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The Uneasy Case Against *Auer* and *Seminole Rock*

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INTRODUCTION

The most familiar doctrine in administrative law is *Chevron* deference: when Congress leaves an ambiguous gap in a piece of legislation, the regulations that fill it “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”¹ Less well known is the deference that applies to agencies’ interpretations of their *own* regulations. This doctrine, known alternately as *Auer* deference or *Seminole Rock* deference,² gives an agency’s interpretation “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”³ *Auer* is important. For now, the doctrine still sits in *Chevron*’s shadow, but it presents issues that, in the words of Chief Justice Roberts, go “to the heart of administrative law” and “arise as a matter of course on a regular basis.”⁴

The future of *Auer* is also in doubt. In a series of important critiques (most notably John Manning’s influential article on the subject⁵) commentators have

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1. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).
2. I follow the Court’s recent convention and refer to this doctrine as *Auer* deference throughout. But the terms are used interchangeably. See, e.g., Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 371 (2012) (noting that the doctrine is “referred to as *Seminole Rock* deference and *Auer* deference”).
3. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).
4. *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring).
5. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). One might expect Manning’s views to have particular influence with Scalia because Manning served as one of the Justice’s first clerks. See *Two New Faculty Are Appointed at Columbia*

chipped away at *Auer*'s foundations—foundations that once seemed both sturdy and obvious. A particularly prominent concern is that *Auer* generates bad incentives: by giving administrators a broad mandate to interpret their own regulations, and by combining the legislative and interpretive powers in a single body, *Auer* gives agencies a reason to produce *vague* regulations.⁶ (Why struggle for precision in the present, when future interpretations will still receive courteous treatment from the courts?) This vagueness, in turn, imposes costs (like uncertainty and surprise) on regulated entities and others who interact with the administrative state.

These concerns have started to stir interest with the Supreme Court. Last term, in *Decker v. Northwest Environmental Defense Center*—a decision applying and upholding *Auer*—Chief Justice Roberts wrote a concurrence (joined by Justice Alito) that expressed willingness to revisit the doctrine when the issue is fully briefed.⁷ Justice Scalia, in turn, wrote a long partial dissent that expressed no such patience (“[e]nough is enough”⁸). He advocated scrapping *Auer* then and there, a call to arms that was all the more notable because Scalia himself had written the unanimous *Auer* opinion sixteen years earlier. Scalia’s *Decker* dissent was probably the most sustained judicial attack on the doctrine⁹ (though not Scalia’s first¹⁰) and the circuit courts have taken note.¹¹ Over the past year, a morbid consensus has emerged: *Auer* isn’t long for American law.¹²

Law, COLUM. UNIV. REC. (Oct. 21, 1994), http://www.columbia.edu/cu/record/archives/vol20/vol20_iss7/record2007.19.html.

6. An important caveat is in order: this is not to suggest that the incentive problem is the *only* critique of *Auer*. Other issues, like compatibility with the separation of powers or the Administrative Procedure Act, have been raised. I limit my discussion to the incentive issue for two reasons. First, the other issues have been taken up at length elsewhere in the recent literature. See, e.g., Aneil Kovvali, Note, *Seminole Rock and the Separation of Powers*, 36 HARV. J. L. & PUB. POL’Y 849 (2013). Second, the separation of powers question often blurs into the consequentialist incentives question: in other words, a key reason that critics dislike giving agencies legislative and interpretive power is that it creates bad incentives. But it is less clear whether *Auer* violates some preexisting *doctrinal* constitutional constraint.
7. *Decker*, 133 S. Ct. at 1338 (Roberts, C.J., concurring).
8. *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).
9. John Elwood, *Opinion Analysis: Too Soon to Say “Au Revoir” to Auer?*, SCOTUSBLOG (Mar. 22, 2013, 1:09 PM), <http://www.scotusblog.com/2013/03/opinion-analysis-too-soon-to-say-au-revoir-to-auer> (“*Decker* represents the most extensive challenge to *Auer* yet, with Justice Scalia offering the most detailed judicial exposition . . . of reasons to abandon that rule.”).
10. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (arguing that *Auer* “frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government,” and noting that he “will be receptive” to reconsidering *Auer* when the question arises).

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Auer's critics have perceptively exposed the doctrine's flaws. But it is unclear whether the call for a wholesale abandonment of the doctrine is warranted. A comparative consideration—is *Auer* really worse than the alternatives?—is especially valuable because, for the first time at the Court, Scalia's *Decker* dissent sketched a vision of what might take the doctrine's place. Scalia wrote that he would prefer to “resolve these cases by using the familiar tools of textual interpretation to decide: [what is] proscribed by the fairest reading of the regulations?”¹³—a position that seems to go beyond what Manning himself has advocated and what other commentators commonly suggest should replace *Auer*.¹⁴ (Perhaps unsurprisingly, Scalia's dissent contained no reference to *Skidmore v. Swift*, the pre-*Chevron* case that famously accorded an agency's interpretation only the “power to persuade”—a doctrine that is often thought of as the default deference regime when *Chevron* does not apply,¹⁵ and of which Scalia has been a particularly vociferous critic.¹⁶)

This paper concedes that *Auer* is a flawed doctrine, but argues that Scalia's alternative (or *Skidmore*) may well be the greater evil. Indeed, while the arguments of Scalia, Manning, and others have done a powerful job of exposing *Auer*'s flaws, the counterarguments have not been adequately aired—counterarguments crucial to clearheaded thinking about the development of

