respondent's arguments as license to attack *Auer*, with each writing separate

132. *Id.* at 613 ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail.")

133. The respondents suggested revisiting *Auer* without presenting an argument; the petitioners disagreed, but also without making an argument. *Id.* at 615–16 (Roberts, C.J., concurring).

134. *Id.*

135. Addressing the agency expertise argument, Justice Scalia stated that such expertise should have "nothing to do with who should interpret regulations." *Id.* at 618 (Scalia, J., dissenting). Instead, he argues that "the purpose of interpretation is to . . . 'say what the law is.'" *Id.* (Scalia, J., dissenting) (quoting *Marbury v. Madison*, (1 Cranch) 137, 177 (1803)).

136. *Id.* at 617–18 ("The first case to apply [*Seminole Rock*] offered no justification whatever—just the *ipse dixit* that 'the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" (quoting *Bowles v. Seminole Rock*, 325 U.S. 410, 414 (1945) (alteration in original))).

137. *Id.* at 620 ("[T]he power to prescribe is augmented by the power to interpret . . .").

138. *Id.* ("Congress cannot enlarge its *own* power through *Chevron*—whatever it leaves vague in the statute will be worked out *by someone else*.")

139. 135 S. Ct. 1199 (2015). At issue was the validity of a Wage and Hour Division opinion letter revising a previously held, and subsequently withdrawn, interpretation of wage and hour regulations for mortgage-loan officers promulgated under the FLSA. *Id.* at 1204–05.

140. *Id.* at 1203–04.

141. *Id.* at 1208 n.4.

142. *Id.* at 1206, 1208 n.4

opinions.¹⁴³ To Justice Scalia, “abandoning *Auer* and applying the [APA] as written” would restore the APA’s original balance regarding deference to agency interpretations.¹⁴⁴ Justice Thomas suggested that *Seminole Rock* effects “a transfer of judicial power to the Executive Branch,” as deference precludes judges from exercising their interpretive powers thus undermining the judiciary’s power “as a check on the political branches.”¹⁴⁵ Given the “serious constitutional questions” raised by *Seminole Rock* deference, Justice Thomas expressed that it “should be reconsidered in an appropriate case.”¹⁴⁶

III. THE COURT’S REASONING

That “appropriate case” appeared in *Kisor v. Wilkie*.¹⁴⁷ In *Kisor*, despite unanimously ruling on the merits to vacate the Federal Circuit Court of Appeals decision to grant *Auer* deference to the VA’s interpretation of its benefits regulations, the Court voted five-to-four to uphold *Auer*.¹⁴⁸ Justice Kagan, joined by Justices Roberts, Ginsburg, Breyer, and Sotomayor, limited *Auer* by adopting a two-step framework for its application. First, courts cannot award deference unless, after “exhaust[ing] all the ‘traditional tools’ of construction,” the regulation remains genuinely ambiguous.¹⁴⁹ Second, a reviewing court must evaluate the reasonableness of the agency’s interpretation, considering “whether the character and context of the agency interpretation entitles it to controlling weight.”¹⁵⁰ On the merits, the Court concluded that the Federal Circuit Court of Appeals failed to “make a conscientious effort to determine . . . whether the regulation [had] more than one reasonable meaning,” and that the lower court concluded too hastily that *Auer* deference applied.¹⁵¹

A. Justice Kagan’s Opinion

Writing for the majority, Justice Kagan based her decision on the presumption that Congress intended courts to defer to agency interpretations of their own ambiguous rules.¹⁵² Justice Kagan noted that agencies have the authority to apply meaning to their own regulations.¹⁵³ Agencies are in the

143. *Id.* at 1217 (Thomas, J., concurring); *id.* at 1211–1213 (Scalia, J., concurring). Justice Alito simply wrote to say he agreed with his colleagues that *Seminole Rock* and *Auer* should be revisited. *Id.* at 1210–11 (Alito, J., concurring).

144. *Id.* at 1213 (Scalia, J., concurring).

145. *Id.* at 1217 (Thomas, J., concurring).

146. *Id.* at 1225; *see supra* Section II.B.1.

147. 139 S. Ct. 2400 (2019).

148. *Id.* at 2408.

149. *Id.* at 2415.

150. *Id.* at 2416.

151. *Id.* at 2423–24.

152. *Id.* at 2414.

153. *Id.* at 2412.

best position to interpret the “original meaning” of a regulation, given their “direct insight” into the rule’s intended meaning.¹⁵⁴ Congress grants the agencies rulemaking power and authorization to “fill out the statutory scheme” because agencies are more adept in making specific policy judgments.¹⁵⁵ Given Congress’s preference for the uniform administration¹⁵⁶ of federal law, the presumption that Congress intended for deference “reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules.”¹⁵⁷ Since the need for uniformity is of particular relevance for highly technical and complex regulations, deference “serves to ensure consistency in federal regulatory law.”¹⁵⁸

Justice Kagan then addressed the limits of *Auer* deference. She cautioned that “*Auer* deference . . . ‘does not apply in all cases.’”¹⁵⁹ Where the presumption for deference does not apply, no deference is owed and an agency interpretation merely has persuasive power.¹⁶⁰ But, when the presumption might apply, Justice Kagan explained that deference is only appropriate if the regulation “is genuinely ambiguous.”¹⁶¹ Without uncertainty, there is no need for deference.¹⁶² To evaluate whether an ambiguity exists, the court must look to “the text, structure, history, and purpose of a regulation” as if there is “no agency to fall back on.”¹⁶³ Incorporating *Chevron*’s footnote nine principle, Justice Kagan noted that if exhausting the entire legal toolkit fails to resolve the interpretative question, only then may the judge determine a statute to be “genuinely ambiguous.”¹⁶⁴

For *Auer* deference to apply, the agency’s reading of the statutory language “must . . . be ‘reasonable.’”¹⁶⁵ Determining reasonableness requires the court to “make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.”¹⁶⁶ Recognizing the open-endedness of such an inquiry, Justice Kagan provided three guideposts for courts: (1) the interpretation must be the agency’s

154. *Id.* Justice Kagan noted that “justification has its limits,” such as in circumstances regarding issues an agency failed to anticipate during the rulemaking or “when lots of time has passed between the rule’s issuance and its interpretation.” *Id.*

155. *Id.* at 2413.

156. *Id.* (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)).

157. *Id.*

158. *Id.* at 2413–14.

159. *Id.* at 2414 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

160. *Id.*

161. *Id.* at 2414–15.

162. *Id.* at 2415.

163. *Id.* (quoting *Pauley v. Bethenergy Mines*, 501 U.S. 680, 707 (1991)).

164. *Id.* *Chevron*’s footnote nine principle states that deference is not appropriate if the judge is able to determine Congress’s meaning after “employing traditional tools of statutory construction.” *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843, n.9 (1984).

165. *Kisor*, 139 S. Ct. at 2415 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

166. *Id.* at 2416.

official position, issued by someone with the policymaking authority¹⁶⁷; (2) the interpretation must implicate the substantive expertise of the agency;¹⁶⁸ and (3) the interpretation must reflect an agency's "fair and considered judgment."¹⁶⁹ Courts should not grant deference to agency interpretations that constitute "convenient litigating position[s]," "post hoc rationalization[s]," or new interpretations that may "unfair[ly] surprise regulated parties."¹⁷⁰

After explaining *Auer*'s new limits, Justice Kagan then addressed *Auer*'s consistency with the APA. Justice Kagan read section 706 of the APA¹⁷¹ as providing two possibilities for judicial review: *de novo* review of the issue, or review of "the agency's reading for reasonableness."¹⁷² Courts act consistently with Congress's presumption when courts conclude and grant deference to an agency's reasonable reading of an interpretation.¹⁷³

Justice Kagan dismissed the argument that *Auer* violated the requirements for notice-and-comment rulemaking in section 553 of the APA.¹⁷⁴ Just as the meaning of a legislative rule promulgated through notice-and-comment "remains in the hands of [the court]," so does an agency's interpretation of a notice-and-comment rule.¹⁷⁵ In either circumstance, she explained, the court has the final say over an agency's action.¹⁷⁶ Justice Kagan further rejected the contention that *Auer* incentivizes agencies to purposefully write vague regulations onto which "they can later impose whatever interpretation[s] of [the] rules they prefer."¹⁷⁷ She highlighted the lack of empirical evidence supporting this claim, and further stated that both regulators and regulated parties have a shared interest in the clarity and precision of a regulation.¹⁷⁸

Finally, Justice Kagan rejected *Kisor*'s separation of powers argument that deference resulted in the vesting of both judicial and legislative powers into a single branch.¹⁷⁹ Noting that courts still "retain[ed] a firm grip on the interpretive function," Justice Kagan stated that the commingling of

167. *Id.*

168. *Id.* at 2417.

