Kisor v. Wilkie: *Auer* Deference is Alive but Not So Well. Is *Chevron* Next?

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On June 26, 2019, the Supreme Court decided *Kisor v. Wilkie*, a case that provided the Court with the opportunity to examine long standing precedents—first set forth in *Bowles v. Seminole Rock & Sand Co.* and later in *Auer v. Robbins*—concerning the deference due by the courts to agencies' interpretations of their own regulations.[1] The Court acted with unanimity in reversing a Federal Circuit decision that applied a deferential standard of review to the Department of Veteran's Affairs' interpretation of a regulation and remanding the case back to the lower court.[2] However, the Court was fractured with respect to whether a deferential standard of review for agencies' interpretations of their own regulations is ever warranted. Five justices decided that such deference is appropriate in certain circumstances and, therefore, that *Auer* should not be overturned.[3] Four justices, however, would have eliminated any deferential standard of review for agency regulatory interpretations.[4] Accordingly, while *Auer* deference remains alive, it is not so well.

Auer deference shares a number of its justifications with its better-known sister doctrine, *Chevron* deference. *Chevron* sets forth the circumstances in which judicial deference is accorded to agency interpretations of their own organic statutes and is a seminal case in administrative law.[5] Since the *Auer* and *Chevron* doctrines have a lot in common, the uncertain future of *Auer* raises questions about whether *Chevron*'s future is similarly uncertain. Because the *Chevron* doctrine is widely known and has been the subject of much scholarly attention, Part I of this article discusses *Chevron*, its justifications, and the criticisms to which it has been subject. This article's discussion of *Chevron* comes prior to its discussion of *Auer* deference in order to provide a basis for comparison in its analysis of *Auer* deference. This section also discusses the *State Farm* doctrine, which is of similar vintage as *Chevron*. That doctrine is designed to ensure that agencies respond appropriately to constituent concerns and provide justification for their regulatory choices.[6] As a result, *Chevron* deference may not sustain agency regulations if the regulatory choices encompassed therein, reasonable as they may be, have not been properly justified. *State Farm*, therefore, provides a check on the latitude

1 Kisor v. Wilkie, 138 S. Ct. 2400 (2019).
2 *See generally id.*
3 *See id.* at 2418.
4 *Id.* at 2425 (Gorsuch, J., concurring).
5 *See infra* notes 22–25 and accompanying text.
6 *See infra* note 91 and accompanying text.

that *Chevron* otherwise provides to agencies.

Part II discusses *Auer* deference, its justifications, and its drawbacks. *Auer* deference was spawned in a case that predated *Chevron* by four decades, *Seminole Rock*.[7] Ironically, *Auer* and *Seminole Rock*, the foundational cases for the deference they espoused, were both seemingly decided without the courts deferring to the agencies' interpretations of the regulations in question.[8] In many respects, *Auer* is subject to criticisms similar to those leveled at *Chevron* and is supported by similar justifications as those put forth to support *Chevron*. However, the two types of deference are not identical; therefore, Part II also explains why *Auer* deference rests on a weaker doctrinal foundation than *Chevron* deference.

Part III analyzes the Supreme Court's decision and reasoning in *Kisor* and explores what *Kisor* means for the future of *Auer* and *Chevron*. Though the Court has let *Auer* live another day, it is unclear just what sort of life it will have. Arguably, *Auer* is now a shell of itself and resembles the standard employed in the *Chevron* "extraordinary cases" or, alternatively, pre-*Chevron* standards of review which (according to Justice Scalia) offered no deference at all. Finally, this part addresses what, if anything, *Kisor* augurs for *Chevron* deference. The Chief Justice and Justices Kavanaugh and Alito made the effort to point out that *Kisor* did not speak to *Chevron* deference.[9] However, Justice Gorsuch's concurrence took *Auer* deference to task on the grounds that such deference violates both the judicial review provisions and notice and comment requirements of the Administrative Procedure Act (APA).[10] Four justices agreed with Justice Gorsuch on this point, and the Chief Justice did not make his opinion known on this issue.[11] Justice Gorsuch's objection to *Auer* deference on the grounds that it violates the judicial review provisions of the APA appears to apply to *Chevron* deference as well. If it does, the Chief Justice's vote may determine whether *Chevron* deference has a lengthy shelf-life as a staple of administrative law.

7 *See* Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531, 547–50 (2018).

8 *See* Auer v. Robbins, 519 U.S. 452, 461–62 (1991); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 415–17 (1945).

9 *Kisor*,139 S. Ct. at 2425 (Roberts, C.J., concurring); *id.* at 2449 (Kavanaugh, J., concurring).

10 *Id.* at 2432–35 (Gorsuch, J., concurring)

11 *Id.* at 2425 (Gorsuch, J., concurring).

I. DEFERENCE TO STATUTORY INTERPRETATION BY AGENCIES: *CHEVRON* & *STATE FARM*

The *Chevron* doctrine sets forth the circumstances in which judicial deference is accorded to agency interpretations of their own organic statutes and has been a bedrock principle of administrative law for quite some time.[12] Its sister doctrine, first set forth in *Seminole Rock* and later in *Auer*, determines the circumstances in which courts afford judicial deference to an agency's interpretation of its own regulations and is less well-known, despite predating *Chevron* by several decades.[13] Judicial deference to agency interpretations of statutes and agency interpretations of their own regulations share common underpinnings. Moreover, both forms of deference are subject to similar criticisms. However, despite their common underpinnings, the doctrines are not identical. Because the *Chevron* doctrine is widely known and has been the subject of much scholarly attention, this section discusses this doctrine, its justifications, and the criticisms to which it has been subject. This discussion takes place prior to that of *Auer* deference in order to provide a basis of comparison for the article's ultimate analysis of *Auer* deference. This section also discusses the *State Farm* doctrine, which is of similar vintage as *Chevron*. This doctrine is designed to ensure that agencies respond appropriately to constituent concerns and provide justification for their regulatory choices.[14] As a result, *Chevron* deference may not sustain agency regulations if the regulatory choices encompassed therein, reasonable though they may be, have not been properly justified. *State Farm*, therefore, provides a check on the latitude that *Chevron* otherwise provides to agencies.

A. Background

Deference by courts to agency action existed long before the *Chevron* decision. Prior to *Chevron*, whatever deference the courts granted to administrative agencies was rooted in common-law canons of statutory construction or in peculiarities inherent in the cause of action, most notably the writ of mandamus.[15] Moreover, the courts

12 *See infra* notes 22–25.

13 *See infra* notes 103–16; *see also* Daniel E. Walters, Opinion, *A Turning Point in the Deference Wars*, REG. REVIEW (July 9, 2019), https://www.theregreview.org/2019/07/09/walters-turning-point-deference-wars/.

14 *See infra* note 91 and accompanying text.

15 For example, courts interpreted the meaning of a statute according to the meaning of its terms at the time of enactment and on the customary interpretation of its terms. *See* Aditya Bamzai, *The Origins of Judicial Deference*

tended to distinguish between questions of fact and questions of law, deferring to agencies only in cases that implicated the former.[16] The rise of the administrative state during the New Deal era resulted in a few cases in which the Court signaled what was to come later under *Chevron*. In *Gray v. Powell*, the Court refused to question the Department of Interior's interpretation of a statutory term set forth in the Bituminous Coal Act of 1937 because it reasoned that Congress delegated interpretive authority to a more informed and experienced body.[17] A few years later, the Court in *NLRB. v. Hearst Publications, Inc*. similarly justified the deference that it accorded the National Labor Relations Board on the basis of the Board's expertise.[18] In *Skidmore v. Swift & Co.,* the Court held that the level of deference that an agency's action warrants depends upon the thoroughness of the agency's deliberations, the validity of its reasoning, its consistency with earlier and later pronouncements, and other factors which provide the agency with the power to persuade—a standard thought by Justice Scalia to offer no deference at all.[19]

Even after the enactment of the APA in 1946, and despite its seeming aversion to judicial deference to agency action, courts applied inconsistent standards in reviewing agency action.[20] Though by 1979 *Skidmore* deference had been in existence for decades, that year the Court applied another multi-factor test—the so-called *National Muffler* test—to determine whether Treasury regulations issued under the general authority of I.R.C. § 7805(a) were a permissible interpretation of that statute.[21] The *Chevron* doctrine, whatever its

to Executive Interpretation, 126 YALE L.J. 908, 930–31 (2017). Judges deferred to executive officials because those officials applied the accepted canons of statutory construction and not because they were executive officials. *See id.* at 943–44. Judges did invoke a very deferential standard of review for executive action when the case was brought by a writ of mandamus or another extraordinary writ. *See id.* at 947–55. The use of such writs diminished substantially after the enactment of federal question jurisdiction in 1875. *See id.* at 955–56.

16 *Id.* at 959–62; *see also* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

17 314 U.S. 402, 411–13 (1941).

18 NLRB. v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–31 (1944).

19 323 U.S. 134, 140 (1944); United States v. Mead Corp., 533 U.S. 218, 239–40, 259 (2001) (Scalia, J., dissenting).

20 *See* Bamzai, *supra* note 15, at 995.

21 Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476–77 (1979). The *National Muffler* Court examined whether the regulations in question were a contemporaneous construction of the statute promulgated with the

merits and faults, did eventually provide some clarity to this issue of what judicial deference agencies were entitled to when interpreting their own organic statutes.

In the seminal case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that a very deferential standard of review is applicable to agency interpretations of their organic statutes if such interpretations had been subject to notice and comment.[22] This standard employs a two-step inquiry. Step One inquires whether the statute directly addresses the precise question at issue and, if it does not, Step Two inquires whether the agency's interpretation is arbitrary, capricious in substance, or manifestly contrary to the statute.[23] Under Step Two, so long as the agency's

awareness of congressional intent; the length of time that the regulations were in effect; the degree of reliance placed on the regulations by affected parties; the consistency of the agency's position; and the degree of scrutiny given the regulations by Congress during subsequent re-enactments of the statute. *Id.* at 477. The Court later applied this test in two cases decided not long after its *National Muffler* decision and, in both cases, noted that less deference is owed to Treasury interpretations issued pursuant to I.R.C. § 7805. *See* United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Rowan Cos. v. United States, 452 U.S. 247, 253 (1981). For almost thirty years after *Chevron*, deference shown to IRS rulemaking depended on whether the regulations were issued pursuant to a specific statutory grant of authority or pursuant to the general grant of congressional authority under I.R.C. § 7805. *See* Mark E. Berg, *Judicial Deference to Tax Regulations: A Recommendation in Light of* National Cable*,* Swallows Holding*, and Other Developments*, 61 TAX LAW 481, 502 (2008); *see also* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1579–86 (2006). In 2011, the Court rejected this approach and held that tax regulations were entitled to *Chevron* deference regardless of the source of their authority: "We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations." Mayo Found. for Med. Research and Educ. v. United States, 562 U.S. 44, 56 (2011).

22 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984). *Skidmore* deference survived *Chevron* with respect to judicial review of informal rules. *See Mead,* 533 U.S. at 234–36 (explaining that *Chevron* did not overrule *Skidmore* and stating that this case, involving a Customs Service ruling, may lend itself to a *Skidmore* claim); *see also* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (stating that *Skidmore* deference is applicable to informal agency actions such as opinion letters, manuals, guidelines, and policy statements); Nelson v. Comm'r, 568 F.3d 662, 665 (8th Cir. 2009) (applying *Skidmore* deference to I.R.S. revenue rulings); Kornman & Assocs., v. United States, 527 F.3d 443, 452–57 (5th Cir. 2008) (concluding that IRS revenue rulings are entitled to *Skidmore* deference).