11. See, e.g., *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 453 (1st Cir. 2013) (noting Scalia's recent skepticism and stressing that “*Auer* deference is not necessary to our conclusion”).
12. See, e.g., Case Note, *Clean Water Act - Auer Deference - Decker v. Northwest Environmental Defense Center*, 127 HARV. L. REV. 328, 333 (2013) (“It seems that *Auer*'s days may be numbered.”).
13. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2013) (Scalia, J., concurring in part and dissenting in part).
14. See Manning, *supra* note 5, at 618 (suggesting that “courts should evaluate agency interpretations of regulations under the standard of judicial review prescribed by *Skidmore*”); see also Brief for Law Professors as Amici Curiae on the Propriety of Administrative Deference in Support of Respondent, *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326 (2013) (Nos. 11-338, 11-347), 2012 WL 5361523 (calling for limitations to *Auer* but not its elimination).
15. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of [an administrator's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1109 (2008) (discussing the modern role of *Skidmore*).
16. See, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in judgment) (“*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations . . . authoritative effect.”).

this doctrine. (And it is undoubtedly a doctrine that will develop further. Numerous cases concerning the scope of *Auer* are winding their way through the federal courts. And, later this term, the Supreme Court will hear a case that will map one of *Auer*'s borders: the justices will clarify the circumstances under which an agency's interpretation must go through notice-and-comment procedures.¹⁷)

Ultimately, this area of law requires negotiating two classic concerns of the modern administrative state: accommodating the need for agency flexibility while guarding against the specter of what Justice Jackson memorably described as "administrative authoritarianism"—the "power to decide without law."¹⁸ There are, of course, many potential doctrines that might strike the right balance (if balance is indeed what we want).¹⁹ Nonetheless, this paper makes two relatively narrow claims. First, I argue that the evolution of the current *Auer* doctrine already represents a plausible strategy for negotiating between expertise and authoritarianism. Indeed, while *Auer*'s "plainly erroneous" standard continues to set the doctrine's baseline, *Auer*'s "domain" is increasingly limited by a series of important carve-outs—carve-outs that "tailor deference to variety,"²⁰ just as *United States v. Mead* limits *Chevron*.²¹ In other words, *Auer* has a step zero—it is not a one-size-fits-all approach—a recent doctrinal shift that has gone unnoticed.²² Second, in light of the fact that *Auer* has evolved, Scalia's alternative (the wholesale abandonment of the doctrine) seems particularly extreme. It does not adequately appreciate the costs of transition or the full range of incentive effects that dismantling *Auer* would entail. Indeed, Scalia's alternative might not live up to the most heavily advertised virtue of dismantling *Auer*: improving regulatory clarity and avoiding unfair surprise. In short, *Auer* is the devil we know—and may be the devil worth keeping.

17. See *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2820 (2014).

18. *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 216 (1947).

19. See, e.g. Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 227 (2013) (promoting a "two-step test to determine whether to defer to an agency's interpretation of its regulation"); Case Note, *supra* note 12 (arguing for limitations on *Auer* based on a "one-bite" principle).

20. *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

21. See *infra* Part II.

22. Cf. Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1483 (2011) ("Perhaps surprisingly, less attention has been paid to the fact that agency interpretations of regulations may also appear in a wide variety of forms."). While Stephenson and Pogoriler lament the lack of attention paid to the variety of administrative interpretations, their article was published before the most important doctrinal developments that are attentive to this variety. See *infra* Part II.

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I. SEMINOLE ROCK, AUER, AND THEIR CRITICS

The Administrative Procedure Act (APA) contains fairly detailed procedures that agencies must follow in order to promulgate formal and informal rules.²³ Formal rulemaking is used on the rare occasions that a statute requires that rules “be made on the record after opportunity for an agency hearing.”²⁴ Informal rulemaking is more common, and requires that agencies comply with assorted requirements for providing notice and an opportunity to comment (hence, “notice-and-comment”). But the APA contains no requirements for how detailed or precise the final rules themselves must be, reflecting a general preference for agency flexibility that received the imprimatur of the Supreme Court in the 1947 case of *SEC v. Chenery Corp.*²⁵ Or, as the Court put it more recently: “[t]he APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication.”²⁶ The standard justification for this preference is flatly practical. It would be burdensome if agencies needed to promulgate new formal rules to cover each new and unanticipated case in which the original rule might apply. That explanation seems sensible enough, but it raises the potential for conflict: when a party interacting with an agency believes it has complied with a regulation, but the agency interprets otherwise.

Bowles v. Seminole Rock & Sand Co., decided in 1945, was the first Supreme Court case to deal with such a conflict. Three years before the decision, at the height of the Second World War, the Office of Price Administration issued price-control regulations requiring (in somewhat circuitous language) that the maximum price for an article “delivered or offered for delivery” in March of 1942 would be the highest price “charged” during the same month.²⁷ (These wartime regulations were designed to prevent large month-to-month jumps in price: the idea was that the price of goods delivered in the present would set a ceiling for goods delivered in the future.) *Seminole Rock*, which sold crushed stone, had an October 1941 contract to deliver its product at sixty cents a ton in

23. See 5 U.S.C. §§ 551-59 (2012); see also DANIEL T. SHEDD, CONG. RESEARCH SERV., R43153, *SEMINOLE ROCK DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATION OF AMBIGUOUS REGULATIONS* 2 (2013) (discussing the relationship between *Auer* and the rulemaking process).