169. *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

170. *Id.* at 2417–18.

171. *See* 5 U.S.C. § 706 (2018) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

172. *Kisor*, 139 S. Ct. at 2419.

173. *Id.*

174. *Id.* at 2420; *see also* 5 U.S.C. § 553 (requiring notice-and-comment procedures for agency rulemakings).

175. *Kisor*, 139 S. Ct. at 2420.

176. *Id.* ("No binding of anyone occurs merely by the agency's say-so.").

177. *Id.* at 2421.

178. *Id.*

179. *Id.*

legislative and judicial functions has been “endemic in agencies . . . ‘since the beginning of the Republic.’”¹⁸⁰ Though agency activities may take on judicial and legislative forms, they are all “ways of executing a statutory plan” fully consistent with an agency’s executive power.¹⁸¹

Relying on *stare decisis*, Justice Kagan provided three reasons against overruling *Auer*. First, she noted the long-standing history of “[d]eference to reasonable agency interpretations of ambiguous rules.”¹⁸² Second, she explained that “abandoning *Auer* . . . would cast doubt on many settled constructions of rules.”¹⁸³ Third, though Congress could have amended the APA at any time to require *de novo* review, Congress chose to accept the Court’s “deference regime.”¹⁸⁴ Though the power and “far-reaching influence” of administrative agencies creates opportunities for their power to be abused, that very possibility further justified reinforcing *Auer*’s limits, rather than abandoning the doctrine entirely.¹⁸⁵

B. Justice Gorsuch’s Concurrence

Concurring only in the judgment, Justice Gorsuch, joined by Justices Thomas, Kavanaugh, and Alito, lambasted the majority’s decision to uphold *Auer*.¹⁸⁶ He described the Court’s decision as “a stay of execution,” which kept *Auer* “on life support” all for the purpose of “pretend[ing] to abide *stare decisis*.”¹⁸⁷ In his view, *Auer* infringed on the court’s fundamental duty: to provide an independent judgment on the law.¹⁸⁸

First, Justice Gorsuch traced the history of *Auer* deference, arguing that the case was “little more than an accident.”¹⁸⁹ He stated that *Skidmore* “reaffirmed the traditional rule that an agency’s interpretation of the law” cannot control the court.¹⁹⁰ *Seminole Rock*, in his view, failed to clarify how much “controlling weight” should be placed on an agency’s interpretation.¹⁹¹ Since the *Seminole Rock* Court arrived at its decision independent of the agency’s interpretation, *Seminole Rock* is more appropriately tied to

180. *Id.* at 2422 (quoting *City of Arlington v. Fed. Commc’n Comm’n*, 569 U.S. 290, 304–05 (2013)).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 2422–23.

185. *Id.* at 2423.

186. *Id.* at 2425 (Gorsuch, J., concurring in judgment).

187. *Id.* (emphasis omitted).

188. *Id.*

189. *Id.* at 2426.

190. *Id.* at 2427.

191. *Id.* at 2428 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Skidmore.¹⁹² Accordingly, *Seminole Rock* should be read as suggesting that agency interpretations are persuasive, but non-binding on the courts.¹⁹³

Justice Gorsuch then declared *Auer* to be “the apotheosis of th[e] line of cases” that inappropriately expanded *Seminole Rock*’s “controlling weight” language.¹⁹⁴ Since *Auer* forced judges to set aside their own views on the law and accept an agency’s reading, even if it “is not the best one,” *Auer* deference displaced the judiciary’s interpretative process.¹⁹⁵ Further attempts “to soften *Auer*’s rigidity” muddled the doctrine and caused “‘widespread confusion’ about when and how” it might apply.¹⁹⁶ These problems provided ample grounds for overruling *Auer*.¹⁹⁷

Focusing on the APA, Justice Gorsuch described *Kisor* as the first time the Court attempted “to square the *Auer* doctrine” with section 706.¹⁹⁸ In his view, section 706 requires a court to determine legal questions on its own, rather than under the guidance of executive branch officials.¹⁹⁹ Under Justice Gorsuch’s reading, section 706 only permits *de novo* review, since deference lets the agency provide the answer to an interpretative question.²⁰⁰ Justice Gorsuch further argued that *Auer* abrogated the distinction between section 553 rules and interpretations.²⁰¹ If a court affords a new interpretation “controlling weight,” it functionally becomes a new regulation.²⁰² In his view, the APA’s requirements imply that an agency cannot amend substantive rules outside of section 553’s procedures.²⁰³ Ultimately, Justice Gorsuch read the APA as countering Congress’s presumption for agency deference.²⁰⁴ In his view, the law of judicial review was “confused” at the time of the APA’s enactment, and the APA was merely an attempt to clarify it.²⁰⁵

Justice Gorsuch next addressed the separation of powers argument. He argued that *Auer* “compromised” a fundamental legal principle by requiring

192. *Id.* at 2428–29 (“[In *Seminole Rock*], the Court declared—for the first time and without citing any authority—that ‘if the meaning of [the regulation were] in doubt,’ the agency’s interpretation would merit ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” (quoting *Seminole Rock*, 325 U.S. at 414 (1945))).

193. *Id.* at 2429.

194. *Id.* (quoting *Seminole Rock*, 325 U.S. at 414 (1945)).

195. *Id.* at 2429–30.

196. *Id.* at 2430 (quoting Kevin Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U. S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 832 (2014)).

197. *Id.* at 2432.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 2434.

202. *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

203. *Id.* at 2434–35.

204. *Id.*

205. *Id.* at 2436.

the judge to abide by the agency's interpretation rather than their own independent judgment.²⁰⁶ Justice Gorsuch explained that *Auer* allows agencies to do what Congress cannot: force the courts to interpret and apply a law according to another branch's judgment.²⁰⁷ By requiring adherence to agency interpretations different from what the judge considers the best possible reading, deference compromises the judiciary's independence and denies litigants the impartial judgment guaranteed by the Constitution.²⁰⁸ Rather than limiting the scope of judicial power, Justice Gorsuch argued, deference co-opts it.²⁰⁹

Justice Gorsuch then addressed Justice Kagan's policy arguments.²¹⁰ To have "a government of laws," he explained, we must be "governed by the public meaning" of an agency's statutes and regulations, not by the agency's intentions.²¹¹ Since an agency's policy judgment is necessarily embodied in the regulation, judicial interpretation is no more of an act of policymaking than of law.²¹² Though he agreed that courts should respect an agency's technical expertise, he stated that courts should "remain open to competing expert and other evidence supplied in an adversarial setting."²¹³ As to Justice Kagan's concern regarding uniformity of the law, Justice Gorsuch expressed that the "judicial system is more than capable of producing a single, uniform, and stable interpretation that will last until the regulation is amended or repealed."²¹⁴

Lastly, Justice Gorsuch addressed *stare decisis*. Analogizing *Auer*'s doctrine to other tools of interpretation, he argued that statements about interpretative methods generally lack the binding force of *stare decisis*.²¹⁵ He questioned *Auer*'s "practical benefit" over other standards such as *Skidmore*.²¹⁶ Further, the scope of the administrative state heightened the effect of "deny[ing] citizens an impartial judicial hearing on the meaning of disputed regulations."²¹⁷

Ultimately, Justice Gorsuch viewed overruling *Auer* as "liberating courts to decide cases based on their independent judgment."²¹⁸ In his view,

206. *Id.* at 2439.