23 *Chevron,* 467 U.S. at 842–43; *Mead*, 533 U.S. at 277.

interpretation of the statute is reasonable, the courts will let the interpretation stand.[24]

The *Chevron* two-step test is more deferential than the *Skidmore* and *National Muffler* tests in several respects. For example, under *Chevron,* whether the agency's action is consistent with its previous position on the matter at hand and whether the regulation had been issued contemporaneously with the statute are not relevant to the level of deference due the agency.[25]

Not all scholars agree that the *Chevron* standard truly employs a two-step inquiry. For example, Matthew C. Stephenson and Adrian Vermeule assert that the two steps of the *Chevron* test are redundant because "the single question is whether the agency's construction is permissible as a matter of statutory interpretation; the two *Chevron* steps both ask the question, just in different ways. As a result, the two steps are mutually convertible."[26] Richard Re, in contrast, asserted that *Chevron* Step One provides the answer to the question of whether Congress left only one permissible interpretation of a statute or more than one.[27] If more than one permissible interpretation exists, then *Chevron* Step Two defers to any number of interpretations, so long as they are reasonable.[28]

Chevron was premised on prudential grounds and acknowledged that the modern administrative state demands that agencies possess specialized knowledge beyond the "ordinary knowledge" possessed by the courts.[29] The Supreme Court has said that"[t]he expert agency is surely better equipped to do the job than individual district judges issuing *ad hoc,* case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an

24 *Chevron*, 467 U.S. at 844; *Mead*, 533 U.S. at 229.

25 *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1001 n.4 (2005) (stating that lack of consistency does not undermine the case for deference); Smiley v. Citibank, 517 U.S. 735, 740–41 (1996) (applying *Chevron* deference to a regulations issued approximately a century after the enactment of the statute). Moreover, the Court has held that *Chevron* deference is owed to regulations that are contrary to previous judicial holdings regarding the meaning of statutory terms so long as the prior holding did not find that the statute was unambiguous. *See Nat'l Cable & Telecomms.*, 545 U.S. at 982.

26 Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

27 Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 610–16 (2014).

28 *Id.*

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

agency can utilize in coping with issues of this order."[30] Similarly, *Chevron* gives tacit recognition to Congress's limitations, for it also rests on notions of congressional intent to delegate authority to the agencies (either expressly or implicitly) and political accountability: judicial deference to agency action is warranted because "[t]he 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."[31]

1. Criticisms

The notion that Congress recognizes its limitations and, consequently, delegates authority to agencies whose personnel possess the expertise required to effectively deal with the matters in question is attractive. However, several criticisms have taken aim at *Chevron* on both prudential grounds and on separation of powers principles.

First, expertise and political accountability are not always compatible with each other. Fealty to technocratic expertise often rests uncomfortably with the need to engage in political horse trading, and political considerations may countermand technical considerations – a point made by critics of administrative power. Such critics, including the House of Representatives, question the political legitimacy of agency actions because of the inordinate influence that the regulated constituency often exerts over the regulator. [32] There are several reasons for the oft-held perception of industry dominance over regulators, including resource disparities, political influence, informational disparities, and the proverbial revolving door between agencies and their regulated constituents.[33]

Second, although *Chevron* ostensibly pays fealty to congres-

30 Am. Elec. Power Co., v. Connecticut, 564 U.S. 410, 428 (2011).

31 *Chevron*, 467 U.S. at 843.

32 The perception of industry dominance over regulators is based, in part, on resource and informational disparities, political influence, and the revolving door between agencies and their regulated constituents. *See* David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1473–75 (2013). Legislation has been introduced in the House of Representatives, including legislation introduced in 2019, that would require a *de novo* judicial review of all relevant questions of law. *See, e.g.*, Separation of Powers Restoration Act of 2019, H.R. 1927, 116th Cong. § 2 (2019); Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. § 2 (2016).

33 *See* Arkush, *supra* note 32, at 1473–75 (2013).

sional intent and separation of powers, *Chevron* deference may, in certain cases, do violence to separation of powers principles by sanctioning Congress's abrogation of its legislative role. While Congress can delegate some responsibility to agencies, Congress cannot delegate its Article I legislative powers, and broad delegations of regulatory authority to agencies arguably constitutes such a delegation.[34] In *Mistretta v. United States*, the Supreme Court applied an "intelligible principle" test to determine whether a congressional delegation is too broad:

> Applying this "intelligible principle" test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . . Accordingly, this Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[35]

Third, *Chevron*'s deferential standard of review may further violate separation of powers principles because it may conflict with

34 Field v. Clark, 143 U.S. 649, 692 (1892). It is worth noting that the Supreme Court has only twice employed the nondelegation doctrine to invalidate congressional delegations of authority to an agency. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Kristin E. Hickman, Gundy, *Nondelegation, and Never-Ending Hope*, Reg. Rev. (July 8, 2019), https://www.theregreview.org/2019/07/08/hickman-nondelegation/.

35 488 U.S. 361, 372–73 (1989); *see also* Gundy v. United States, 139 S. Ct. 2116, 2122–24 (2019) (holding that Congress did not violate this doctrine by granting the Attorney General broad authority to implement the Sex Offender Registration and Notification Act to offenders who were convicted prior to the statute's passage). The APA precludes judicial review of actions committed to agency discretion by law, a provision that the Court has construed narrowly, applicable in the rare instances where the statutory terms are so broad that there is no law to apply. *See* 5 U.S.C. § 701(2) (2018); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410–11 (1971). This "no law to apply" standard appears to sit uncomfortably aside the non-delegation doctrine set forth in *Mistretta*. *See* Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. Chi. L. Rev. 1047 (2006).

the strictures of the APA. Section 706 of the APA states that 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."[36] Arguably, the application of *Chevron* deference represents a failure by the courts to properly perform their judicial function as set forth in § 706 of the Act. Many scholars believe that Congress, in enacting the APA, intended to rein in the growing power of the agencies and enshrine a *de novo* standard of review of agencies' interpretation of the law.[37] Moreover, any seeming conflict between *Chevron* and the APA should not be resolved on policy grounds or assumptions regarding Congress's intent because the APA cannot be overridden by another statute unless the other statute does so expressly.[38]

A final criticism of the *Chevron* doctrine is that because courts have applied *Chevron* to statutes that were enacted prior to the *Chevron* decision, in those cases, courts are not reflecting the interpretive norms pursuant to which Congress legislated but, instead, are upending those norms.[39]

2. Extraordinary Cases

To the extent that *Chevron* deference rests on an implicit delegation of authority by Congress to an agency to patch statutory gaps, such deference is unwarranted if circumstances indicate that such implicit delegation by Congress was unlikely. The Supreme Court

36 5 U.S.C. § 706 (2018). Though a detailed analysis of the APA is beyond the scope of this work, a basic understanding of the Act is helpful to understanding certain criticisms of *Chevron*. The Act's purposes are to inform the public about agencies' procedures, rules, and organization; provide the public with the opportunity to participate in the rule-making process; to establish standards for the promulgation of rules and adjudicating disputes; and to set forth the scope of judicial review of agencies' actions. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (photo reprint 1973) (1949), http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf. This source also provides a detailed description and analysis of the statute.

37 *See* Bamzai, *supra* note 15, at 986–90.

38 *See* 5 U.S.C. § 559 (2018). *See generally* Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act*, 31 VA. TAX REV. 813, 816–24 (2013); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2585–91 (2006); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998).

39 *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 625 (1996).

set forth this idea in *FDA v. Brown & Williamson Tobacco Corp.*, a case in which the Food and Drug Administration's authority to regulate tobacco products was at issue:

> Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. *In extraordinary cases*, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[40]

The Court ultimately refused to defer to the agency in this matter.[41]

In the aftermath of *Kisor*, it is arguable that the courts' application of *Auer* deference may be predicated on an analysis similar to that undertaken with respect to *Chevron* deference in "extraordinary cases."[42] A relatively recent case further demonstrates the "extraordinary case" case exception to *Chevron* deference. The Court in *King v. Burwell* refused to apply *Chevron* deference to a Treasury regulation that interpreted a tax credit provision, § 36B of the Internal Revenue Code, rather expansively for reasons similar to its refusal to apply such deference in *Brown & Williamson*.[43] At issue in *King* was whether, due to an ambiguity in § 36B, tax credits were available to enrollees on Federal Exchanges as the Treasury Department believed, or whether instead, the statutory provision limited such credits to enrollees on State Exchanges. The Patient Protection and Affordable Care Act (ACA) segmented the health insurance market into four

40 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–26, 159 (2000) emphasis added) (internal citation omitted). The Court also quoted from a law review article written by Justice Breyer that predated his membership on the Court: "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *Id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)).

41 529 U.S. at 160–61.

42 *See infra* notes 249–65 and accompanying text.

43 King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

markets, one of which is comprised of the American Health Benefit Exchanges [hereinafter Exchanges].[44] The Exchanges, which are governmental or non-profit entities, function as insurance marketplaces in which individuals have the ability to comparison shop for insurance products.[45] The statute required each state to create and operate an Exchange that offers insurance for purchase by individuals and employees of small employers.[46] However, under the ACA, a state could opt out of creating and operating an Exchange, in which case the Exchange will be established by the federal government.[47]

A critical component of the ACA was the so-called individual mandate.[48] The individual mandate required applicable individuals and their dependents to maintain the minimum essential health insurance coverage.[49] Failure to maintain such coverage for one or more months would result in the imposition of a penalty that was to be included with a taxpayer's income tax return for the taxable year, which would include the month that such failure occurred.[50] The Tax Cuts and Jobs Act of 2017 eliminated the shared responsibility payment effective in 2019.[51]

Section 36B of the Internal Revenue Code provided a tax credit to individuals and families whose income is below a certain threshold and who pay premiums for insurance through an Exchange established by the State under section 1311 of the ACA.[52]

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44 The other markets are the individual market and two employer provided group insurance markets, the small and large group market. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1304, 1311, 1312, 124 Stat. 119, 171, 174, 182 (2010) (codified at 42 U.S.C. §§ 18024, 18031, 18032 (2018)).

45 *Id.* § 1311, 124 Stat. at 176 (codified at 42 U.S.C. § 18031(d)(1)–(4)(2018)).

46 *Id.* § 1311(b), 124 Stat. at 173 (codified at 42 U.S.C. § 18031 (2018)).

47 *Id.* § 1321(c), 124 Stat. at 186 (codified at 42 U.S.C. § 18041 (2018)).

48 *Id.* § 1501(b); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, § 10106(b)(1), 124 Stat. at 244–49, 909–10 (2010) (codified as amended at I.R.C. § 5000A (2018)).The penalty amount imposed by the statute was amended shortly thereafter by the Health Care and Education Reconciliation Act of 2010. Health Care and Education Reconciliation Act §1002, 124 Stat. 1029, 1032–33 (2010) (codified at I.R.C. § 5000A (CCH 2018)).

49 I.R.C. § 5000A(a) (CCH 2018)).

50 I.R.C. §§ 5000A(a), 5000A(b)(1)-(2) (CCH 2018). The requirement to maintain minimum essential coverage is variously met through, among other means, Medicare or Medicaid coverage, individual insurance policies, or eligible employer-sponsored group health plans or insurance coverage. *Id.* § 5000A(f).