24. 5 U.S.C. § 553(c) (2012).

25. *Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (“The function of filling in the interstices of the Act should be performed, as much as possible, through 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.”).

26. *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 96 (1995).

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

March of 1942.²⁸ When the company made new contracts several months later to sell its product at higher rates, the administrator brought an action to enjoin the sale, arguing that the new contracts violated the price controls. The administrator claimed that the maximum price was fixed by mere delivery in 1942. The company, on the other hand, argued that a price was fixed only when there was both delivery *and* charge in the decisive month.²⁹

The plain text of the regulation—with its clumsy tangle of charges, deliveries, and offers for delivery—did not suggest an obvious answer. But the Supreme Court sided with the Price Administration, holding that “the ultimate criterion” in interpreting the regulation was “the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”³⁰

Intriguingly, the *Seminole Rock* Court cited no authority of any kind for this standard. But, over time, various practical and legal rationales have emerged to justify the deference. For a long time, a popular justification was a kind of a warped originalist rationale: a current agency interpretation offers the greatest insight into the intended meaning of the originally promulgated rule.³¹ But this justification seemed to ignore the fact that rule and interpretation are often separated by the passage of time, professional turnovers, and political elections.³² And it is a justification that rests, moreover, on the contestable notion that courts should look to what the original regulator *meant*.³³

By the end of the century, the justification had evolved. When the Court reaffirmed *Seminole Rock* in the 1997 case of *Auer v. Robbins*, the rationale for such broad deference had shifted to the familiar territory of comparative institutional competence—“broad deference is all the more warranted when” the programs in question “require significant expertise and entail the exercise of judgment grounded in policy concerns”³⁴—coupled with a seemingly intuitive inference about the logical reach of *Chevron*. In *Auer*, the Court considered whether the Department of Labor’s overtime regulations, which did not cover

28. *Id.* at 412.

29. *Id.* at 415.

30. *Id.* at 414.

31. See Stephenson & Pogoriler, *supra* note 22, at 1454.

32. Indeed, this early rationale for *Seminole Rock* deference might actually have a kind of anti-originalist quality, since it suggests that an after-the-fact agency gets to fix the so-called original meaning, rather than be bound by it.

33. See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part) (“The implied premise of this argument—that what we are looking for is the agency’s *intent* in adopting the rule—is false. There is true of regulations what is true of statutes. As Justice Holmes put it: ‘[w]e do not inquire what the legislature meant; we ask only what the statute means.’”) (internal citations omitted).

34. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

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workers paid on a salary (as opposed to hourly) basis, applied to St. Louis police sergeants and lieutenants who earned salaries that could be reduced based on the “quality or quantity” of work completed.³⁵ The Secretary of Labor argued that the officers were not entitled to overtime pay; Scalia, writing for a unanimous Court, agreed. “A rule requiring the Secretary to construe his own regulations narrowly would make little sense,” Scalia wrote, “since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.”³⁶ In other words, the ruling in *Auer* could be thought of as a simple, logical extension of *Chevron*. Scalia found it ridiculous to take with one hand what the Court had given with the other.

But *Auer* differs from *Chevron* in one crucial respect: while *Chevron* divides the power to legislate and interpret between Congress and an agency, *Auer* seems to hand both powers to the agency—arguably violating the familiar maxim that no one should be a judge in her own case.³⁷ In theory, *Chevron* gives Congress an incentive to (in Scalia’s words) “speak as clearly as possible on the matters it regards as important.”³⁸ The clearer Congress speaks, the less power agencies have to pursue contrary objectives. *Auer*, on the other hand, gives agencies an incentive to (in the words of one influential critic) be “vague in framing regulations, with the plan of issuing ‘interpretations’ to create the intended new law without observance of notice-and-comment procedures.”³⁹

Indeed, as that quote suggests, *Auer* seems additionally worrying because it cuts a path that agencies might use to skirt an important legal constraint. In general, when agencies act to make binding instantiations of law, they must comply with either ex ante procedural safeguards or live with a more scrutinizing version of ex post judicial review. (This is sometimes called the “pay now or pay later” principle.⁴⁰) For example, when implementing a vague statute, agencies might choose between more costly notice-and-comment rulemaking (which will usually get *Chevron* deference) or less costly informal interpreta-

35. *Auer v. Robbins*, 519 U.S. 452, 454-55 (1997).

36. *Id.* at 463.

37. Stephenson & Pogoriler, *supra* note 22, at 1460. *But see* Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 387 (2012) (“Sometimes rulemakers in public law do and should design institutions with a view to the *nemo iudex* principle. In other cases, however, they do not and should not. In many settings, public law makes officials or institutions the judges of their own prerogatives, power, or legal authority. Officials or institutions may determine their own membership, award their own compensation, rule on the limits of their own jurisdiction, or adjudicate and punish violations of rules they themselves have created.”).

38. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

39. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1, 11-12 (1996).

40. For a much fuller discussion of these points, see Stephenson & Pogoriler, *supra* note 22, at 1461-65.

tions of the statute (which will get only *Skidmore* deference).⁴¹ *Auer* threatens this bargain by suggesting a method for skipping the bill: agencies can comply with the barest ex ante formal procedures—say, by using notice-and-comment to promulgate a mushy legislative rule that simply restates the ambiguous text of the statute—but still give the rule bite with later interpretations that have no procedural safeguards and receive little judicial scrutiny.