207. *Id.* (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 95 (1868)).

208. *Id.*

209. *Id.* at 2440.

210. *Id.* at 2441.

211. *Id.*

212. *Id.*

213. *Id.* at 2443.

214. *Id.*

215. *Id.* at 2444.

216. *Id.* at 2445–46.

217. *Id.* at 2446–47.

218. *Id.* at 2447.

the Court's decision "le[ft] *Auer* so riddled with holes" that courts may view it as similarly constraining as *Skidmore*.²¹⁹ He concluded by charging a future Court to revisit the doctrine and overrule it, either because of the ineffectiveness of the doctrine's new limitations or the frustrating effect that the doctrine has on courts' ability to provide meaningful and impartial judicial review of ambiguous regulations.²²⁰

C. Chief Justice Roberts's and Justice Kavanaugh's Concurrences

Both Chief Justice Roberts and Justice Kavanaugh filed separate concurring opinions. Chief Justice Roberts expressed that nothing in the *Kisor* decision directly touched on the issue of *Chevron*'s applicability.²²¹ Further, he stated "that the distance between the majority and Justice Gorsuch" is smaller than it seems.²²² In Chief Justice Roberts' view, the determinative factors for granting deference established by the majority parallel the reasons identified by Justice Gorsuch that persuade a court to adhere to an agency's interpretation.²²³ Despite the distinctions between *Auer* and *Skidmore*, he suggested "that the cases in which *Auer* deference is warranted largely overlap with the cases in which" the refusal to defer would be unreasonable.²²⁴

Justice Kavanaugh, joined by Justice Alito, viewed the rigorous application of *Chevron*'s footnote nine as having an effect akin to formally rejecting *Auer*.²²⁵ *Kisor* requires judges to "engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation," while "simultaneously be[ing] appropriately deferential to an agency's reasonable policy choices."²²⁶

Justice Kavanaugh's opinion provides an alternate view of *Kisor*'s supposed fatal effect on *Auer* to that of Justice Gorsuch. Yet, Chief Justice Roberts' recognition of *Auer*'s precedential weight underlies his attempt to find common ground between the majority and Justice Gorsuch's views on deference.

219. *Id.* at 2448.

220. *Id.*

221. *Id.* at 2425 (Roberts, C.J., concurring).

222. *Id.*

223. *Id.*

224. *Id.* at 2424–25.

225. *Id.* at 2448 (Kavanaugh, J., concurring) ("[T]he footnote [nine] principle . . . means that courts will have no reason or basis to put a thumb on the scale in favor of an agency . . ."); see *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

226. *Kisor*, 139 S. Ct. at 2449 (Kavanaugh, J., concurring).

IV. ANALYSIS

Despite retaining *Auer* deference, *Kisor* stops short of settling the debate as to whether *Chevron* deference will survive the Roberts Court in its current form. In light of Justice Gorsuch's and Justice Kavanaugh's efforts to undermine and erode the administrative state, Section IV.A addresses how Justice Kagan's opinion realigns *Auer* to accord with its historical precedent and the *Chevron* framework. Section IV.B argues that *Kisor* mitigates *Auer*'s constitutional concerns by requiring more active judicial scrutiny and due process than was previously guaranteed under *Auer*'s standard. Though the compromise struck by Justice Kagan provides a framework for the Court to retain some form of deference, Section IV.C discusses how that compromise also provides a framework for further narrowing *Chevron* and indicates further judicial balkanization of administrative agencies. Lastly, Section IV.D addresses *Kisor* in the context of increasingly vocalized attacks on the administrative state and its implications, arguing that deference doctrine's future remains unsettled and bleak.

A. *Kisor's Framework Realigns Auer Deference to a Form More Consistent with Seminole Rock and the Degree of Deference Intended by the APA.*

In adopting a new framework, the Court appropriately realigned *Auer* deference to the original test applied in *Seminole Rock*. Given *Udall v. Tallman*'s²²⁷ misapplication of *Seminole Rock* as a single-step test, Justice Kagan's opinion corrected the Court's longstanding misuse of *Seminole Rock* by recasting the doctrine as a two-step inquiry.²²⁸ Further, despite conservative claims to the contrary, the Court correctly noted that a two-step test for reasonableness review comports with the APA, since the Act does not expressly mandate *de novo* review.²²⁹

1. *Justice Kagan's Opinion Divorces Auer Deference from Udall v. Tallman's Application of Seminole Rock and Realigns the Doctrine with Its Original Framework.*

The deference inquiry applied in *Auer* substantially deviated from the framework applied by the *Seminole Rock* Court. In *Seminole Rock*, the inquiry focused on the ambiguous provision in question. Yet, the *Tallman* Court's misapplication of *Seminole Rock* shifted the Court's focus away from the ambiguity itself, and more to the reasonableness of the interpretation. Given *Auer* marks the most extreme expansion of *Tallman*'s approach,

227. 380 U.S. 1 (1965).

228. See *infra* Section IV.A.1.

229. See *infra* Section IV.A.2.

Justice Kagan realigns *Auer* deference with its governing precedent in *Seminole Rock* by directing the Court's focus back to the regulation.

Though *Seminole Rock*'s "controlling weight" language is most often read as a single step inquiry, there is an implicit first step.²³⁰ For a court to decide whether an agency's regulation is "plainly erroneous or inconsistent," it first examines the regulation to determine whether the regulation is ambiguous; then, upon such a conclusion, the court must decide if the agency's regulation falls within the boundary of acceptable interpretation.²³¹ Reading *Seminole Rock* as establishing a two-step inquiry accords with the Court's disposition of that case. Unlike the mechanical application of deference in *Auer*, the *Seminole Rock* Court fully and independently engaged with the text to determine whether the provision was ambiguous *before* considering whether the agency's interpretation justified deference.²³² In essence, *Seminole Rock*'s inquiry is not unlike that of *Chevron*.²³³

Seminole Rock's two-step framework is strikingly absent in *Udall v. Tallman*. Though the *Tallman* Court evaluated the text to determine whether the Secretary of Interior's interpretation was "reasonable," the Court stopped short of forming its own conclusion as to the meaning of the regulation.²³⁴ The Court's inquiry focused solely on the reasonableness of the Secretary's interpretation of the ambiguity, rather than on resolving the ambiguity itself.²³⁵ Accordingly, the Court's application of *Seminole Rock* post-*Tallman* almost exclusively centered on the reasonableness of the agency's interpretation at the expense of an independent judicial evaluation of the text.²³⁶ *Auer* exemplifies the most extreme extension of this approach. In *Auer*, not only did the Court not evaluate the regulation in question, but its analysis solely concerned defending the reasonableness of the Secretary's interpretation.²³⁷

230. See Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 70–71 (2000) (explaining that reviewing courts must first determine if a regulation is unambiguous before deciding whether to grant deference to the agency's interpretation).

231. *Bowles v. Seminole Rock*, 325 U.S. 410, 414 (1944).

232. *Id.* at 415–418; see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2428 (2019) (Gorsuch, J., concurring in judgment) (explaining that the *Seminole Rock* Court concluded the OPA's regulation was permissible "[o]nly after reaching that conclusion based on its own independent analysis").

233. Compare *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 865 (1984) ("First, always, is the question of 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."), with *Seminole Rock*, 325 U.S. at 414 ("The intention of Congress . . . may be *relevant in the first instance* in choosing between various constructions." (emphasis added)).

234. *Udall v. Tallman*, 380 U.S. 1, 22–23 (1965) ("[N]either [the Court of Appeals' holding] nor this Court's affirmance in any way casts doubt upon the reasonableness of the Secretary's interpretation of the orders at bar . . .").