51 Pub. L. No. 115-97, § 11081 131 Stat. 2054, 2092 (2017).

52 I.R.C. §§ 36B(a), 36(c)(1)(A), 36B(c)(2)(A) (CCH 2019).

The credit was designed to subsidize health insurance coverage for taxpayers whose household income for the taxable year equals or exceeds 100% but does not exceed 400% of an amount equal to the poverty line for a family of the size involved.[53] Section 36B's language appears to limit eligibility for a tax credit to taxpayers who are enrolled in State Exchanges.[54] However, the Treasury issued regulations pursuant to which participants in Federal Exchanges would also qualify for the tax credit.[55]

Because Virginia did not establish an Exchange, its residents were served by the Federal Exchange, HealthCare.gov.[56] The availability of tax credits to enrollees of the federal Exchange in Virginia subjected certain enrollees to the individual mandate; not wishing to pay the individual mandate, those enrollees challenged the Treasury regulations.[57] The District Court held that the ACA as a whole evinced Congress's intent to make the credits available nationwide and that consequently, the regulations were within the Treasury's authority; the Fourth Circuit unanimously affirmed.[58] However, in *Halbig v. Burwell*, a case brought by residents of several states that were insured through federal Exchanges, the D.C. Circuit held that the regulations were invalid.[59]

On June 25, 2015, Supreme Court heard *King v. Burwell* and, in a 6-3 decision, affirmed the judgment of the Fourth Circuit and held that enrollees on Federal Exchanges are indeed entitled to tax credits.[60] On behalf of the Court, the Chief Justice proceeded to an-

53 I.R.C. § 36B(c)(1) (CCH 2019).

54 *See supra* note 52 and accompanying text.

55 *See* 26 C.F.R. §§ 1.36B-1(k) (2012) (defining Exchange by reference to 45 C.F.R. § 155.20), 1.36B-2(a) (providing eligibility for credit by enrollment in an Exchange); 45 C.F.R. § 155.20 (2012) (stating that the term "Exchange" refers to state Exchanges, regional Exchanges, subsidiary Exchanges, *and a federally-facilitated Exchange*).

56 King v. Sebelius, 997 F. Supp. 2d 415, 419 (E.D. Va. 2014), *sub nom* King v. Burwell, 759 F.3d 358 (4th Cir. 2014).

57 *Id.* at 420–21.

58 King v. Burwell, 759 F.3d 358 (4th Cir. 2014), *aff'g* King v. Sebelius, 977 F. Supp. 2d 415 (E.D. Va. 2014).

59 758 F.3d 390, 393–94 (D.C. Cir. 2014), *rev'g* Halbig v. Sebelius, 27 F. Supp. 3d 1 (D.D.C. 2014). The decision of the court was vacated and a rehearing *en banc* was granted. Halbig v. Burwell, 2014 U.S. App. LEXIS 17099, at *5 (D.C. Cir. Sept. 4, 2014).
However, the case subsequently was held in abeyance pending the decision of the Supreme Court. Halbig v. Burwell, 2014 U.S. App. LEXIS 23434, at *12 (D.C. Cir. Nov. 12, 2014).

60 King v. Burwell, 135 S. Ct. 2480, 2496 (2015). Justices Scalia, Thomas, and

alyze the IRS's interpretation of § 36B without the use of *Chevron* and, in contrast to the lower courts, resorted to applying "extraordinary case" jurisprudence. He reasoned that the deference afforded administrative agencies in their interpretations of statutory ambiguities under *Chevron* is premised on the notion that such ambiguities "constitute[] an implicit delegation from Congress to the agency to fill in the statutory gaps."[61] This implication may be unwarranted in "extraordinary cases" and, according to the Chief Justice, this legislation was one such case:[62]

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. . . . It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. . . . This is not a case for the IRS.[63]

The majority opinion noted that plain statutory language is enforceable according to its terms, but whether such language is in fact plain "'may only become evident when placed in context . . . and with a view to their place in the overall statutory scheme."'[64] The Court found it possible to interpret the language of § 36B either to limit tax credits to enrollees in State Exchanges or to permit enrollees on both State and Federal Exchanges to qualify for tax credits.[65] However, it also believed that the statute intended equivalency between the two types of Exchanges and that denying tax credits to enrollees on Federal Exchanges would create a fundamental difference

Alito dissented. *Id.*

61 *Id.* at 2488 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

62 *Id.* at 2488–89 (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).

63 *Id.* at 2489 (internal citations omitted). Until recently, the level of deference due tax regulations was uncertain. *See supra* note 21 and accompanying text.

64 *King*, 135 S. Ct. at 2489 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132–33).

65 *Id.* at 2490–91.

between the two types of Exchanges.[66] The Court rejected the notion that the words "established by the State" would have been unnecessary if Congress intended the tax credits to be available for qualified individuals enrolled on all Exchanges.[67] It explained that the legislation had been poorly drafted, due in large part to the political machinations that were employed in order to secure its passage.[68] Accordingly, the Court found the phrase "an Exchange established by the State" to be ambiguous.[69] As previously noted, the Court did not defer to the IRS for the resolution of the statute's ambiguity.[70] Instead, it turned to the broader structure of the legislation and to separation of powers principles to clarify the ambiguity and ultimately rule in favor of the government.[71]

In both *Brown & Williamson Tobacco* and *King*, the Court explained its reluctance to invoke *Chevron* was based on its belief that the stakes involved belied an intent by Congress to delegate the issue to the requisite agency. However, the Court in both cases found evidence of Congress's intent with respect to the issue before the Court so that, after a searching inquiry, there was no ambiguity after all. As previously noted, *Auer* deference, in the aftermath of the Court's decision in *Kisor*, ostensibly resembles the Court's approach to *Chevron* deference in what it considers an "extraordinary case."[72]

B. The State Farm *Doctrine*

Chevron inquires whether the substance of a regulatory action is reasonable in light of the statutory language it purports to interpret. However, the fact that an agency's chosen regulatory approach passes muster under *Chevron* does not ensure that courts will sustain the regulatory scheme. Under the APA, a court may invalidate agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[73] One year before *Chevron*,

66 *Id.* at 2489–90.
67 *Id.* at 2492.
68 *Id.*
69 *Id.*
70 *See supra* notes 61–63 and accompanying text.
71 *King*, 135 S. Ct. at 2495–96.
72 *See supra* note 71 and accompanying text.
73 5 U.S.C. § 706(2)(A) (2018). Courts may also set aside agency actions that are contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; taken without observance of required procedure; decisions in certain hearings that are unsupported by substantial evidence; or unwarranted by the facts

the Supreme Court decided *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[74] the seminal case concerning the APA's arbitrary and capricious standard. How and why a particular regulatory approach was chosen is critical to its sustainability notwithstanding *Chevron*. *State Farm*, therefore, provides a check on the latitude that *Chevron* otherwise provides the agencies in their formal rulemaking—a check that is absent in the informal rulemaking context where agencies receive *Auer* deference.

At issue in *State Farm* was the Department of Transportation's rescission of an automobile safety standard.[75] The Department had issued several automobile safety standards between 1967 and 1978 that initially required automobile manufacturers to install seatbelts and that later required the installation of full passive front seat occupant restraint systems—airbags or automatic seatbelts—in model year 1984 vehicles.[76] In 1981, the Department ordered a one year delay in the new standard and eventually rescinded the standard altogether.[77] The regulations were issued pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, which directed the Secretary of Transportation to issue practical and objective motor

to the extent that the facts are subject to a trial *de novo*. *See id.* §§ 706(2)(B)–(F) (2018). Unless a statute provides otherwise, only final agency actions for which there is no other adequate court remedy are reviewable by a court. *See id.* § 704. In general, "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." *Id.* § 702. However, agency actions are not subject to judicial review if a statute precludes such review or the action is committed to agency discretion by law. *Id.* §§ 701(1)–(2). See *supra* note 35 for a discussion of actions committed to agency discretion and the non-delegation doctrine.

74 463 U.S. 29, 29 (1983).

75 *Id.* at 34.

76 *Id.* at 34–37. Originally, passive restraints were required in all vehicles manufactured after August 15, 1975. *Id.* at 35. In the two years preceding the effective date of the passive restraint requirement, vehicles could be manufactured with passive restraint or shoulder belts coupled with an ignition lock. *Id*. The shoulder belt/ignition lock option was selected by most manufacturers, but the unpopularity of this feature led Congress to amend the statute in 1974 to foreclose this option. *Id.* at 36. The effective date was later postponed for approximately one year and then suspended pending the completion of a demonstration project. *Id.* at 37. Finally, a new Secretary of Transportation had the Department of Transportation issue the new standard in 1977. *Id.* The standard was to be phased in first with large cars in model year 1982 and then to all cars by model year 1984. *Id.*

77 *Id.* at 38.

vehicle safety standards and, in so doing, to consider all relevant safety data, the reasonableness and practicality of proposed safety standards, and whether such standards would contribute to carrying out the purpose of the statute.[78]

While vehicle manufactures had planned to meet the standard in approximately ninety-nine percent of new cars through the installation of automatic seat belts, the Department had assumed that airbags would only be installed in sixty percent of new cars.[79] Because most automatic seat belts could be disengaged with relative ease, the Department believed that minimal safety benefits would be derived from the imposition of the standard, thereby rendering the costs to comply with the standard unreasonable.[80] Moreover, the Department believed that the imposition of an expensive yet ineffective standard would negatively impact the public's attitude toward vehicle safety.[81]

State Farm and an automobile insurance trade group challenged the rescission of the standard, and the D.C. Circuit invalidated the rescission because it believed that there was insufficient evidence to support the agency's conclusion regarding seat belt use, and because the Department failed to give proper consideration to either a requirement to install non-detachable seat belts or to a requirement to install airbags.[82] The Supreme Court agreed with the D.C. Circuit that rescission of a regulation was reviewable under the arbitrary and capricious standard, stating that "the revocation of an extant regulation is substantially different than a failure to act" and obligates an agency "to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[83]

78 *Id.* at 33–34.
79 *Id.* at 38.
80 *Id.* at 38–39.
81 *Id.*
82 *Id.* at 39–40.
83 *Id.* at 41–42. The Court, therefore, distinguished the revocation of an existing regulation from the failure to issue the regulation in the first place: the former is subject to judicial review while in general the latter is not. *See id.* The APA does authorize a court to compel agency action that has been unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1) (2018). However, the courts are reluctant to compel agency, and will do so only if they find that the agency has a clear, nondiscretionary duty to act. Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction,* 26 Va. Envtl L.J. 461, 465 (2008). Agency inaction is often considered committed to

According to the *State Farm* court, the arbitrary and capricious standard is narrow and does not sanction the substitution of a court's judgment for that of the agency.[84] An agency must articulate a satisfactory explanation for its action and there must exist a rational nexus between the facts found and the agency's action.[85] The *State Farm* court explained that an agency rule is arbitrary and capricious if the agency: 1) relied on factors that Congress did not intend it to consider; 2) entirely failed to consider an important aspect of the issue in question; 3) offered an explanation that is counterfactual; or 4) offered an explanation that is so implausible that it belies a difference of opinion or agency expertise.[86] It continued to say that while a court may discern an agency's reasoning if such reasoning is not clear, a court cannot provide a reasoned basis for an agency's action that the agency itself has not advanced.[87] The Court held that the rescission of the passive restraint requirement was arbitrary and capricious because the fact that detachable seat belts are ineffective does not provide a rational basis for rescinding the airbag requirement and, with respect to automatic seatbelts, the Department failed to consider evidence regarding the effect that detachable seat belts would have on vehicle safety.[88]

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agency discretion by law or not considered final agency action, and therefore, unreviewable. *See id.* at 465–66.