II. THE NEED FOR BALANCE—AND DOCTRINAL MOVES TOWARD IT

Manning's and Scalia's criticisms should not be exaggerated: agencies are not necessarily mechanical cost minimizers or power maximizers,⁴² and they still churn out plenty of precise, detailed rules.⁴³ But these criticisms nonetheless have an attractive logical force: allowing agencies wide latitude to interpret their ambiguous regulations does seem to provide those agencies with little incentive to make their regulations more precise.

But precision is not the only value that agency actions must serve—and, indeed, more precision is not always better. As Colin Diver pointed out more than 30 years ago, there are often unavoidable tradeoffs between, on the one hand, the transparency and accessibility of a rule, and the rule's "congruence" with underlying policy objectives on the other.⁴⁴ (For example, a rule mandating that no pilot fly after his fiftieth birthday might be easy to understand and apply. But, like many bright-line rules, it will push out many safe pilots and keep in many unsafe pilots, and it won't necessarily maximize safety.⁴⁵) In the context of *Auer* deference—as in many other areas of administrative law—the goals with which precision competes are the expertise and flexibility of the agency. *Auer*, unsurprisingly, favors flexibility and expertise.⁴⁶

41. See *id.* at 1463.

42. Indeed, the agencies' maximand turns out to be a tricky thing to model. For classic but somewhat diverse examples, see WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971), which uses a model in which agencies seek to maximize their budgets; and Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 305 (1972), which uses a model in which agencies are assumed to maximize the utility of their law-enforcement activities.

43. See Stephenson & Pogoriler, *supra* note 22 at 1465 (noting that "under the current regime, agencies still engage in substantial legislative rulemaking, and these rules are often quite detailed").

44. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

45. *Id.* at 67-71. Note that this is also a subcategory of the general efficiency tradeoff between rules and standards. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

46. See e.g., Case Note, *supra* note 12, at 333 (arguing that *Auer* "respects comparative institutional competence by giving agency experts wide latitude to resolve technical regulatory ambiguities").

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Are there ways to respect institutional competence while also avoiding the worst of agency incentives? In an important sense, doctrinal developments since *Auer*—and especially since Scalia’s *Decker* dissent—have attempted to strike this balance by mapping the boundaries of deference with more precision.

Soon after *Auer*, the D.C. Circuit started to map this boundary when it considered whether regulations promulgated under the Americans with Disabilities Act required that stadium owners offer their wheelchair-bound patrons lines of sight over standing spectators.⁴⁷ (The plaintiffs’ concern was that spectators would stand and cheer during the most dramatic moments, depriving disabled fans of their view when it matters most.) The text of the regulation in question demanded only “lines of sight comparable to those for members of the general public.”⁴⁸ The D.C. Circuit panel did not hesitate approving the Department of Justice’s interpretation—publicized several years earlier in ADA assistance manuals—that “comparable” lines of sight required a view over standing spectators.⁴⁹ Nonetheless, Judge Silberman’s majority opinion went out of its way (with an approving nod to Manning’s article) to suggest “an outer limit” to the *Auer* doctrine: “[a] substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking.”⁵⁰ “It is certainly not open to an agency to promulgate mush,” Silberman concluded, “and then give it concrete form only through subsequent less formal ‘interpretations.’”⁵¹

Silberman’s musings had the flavor of dicta, but sharper doctrinal limits have since followed. In a series of decisions that are reminiscent of *Chevron*’s first step,⁵² for example, the Court has made clear that “*Auer* deference is warranted only when the language of the regulation is ambiguous,”⁵³ just as *Chevron* deference is warranted only when the language of the statute is ambiguous. At first blush, this might appear to be a simple restatement of why *Auer* offers bad incentives (wouldn’t this be more likely to produce unclear regulations?), but this version of the doctrine does genuinely restrict the domain of *Auer*.⁵⁴

47. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 580 (D.C. Cir. 1997).

48. *Id.* at 581.

49. *Id.*

50. *Id.* at 584.

51. *Id.*

52. *Chevron*’s first step is deciding whether the statute in question is ambiguous (or, put differently, whether Congress has spoken to the issue).

53. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000).

54. To see why, consider two possible descriptions of *Auer* deference: (1) “A court will always defer to an agency’s interpretation of a regulation”; and, (2) “A court will always defer to an agency’s interpretation of a regulation when the regulation is ambiguous.” Depending on how one conceives of the agency’s maximand, it’s not obvious that (2) will produce worse “clarity” incentives than (1). But (2) *will* restrict an agency’s interpretation in cases where it is attempting to change the regu-

More recently, the Court has made clear that the regulation in question cannot simply “parrot[]” the language of the underlying statute, fleshing out the upper bound of regulatory vagueness.⁵⁵

This was perhaps best seen in *Gonzales v. Oregon*, in which the Court considered whether the Attorney General could interpret regulations to criminalize prescribing drugs for assisted suicide. The relevant regulations required that drug prescriptions shall be issued “for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”⁵⁶ The regulation did seem genuinely vague; certainly, nothing about the language suggested that it would be “plainly erroneous” to exclude assisted suicide from the category of legitimate medical practices exercised in the usual course of care. But the problem was that the language of the regulation was almost identical to the language of the underlying statute, which defined a “valid prescription” as one “issued for a legitimate medical purpose.”⁵⁷ According to Justice Kennedy’s majority opinion, this knocked the regulation outside the domain of *Auer*: “[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”⁵⁸ Kennedy’s so-called “antiparrotting canon”⁵⁹ thus made the case turn on the meaning of the statute, not the regulation. (The Court held that the regulation was not entitled to *Chevron* deference, and that the statute did not authorize the Attorney General’s actions.)