235. *Id.* at 18–19.

236. See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513–17 (1994) (framing its evaluation of the ambiguity around the reasonableness of the Secretary's interpretation).

237. *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

Thus, the *Auer* Court's application of *Seminole Rock* is wholly distinct from deference doctrine's original application. Unlike in *Seminole Rock*, where an agency's interpretation is controlling based on its consistency with the statutory scheme, *Auer* assumes that the interpretation is controlling unless demonstrated otherwise.²³⁸ As compared to *Seminole Rock*, a judge's exclusive concern under *Auer* is the reasonableness of the interpretation rather than the meaning of the ambiguity.²³⁹ The shift in focus away from the regulation's language results in a lower degree of judicial scrutiny, as the judge is no longer independently interpreting the meaning of the regulation.²⁴⁰

Kisor effectively realigns *Auer* with *Seminole Rock*. *Kisor*'s first requirement—that the regulation remain genuinely ambiguous after a judge fails to resolve the ambiguity using “all the ‘traditional tools’ of construction”—forces the judge to engage directly with the text beyond the frame of an agency's interpretation.²⁴¹ This requirement, similar to *Chevron*'s first step, is functionally similar to the Court's approach in *Seminole Rock*.²⁴² *Kisor*'s second requirement—reasonableness review—is explicitly grounded in the review standard established by *Chevron*.²⁴³ Though the “plainly erroneous or inconsistent” standard in *Seminole Rock* is arguably more deferential than *Chevron*'s reasonableness standard, in practice courts have applied the two standards in a similar fashion.²⁴⁴ Thus, *Kisor* clarifies how the *Seminole Rock* standard should be applied by aligning *Auer*'s deferential standard with *Chevron*. *Kisor*'s framework reestablishes

238. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 629 (1996) (describing a post-*Udall* application of *Seminole Rock* where “the Court made no effort to decide how it would have [independently] construed the regulation”).

239. See *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 614 (2013) (focusing on whether the agency's interpretation is reasonable rather than on whether it is the best reading to clarify the ambiguity).

240. See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1219–20 (2015) (Thomas, J., concurring in judgment); see also Manning, *supra* note 238, at 639 (arguing that *Seminole Rock* involves “no independent interpretive check” of an administrative agency's “lawmaking”).

241. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984)).

242. See Kevin O'Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 245–46 (2013) (explaining that in *Seminole Rock*, “the Court performed a much more searching inquiry to ascertain the meaning of the regulation than the plain language of the test it purported to apply”); see also Angstreich, *supra* note 230, at 70–71 (“[A]lthough formally stated as a one-step test, *Seminole Rock* implicitly involves a preliminary analysis that mirrors *Chevron* step one.”).

243. *Kisor*, 588 U.S. at 2416 (“Under *Auer*, as under *Chevron*, the agency's reading must fall ‘within the bounds of reasonable interpretation.’” (quoting *City of Arlington v. Fed. Comm'n Comm'n*, 569 U.S. 290, 296 (2013))).

244. See Angstreich, *supra* note 230, at 70, n.87–88 and accompanying text (“[I]n practice, courts review agency interpretations of their own regulations under a standard nearly identical to that at *Chevron* step two.”).

Seminole Rock deference as initially applied, rather than as interpreted by *Tallman* and *Auer*.

2. *Kisor is Consistent with the APA's Judicial Review Provisions Since the APA Does Not Exclusively Require De Novo Review of Agency Decisions.*

Kisor comports with the degree of deference Congress intended when it enacted the Administrative Procedure Act. Judicial deference to agency expertise began well before enactment of the APA.²⁴⁵ As the administrative state expanded, courts progressively began adopting a more deferential attitude towards agency findings.²⁴⁶ During the New Deal and World War II era, courts recognized and applied varying degrees of deference when reviewing agency findings of law as well as fact.²⁴⁷ Since the APA was expressly intended to “restate[] the present law as to the scope of judicial review,” that scope encapsulated some degree of judicial deference.²⁴⁸

Despite Justice Gorsuch’s contentions, section 706 does not mandate *de novo* review.²⁴⁹ Section 706 requires reviewing courts to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action,”²⁵⁰ The section’s broad framing gives a judge discretion in *how* to decide such legal questions.²⁵¹ Justice Gorsuch’s argument uses an unduly narrow construction of section 706 that mischaracterizes deference’s central legal question and proceeds under a false premise.²⁵² Section 706 permits two types of review: *de novo* review and “reading for reasonableness” review.²⁵³ The Attorney General’s Committee on Administrative Procedures stated:

245. *See supra* Sections II.A–B.

246. *See supra* notes 37–40 and accompanying text; *see also* John J. Coughlin, *The History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 IDAHO L. REV. 89, 110 (2001) (“While the Supreme Court was firmly committed to the availability of judicial review of agency actions to individuals who incurred injury to a legal right, the limited scope of the review permitted the administrative agencies wide latitude.”).

247. *See e.g.*, *Nat’l Labor Relations Bd. v. Hearst Publ’ns*, 311 U.S. 111, 130–31 (1944) (stating that questions of statutory interpretation are appropriate, so long as courts “giv[e] appropriate weight to the judgment of those whose special duty is to administer the questioned statute”).

248. ATTORNEY GENERAL’S MANUAL, *supra* note 61, at 108.

249. *See supra* notes 198–200.

250. 5 U.S.C. § 706 (2018).

251. *See* Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1642 (2019) (“The APA does not say whether and when courts should defer to agency interpretations of law.”).

252. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 (2019) (arguing that the APA’s silence on whether to defer when interpreting regulations suggests that “Congress told courts to ‘determine’ those matters for themselves”). *But see* The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (“[O]ne provision of the [APA] itself seems to have been based upon the quite mistaken assumption that questions of law would always be decided *de novo* by the courts.”).

253. *Kisor*, 139 S. Ct. at 2419.

Even on questions of law [independent judicial] judgment seems not to be compelled. The question of statutory interpretation might be approached by the court *de novo* and given the answer which the court thinks to be the “right interpretation.” Or the court might approach it, somewhat as a question of fact, to ascertain, not the “right interpretation,” but only whether the administrative interpretation has substantial support.²⁵⁴

“Substantial support” means “reasonableness review.”²⁵⁵ Thus, the legal question central to *Chevron* deference—whether an agency’s interpretation is reasonable—is fully permissible, despite the fact that *Chevron* seems to eschew *de novo* review.²⁵⁶ With *Chevron* deference, the legal question concerns whether Congress has delegated interpretive authority to the administrative agency; an affirmative finding triggers reasonableness review.²⁵⁷ Similarly, *Kisor*’s reasonableness review was triggered by the Court’s evaluation as to “whether the character and context of the agency interpretation entitles it to controlling weight.”²⁵⁸ Just as in *Chevron*, whether an agency’s interpretation of a regulation is entitled to deference under *Kisor* is a question of law fully within the scope of review intended by section 706 of the APA.²⁵⁹

Ultimately, the Court appropriately responded to the criticism that *Auer* was divorced from its precedent by establishing a framework for deference that more closely tracks *Seminole Rock*’s inquiry. Since Congress intended to restate the law of judicial review to agency actions in the APA,²⁶⁰ *Kisor*’s reasonableness review comports with the degree of deference intended by the APA.

254. S. DOC. NO. 8, 77th Cong., 1st Sess. 90–91 (1941).

255. See Sunstein, *supra* note 251, at 1647–48 (explaining how the APA’s drafters suggested courts might accept an agency’s interpretation as long as it is reasonable, even if it is not the best interpretation).

256. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”); see also Sunstein, *supra* note 251, at 1646–47 (describing the similarities between the Committee’s explanation of the APA’s scope of judicial review and *Chevron*).

257. See JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 29 (2018) (explaining how *Chevron* deference comports with section 706 of the APA).

258. *Kisor*, 139 S. Ct. at 2416.

259. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2104–05 (1990) (“The reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency’s decision is ‘arbitrary’ or ‘capricious’ within the meaning of the APA.”); see also Angstreich, *supra* note 230, at 86 (explaining the similarities between *Chevron* and *Seminole Rock*).

260. See ATTORNEY GENERAL’S MANUAL, *supra* note 61, at 108.

B. Kisor’s Heightened Judicial Scrutiny Redresses Constitutional Concerns Undergirding Auer’s Criticisms

Unlike the judiciary’s limited inquiry under *Auer*, *Kisor*’s framework mandates independent judicial inquiry into a regulation’s meaning. This framework effectively addresses the criticism that deference infringes on the Constitution’s guarantee of an impartial judgment to those before the court.²⁶¹ Active judicial scrutiny also remedies the separation of powers concerns of *Auer* deference’s critics by narrowing the circumstances in which deference applies, thereby granting the judge greater discretion in determining whether an interpretation is reasonable or not.²⁶²

1. Kisor Mitigates Due Process Concerns by Requiring More Active Judicial Scrutiny of an Ambiguous Regulation

Kisor’s framework rebuts Justice Gorsuch’s chief criticism that deference infringes on the judge’s responsibility “to say what the law is.”²⁶³ By requiring the judge to exhaust the interpretative toolkit and find a “genuine ambiguity” before deferring, *Kisor* mandates that the judge construe the text independently from the agency’s reading and grants the judge a degree of independence absent in *Auer*.²⁶⁴

Kisor’s high standard for ambiguity affords judges great leeway in deciding whether deference is owed.²⁶⁵ If the judge agrees that the agency’s reading is the “best reading” of the statute, deference is appropriate.²⁶⁶ But, if the judge disagrees, *Kisor* provides the judge greater freedom to avoid a result that may be contrary to the law’s intended meaning.²⁶⁷ *Kisor*’s framework and limitations prohibit a judge from engaging in the very sort of

261. *See infra* Section IV.B.1.

262. *See infra* Section IV.B.2.

263. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see Kisor*, 139 S. Ct. at 2440 (Gorsuch, J., concurring in judgment) (explaining that *Auer* “seeks to *coopt* the judicial power by requiring an Article III judge to decide a case before him according to principles that he believes do not accurately reflect the law” (emphasis in original)); *see also Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1219 (2015) (“*Seminole Rock* deference . . . precludes judges from independently determining [the meaning of the law].”); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 618 (2013) (explaining that the aim of interpretation is “[n]ot to make policy, but to determine what policy has been made”).

264. *Kisor*, 139 S. Ct. at 2415 (explaining that the Court’s application of *Auer* transformed *Seminole Rock* deference into a more “reflexive” doctrine and that “a court must ‘carefully consider[]’ the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on” (alteration in original)).

265. *Id.* (“[A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on the first read.”).

266. *Id.* at 2416–18.

267. *Id.* at 2418 (“[T]his Court has cabined *Auer*’s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules.”); *see id.* at 2442 (Gorsuch, J., concurring in judgment) (advocating for “redirecting the judge’s interpretative task back to its roots” to ensure proper scrutiny over the law).

mechanical application of deference that underlies the Court's conservatives' concerns.²⁶⁸ Ultimately, the active judicial scrutiny mandated in *Kisor* remedies Justice Gorsuch's concern that *Auer* removes the judge from their Article III role and infringes on the legal process the Constitution guarantees to litigants.²⁶⁹

2. *Kisor's Heightened Judicial Scrutiny Mitigates Separation of Powers Issues*

In light of the criticism that *Auer* deference permits an agency to interpret its own rules, *Kisor* created a heightened judicial scrutiny that mitigated such concerns for three reasons.²⁷⁰ First, unlike *Auer's* broad and highly deferential framework, *Kisor* still requires a judge to exercise their independent judgment when construing a statute.²⁷¹ Applying *Kisor* necessarily precludes the type of mechanical, "hands-off" jurisprudence that arguably aggrandized agency power at the judiciary's expense.²⁷²

Second, *Auer's* criticisms are rooted in a false premise: that *Auer* deference leads agencies to circumvent notice-and-comment rulemaking by issuing vague regulations supplemented by guidance documents exempt from APA procedural requirements.²⁷³ Implied in this "self-delegation" argument is an inherent suspicion and skepticism of agencies and their experts.²⁷⁴ Yet, as Justice Kagan rightly notes, "no real evidence backs up"

268. *Id.* at 2421 (majority opinion) (explaining that *Kisor's* limitations ensure that "courts retain a firm grip on the interpretive function").

269. Article III charges the judiciary with resolving civil cases and controversies arising under the laws of the United States, thus the Constitution entitles those before the courts review by a body separate from the political branches. U.S. CONST. art. III, § 2, cl. 1.

270. *See, e.g.,* *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring in judgment) ("It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.").

271. *Compare Kisor*, 139 S. Ct. at 2415 (stating that "a court must 'carefully consider' the text, structure, history, and purpose of a regulation" before determining it is ambiguous), *with Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))).

272. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring in judgment) (arguing that *Seminole Rock* deference "undermines the judicial 'check' on the political branches").

273. *See Kisor*, 139 S. Ct. at 2440–41 (Gorsuch, J., concurring in judgment) (arguing that an "agency's failure to write a clear regulation winds up increasing its power, allowing it to both write and interpret rules that bear the force of law"); *see also Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., dissenting) (explaining how *Auer* deference encourages agencies to circumvent notice-and-comment procedures by issuing vaguely framed regulations intended to be subsequently fleshed out by issuing interpretations (citing Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 11–12 (1996))).

274. *See Manning, supra* note 238, at 655–56 (arguing "an agency's right of self-interpretation should have an untoward effect upon its incentive to speak precisely and transparently when it promulgates regulations").

such an assertion.²⁷⁵ Further, agencies have an active interest in writing clear regulations.²⁷⁶ Ambiguity is a threat to the long-term legitimacy of the regulatory scheme and frustrates effective agency administration.²⁷⁷

Third, the “self-delegation” argument ignores the fact that agencies are merely clarifying already established legislative rules when they issue guidance documents.²⁷⁸ In drafting guidance documents, an agency is engaging in an extension of its delegated authority for crafting regulations, rather than “enlarg[ing] its own power” by interpreting what it previously wrote.²⁷⁹ Precise and specific regulations are costly to adopt and enforce.²⁸⁰ Further, agencies may not be able to anticipate every circumstance in which a rule is applied.²⁸¹ The ability to issue subsequent interpretations to established regulations provides agencies with much needed flexibility in navigating the tradeoffs between costs, clarity, and congruence.²⁸² An agency’s ability to adopt a rule due to an unforeseen circumstance is necessarily implied in an agency’s delegated authority, as doing so is required in their exercise of the “executive Power”²⁸³ and responsibility in “executing a statutory plan.”²⁸⁴ Agencies have broad discretion regarding the procedures

275. *Kisor*, 139 S. Ct. at 2407; see also Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 308 n.45 (2017) (describing how an analysis of over 2000 rules did not uncover any evidence of them being written intentionally ambiguous).

276. *Kisor*, 139 S. Ct. at 2421 (explaining how vagueness increases the likelihood a rule may be overturned and makes established rules more susceptible to reinterpretation by “future administrations, with different views”); see also Sunstein & Vermeule, *supra* note 275, at 308–09 (stating that both internal and external pressures compel clarity in regulations).

277. *Kisor*, 139 S. Ct. at 2421; see also Sunstein & Vermeule, *supra* note 275, at 309 (explaining how “*Auer* actually incentivizes clarity” because “[i]f an agency leaves a regulation ambiguous, [then the agency] cannot be certain that a subsequent interpretation will be made by an administration with the same or similar values”).

278. See Sunstein & Vermeule, *supra* note 275, at 313 (“When an agency makes valid legislative rules, those rules bind the agency itself as well as all the world.”).

279. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., dissenting) (emphasis omitted); see also Sunstein & Vermeule, *supra* note 275, at 313–14 (“In the standard *Auer* case, there is nothing at all arbitrary about the agency’s decision to specify, through interpretation, what a legislative rule means, not least because the agency is often answering a question that it did not anticipate.”).

280. See Angstreich, *supra* note 230, at 114 (“When a regulation is specified in great detail it can become difficult to identify the applicable regulatory subprovision and, therefore, more costly to enforce and less likely to induce compliance. Increased clarity also adds to the costs of promulgating the rule.”).

281. See Cass Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 993 (1995) (“Those who issue a rule cannot know the full range of situations to which the rule will be applied, and in the new circumstances, the rule may be hopelessly outmoded.”).

282. See Angstreich, *supra* note 230, at 114–15 (explaining the comparative advantages of vague and precise rules, and arguing that *Seminole Rock* deference does little to incentivize an agency’s choice between vagueness and precision).

283. U.S. CONST. art. II, § 1, cl. 1; *City of Arlington v. Fed. Comm’n Comm’n*, 569 U.S. 290, 305, n.4 (2013).

284. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019); see *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“[I]t can still be apparent from the agency’s generally conferred authority . . . that Congress would expect the agency to be able to speak with the force of law when it addresses

used to implement regulations within their statutory authority.²⁸⁵ Accordingly, the decision whether to interpret the meaning of a regulation through a guidance document, rather than promulgate an entirely new rule, is a procedural decision about *how* to answer an unforeseen question under the current statutory scheme.²⁸⁶

Kisor departs from *Auer*'s mechanical application by conditioning deference on a judge's independent inquiry into the reasonableness of an interpretation.²⁸⁷ *Kisor* redirects the judge's focus away from the agency's interpretation and towards the text of the regulation, thereby granting litigants the process guaranteed in the Constitution and limiting the potential aggrandizement of agency power.

C. Kisor's Double-Edged Sword: Defending Expert Agencies While Providing the Framework for Their Erosion.

Kisor seems to exalt the administrative state's institutional competencies and bolster arguments justifying the reasons to vest interpretative authority with the expert agencies.²⁸⁸ Yet, *Kisor* provides a framework for the Court to import future restrictions onto *Chevron*, thereby eroding the administrative state's effectiveness and authority.²⁸⁹ Though it is unlikely a majority on the Court would vote to abrogate *Chevron* given its longevity as precedent, *Kisor* suggests that, should *Chevron* be revisited, the Court likely would further narrow and limit the doctrine's applicability.²⁹⁰

ambiguity in the statute or fills a space in the enacted law . . ."); *Martin v. Occupational Safety & Health Comm'n*, 499 U.S. 144, 153 (1991) ("[W]e presume here that Congress intended to invest interpretative power in the administrative actor in the best position to develop [regulatory standards.]); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("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."); see also *City of Arlington*, 539 U.S. at 327 (Roberts, C.J., dissenting) ("An agency's interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of lawmaking power from Congress to the Executive.").

285. See *Sec. & Exch. Comm'n v. Chenery Corp.* ("Chenery II"), 332 U.S. 194, 201–03 (1947) ("[A]n administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.").

286. Agencies should have flexibility in deciding which tools are best suited to resolve unforeseen problems related to rules they issue. Given that such procedural decisions—determining which tools to use—are context dependent, the Court recognizes that such decisions are best left to agency discretion. See, e.g., *Nat'l. Labor Relations Bd. v. Bell Aerospace CO. Div. of Textron, Inc.*, 416 U.S. 267, 291–94 (1974) (explaining how procedural decisions, such as whether to "announc[e] new principles" through rulemaking or adjudication, are discretionary and warrant deference); Sunstein & Vermeule, *supra* note 275, at 313–14 (arguing that an agency's procedural decisions do not alter the boundaries of their authority).

287. See *supra* Section II.D.

288. See *infra* Section IV.C.1.

289. See *infra* Section IV.C.2.

290. See *infra* Section IV.C.3.

1. *The Institutional Competencies of Administrative Agencies Make Them Better Positioned to Clarify Regulatory Ambiguities.*

Both Congress and the courts have recognized the pragmatism of letting the agencies clarify ambiguities in the statutes and regulations that they administer.²⁹¹ Agencies' subject matter expertise, fact-finding abilities, familiarity with policy goals, and experience in implementing and enforcing regulations underlie the appropriateness of judicial deference.²⁹² Vesting agency actors with implementation responsibilities ensures that the laws are administered in an effective and consistent manner.²⁹³ Congress intended agencies to fulfil the responsibility of fleshing out congressional commands and developing them into regulations that serve Congress's legislative aims.²⁹⁴ As the Court noted in *Mead*, an agency's "conferred authority" suggests that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."²⁹⁵ An agency's experience with implementing and enforcing its regulations provides greater expertise when resolving regulatory ambiguities. The Court has justified deference based on an agency's exclusive responsibility of enacting and implementing its regulations.²⁹⁶

291. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (explaining "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute").

292. See *Martin v. Occupational Safety & Health Comm'n*, 499 U.S. 144, 150–51 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); see *MASHAW*, *supra* note 257, at 131 (explaining how an agency's scientific and technical expertise and experience in "implementing broad goals in heterogeneous contexts and in consultation with diverse interested parties and institutions" is central to *Chevron's* "insistence" on deference).

293. See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("This broad deference is all the more warranted when . . . the regulation concerns 'a complex and highly technical regulatory program.'" (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991))); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) ("[L]anguage in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation.").

294. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) ("[T]he presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often 'entail[s] the exercise of judgment grounded in policy concerns.'" (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512)); *Martin*, 499 U.S. at 153 (finding that "historical familiarity and policymaking expertise" suggest a presumption "that Congress delegates interpretative lawmaking power to the agency rather than to the reviewing court"); *Fed. Commc'n Comm'n v. Pottsville Broad. Co.*, 309 U.S. 134, 146 (1940) ("Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal."); see also *LANDIS*, *supra* note 1, at 70 ("Despite the outcry from time to time by individual members of the Congress against the grant of powers to the administrative to formulate regulatory provisions, on the whole that process today has the respect of members of the legislative branch . . .").

295. *Mead*, 533 U.S. at 229.

296. See, e.g., *Martin*, 499 U.S. at 152 (explaining that the Secretary of Labor's experience in enforcing the Occupational Safety and Health Act underlies the presumption that Congress intended

Further, the Court has long acknowledged that agencies are best equipped to resolve statutory ambiguities because of their experience in administering regulations.²⁹⁷ Granting agencies interpretive authority allows for consistency in the regulatory scheme and provides clearer notice to those subject to the regulations.

Justice Gorsuch's contention that judges are "capable of producing a single, uniform, and stable interpretation" contravenes the practical understanding that "judges are most likely to come to divergent conclusions when they are least likely to know what they are doing."²⁹⁸ Unless the judge is an expert in the subject matter, the best interpretation of an ambiguity likely stems from the most knowledgeable authority.²⁹⁹ Deferring to the agency's expertise is not an abdication of judicial responsibility, but rather a pragmatic understanding that proper administration of the law necessarily involves adjusting to the judiciary's limited competencies to ensure that the law functions as Congress intended.³⁰⁰

Justice Kagan appropriately recognized that the policymaking responsibilities and expertise delegated to agencies justifies deference. The effectiveness of a regulatory scheme depends on an agency's regulations being clear and long-lasting, yet the executive branch's responsiveness to the electorate requires agencies to have a degree of flexibility in how these schemes are administered.³⁰¹ An agency's expertise in the subject of a statute informs its ability to adopt regulations to changing political tides or to adapt

the Secretary to have interpretative power); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."); *Nat'l Labor Relations Bd. v. Hearst Publ'n*, 322 U.S. 111, 130 (1944) ("Everyday experience in the administration of the statute gives [an agency] familiarity with the circumstances and backgrounds of employment relationships in various industries The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act.")