84 *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

85 *Id.* (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

86 *Id.*

87 *Id.* (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

88 *Id.* at 48–49. The Court found that the Department of Transportation gave no consideration to amending the standard to mandate airbags in light of its position that detachable seat belts are not effective. *Id.* at 49–50. The agency's assertions that airbags create difficulties in the production of small cars and that public reaction to mandatory airbags would be negative were, according to the Court, *post hoc* rationalizations. *Id.* Agency action, if it is to be sustained, must be based on the reasons articulated by the agency when it took action. *Id.* (citing *Burlington Truck Lines*, 371 U.S. at 168; *Chenery*, 332 U.S. at 196; Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 539 (1981)). The Court acknowledged that agencies often operate in the face of uncertainty and that judgments may be drawn from facts and probabilities. *Id.* at 52. However, an agency must do more than merely recite "substantial uncertainty" as its rationale for an action; instead, it must rationally connect the facts found with the choice made and justify why it is rescinding a rule before searching for further evidence. *Id.* at 51–52. The Court found the Department of Transportation's reliance on various data and its consideration of a "continuous passive" seat belt option inadequate. *Id.* at 52–56.

Several scholars and the American Bar Association have asserted that a conceptual distinction between *Chevron* and *State Farm* is difficult to discern because both cases implicate similar inquiries.[89] *State Farm* and *Chevron* will yield the same result in many, if not most, cases. *Chevron* Step Two is unlikely to be met if the regulatory action is supported by counterfactual or implausible justifications or by actions that fail to consider an important aspect of the issue in question. However, despite their oft similarity, *State Farm* and *Chevron* are not the same. *Chevron* examines whether an agency has reasonably interpreted the law, while *State Farm* seeks an articulated reasonable factual and/or policy basis for an agency's action.[90] While *Chevron* rests on notions of agency expertise and congressional intent, justification for *State Farm* includes the need to impose discipline on agency decisions, legitimize agency action, and enable judicial review.[91]

Chevron and *State Farm* can very well yield disparate results. *Chevron* Step Two permits any number of agency choices provided that those choices are reasonable; in contrast, *State Farm* asks why the agency made a particular choice. An agency's choice may be permissible in the abstract yet inadequately justified. In *State Farm*, the Department of Transportation had significant latitude to take action under the statute, and a variety of approaches (for example, passive seat belts only, air bags only, seat belts for certain cars, and air bags for others, or manual seat belts with an interlock or buzzer feature) would probably have passed muster under *Chevron* Step Two.[92] However, the *State Farm* court required the agency to articulate the facts to support the choice it made. Therefore, while failure of *Chevron* Step Two inevitably will result in a concomitant failure of the *State Farm* test, the opposite is not necessarily true. The Ninth Circuit, in a 2019 decision that upheld the validity of Treasury regulations requiring the allocation of a portion of equity-based compensation

89 *See* David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 162–64 (2010).

90 Justice Breyer has noted that the law versus facts distinction between the two tests is counterintuitive because of its implication that the courts are more likely to defer to an agency's interpretation of law than to an agency's factual and policy conclusions. *See* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 765 (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 394 (1986)).

91 *See* Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 Duke L.J. 1811, 1820–23 (2012).

92 *See supra* notes 76–81 and accompanying text.

costs to controlled foreign corporations, stated:

> In the context of the arguments made in this case, we evaluate the validity of the agency's regulations under both *Chevron* and *State Farm*, which "provide for related but distinct standards for reviewing rules promulgated by administrative agencies. *State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking process. *Chevron*, by contrast, is generally used to evaluate whether the conclusion reached as a result of that process—an agency's interpretation of a statutory provision it administers—is reasonable. A litigant challenging a rule may challenge it under *State Farm*, *Chevron*, or both."[93]

A relatively recent tax case in the Federal Circuit nicely captured the distinction between *Chevron* and *State Farm*. At issue in *Dominion Resources, Inc. v. United States* was a regulation interpreting I.R.C. § 263A, a statute that required, *inter alia,* interest to be capitalized on certain expenditures.[94] The regulation adopted a methodology that was decidedly government-friendly and somewhat counterintuitive. The Federal Circuit reversed the decision of the Court of Federal Claims and held that the regulation in question failed both *Chevron* Step Two and the *State Farm* test.[95] Judge Clevenger's concurrence aptly distinguished between *Chevron* Step Two and *State Farm*. He agreed that because the Treasury proffered no reasonable explanation for its interpretation, the regulation should be invalidated under *State Farm*.[96] However, he did not believe that the regulation should have been invalidated under *Chevron* Step Two and articulated several reasons why the Treasury's position merited serious consideration.[97] Judge Clevenger noted that the majority's application of *Chevron* precludes the government from re-promulgating its regulation, no matter how well-formed its reasoning for its interpretation

93 Altera Corp. v. Comm'r, 926 F.3d 1061, 1086 (9th Cir. 2019) (internal citations omitted).
94 681 F.3d 1313, 1314.
95 *Id.*
96 *Id.* at 1320 (Clevenger, J. concurring).
97 *Id.* at 1320–21.

of the relevant statute was.[98] Therein lies the distinction between *Chevron* and *State Farm*: where a regulation fails *Chevron* Step Two, *State Farm* is irrelevant because no explanation can turn an unreasonable position into a reasonable one.

Judge Clevenger's concurrence also evidences that *State Farm* cabins the discretion that *Chevron* provides the agencies. He believed that the regulation in question passed muster under *Chevron* but not under *State Farm*.[99] In essence, despite the fact that multiple interpretations of a statute—including the interpretation put forth by an agency—may be reasonable, the interpretation put forth must be the result of a reasoned process with articulated facts to support the choice made the agency. This process-oriented check on the discretion granted to agencies in their formal rulemaking is absent from the agencies' informal rulemaking that implicates *Auer* deference, and is one reason that *Auer* deference rests on a weaker doctrinal foundation than *Chevron* deference.

II. Deference to Regulatory Interpretations by Agencies: *Seminole Rock* & *Auer*

Deference to agencies' interpretations of their own regulations, so-called *Seminole Rock* or *Auer* deference, predates *Chevron* by four decades. However, such deference has not received the scholarly attention that *Chevron* deference has.[100] *Chevron* deference is premised on the comparative expertise of agencies and the implicit delegation of authority by Congress to the agencies.[101] Regulatory actions entitled to *Chevron* deference have been issued after notice and comment and their promulgation must pass muster under *State Farm*.[102] Whether an agency is entitled to deference in its interpretation of its own regulations raises issues similar to those raised by *Chevron*. However, there are important distinctions between agencies' statutory and regulatory interpretations. This section discusses *Auer d*eference and the similarities and distinctions between such deference and *Chevron* deference. In short, this section points out that despite their similarities, *Auer* rests on a weaker doctrinal foundation than *Chevron* does, and it is no surprise that the *Kisor* decision cabined *Auer* deference to a great extent.

98 *Id.* at 1322–23.
99 *Id.* 1320–21 (Clevenger, J., concurring)
100 *See supra* note 6.
101 *See supra* note 24.
102 *See supra* notes 14, 61–62, and accompanying text.

A. Seminole Rock *&* Auer

The issue in *Bowles v. Seminole Rock & Sand Co.* was the interpretation of a regulation issued by the Office of Price Administration pursuant to the Emergency Price Control Act of 1942.[103] The regulation operated to freeze the price of certain products sold by a seller to the price charged by that seller during March 1942.[104] Under the regulation, the maximum price that could be charged for the product in question was the highest price charged for any product that was delivered or offered for delivery during March of 1942.[105] The regulation further defined the term "highest price charged during March 1942" in a tripartite manner that considered whether a sale was made for delivery in March 1942, in which case the price for such sale established the base price.[106] If no such sale was made, then the regulation looked to offers to sell for delivery in March 1942; and, if this approach yielded no base price, then the price charged by the seller for a different class of product, adjusted for customary price differentials between the products in question, was established as the base price.[107]

The respondent entered into a contract in October 1941 to sell crushed stone for $0.60 per ton and delivered the stone in March 1942.[108] The respondent also entered into a contract in January 1942 to sell crushed stone for $1.50 per ton, but did not deliver this stone until August 1942.[109] The government, applying the first pricing rule, determined that the ceiling price for the respondent was set at $0.60 per ton.[110] Respondent asserted that the first of the three pricing rules was inapplicable because this rule required that both the sale and delivery occur in March 1942.[111] As a result, the respondent argued, the second rule was applicable and therefore established the price ceiling at $1.50 per ton.[112]

The Court stated that in determining the meaning of a regulation, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous

103 325 U.S. 410, 411 (1945).
104 *Id.* at 413.
105 *Id.* at 414.
106 *Id.* at 414–15.
107 *Id.*
108 *Id.* at 412.
109 *Id.*
110 *Id.* at 412–13.
111 *Id.* at 415.
112 *Id.*

or inconsistent with the regulation."[113] This statement underpinned so-called *Seminole Rock* deference (what would later be referred to as *Auer* deference). The statement was made in a rather conclusory manner because the Court offered no reasons why such a deferential standard was warranted. Ironically, a close reading of the case indicates that the Court did not rely on the deference it granted. The Court proceeded to examine the regulations in question and held that the regulations unambiguously called for the result put forth by the government:

> As we read the regulation, however, rule (i) clearly applies to the facts of this case, making 60 cents per ton the ceiling price for respondent's crushed stone. The regulation recognizes the fact that more than one meaning may be attached to the phrase "highest price charged during March, 1942." The phrase might be construed to mean only the actual charges or sales made during March, regardless of the delivery dates. Or it might refer only to the charges made for actual delivery in March. Whatever may be the variety of meanings, however, rule (i) adopts the highest price which the seller "charged . . . for delivery" of an article during March, 1942. The essential element bringing the rule into operation is thus the fact of delivery during March. If delivery occurs during that period the highest price charged for such delivery becomes the ceiling price. Nothing is said concerning the time when the charge or sale giving rise to the delivery occurs. One may make a sale or charge in October relative to an article which is actually delivered in March and still be said to have "charged . . . for delivery . . . during March." We can only conclude, therefore, that for purposes of rule (i) the highest price charged for an article delivered during March, 1942, is the seller's ceiling price regardless of the time when the sale or charge was made.[114]

The Court found further support in other provisions of the

113 *Id.* at 414.
114 *Id.* at 415–16.

regulatory language.[115] Although the Court did note that the consistent administrative interpretation of the rule removed any doubts it had regarding the regulation's interpretation, the Court's opinion belied that it had any doubts once it parsed through the regulatory language.[116] As noted above, the Court did not articulate why deference is due an agency's interpretation of its own regulations. Decades later, however, the Court justified such deference with reasons similar to those used to justify *Chevron* deference: political accountability and expertise.[117] Further support for deference is the fact that an agency is in the best position to interpret regulations that the agency itself issued.[118] Note that *Seminole Rock* was decided prior to the passage of the APA, yet its precedential value was undiminished by the statute's passage. Like *Chevron* deference, the doctrine set forth in *Seminole Rock* was never reconciled with the judicial review provisions of the APA.[119]

A half-century after *Seminole Rock*, the Court decided *Auer v. Robbins*.[120] At issue in *Auer* was whether a Department of Labor regulation implementing the Fair Labor Standards Act's exemption of executive, administrative, or professional employees from the statute's overtime pay requirements was a permissible reading of the statute.[121] The regulation provided that one requirement for exempt status as an executive, administrative, or professional employee was the receipt of a threshold compensation level on a salaried basis.[122] The regulation defined salary-based compensation in part as compensation not subject to reduction because of variations in the quality or quantity of work.[123] The petitioners asserted that the "no disciplinary deductions" element of the salary-basis test was an "un-

115 *Id.* at 416–17.