In addition, the Court has consistently held that the interpretation in question cannot be a mere “post hoc rationalization”—language that was used in *Auer* but taken up in other cases⁶⁰—or a simple “convenient litigating position.”⁶¹ In *Chase Bank v. McCoy*, for example, the Court had to decide whether regulations issued under the Truth in Lending Act required credit-card issuers to notify cardholders of an interest rate increase that, under the contract’s terms, was triggered by the cardholder’s delinquency or default. Once again, the Court held that the regulation in question was indeed ambiguous⁶²: it required

lation of a previous administration or has simply changed its own mind – that is, in cases where the regulation is clear through no fault of the agency’s present-day interpreters.

55. *Gonzales v. Oregon*, 546 U.S. 243, 256–57 (2006).

56. *Id.* at 256.

57. *Id.* at 257.

58. *Id.*

59. This term, since widely used, was coined in Scalia’s dissent. *See id.* at 278 (Scalia, J., dissenting).

60. *See Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 873 (2011).

61. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

62. *See Chase Bank*, 131 S. Ct. at 878.

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simultaneously that issuers disclose “each periodic rate that may be used to compute the finance charge”⁶³ (which would seem to cover the contract terms) but exempted notice requirements for rate increases that followed from “the consumer’s default or delinquency”⁶⁴ (which would seem to exclude them). The Court deferred to the interpretation offered by the agency—in this case, the Federal Reserve Board’s view that notice was *not* required—even though the Board’s interpretation was offered (like the interpretation in *Auer*) only in an amicus brief before the Court.⁶⁵ But the *Chase Bank* majority also took great pains to emphasize why deference was warranted—and, in so doing, offered more details on when it would *not* be. Perhaps most intriguingly, the Court suggested that the interpretation was deference-worthy in part because the agency was “not a party to this case.”⁶⁶ While the Court did not elaborate, the implication seemed to be that an agency’s simultaneous involvement in litigation and interpretation—easy-to-identify factors—would be a combination of perverse incentives too rich for the Court.

The Court introduced its most recent influential carve-out in 2012, in *Christopher v. SmithKline Beecham Corp.* Like *Auer*, *Christopher* involved the overtime requirements of the Fair Labor Standards Act. According to the Act, overtime requirements do not apply to a company’s “outside salesman,” a term defined by a complex (and, yes, ambiguous) series of Department of Labor regulations.⁶⁷ Two salesmen employed by the pharmaceutical company SmithKline Beecham (now GlaxoSmithKline) sued for overtime pay in Arizona federal court, which dismissed the suit. (The district court held that plaintiffs “plainly and unmistakably fit within the terms and spirit” of the outside salesman exemption.⁶⁸) While the case was being appealed, however, the Department of Labor filed an amicus brief in separate litigation in the Second Circuit—to which the Second Circuit deferred⁶⁹—offering an interpretation of the regulations that supported the Arizona salesmen’s claim. But the Ninth Circuit declined to defer to the agency’s interpretation, thus creating a split between these coastal circuits.

63. *Id.*

64. *Id.*

65. *Id.* at 880.

66. *Id.* at 881 (“The Board is not a party to this case. . . . In short, there is no reason to suspect that the position the Board takes in its *amicus* brief reflects anything other than the agency’s fair and considered judgment as to what the regulation required at the time this dispute arose.”).

67. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2161 (2012).

68. *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498, 2009 WL 4051075, at *4 (D. Ariz. Nov. 20, 2009).

69. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *abrogated by Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

The Supreme Court agreed with the Ninth Circuit and declined to defer to the agency interpretation. Writing for the majority, Alito confessed that *Auer* “ordinarily calls for deference to an agency’s interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief”⁷⁰—as it was in both *Auer* and in the case before the Court. But Alito went on to hold that, in the present pharmaceutical case, there were “strong reasons for withholding the deference that *Auer* generally requires,” because agreeing with the agency interpretation would “impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced.”⁷¹ Such liability would, Alito cautioned, amount to the kind of “unfair surprise” that the Court had warned against almost five years earlier in *Long Island Care v. Coke*.⁷²

Since *Christopher*, the circuit courts have also developed other limits to *Auer*’s reach, deciding cases that both shore up the holding in *Christopher*⁷³ and suggest new limits to the *Auer* doctrine. Last year, the Fifth Circuit reviewed a decision of the Department of Health and Human Services to uphold fines levied against a nursing home for undercooking eggs. (The investigating agency had observed two breakfast plates “smeared” with egg yolk,⁷⁴ apparently suggesting undercooking violations severe enough to warrant a \$5,000 fine.) The regulations in question mandated only that facilities serve food in a “sanitary” manner,⁷⁵ a requirement that left a hefty portion to the imagination. Long before the litigation, however, the department had issued an interpretive manual that offered more specific guidance, suggesting that eggs should be cooked at “145 degrees F for 15 seconds; until the white is completely set and the yolk is congealed.”⁷⁶ The problem was that this interpretation was *also* vague. Indeed, the case hinged on a crucial semicolon; since the punctuation could be read ei-

70. *Christopher*, 132 S. Ct. at 2166.