297. See *Mead*, 533 U.S. at 234 (justifying deference to agency interpretations "given the 'specialized experience and broader investigations and information' available to the agency" and the importance of uniformity in a regulation's meaning and application (quoting *Skidmore v. Swift*, 323 U.S. 134, 139 (1944))); see also *Gray v. Powell*, 314 U.S. 402, 412 (1941) ("Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched.").

298. *Kisor*, 139 S. Ct. at 2443 (Gorsuch, J., concurring in judgment); *id.* at 2414 (majority opinion).

299. Banks Miller & Brett Curry, *Experts Judging Experts: The Role of Expertise in Reviewing Agency Decision Making*, 38 L. & SOC. INQUIRY 55, 69 (2013) (concluding "that subject matter expertise makes federal appellate judges significantly less likely to defer to an agency than their nonexpert peers").

300. See Sunstein & Vermeule, *supra* note 275, at 320 ("Because of the need to resolve technical issues, and because of the plain advantages of accountability, the balance cuts hard in the direction of *Auer*.").

301. See *Kisor*, 139 S. Ct. at 2413; see also MASHAW, *supra* note 257, at 173–74 (arguing that delegating to agencies the responsibility to make choices based on facts and circumstances that are unavailable to Congress is a policy choice).

a statute to changing factual circumstances.³⁰² By noting the judiciary's limitations as a generalist branch whose policymaking responsibilities are restrained by the separation of powers doctrine, Justice Kagan grounds her reasoning in the pragmatic understanding that the judiciary's limited competencies and expertise justify trusting the experts.³⁰³

2. *Kisor's Framework Indicates How the Court May Further Narrow Deference Doctrine*

Though *Kisor's* framework is identical to *Chevron's*, the express limitations on its applicability make the doctrine far narrower. The markers provided to guide a court's reasonableness review limit the circumstances in which deference may be granted.³⁰⁴ Since *Kisor* heightens the burden for an agency seeking deference, the markers serve the purpose of ensuring that the agency not only acted in accordance with its delegated authority, but that it acted reasonably and consistently.³⁰⁵ While *Chevron* has been modified in order to ensure that Congress intended to vest interpretive authority in an agency, its reasonableness prong still remains somewhat broad.³⁰⁶

Accordingly, applying *Kisor's* guideposts to *Chevron* would narrow the deference doctrine by restraining the broadness of *Chevron's* reasonableness review. In turn, judges would have far greater discretion in deciding whether *Chevron* applies. As will be discussed in Section IV.C.3, the Court's current composition suggests that it is interested in reconsidering *Chevron*. Should it choose to do so, *Kisor's* limits provide a means to narrow the doctrine without eliminating it.

3. *Kagan's Caution and Conservative Skepticism Render Deference's Future Unsettled and Bleak*

Despite Justice Kagan's rosy view of agency expertise, the majority opinion cautions courts from relying on agency expertise. Her opinion

302. See *Kisor*, 139 S. Ct. at 2413; *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (explaining that since agencies are politically accountable under the executive branch, it is appropriate for them to make policy choices that Congress either implicitly or explicitly left for the agency to resolve).

303. See MASHAW, *supra* note 257, at 124–31 (explaining how agency expertise and political accountability underpin the reasoning in favor of agency deference).

304. *Kisor*, 139 S. Ct. at 2416.

305. See O'Leske, *supra* note 242, 275–85 (proposing four context-dependent factors to determine whether deference is owed similar to those subsequently established in *Kisor* and arguing such an approach would reduce “incentive[s] to promulgate vague regulations,” diminish “opportunit[ies] to re-interpret a regulation routinely without adequate notice,” and “promote much-needed certainty for the public”).

306. See *United States v. Mead Corp.*, 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) (“*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates. . . . Any resolution of the ambiguity by the administering agency that is authoritative . . . must be accepted by the courts if it is reasonable.” (emphasis added)).

weighs deference's practicality against the judiciary's ability "to perform their reviewing and restraining functions."³⁰⁷ In pronouncing *Auer*'s limits, Justice Kagan lends credence to the arguments of those fearful and suspicious of the administrative state.³⁰⁸ *Kisor*'s requirement that an interpretation must "emanate" from those tasked with the ability "to make authoritative policy in the relevant context" suggests that, without such limits, any agency decisionmaker could essentially make binding law.³⁰⁹ Though, on the surface, such a limit is absolutely reasonable, it begs the question as to who decides whether an agency actor has such authority: the agency or the judge? By tasking the judge to resolve this question, *Kisor* implies a degree of distrust in an agency's decision to internally delegate its vested authority.³¹⁰

Further, inherent in Justice Kagan's admission that "the administrative realm is vast and varied," is a suspicion of bureaucracy.³¹¹ Accordingly, the "character and context" limit suggests that not all reasonable interpretations are contextually appropriate.³¹² Yet, if an agency is best positioned for interpreting and administering its statutory scheme, would it not know whether, under certain circumstances, Congress presumed its interpretations to warrant some degree of deference?³¹³

Ultimately, the tension in Justice Kagan's opinion between deference and oversight not only reflects her cautious view of the administrative state but also results in a compromise that does little to prevent future efforts to undermine the administrative state.

While Justice Gorsuch has been particularly vocal in calling for the abrogation of deference doctrine entirely, his conservative colleagues have

307. *Kisor*, 139 S. Ct. at 2415.

308. *Id.* at 2418.

309. *Id.* at 2416; see Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2481 (2017) (describing how Justice Kagan's view of administrative legitimacy establishes the President "as a nationally elected check on the ills of bureaucracy"); see also Judge Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016) (describing how agency decisionmakers can use *Chevron* to pursue their own policy goals).

310. The expansive scope of the administrative state and its oversight difficulties increases the likelihood for abuses of power and illegitimate action. See Justice Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2264 (2001) ("[M]odels of administration . . . relying on internal expertise provoke serious questions about the quality, *no less than the legitimacy*, of agency action." (emphasis added)); Adrian Vermeule, *Optimal Abuse of Power*, 109 Nw. U.L. Rev. 673, 677 (2015) (arguing that the size of the administrative state and difficulty in enforcement "ensure that some positive rate of abuse is inevitable").

311. *Kisor*, 139 S. Ct. at 2416.

312. *Kisor* narrowly defines "character and context" by requiring that an interpretation be a "fair and reasoned," "official" position on a matter within an agency's designated substantive expertise. *Id.* at 2416–17.

313. See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("[I]t can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity. . . ."); see also LANDIS, *supra* note 1, at 61 (explaining that agencies are "dependent on the legislative and executive for an extension of [their] existing powers" if circumstances so require).

signaled a willingness to consider the issue.³¹⁴ Justice Thomas likely would join Justice Gorsuch in eliminating *Chevron* entirely, as evidenced by his concurrence in *Michigan v. EPA*.³¹⁵ Justice Kavanaugh's writings on *Chevron* indicate that he also favors overturning *Chevron*. Like his conservative colleagues, Justice Kavanaugh has argued that judicial deference poses separation of powers concerns.³¹⁶ However, his view of the doctrine is somewhat more nuanced than that of Justices Gorsuch and Thomas. Justice Kavanaugh has suggested that there are two circumstances where deference "makes a lot of sense:"³¹⁷ first, where the statute explicitly delegates interpretive authority to the agency; and second, where a statute "uses broad, open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.'"³¹⁸ Considering how *Kisor*'s limits could be applied to *Chevron*, Justice Kavanaugh would likely be open to restraining the doctrine, but in a manner where its application is so circumscribed that it would be rendered functionally null.³¹⁹

Chief Justice Roberts, though unlikely to join in an opinion which abrogates *Chevron*, seems to be open to revisiting and narrowing the doctrine.³²⁰ His recently developed "major questions doctrine" has already narrowed the circumstances where deference may apply.³²¹ His dissent in

314. See Matthew C. Turk & Karen E. Woody, *Justice Kavanaugh, Lorenzo v. SEC, and the Post-Kennedy Supreme Court*, 71 ADMIN. L. REV. 193, 246–49 (2019) (arguing that while Justices Gorsuch, Kavanaugh, and Thomas seek to eliminate *Chevron*, Justices Breyer, Roberts, and Alito favor retaining, but limiting the doctrine).