116 *Id.* at 415–18. The Court cited *Seminole Rock* in a 1989 case in which it applied a deferential standard to the Forest Service's interpretation of its own regulation. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989).

117 *See* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696–97 (1991).

118 *See* Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 152–53 (1991).

119 However, in a portion of the *Kisor* opinion only garnering four votes, Justice Kagan did reconcile such deference with the judicial review provisions of the APA—a reconciliation to which Justice Gorsuch objected. *See infra* notes 209–13, 236 and accompanying text.

120 519 U.S. 452 (1991).

121 *Id.* at 454.

122 *Id.* at 455.

123 *Id.*

reasonable interpretation of the statutory exemption" with respect to public sector employees.[124] The Court invoked *Chevron* and held that the application of the regulation to public sector employees was a permissible construction of the statute.[125]

The Department of Labor's application of the regulation to certain law enforcement personnel was also at issue. The petitioners, two sergeants and a lieutenant, asserted that they were not exempt from the statutory overtime rules because their compensation could be reduced for a variety of disciplinary reasons related to quality and quantity of work issues.[126] The crux of the interpretive dispute centered on whether the "no disciplinary deductions" rule is violated if "a theoretical possibility of [a pay] reduction[]" is possible or whether a more concrete vulnerability to a pay reduction is required.[127] In an amicus brief, the Department of Labor stated its position that the regulatory standard is met if the employer has an actual practice of making pay deductions or if there exists an employment policy that creates a significant likelihood of such deductions – an interpretation under which the overtime exemption would be maintained in this case.[128]

The Court, citing language from the *Seminole Rock* opinion, stated that the Department of Labor's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[129] According to the Court, the Department of Labor's interpretation easily passed muster under this standard.[130] Moreover, the Court believed that the Department's position was the result of fair and considered judgment and not some "*post hoc* rationalizatio[n]" made to defend past agency action from attack.[131] The Court rejected the argument that the Department of Labor's position contradicts the rule that exemptions to the Fair Labor Stan-

124 *Id.* at 457.

125 *Id.* at 457–58. The respondents also raised a procedural objection that implicated issues similar to those that *State Farm* addressed: the Court held that these issues could only be raised pursuant to the procedures set forth in the APA. *Id.* at 458–59. See *supra* notes 74–98 and accompanying text for a discussion of *State Farm*.

126 *Auer*, 519 U.S. at 459–60.

127 *Id.* at 459.

128 *Id.* at 461–62.

129 *Id.* at 461 (internal citations omitted).

130 *Id.*

131 *Id.* at 462 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).

dards Act are to be narrowly construed. According to the Court, this is a rule that governs judicial interpretations of statutes and regulations but does not impose any limitation on an agency in resolving regulatory ambiguities.[132]

Auer deference is not due to an agency if its interpretation is not the result of "fair and considered judgment," if it conflicts with a prior interpretation, or if it represents a "convenient litigating position" or "*post hoc* rationalizatio[n]."[133] Note that *Chevron* deference has been applied regardless of whether the regulation in question conflicted with prior guidance.[134] In some cases, whether a regulation contains an ambiguity is a point of contention.[135]

1. Criticisms

Auer deference is a logical extension of *Chevron* to the extent that it rests on notions of political accountability and subject matter expertise.[136] In fact, who better to discern the meaning of words than the person from whom those words emanated?[137] Some of the criticisms leveled at *Chevron* are applicable to *Auer*; for instance, *Auer*'s deferential standard of review, like *Chevron*'s standard of review, exists uncomfortably with the language of the judicial review provisions of the APA.[138] Critics of *Auer,* however, point to two infirmities applicable only to *Auer* and not to *Chevron*. First, *Auer* deference vi-

132 *Id.* at 462–63.

133 Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (quoting *Auer*, 519 U.S. at 462 and *Bowen*, 488 U.S. at 213).

134 *See supra* note 25 and accompanying text.

135 For example, the Fourth Circuit held that the Department of Education's interpretation of its regulations under Title IX of the Civil Rights Act of 1964 that required schools to treat transgender students consistent with their gender identity was entitled to deference under *Auer. See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715, 719–20 (4th Cir. 2016), *vacated by* 137 S. Ct. 1239 (2017). *But see* Texas v. United States, 201 F. Supp. 3d 810, 828, 832–33 (N.D. Tex. 2016) (granting preliminary injunction and holding that *Auer* deference was inapplicable to the Department's interpretation). The court in *Texas v. United States* stated that *Auer* "deference is only warranted . . . when the language of the regulation is ambiguous" and that an ambiguity does not exist merely because the drafters lacked the foresight to choose language that would contradict any later creative contortions. *Id.* at 832 (citing Moore v. Hannon Food Servs., Inc., 317 F.3d 489, 495, 497 (5th Cir. 1989)).

136 *See supra* notes 29–31, 117 and accompanying text.

137 *See supra* note 113 and accompanying text.

138 Some members of Congress have put forth amendments to § 706 of the APA that would require courts to undertake a *de novo* review of relevant questions of law. *See supra* note 32 and accompanying text.

olates separation of powers principles because it places interpretive and enforcement power in the same hands without the independent interpretive check provided by statutory language that exists under *Chevron*.[139] In contrast, *Chevron*—to the extent it is grounded in implied congressional delegation—is felicitous to separation of powers, although it does raise its own, albeit different, separation of powers issues.[140]

Second, *Chevron* deference is inapplicable to informal agency actions and thus encourages agencies—if seeking deference to their regulatory choices—to act by formal rulemaking, with the attendant notice and comment procedures set forth in the APA.[141] *Auer* deference, by providing deference to the agencies in interpreting their own regulations, encourages the issuance of vague regulatory guidance that provides agencies with the flexibility afforded informal guidance or adjudication, thereby raising concerns about fair notice to the affected constituencies and perhaps aggravating the problem of agency capture encouraged by *Chevron*.[142] *State Farm* may exacerbate a preference for adjudication because it increased the cost of enforcement by regulation through its "hard-look" standard of review.[143] Despite the fact that the Supreme Court expressed a preference for agency rulemaking in *SEC v. Chenery,*[144] it held in that case that the decision to adjudicate is left to the agency's discretion:

> The function of filling in the interstices of the Act should be performed, as much as possible, through

139 *See* Manning, *supra* note 39, at 638–40.

140 *See supra* notes 34–39 and accompanying text.

141 *See* United States v. Mead Corp., 533 U.S. 218, 232–35 (2001) (applying the less deferential *Skidmore* standard of review to informal rules, in this case a customs service ruling); *see also* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (stating that *Skidmore* deference is applicable to informal agency actions such as opinion letters, manuals, guidelines, and policy statements). See *supra* note 19 and accompanying text for a discussion of *Skidmore* deference.

142 *See* Manning, *supra* note 39, at 659–62; *see also supra* notes 32–33 and accompanying text. Whether, in fact, *Auer* deference has resulted in an epidemic of regulatory vagueness is questionable. *See* Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 Colum. L. Rev. L 85, 142 (2019) (providing an analysis of over 1200 agency rules that belies the claim that *Auer* deference will incentivize agencies to issue rules in vague terms).

143 *See* Manning, *supra* note 39 at 663–64; *see also supra* notes 84–86 and accompanying text.

144 332 U.S. 194, 196 (1947).

> this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an 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. In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. [145]

There is common-sense appeal to the idea that an agency is in the best position to determine the meaning of words that it itself promulgated. Moreover, deference to an agency's interpretation of its own regulations is supported by rationales that have similarly supported *Chevron* deference. However, the distinctions between *Auer* and *Chevron* deference are significant and the doctrinal under-

145 *Id.* at 202–03 (internal citations omitted).

pinnings of *Auer* are less sturdy than *Chevron*'s. The *Kisor* case laid bare *Auer's* foundational weakness.

III. *KISOR*: THE FUTURE OF *AUER* & *CHEVRON*

The Court's decision in *Kisor v. Wilkie* did little to clarify when and how courts should employ *Auer* deference. Instead, the *Kisor* Court left uncertain the future of *Auer* deference and signaled the possibility that the *Chevron* doctrine's life expectancy may be shorter than previously imagined. The Court's decision in *Kisor* begs two questions. First, is there anything left of *Auer* deference, or has it been replaced, for all practical purposes, with something resembling *Skidmore* deference? Second, despite Chief Justice Roberts's and Justice Kavanaugh's admonitions, does *Kisor* portend a limited shelf life for *Chevron*?[146]

A. Kisor

James Kisor was a veteran of the Vietnam War and in December 1982, filed a claim for disability benefits due to post-traumatic stress disorder (PTSD) with the Department of Veteran's Affairs.[147] In March of 1983, a psychiatric examination was obtained from an agency psychiatrist in which the examiner did not diagnose Mr. Kisor as suffering from PTSD but instead diagnosed him with two personality disorders, neither of which could serve as a basis for a service connected disability.[148] Consequently, the Department of Veterans Affairs denied his claim in May 1983.[149] Mr. Kisor submitted a request to reopen his case in 2006, and, during the pendency of this request, he submitted a psychiatric evaluation that did diagnose him with PTSD.[150] A few months later, an examiner from the Veterans Administration made a similar diagnosis.[151] Ultimately, Mr. Kisor was awarded disability benefits effective June 5, 2006, the date

146 *See supra* note 231 and accompanying text.

147 Kisor v. Shulkin, 869 F.3d 1360, 1361 (Fed. Cir. 2017), *aff'g* Kisor v. McDonald, No. 14-2811, 2016 U.S. App. Vet. Claims LEXIS 73 (Jan. 27, 2016). David Shulkin replaced Robert McDonald as Secretary of Veterans Affairs in February 2017. Dave Phillips, *Head of Veterans Health System is Trump's Pick to Lead Veterans Affairs*, N.Y. TIMES (Jan. 11, 2017), https://nytimes.com/2017/01/11/us/david-shulkin-secretary-department-veterans-affairs.html?searchResultPosition=6.

148 *Kisor*, 869 F.3d at 1361.

149 *Id.* at 1361–62.

150 *Id.* at 1362.