71. *Id.* at 2167.

72. *Id.*; see also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-171 (2007); Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of “Fair Notice,”* 86 S. CAL. L. REV. 193, 194 (2013) (describing the *Christopher* decisions as an example of a more general fair notice requirement, which the authors describe as an “essential protection of the due process clause, [which] shields all defendants from unfair and arbitrary punishment”).

73. See, e.g., *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140 (1st Cir. 2013) (“The letter is not owed *Auer* deference in this case because such deference is inappropriate where significant monetary liability would be imposed on a party for conduct that took place at a time when that party lacked fair notice of the interpretation at issue.”).

74. *Elgin Nursing & Rehab. Ctr. v. U.S. Dep’t of Health & Human Servs.*, 718 F.3d 488, 490 (5th Cir. 2013).

75. *Id.*

76. *Id.* at 494.

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ther conjunctively or disjunctively, it wasn't clear what should happen if an egg was cooked for 15 seconds at 145 degrees but remained stubbornly runny.

The nursing home insisted that its cooking—which supposedly met the timing and heat requirements—passed muster. The agency disagreed: it insisted that the eggs had to be cooked solid. But the Fifth Circuit declined to grant the agency's interpretation deference, noting that all of the circuit's previous *Auer* decisions “addressed only an agency's direct interpretation of its published regulations.”⁷⁷ In this case, the court continued, the agency “asks us to go a step further,” in search of what the opinion memorably described as “*Seminole Rock* squared” deference—“deferring to its interpretation of its manual interpreting its interpretive regulation.”⁷⁸ The court (with an approving nod to *Christopher*) declined to defer to this epiphenomenal interpretation, arguing that to hold otherwise would burden the courts with additional litigation and deny regulated entities fair notice about what a regulation entailed.⁷⁹

The Court of Appeals for the Federal Circuit, meanwhile, has recently declined to grant *Auer* deference to new agency interpretations that conflict with previous or longstanding ones⁸⁰ (as have the Ninth Circuit⁸¹ and the Eighth Circuit⁸²). The Federal Circuit considered whether a colonel from the Oregon national guard, “automatically retired” after 20 years of service, was “eligible” (in the words of the military memorandum at issue) for a hearing before a retention board. The court actually resolved the case at what might be called *Auer* step one⁸³—the memo was held to be *not* ambiguous and the retired colonel was indeed eligible for a hearing—but nonetheless pressed on to observe that, “[e]ven if the regulation *was* ambiguous, the deference traditionally given to an agency's interpretation would not be warranted here.”⁸⁴ This was because the agency offered numerous interpretations (the court counts at least four) and “each newly posited rationale differed from the earlier-provided rationales.”⁸⁵ “The inconsistencies and series of different rationales,” the court concluded,

77. *Id.* at 493.

78. *Id.*

79. *Id.* at 494.

80. *Cameron v. United States*, 550 F. App'x 867, 874 (Fed. Cir. 2013).

81. *Indep. Training & Apprenticeship Program v. California Dep't of Indus. Relations*, 730 F.3d 1024, 1035 (9th Cir. 2013) (noting the presence of two concerns: “the DOL's interpretation is inconsistent with its prior interpretation, and there is a significant potential for unfair surprise”).

82. *Perez v. Loren Cook Co.*, 750 F.3d 1006, 1017 (8th Cir. 2014) (“When an agency acquiesces in an interpretation of an ambiguous regulation for an extended period of time, then changes its interpretation to sanction conduct that occurred prior to the new interpretation, ‘there are strong reasons’ for withholding deference.”).

83. *See supra* note 52.

84. *Cameron*, 550 F. App'x at 874 (emphasis added).

85. *Id.*

“provide a further reason why the interpretation . . . advanced by the government in this appeal does not merit the traditional level of deference.”⁸⁶

That same year, the Tenth Circuit questioned whether *Auer* applies to novel interpretations, period.⁸⁷ *Abercrombie & Fitch* had appealed a summary judgment in favor of an Equal Employment Opportunity Commission claim that the clothing company failed to provide a reasonable religious accommodation for a potential employee (a young Muslim woman who wore a headscarf) in violation of Title VII.⁸⁸ The Tenth Circuit reversed the district court and rejected the EEOC’s claim, holding that the potential employee had not satisfied an important element of the *prima facie* case: she had not provided the hiring agent with notice of the necessary accommodation. In emphasizing this element of the *prima facie* case, the court rejected the EEOC’s push for a “broader” interpretation of the notice requirement, one in which the employee would not be the only permissible source of notice. (In this case, the Muslim woman’s friend had informed employees of the same *Abercrombie* branch that she wore a headscarf.) In denying the EEOC *Auer* deference,⁸⁹ the court mentioned many of the same factors cited in the cases above—surprise, conflict with other interpretations—but concluded with what might be the most ambitious suggestion for the limits of *Auer* deference: “the EEOC does not identify any prior instance where it has taken the stance regarding notice that it does here, and its position does not appear to be anything other than a creature of this proceeding”—a proceeding where it was (in the words of *Chase Bank*) “a party to this case.”⁹⁰ This is ambitious reasoning partly because *Auer* itself blessed creatures of a proceeding: there, Scalia rejected the petitioner’s complaint that that interpretation arrived “in the form of a legal brief.”⁹¹ More broadly, it suggests the long logical reach of the “fair notice” and “unfair surprise” themes: agencies should not expect *Auer* deference for interpretations that parties had no reason to expect.