315. 135 S. Ct. 2699, 2712 (2015) (Thomas, J. concurring) (arguing that *Chevron* deference's "transfer" of interpretative authority "is in tension with Article III's Vesting Clause"); see also *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 1213–15 (2015) (Thomas, J., concurring in judgment) (lambasting the Court's tradition of deference and concluding that, while *stare decisis* is essential to the legal system's stability, "*stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means" (quoting *McDonald v. Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., concurring in part and concurring in judgment))).

316. The Honorable Brett M. Kavanaugh, *The Role of the Judiciary in Maintaining the Separation of Powers*, HERITAGE FOUND. LECTURE, 8–9, (Oct. 25, 2017) <https://www.heritage.org/sites/default/files/2018-02/HL1284.pdf> (arguing that *Chevron*'s indeterminacy is "antithetical to the neutral, impartial rule of law").

317. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2152 (2016).

318. *Id.* at 2153–54. In these cases, Justice Kavanaugh suggests the standard of review for deference is functionally equivalent to arbitrary and capricious review. *Id.*; see *Motor Vehicles Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983) (holding that the arbitrary and capricious standard concerns whether the agency considered the relevant factors and whether it made a "clear error of judgment" and requires the agency to consider the relevant data and provide a "rational connection between the facts found and the choices made").

319. See Turk & Woody, *supra* note 314, at 248 (explaining that Justice Kavanaugh likely favors either overturning *Chevron* or "redefining its holding out of existence").

320. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (recognizing that *stare decisis* warranted upholding *Auer* yet addressing the similarities between *Skidmore* and *Auer*'s newly cabined scope).

321. See Turk & Woody, *supra* note 314, at 247 (noting that the "major questions doctrine" "carves out an exception to *Chevron*" in cases where ambiguous statutory language "raise[s] legal questions of great importance").

*City of Arlington v. Federal Communications Commission*³²² indicates limits on the scope of deference.³²³ And though the Chief Justice joined Justice Kagan in retaining but limiting *Auer*, his refusal to join in her policy and presumption arguments indicates an underlying skepticism of the Court's precedent of agency-centric deference. Chief Justice Roberts indicated there are circumstances where refusing to defer to the agency's interpretation would be unreasonable.³²⁴ The Chief Justice alludes to deference's effect as a check against erroneous and politically-motivated interpretations which could hamper the effectiveness of a regulatory scheme.³²⁵ Further, Chief Justice Roberts' suggestion that "the distance between [Justice Kagan] and Justice Gorsuch is not as great as it may initially appear" suggests a more conservative approach to deference.³²⁶ Given the overlap between *Skidmore* and *Kisor*, Chief Justice Roberts implies that narrowing *Chevron* could square adherence to *Chevron*'s precedent with Justice Gorsuch's *Skidmore*-only jurisprudence.³²⁷

Justice Alito's view is a bit more enigmatic. While Justice Alito's prior record reflects the view that *Chevron* is binding precedent,³²⁸ his abstention from joining parts IV and V of Justice Gorsuch's concurrence and his joining in Chief Roberts' *City of Arlington* dissent indicates his support for further limiting deference.³²⁹

Ultimately, with only three Justices clearly in favor of formally eliminating *Chevron*, it is probable that deference doctrine survives the Roberts Court. Given the narrowing effect of applying *Kisor*'s framework to *Chevron*, it is more likely that a majority of the Court would adopt limits similar to *Kisor* in the future, thus rendering *Chevron* far more docile and ineffective. Given recent efforts to circumscribe the administrative state, such limitations would further diminish the administrative state's

322. 569 U.S. 290 (2013).

323. *Id.* at 312 (Roberts, C.J., dissenting) ("An agency cannot exercise interpretive authority until it has it [W]hether an agency enjoys that authority must be decided by a court, without deference to the agency.").

324. *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring).

325. See Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1506 (2018) (concluding empirical evidence supports "that *Chevron* deference appears to significantly constrain judges' political behavior" in reviewing statutory interpretations).

326. *Kisor*, 139 S. Ct. at 2424.

327. *Id.*

328. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) (stating that unless there has been "a secret decision that has somehow escaped my attention, [*Chevron*] remains good law").

329. 569 U.S. 290 (2013); see Turk & Woodley, *supra* note 314, at 248 (describing Chief Justice Roberts's dissent as "an important statement on the limits of judicial deference, which the Court's majority accused of having '*Chevron* itself as the ultimate target'" (quoting *City of Arlington*, 569 U.S. at 312)).

institutional credibility.³³⁰ In turn, this would hinder the ability of agencies to act pursuant to their constitutionally delegated authority.³³¹ Moreover, jurisdictional inconsistencies resulting from enhanced judicial discretion would frustrate the predictability that notice-and-comment rulemaking provides to regulated parties.³³² Further, limiting *Chevron* would erode an important check on ideological judicial behavior,³³³ with potentially devastating implications for environmental, labor, and civil rights regulations.³³⁴ While Justice Gorsuch is correct in noting that we once survived in a “world without *Chevron*,”³³⁵ *Chevron* is now a cornerstone of the modern regulatory apparatus. By continuing to chip away at the doctrine, the Court risks collapsing the entire administrative state.

V. CONCLUSION

In *Kisor*, the Court correctly decided to retain and reinforce *Auer* deference. In so doing, the Court realigned *Auer* to be more consistent with *Seminole Rock*'s historic precedent.³³⁶ As a result, *Kisor* provides redress to concerns about the constitutionality of deferring to an agency's interpretations of its own rules by establishing limitations on its application that enhance the judge's role and discretion.³³⁷ Yet, while *Kisor* justifies deference's practicality and bolsters the presumption that Congress intended for deference, Justice Kagan's opinion provides a more cautious approach and suggests an underlying distrust of the administrative state.³³⁸ Ultimately,

330. See generally William Funk, *The Attack on Administrative Regulation*, 42 VT. L. REV. 427, 427–28 (2018) (arguing that there is a concerted effort in academia, “Congress, and the courts to undermine agency regulation as fundamentally illegitimate—if not unconstitutional”).

331. See Judge Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 309–10 (1986) (describing *Chevron*'s practical consequences such as “allow[ing] agencies to use their expertise in interpreting the many complex statutes that characterize the modern administrative state; improv[ing] agency proceedings; encourag[ing] better legislative draftsmanship by Congress; and permit[ing] an incoming administration to carry out its electoral mandate more comprehensively and consistently”).

332. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 542 (2003) (explaining that notice-and-comment rulemaking promotes predictability by allowing affected parties that participate in the rulemaking proceedings “to anticipate the rule and plan accordingly”).

333. See Barnett, *supra* note 325, at 1493–1519 (showing how *Chevron* constrains judicial partisanship and ideological decisionmaking).

334. See Robert L. Glicksman, *Kisor v. Wilkie: A Reprieve for Embattled Administrative State?*, GEO. WASH. L. REV. ON THE DOCKET (July 3, 2019), <https://www.gwlr.org/kisor-v-wilkie-a-reprieve-for-embattled-administrative-state/> (arguing that allowing only Congress to regulate matters of public health threatens to infringe on “individual interests in health, safety, and economic security” and enhances risks to those individuals Congress deemed “to be in need of the government's protection”).

335. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016)(Gorsuch, J., concurring).

336. See *supra* Section IV.A.

337. See *supra* Section IV.B.

338. See *supra* Section IV.C.1.

Kisor establishes limitations that, if applied to *Chevron*, would narrow the Court's deference doctrine even further.³³⁹ Though it is unlikely the Court will eliminate agency deference entirely, *Kisor* is precursor for the further erosion of agency deference and a bleak prognosis for deference doctrine's vitality.³⁴⁰

339. *See supra* Section IV.C.2.

340. *See supra* Section IV.C.3.