151 *Id.*

he requested the reopening of his case.[152] Mr. Kaiser filed an administrative appeal asserting that the effective date of the award should be May 1983, the date his initial claim for disability was denied.[153] His appeal was rejected, a decision that was upheld by the United States Court of Appeals for Veterans Claims and by the Federal Circuit.[154]

Mr. Kisor's claim was reopened pursuant to a regulation that permits claims to be reopened on the submission of new and material evidence—in this case, the psychiatric diagnosis of PTSD.[155] However, another regulatory provision provided for reconsideration of a claim. This second provision mandated the reconsideration of a case by the Veterans Administration if the agency "receive[d] or associate[d] with the claims file *relevant* official service department records that existed" but that had not been part of the claims file when the agency originally decided the claim.[156] In contrast to reopened claims, the effective date of reconsidered claims was retroactive to the date that the Veteran's Administration received the previously decided claim or to the date the entitlement arose, whichever is later.[157] As a result, under this regulatory provision, the effective date of Mr. Kisor's benefits would have been December 1982, the date the Veterans Administration received his claim.[158]

The case rested on the interpretation of the term "relevant" in the regulation cited above.[159] In addition to the psychiatric evaluation that Mr. Kisor obtained in 2007, he submitted personnel records that documented his service in Vietnam.[160] Mr. Kisor asserted that these records were "relevant" department service records, thereby entitling his claim to reconsideration under the regulation.[161]According to Mr. Kisor, a record was relevant for this purpose if it had the tendency to make the existence of any fact of consequence to the determination at issue more or less probable.[162] He argued that be-

152 *Id.*
153 *Id.* at 1363.
154 *Id.* at 1361, 1369.
155 *Id.* at 1362 n.3.
156 *Id.* at 1363.
157 *Id.* (citing 38 C.F.R. § 3.156(c)(1) (2017)).
158 *Id.* at 1364.The effective date for awards that have been reconsidered is set forth in 38 C.F.R. § 3.156(c)(3). *See id.* at 1363.
159 *Id.* at 1365–66.
160 *Id.* at 1362.
161 *Id.* at 1363–64.
162 *Id.* at 1365–66.

cause his personnel records demonstrated his exposure to in-service stressors, they were therefore relevant.[163]

The government, in contrast, posited that records are not relevant for this purpose if, in light of other evidence, the agency had no obligation to consider the records.[164] In this case, Mr. Kisor's service record and its support for the existence of an in-service stressor was not in dispute at the time the original claim was examined; at issue was the existence or absence of PTSD.[165]

The court held that the term "relevant" was ambiguous because it was not clear whether "relevant" meant that the records had to cast doubt on an agency's decision, that the records related more broadly to the claim, or that the records had to meet some other standard.[166] The Federal Rules of Evidence provided support for the petitioner's interpretation while the appellant found support for its interpretation in case law, legal dictionaries, and treatises.[167] The court cited, *inter alia, Seminole Rock* and *Auer*, and held that the Veteran's Administration's interpretation of the regulation was neither plainly erroneous nor inconsistent with the applicable regulatory framework.[168] Accordingly, the Federal Circuit upheld the government's interpretation of the regulation.[169]

On June 26, 2019, the Supreme Court unanimously vacated the judgement of the Federal Circuit and remanded the case for further proceedings.[170] Justice Kagan delivered the opinion of the Court in which *Auer* deference retained a role in construing regulations, but a role whose scope the Court limited:[171] "The deference doctrine we describe is potent in its place, but cabined in its scope."[172]

163 *Id.* at 1366.
164 *Id.*
165 *Id.*
166 *Id.* at 1367.
167 *Id.* at 1367–68.
168 *Id.*
169 *Id.* at 1369.
170 Kisor v. Wilkie, 136 S. Ct. 2400, 2424 (2019). Robert Wilkie replaced David Shulkin as Secretary of Veterans Affairs in July 2018. Sarah Mervosh, *Senate Confirms Robert Wilkie as Veterans Affairs Secretary*, N.Y. Times (July 23, 2018), https://www.nytimes.com/2018/07/23/us/politics/senate-confirms-robert-wilkie-veterans-affairs.html?searchResultPosition=3. Justice Roberts concurred in part as did Justice Gorsuch whose concurrence was joined by Justice Thomas and joined in part by Justices Kavanaugh and Alito. *Id.* at 2424–25, 2448.
171 *Kisor*, 136 S. Ct. at 2408.
172 *Id.*

The majority of the Court noted that agency regulations may contain genuine ambiguities and as a result may not clearly address every issue or, in certain cases, might be susceptible to more than one reasonable interpretation.[173] These ambiguities could arise from careless drafting or from "well-known limits of expression or knowledge. The subject matter of a rule 'may be so specialized and varying in nature as to be impossible'—or at any rate, impracticable—to capture in its every detail."[174] Finally, such ambiguities can surface when a problem arises that was not reasonably foreseeable at the time the regulation was drafted.[175] The Court provided several examples of regulations whose application in a particular situation was susceptible to more than one reasonable interpretation.[176]

According to the majority, *Auer* deference "is rooted in the presumption that Congress would generally want an agency to play the primary role in resolving regulatory ambiguities."[177] Because Congress rarely is explicit with respect to whether it has assigned such interpretive responsibility to an agency or to the courts, the courts have had to presume Congress's intent in this respect:

> We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.[178]

The Court articulated three reasons in support of the aforementioned presumption. First, it stated that the agency that authored the rule is in a better position to determine its meaning than a court.[179] According to the Court, the persuasiveness of this rationale is diminished if the ambiguity arises from the application of

173 *Id.* at 2410.
174 *Id.* at 2410 (quoting SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)).
175 *Id.*
176 *Id.* at 2410–11.
177 *Id.* at 2412.
178 *Id.* (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991)).
179 *Id.*

the regulation to an issue that the agency failed to anticipate when drafting the rule or when the interpretation is made long after the promulgation of the regulation.[180] That said, the majority reasoned that for contemporaneous interpretations, the point holds true.[181] Second, the Court stated that *Auer* deference is supported by the notion that the resolution of genuine regulatory ambiguities often involves policy making.[182] It explained that agencies have comparative advantages over the courts in conducting factual investigation and cost-benefit analysis, and in understanding scientific and technical matters.[183] Moreover, in addition to their institutional expertise, the Court wrote that agencies are accountable politically for their policy decisions.[184] Finally, the majority of the Court explained that deference to agencies' interpretations of their own regulations helps to maintain uniformity in the application of law.[185] It said that Congress prefers uniform administrative decisions to piecemeal litigation, which is susceptible to divergent conclusions, particularly for complex and highly technical matters.[186] Thus, the Court stated, *Auer* deference promotes consistency in federal regulatory law.

Thus having set forth the justifications for *Auer* deference, the Court then cautioned that such deference is not warranted in all cases and admitted that the Court had, in the past, resorted to such deference reflexively.[187] Justice Kagan's opinion proceeded to reinforce the inherent limits in the *Auer* doctrine. First, she reasoned for the Court, *Auer* deference is inapplicable unless the regulation at issue is genuinely ambiguous—a conclusion that a court should reach only after exhausting all "'traditional tools' of construction."[188] The application of such tools may require a "taxing inquiry" that "carefully consider[s] the text, structure, history, and purpose of a regulation" as if there was no agency on which a court could rely for guidance.[189] Many "seeming ambiguities" will be resolved in this

180 *Id.* at 2412–13.
181 *Id.* at 2412.
182 *Id.*
183 *Id.* at 2413.
184 *Id.*
185 *Id.*
186 *Id.* at 2413–14.
187 *Id.* at 2414–15 (internal citations omitted).
188 *Id.* at 2415 (quoting Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984)).
189 *Id.*

manner.[190]

Justice Kagan continued to explain that the rigorous application of interpretative tools will be useful even if such tools did not eliminate the seeming ambiguity in the regulations because this analysis will establish the outer bounds of permissible interpretations of the regulation in question.[191] Her opinion reasoned that the agency's interpretation must come within this permissible zone of ambiguity.[192] Justice Kagan gave lie to the notion that agency constructions of regulations are entitled to greater deference than their interpretations of statutes; she wrote for the Court that *Seminole Rock* and *Auer* do not provide greater deference to agencies than *Chevron* does.[193]Finally, the majority opinion stated that an agency's reasonable interpretation of a genuinely ambiguous regulation is not necessarily entitled to *Auer* deference.[194] As previously noted, *Auer* deference is predicated, in part, on congressional intent regarding who should resolve regulatory ambiguities.[195]

The Court then set forth "some especially important markers for identifying when *Auer* deference is and is not appropriate."[196] First, it reasoned that the interpretation at issue must be the agency's authoritative or official position and not an *ad hoc* statement that does not reflect the agency's views on the matter.[197] The majority, in a nod to bureaucratic realities, stated that authoritative interpretations need not emanate from agency heads or top agency officials but must emanate from actors understood to make authoritative policy and using vehicles that are understood to convey such policy.[198]

Second, the Court argued that *Auer* deference is appropriate if the agency's interpretation implicates the agency's substantive expertise—expertise which underpins the presumption of congressional delegation.[199] According to the *Kisor* court, the case for deference diminishes when the subject matter at issue is far removed from the agency's typical duties or if it falls within the scope of another agen-

190 *Id.*
191 *Id.* at 2415–16.
192 *Id.*
193 *Id.* at 2416.
194 *Id.*
195 *Id.*; *see also supra* note 117–18 and accompanying text.
196 *Kisor*, 139 S. Ct. at 2416.
197 *Id.*
198 *Id.*
199 *Id.* at 2417.

cy's authority.[200] Therefore, it explained, deference is appropriate in technical matters or matters that sound in policy, but inappropriate in cases where the issue's resolution more naturally resides with a court.[201]

Finally, Justice Kagan's opinion stated that *Auer* deference is appropriate only if the agency's interpretation reflects its "'fair and considered judgment.'"[202] Consequently, the Court found that deference is not warranted for a "'convenient litigation position' or '*post hoc* rationalizatio[n] advanced'" to justify past action.[203] Moreover, it explained that deference is unwarranted to a new agency interpretation that unfairly disrupts the expectations of regulated parties or imposes retroactive liability for longstanding conduct that the agency had not previously addressed.[204] The majority thus provided a deference doctrine "not quite so tame as some might hope, but not nearly so menacing as they might fear."[205]

The Court then explained its reasons for dismissing the petitioner's contention that *Auer* and *Seminole Rock* should be abandoned. The petitioner had asserted that *Auer* deference is inconsistent with § 706 of the APA.[206] As noted above, this provision states that courts shall determine the meaning and applicability of the terms of an agency action.[207] The petitioner argued that *Auer* thwarts meaningful judicial review.[208] The Court dismissed this notion for several reasons. First, the inquiry required of a court in order for it to determine whether deference is warranted constitutes "meaningful judicial review."[209] Second, it explained that § 706 does not specify that the standard of review to be employed by a court in reviewing agency action be a *de novo* standard.[210] *Auer* deference is premised, in large part, on the presumption that Congress delegated considerable interpretive latitude to agencies; therefore, in situations where such

200 *Id*.
201 *Id.*
202 *Id.* (internal citations omitted). Note that in *King v. Burwell*, the Court believed that Congress would not delegate matters that implicate health care policy to the IRS. *See supra* note 63 and accompanying text.
203 *Kisor*, 139 S. Ct. at 2417 (internal citations omitted).
204 *Id.* at 2417–18.
205 *Id.* at 2418.
206 *Id.*
207 *Id.*; *see also supra* note 36 and accompanying text.
208 *Kisor*, 139 S. Ct. at 2418–19.
209 *Id.* at 2419.
210 *Id.*

presumption holds, deference to agency interpretations does not offend, but rather comports with, § 706.[211] Finally, the Court said that the APA did not significantly disturb the standards of judicial review at the time of its enactment.[212] *Seminole Rock* was on the books at the time of its enactment and, in any event, *de novo* review of agency interpretations was not required by the law at that time.[213]

The petitioner had also asserted that the application of *Auer* deference to interpretive rules gives such rules the force and effect of law without having first been put through the rigors of the APA's notice and comment procedures.[214] The majority opinion, citing *Perez v. Mortgage Bankers Association*, dismissed this contention because interpretative rules do not have the force and effect of law.[215] It noted that agency enforcement actions must be brought pursuant to a legislative rule which has gone through the required notice and comment procedures and the final say on whether an agency's interpretation of a legislative rule is valid rests with the courts.[216] "No binding of anyone occurs merely by the agency's say-so."[217] In fact, *Auer* deference is conditioned upon the same procedural values embodied in the APA and, therefore, "reinforces, rather than undermines, the ideas of fairness and informed decisionmaking at the core of the APA."[218]

Justice Kagan's opinion forcefully rejected the notion that *Auer* deference encourages agencies to issue vague rules. She noted that no evidence supports this assertion and common sense appears to lean in quite the opposite direction.[219] Additionally, she ex-

211 *Id.* The same rational supports *Chevron* deference in the face of similar attacks. *Id.* (citing Arlington v. FCC, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting)).