A bit of summary is in order. *Seminole Rock* and *Auer* established a simple baseline standard: “the administrative interpretation . . . becomes of controlling

86. *Id.*

87. EEOC v. *Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1139 (10th Cir. 2013) (“In other words, on prior occasions, the EEOC has repeatedly taken a position on the notice question that is inconsistent, and conflicts with, the interpretation of that question that it now seeks to engraft onto its regulation.”).

88. *Id.* at 1110–11.

89. For the purposes of this short paper, I bracket the question of whether the EEOC might be an outlier in the Court’s deference jurisprudence. See, e.g., EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244, 256–57 (1991) (noting that the EEOC is not typically entitled to *Chevron* deference). In any case, the potentially special status of the EEOC does not appear to have been a factor in the Tenth Circuit discussion of *Auer* in the *Abercrombie* case.

90. *Abercrombie*, 731 F.3d at 1139.

91. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

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weight unless it is plainly erroneous or inconsistent with the regulation.”⁹² That standard has now been tempered in a number of ways. First, the Court has made clear that *Auer* deference is warranted only when the regulation in question is actually ambiguous.⁹³ Second, the regulation can’t be *too* ambiguous: it can’t, for example, parrot the ambiguity of the statute.⁹⁴ Third (and itself somewhat ambiguously), the interpretation must be the agency’s considered judgment; it can’t be simple after-the-fact convenience.⁹⁵ Fourth, the interpretation cannot impose too much unexpected liability.⁹⁶ Fifth, in at least one circuit the interpretation cannot be interpreting a preexisting interpretation.⁹⁷ Sixth, in several circuits the interpretation cannot conflict with previous interpretations.⁹⁸ Seventh (and perhaps halfway to eighth), at least one circuit has affirmatively suggested that an interpretation is less worthy of *Auer* deference when it is novel, and when the agency is a party to the case.⁹⁹

There are family resemblances between these limits. (Interpretations that conflict with longstanding ones might be more likely to occasion an unfair surprise; interpretations offered by an agency that is a party to litigation might be less likely to reflect the agency’s considered judgment; and so on.) But many of these doctrinal innovations do to *Auer* what *United States v. Mead* does to *Chevron*: they limit the “domain” of deference by adding what is often described as a “step zero.”¹⁰⁰

92. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1943).

93. Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

94. Gonzales v. Oregon, 546 U.S. 243, 256-57 (2006).

95. See Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 873 (2011); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988).

96. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012).

97. *Id.*

98. See Perez v. Loren Cook Co., 750 F.3d 1006, 1006-14 (8th Cir. 2014); Cameron v. United States, 550 F. App’x 867, 874 (Fed. Cir. 2013); Indep. Training & Apprenticeship Program v. Cal. Dep’t of Indus. Relations, 730 F.3d 1024, 1035 (9th Cir. 2013).

99. See EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1139 (10th Cir. 2013). Whether or not an agency is party to the case has been discussed in previous decisions. But, to the best of my knowledge, this is the only case in which the fact that the agency is a party is affirmatively weighed as a factor *against* deference.

100. See Stephenson & Pogoriler, *supra* note 22, at 1452; cf. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (making a similar argument in the *Chevron* context). For a longer discussion of the step-zero concept in the *Chevron* context, see generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

Mead was not the first case to limit *Chevron* deference in this way,¹⁰¹ but it was almost certainly the most important. In *Mead*, the paper and school-supply company challenged a tariff ruling letter—essentially, a short customs classification ruling—that re-categorized *Mead*’s day planners as “diaries” and subjected them to higher tariff rates.¹⁰² The company lost in the administrative appeals process, but the Court of Appeals for the Federal Circuit reversed, holding that the letter was not entitled to *Chevron* deference. The Supreme Court affirmed, holding that *Chevron* applies “only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” “Delegation of such authority,” Justice Souter continued, “may be shown in a variety of ways,”¹⁰³ including whether the agency had the power to engage in notice-and-comment rulemaking;¹⁰⁴ whether the agency action in question applied generally and prospectively or only between the parties;¹⁰⁵ and the sheer volume of rulings produced.¹⁰⁶

Auer now has a step zero. For at least a decade, the doctrine has had an implicit step one: before the Court asks whether the agency’s interpretation is plainly erroneous, it asks whether the regulation in question is actually ambiguous. (Just as, in the *Chevron* context, courts ask whether a statute is ambiguous.¹⁰⁷) In addition, previous authors have certainly *advocated* new constraints on *Auer* that resemble *Mead*’s constraints on *Chevron*.¹⁰⁸ But the fact that contemporary *Auer* doctrine is starting to “tailor deference to variety” is an im-

101. See Sunstein, *supra* note 100, at 211 (describing *Christensen* as the “initial” decision).

102. See *United States v. Mead Corp.*, 533 U.S. 218, 225 (2001).

103. *Id.* at 226-27.

104. *Id.*

105. *Id.* at 233 (“Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued . . .”).