212 *Id.*

213 *Id.* at 2420.

214 *Id.* The notice and comments requirements do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.
5 U.S.C. § 553(b) (2012). The D.C. Circuit held that interpretive rules that revise an existing interpretive rule are subject to the Act's notice and comment requirements. *See* Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 586 (1997). The Supreme Court scuttled the so-called *Paralyzed Veterans* doctrine in *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015).

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

216 *Id.*

217 *Id.*

218 *Id.* at 2420–21.

219 *Id.* at 2421.

plained that regulators want their regulations to be effective and, consequently, will strive for clarity in their rules.[220] Moreover, she wrote that regulated parties prefer clarity to the uncertainty of vague rules and will push agencies to issue clear rules.[221] Justice Kagan also stated that vague rules reduce the likelihood that the policy choices embodied by those rules will survive future administrations who can use the previous administration's lack of clarity to reinterpret the rules to their liking.[222] Finally, Justice Kagan rejected the petitioner's contention that *Auer* deference violates separation of powers principles.[223] As was noted elsewhere in the opinion, the *Kisor* Court found that *Auer* deference does not usurp the interpretive role of the courts and the commingling of legislative and judicial functions within an agency has long been permitted.[224]

Justice Kagan's opinion concluded with a discussion of why *stare decisis* weighed heavily against the petitioner in this case. She wrote that *Auer* deference has been applied in thousands of cases, that abandoning them would call into question many settled constructions of rules, and that deference is not "unworkable," nor is it a "doctrinal dinosaur."[225]

Having placed—"reinforced," in the Court's words—limitations on *Auer* deference, the Court held that the Federal Circuit "jumped the gun in declaring the regulation ambiguous."[226] Moreover, the Supreme Court found that the Federal Circuit assumed too quickly that *Auer* deference should apply in the event that the regulation contained a genuine ambiguity.[227] Accordingly, the Court vacated the judgment and remanded the case back to the Federal Circuit.[228]

Chief Justice Roberts, in a brief concurrence, opined that *Auer* deference, as reformulated by the majority's decision, shares many similarities with the *Skidmore* standard of review preferred by Justice Gorsuch in his concurring opinion.[229] In the Chief Justice's

220 *Id.*
221 *Id.*
222 *Id.*
223 *Id.* at 2421–22.
224 *Id*. at 2421–22.
225 *Id.* at 2422 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) and Kimble v. Marvel Entm't, L.L.C., 576 U.S. 2409, 2411 (2015)).
226 *Id.* at 2423.
227 *Id.* at 2424.
228 *Id.*
229 *Id.* (Roberts, C.J., concurring). Justices Kavanaugh and Alito also shared this

opinion, cases in which *Auer* deference is warranted will largely overlap with those cases in which the failure of a court to be persuaded by an agency's interpretation is unreasonable.[230] Moreover, the Chief Justice pointedly noted that the Court's decision in this case did not touch on the issue of *Chevron* deference, which, according to the Chief Justice, raises issues distinct from *Auer*.[231]

The tenor of Justice Gorsuch's concurrence, joined by Justice Thomas and, in part, by Justices Kavanaugh and Alito, is succinctly captured in one sentence: "Respectfully, I would stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court of appeals to afford Mr. Kisor its best independent judgment of the law's meaning."[232] Justice Gorsuch took exception with Justice Kagan's historical account of judicial deference to agency interpretations and stated that *Seminole Rock*, the genesis of *Auer* deference, was decided by the Court's independent analysis of the provision at issue.[233] Moreover, for many years after the decision, *Seminole Rock* deference was closely aligned with *Skidmore* and its multi-factor analysis.[234]

In contrast to Justice Kagan, Justice Gorsuch believed that *Auer* deference violated both § 706 and § 553 of the APA.[235] According to Justice Gorsuch, any time a court, "in deference to an agency, adopts something other than the best reading of a regulation," it abdicates the duty of judicial review assigned to it by § 706.[236] Moreover, Justice Gorsuch argued that agency interpretations of a substantive regulation are, for all practical purposes, new regulations.[237] Justice Gorsuch wrote that *Auer* gives controlling weight to informal agency interpretations that provide the public with no advance notice or opportunity to comment and thus "supplies agencies with a shortcut around the APA's required procedures for issuing

belief, although they would have preferred, like Justices Gorsuch and Thomas, that *Auer* be overturned. *See id.* at 2425, 2448 (Kavanaugh, J., concurring).

230 *Id.* at 2424–25 (Roberts, C.J., concurring).

231 *Id.* at 2425. Justices Kavanaugh and Alito agreed with the Chief Justice on this point. *See id.* at 2449 (Kavanaugh, J., concurring).

232 *Id.* at 2426 (Gorsuch, J., concurring).

233 *Id.* at 2427–28; *see also* supra notes 114–17 and accompanying text.

234 *Kisor*, 139 S. Ct. at (Gorsuch, J., concurring). See *supra* note 19 and accompanying text for a discussion of *Skidmore* deference.

235 *See Kisor*, 139 S. Ct. at 2432–35 (Gorsuch, J., concurring).

236 *Id.* at 2432 (Gorsuch, J., concurring).

237 *Id.* at 2434.

and amending substantive rules."[238] Justice Gorsuch also believed that *Auer* deference "sits uneasily" with Article III of the Constitution and "represents no trivial threat" to foundational separation of powers of principles.[239]

With respect to the policy arguments made in support of *Auer* deference, Justice Gorsuch resorted to the admonition that regulations should be accorded their plain meaning and not a meaning based on the drafters' intent.[240] Furthermore, ascertaining the drafters' intent is unlikely if the evidence of such intent is put forth by current agency personnel who may or may not share the views of the drafters.[241] The utility of pre-enactment legislative history in ascertaining the meaning of a statute is subject to debate, Justice Gorsuch wrote, "[s]o why on earth would we give 'controlling weight' to an agency's statements about the meaning of an already-promulgated regulation?"[242] Justice Gorsuch was not moved by appeals to political accountability and technical expertise in support of deference; he noted that turning judges into "rubber stamps for politicians" is not a prudent exercise in political accountability, but rather is a surrender of "the judgment embodied in the Constitution and the APA that courts owe the people they serve their independent legal judgment about the law's meaning."[243]

Additionally, Justice Gorsuch wrote that with respect to technical expertise, courts should afford careful consideration of an agency's views but remain open to competing evidence because experts are sometimes wrong.[244] Finally, Justice Gorsuch dismissed the notion that *Auer* deference promotes consistency and uniformity in the law for two reasons. First, he stated that the judicial system can achieve uniform interpretations of regulations without resorting to *Auer* deference.[245] Second, he stated that the disagreements regarding when and how to apply *Auer* have hardly worked to promote consistency and uniformity.[246] Justice Gorsuch wrapped up his concurring opinion by providing five reasons for overturning *Auer* and

238 *Id.*
239 *Id.* at 2347–49.
240 *Id.* at 2441.
241 *Id.*
242 *Id.* at 2442.
243 *Id.*
244 *Id.* at 2442–43.
245 *Id.* at 2443.
246 *Id.*

to make *Skidmore* the standard for judicial review:[247] he argued that (1) no persuasive rationale supports *Auer*; (2) *Auer* has not proven to be a workable standard; (3) *Auer* is out of step with the way courts normally interpret written laws; (4) the explosive growth of the administrative state has increased *Auer*'s potential for mischief; and (5) *Auer* has generated no serious reliance interests.[248]

B. Is Auer *Viable and Should it be?*

In certain respects, the *Kisor* court's iteration of the circumstances under which *Auer* deference is appropriate are unremarkable, not new, and perhaps speak to the reflexive nature in which courts had been resorting to *Auer*.[249] In other respects, rigorous adherence to the Court's strictures may morph *Auer* deference into a combination of the *Chevron* "extraordinary case" and *State Farm* or into a version of *Skidmore* deference—in essence no deference at all. At the very least, the Court has failed to introduce a semblance of certainty into whether and to what extent *Auer* deference remains applicable.

Justice Kagan's majority opinion held that *Auer* deference is inapplicable unless, after exhausting all "'traditional tools' of construction," the regulation at issue is genuinely ambiguous—a conclusion that may require a court to carefully consider the "text, structure, history, and purpose of a regulation" as if there was no agency on which a court could rely for guidance.[250] The predication of deference on the existence of a genuine ambiguity is hardly noteworthy and speaks more to the courts' cavalier approach to deference than to the imposition of a new standard—a fact Justice Kagan herself admitted.[251]

The Court suggested a regulatory ambiguity exists when a regulation does not clearly address the issue at hand or is susceptible to more than one reasonable interpretation.[252] However, is it conceivable that regulatory ambiguities exist after all traditional tools of construction have been exhausted? More likely, such tools will provide cover for the courts to discern the true intent of a regulation based on its structure, history, and purpose. The ambiguity will vanish in the face of a court's opinion on the regulation's best

247 *Id.* at 2445–47.
248 *See id.* at 2445–48.
249 *See supra* note 187 and accompanying text.
250 *See supra* notes 181–82 and accompanying text.
251 *See supra* note 187 and accompanying text.
252 *See Kisor*, 139 S. Ct. at 2410.

interpretation. Justice Kagan predicted that many ambiguities will be resolved at this point,[253] and Justice Kavanaugh predicted most ambiguities will be thus resolved.[254] The exception to *Chevron* deference that the Court carved out for extraordinary cases may be instructive as to what lies in store for *Auer*.

The Court in both *FDA. v. Brown & Williamson Tobacco Corp* and *King v. Burwell* refused to grant the FDA and IRS, respectively, *Chevron* deference because the importance of the issues in question belied the notion that Congress delegated the authority to resolve them to the affected agencies.[255] The Court in both cases did exactly what Justice Kagan admonished the courts to do before concluding *Auer* deference is warranted: it resolved the ambiguity by resorting to tools of construction. In *Brown & Williamson Tobacco*, the Court explained in twenty-three pages of its opinion that Congress indeed had foreclosed the FDA from regulating tobacco products.[256] Congress's intent, as the Court exhaustively made evident, was clear, and it should have made no difference that this case was extraordinary.[257]

Likewise, after parsing the statute as a whole, the Court in *King v. Burwell* came to the conclusion that Congress intended to make tax credits available to enrollees on Federal Exchanges.[258] Remarkably, the Court found an ambiguity in the statutory language that, as the dissent pointedly noted, did not exist, and then proceeded to apply canons of construction to resolve the very ambiguity it created.[259] Perhaps Justice Kagan's admission that *Auer* has been ap-

253 *Id.* at 2415.

254 *Id.* at 2448 (Kavanaugh, J., concurring).

255 *See supra* notes 50, 61–63 and accompanying text.

256 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133–56 (2000).

257 *Id.* at 159–60.

258 *See supra* notes 64–71 and accompanying text.

259 The dissenting opinion, authored by Justice Scalia, acerbically disagreed with the majority's conclusion and could be used as a primer in the canons of statutory construction. Justice Scalia believed that Congress could not have "come up with a clearer way to limit tax credits to State Exchanges than to use the words 'established by the State.'" King v. Burwell, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting). To be sure, context always is a relevant consideration in statutory interpretation but context "is a tool for understanding the terms of the law, not an excuse for rewriting them." *Id.* Justice Scalia disagreed with the Chief Justice's belief that the phrase "established by the State" was surplusage caused by the circumstances surrounding the passage of the legislation: redundant language, according to Justice Scalia, is commonly used by lawmakers but the majority rendered the

plied reflexively may apply to the courts' resort to *Chevron* deference. After all, why should a searching inquiry to find Congress's intent be limited to extraordinary cases?

In *Kisor*, Justice Kagan set forth several "markers" for when *Auer* deference is appropriate, one of which is that the interpretation in question represent the agency's fair and considered judgment.[260] Thus, deference is not appropriate for an agency action that represents a convenient litigation position or a *post hoc* rationalization put forth to justify past action, that unfairly disrupts the expectations of regulated parties, or that imposes retroactive liability for longstanding conduct that the agency had previously ignored.[261] These markers did not impose new limitations to the use of *Auer* deference, for they have been set forth by the Court in the past.[262] Perhaps Justice Kagan was reiterating these limitations or perhaps she was gently reminding the courts that these markers are not to be reflexively dismissed. In any event, rigorous application of the "fair and considered judgment" standard moves *Auer* closer to *State Farm*– regardless of the merits of the position, it matters why and how that position was formulated.

As Chief Justice Roberts and Justice Kavanaugh both noted, the limitations that the Court imposed on the use of *Auer* deference have caused such deference to closely resemble the standard of review preferred by Justice Gorsuch: the *Skidmore* standard.[263] Under *Skidmore*, the deference due an agency depends on a number of factors including the thoroughness of the agency's deliberations, the soundness of its reasoning, its consistency with earlier and later pronouncements, and other factors which provide the agency with the power to persuade.[264] As noted earlier, Justice Scalia opined that

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phrase in question a nullity, thereby violating a virtually absolute principle of statutory construction. *Id.* at 2498. Moreover, Justice Scalia pointed out that this language was repeated seven times throughout the statute but was not repeated throughout the entire statute, and common sense dictates that the use of a phrase in some cases and another phrase in other cases indicates that the two phrases have contrasting meanings. *Id*. at 2499. He also wrote in his dissent that the majority's interpretation rendered various statutory provisions nonsensical. *Id.*

260 *See supra* note 202 and accompanying text.

261 *See supra* notes 203–04 and accompanying text.

262 *See supra* note 133 and accompanying text.

263 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2423 (2019) (Roberts, C.J., concurring); *id*. at 2447–48 (Kavanaugh, J., concurring).

264 *See supra* note 19 and accompanying text.

Skidmore offered no deference whatsoever. [265]

The validity of courts granting *Auer* deference to agency interpretations of ambiguities surviving the application of the courts' interpretive toolbox is questionable. Ambiguity of regulatory language may be a manifestation of opacity on the part of the agency in making its intent known. Alternatively, the agency may have failed to contemplate the issue because subsequent developments—technological or otherwise—have presented a fact pattern that the agency could not have foreseen. It is a common-sense assumption that the more critical and central an ambiguity is to a regulatory scheme, the more likely it is that the agency intended a particular result. Arguably, the case for *Auer* deference is strongest in such circumstances because the agency is in the best position to explain the intent of their own regulations. However, this rationale does not hold if the issue in question was not foreseen by the agency at the time the regulations were promulgated.

However, even the strongest case for *Auer* deference is not strong enough to justify the continued existence of the doctrine. It should not matter why a regulation is vague. Justice Kagan's opinion squarely addressed the co-existence of *Auer* and the judicial review provisions and notice and comment requirements of the APA in *Kisor*.[266] Although *Auer* deference and *Chevron* deference are distinct, they are closely related. *Chevron* deference is due only if the regulations in question have been subjected to notice and comment.[267] If the agency action involved a statutory interpretation, then *Chevron* deference would be unwarranted unless that interpretation was a final rule subject to notice and comment. However, if the agency action involved an interpretation of its own regulation, then *Auer* deference could be applied. The interspersing of a regulation between a statute and a regulatory interpretation should not entitle the latter to the application of a deferential standard of review to which it would not have been entitled had no intervening regulation been issued.

For example, pursuant to the Wire Act, a person who is "engaged in the business of betting or wagering" and knowingly "uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the

265 *See* United States v. Mead, 533 U.S. 218, 239–40, 259 (2001) (Scalia, J., dissenting).

266 *See supra* notes 206–13 and accompanying text.

267 *See supra* note 22 and accompanying text.

placing of bets or wagers on any sporting event or contest" is subject to criminal sanctions.[268] Assume that in 1992 the Department of Justice issued regulations after the requisite notice and comment that stated that fantasy sports contests are not considered to be a form of sports gambling and, therefore, are not subject to the Wire Act. The regulatory language clearly applied the exemption to season-long fantasy contests, the only form of fantasy sports existent at the time. Twenty years later, the emergence of the internet and the ingenuity of the fantasy sports industry led to the rapid growth of daily fantasy sports contests.[269] Assume that the regulatory language could be interpreted to exempt all fantasy sports contests from the Wire Act or, alternatively, to exempt only season-long fantasy contests. Assume further that the Department of Justice issues an opinion from the Office of Legal Counsel that states that the Wire Act does apply to daily fantasy sports contests. Assuming that such an opinion qualifies as an official pronouncement of the Department of Justice, is the result of the Department's fair and considered judgment, and that the regulation at issue is indeed ambiguous, should *Auer* deference be accorded such an opinion?[270]

If the Department had never issued the 1992 regulation, then the Department's position as set forth in its formal opinion would not be entitled to *Chevron* deference because it was not subject to notice and comment. However, because in this hypothetical a regulation was issued suddenly, *Auer* deference would be warranted. Keep in mind that the regulation evidenced no intent regarding daily fantasy sports contests because they did not exist at the time that the regulation was issued. Both the regulations and the legal opinion interpret the application of the Wire Act, but only the regulations

268 18 U.S.C. § 1084(a) (2018). Violations are subject to fines, imprisonment for no longer than two years, or both. *Id.*

269 Daily and season-long fantasy sports contests share the same basic premise but there are significant differences between the two types of contests. For a discussion of season-long and daily fantasy sports contests and the distinctions between the two, see KEVIN BONNETT, ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS (2014).

270 Of course, it is by no means certain that such a pronouncement would pass muster as the Department's fair and considered judgment. For example, given the punitive nature of the statute, any expansion of its application—particularly to activities that had existed for some time—may cause a court to reject the application of *Auer*. *See, e.g.*, Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012) (rejecting *Auer* deference when the action in question would have imposed significant liability for actions earlier tolerated and thus create an unfair surprise).

were issued subject to notice and comment. Justice Gorsuch's objection to *Auer* deference due to the notice and comment requirements of the APA makes this point:

> *Auer* is also incompatible with the APA's instructions in § 553. That provision requires agencies to follow notice-and-comment procedures when issuing or amending legally binding regulations . . . but not when offering mere interpretations of those regulations. An agency wishing to adopt or amend a binding regulation thus must publish a proposal in the Federal Register, give interested members of the public an opportunity to submit written comments on the proposal, and consider those comments before issuing the final regulation. . . . By contrast, an agency can announce an interpretation of an existing substantive regulation without advance warning and in pretty much whatever form it chooses. . . . For all practical purposes, "the new interpretation might as well be a new regulation." *Auer* thus obliterates a distinction Congress thought vital and supplies agencies with a shortcut around the APA's required procedures . . . .[271]

Prior to the Court's decision in *Kisor,* Professors Kristen Hickman and Mark Thomson noted that support for *Auer* deference on pragmatic grounds weakens if *Auer* is not simple and straightforward to apply.[272] They provided a non-exhaustive list of issues that *Auer* deference has created.[273] For example, they stated that courts have disagreed on the application of certain exceptions to *Auer* deference such as agency actions that represent "convenient litigating positions" or "post hoc rationalizations" or that result in "unfair surprise."[274] Unfortunately, the Court failed to resolve any of these issues. Arguably, the only question that the Court answered is how *Auer* can co-exist with the judicial review provisions of the APA. Unfortunately, even this answer has limited utility, for it failed to

271 Kisor v. Wilkie, 139 S. Ct. 2400, 2434 (2019) (Gorsuch, J., concurring).
272 Kristen E. Hickman & Mark R. Thomson, *The Chevronization of* Auer, Minn. L. Rev. Headnotes 103, 105 (2019).
273 *Id.* at 105–06.
274 *Id.*

receive the support of the Chief Justice and the four concurring Justices.[275]

The Court's decision in *Kisor* has left *Auer* deference standing, but wobbly. The majority opinion requires that the agency action in question survive a gauntlet of inquiries that exhaust the judicial toolbox in order for the agency's action to receive deference from a court. It remains to be seen whether the courts will employ their judicial toolbox vigorously or whether they will resort to a deferential standard after paying lip service to other interpretive tools.

C. *Et Tu* Chevron*?*

Chief Justice Roberts and Justices Kavanaugh and Alito opined that the Court's holding in *Kisor* did not implicate *Chevron* deference.[276] However, *Chevron* is the elephant in the room—very difficult to ignore. Four Justices preferred that *Auer* be overruled, and their asserted grounds for doing so do not bode well for *Chevron*: these four Justices believed that *Auer* deference is unsupportable under both the judicial review and notice and comment provisions of the APA.[277]

Chevron deference does not run afoul of the notice and comment requirements because such deference is reserved for final rules issued after notice and comment.[278] However, it is difficult to find a distinction between *Chevron* and *Auer* deference that would support the belief that only the latter abrogates the judicial review provisions of the APA. Justices Kagan, Ginsberg, Breyer, and Sotomayor find no incongruence between *Auer* deference—and presumably *Chevron* deference—and § 706 of the APA.[279] Justices Kavanaugh, Thomas, Gorsuch, and Alito believe otherwise. The Chief Justice failed to opine on this issue. It is difficult to envision any way that *Chevron* deference could survive a majority holding that such deference violates § 706 of the APA.

As previously noted, in certain respects the Court merely reiterated the conditions under which *Auer* deference is appropriate as its way of expressing its opinion that *Auer* has been applied without

275 *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring); *id.* at 2425 (Gorsuch, J., concurring); *id.* at 2448 (Kavanaugh, J., concurring).
276 *Id.* (Roberts, C.J., concurring); *id.* at 2449 (Kavanaugh, J., concurring).
277 *Id.* at 2432, 2434.
278 *See supra* note 22 and accompanying text.
279 *See supra* notes 206–13 and accompanying text.

rigor and perhaps in too cavalier a manner.[280] Justice Kagan's admonitions regarding when and how *Auer* is to be applied could easily be said of *Chevron* deference. It seems unlikely that a genuine ambiguity is ascertainable under *Chevron* more readily than a genuine ambiguity under *Auer.* Why should a court ignore its full interpretative toolkit in the former but not the latter? The rigor applied by the Court in "extraordinary cases" should extend to all ambiguities of statutory language. *Chevron* has been around for over thirty-five years and is a bedrock principle in administrative law. However, it is difficult to be sanguine about its prospects. The Court could weaken the importance of *Chevron* if it put some teeth in the non-delegation doctrine, thus preventing sweeping delegations of authority to the agencies. The Court, however, declined to do so in this very term.[281]

Conclusion

Auer deference has not received the scholarly attention that *Chevron* has. The Supreme Court's decision in *Kisor* brings welcome attention to such deference. The Court did not deliver a death blow to *Auer* deference, but it certainly limited its utility. It remains to be seen how the lower courts will apply the requirements that the Court set forth in *Kisor*, but it is possible that *Auer* deference will devolve into a *Skidmore* type deference. Moreover, Justice Gorsuch has made clear his aversion to deferential standards of review and their encroachment on judicial prerogatives. Three Justices share his opinion. Consequently, *Chevron* deference may wind up in the Court's crosshairs in the near future.

280 *See supra* note 187 and accompanying text.
281 *See supra* notes 34–35 and accompanying text.