106. *Id.* (“Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency’s 46 scattered offices is simply self-refuting.”).

107. It’s worth noting that the coherence of these discrete steps is often disputed. See, e.g., Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009) (making the argument suggested by its title). I’m sympathetic to Stephenson and Vermeule’s account, but I’m also uncertain of the stakes in the debate: counting steps in *Chevron* might be a little like counting angels on the head of a pin. I adopt the “steps” terminology because it is a useful and widely used shorthand for making the analogy between developments in *Auer* and developments in *Chevron*.

108. Stephenson & Pogoriler, *supra* note 22, at 1452 (considering “the question of whether there ought to be limits to *Seminole Rock*’s domain, comparable . . . to the limits that have been advocated . . . for *Chevron*’s domain”).

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portant and underappreciated feature of current law. (A recent casebook, for example, notes that “there is no equivalent in [the *Auer*] setting to the *Mead*/step zero line of cases,”¹⁰⁹ and as recently as last year—even in the wake of *Christopher*—critics were still lamenting “the one-size-fits-all approach now embodied in *Auer*.”¹¹⁰) Three years ago, Matthew Stephenson and Miri Pogoriler asked whether American law might “conclude that although it is *usually* sensible to presume that a congressional delegation to an agency . . . implicitly includes a delegation of the power to issue definitive interpretations of those rules, this presumption is appropriate only when these interpretations are issued in certain forms, but not others.”¹¹¹ At the time they conceded that “the current caselaw does not appear to endorse any such principle.”¹¹² Increasingly, however, the caselaw does exactly that.

III. SCALIA’S UNEASY CASE AGAINST AUER DEFERENCE

In a sense, then, the *Auer* doctrine is evolving to heal itself. The doctrine now consists of a default standard (“controlling weight unless it is plainly erroneous or inconsistent with the regulation”) tempered by a series of limitations and carve-outs that seem increasingly *Mead*-like. Viewed in this light, the doctrine has a more nuanced and pragmatic spirit than its most unsparing critics suggest.

Of course, that pragmatic spirit does not, in the words of Stephenson and Pogoriler, “lead inexorably to any particular conclusions regarding the proper scope” of *Auer* deference¹¹³—just as pragmatic rationales for *Chevron* deference do not, a priori, resolve hard questions about the proper deference owed to tariff letters. The question is always relative: what’s the best way to strike the pragmatic balance?

That question is frustrating to answer in the abstract. But there are good reasons to think Scalia’s option—or, as is more commonly suggested, reverting to *Skidmore* deference—is not as obvious as he would like to suggest. For one, it’s not clear that Scalia’s solution will succeed by one of its own standards: reducing regulatory uncertainty and the risk of “unfair surprise.” This is partly for a reason that Scalia identifies in his *Decker* dissent: without *Auer*, the country will face “the uncertainty produced by divergent views of numerous district courts and courts of appeals as to what is the fairest reading of the regulation,

109. ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS, AND CASES 384 (Stephen G. Breyer et al., eds., 7th ed. 2011).

110. Daniel Mensher, *With Friends Like These: The Trouble with Auer Deference*, 43 ENVTL. L. 849, 871 (2013).

111. Stephenson & Pogoriler, *supra* note 22, at 1484.

112. *Id.*

113. *Id.* at 1458.

until a definitive answer is finally provided, years later, by this Court.”¹¹⁴ That process can surely produce surprises of its own.¹¹⁵

But the problems run deeper. The *Auer* debate focuses almost exclusively on agency incentives vis-à-vis regulatory precision, ignoring the fact that abandoning *Auer* might have broader, cross-cutting incentive effects. These come in several forms. First, removing *Auer* may make rulemaking costlier, in the sense that more front-end rulemaking effort will be required on the part of the agency to produce its desired outcomes in individual cases. (*Auer* lets the agencies delay the development of specificity, and presumably the development of specificity is costly.) This might lead to fewer regulations, slower regulations, or shift the balance away from rulemaking and toward adjudication (which would, in turn, vitiate the public benefits of the notice-and-comment process).¹¹⁶

Removing *Auer* might also affect the incentives of regulated parties themselves: at least one commentator has argued that *Auer* gives regulated entities better incentives to participate early in notice-and-comment than *Skidmore*, since regulated entities are currently more likely to succeed in a hard-look challenge than a challenge under *Auer*. The thought is that, if *Auer* gives agencies an incentive to skimp on notice-and-comment—to parrot the statute, to promulgate mush—it presumably gives regulated entities a complementary incentive to join the fray early. Under *Skidmore*, by contrast, regulated entities will be less eager to bring concerns to an agency’s attention, thinking that they are more likely to succeed in challenging the agency’s subsequent interpretation.¹¹⁷ Both of these ideas can be expressed with a little more formality: for regulated entities, *Auer* raises the cost of skipping notice-and-comment; *Skidmore* lowers the cost of skipping notice-and-comment.¹¹⁸ Whether the switch from *Auer* to *Skidmore* (or to Scalia’s “fairest reading” standard) will reduce or increase the

114. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part).

115. There are different views as to whether circuit splits are common or problematic. Of particular note might be Chief Justice Roberts’s argument that easily accessible online legal databases have made circuit splits less common. See Robert Barnes, *Roberts Supports Court’s Shrinking Docket*, WASH. POST, Feb. 2, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020102213.html>. But Roberts’s claim turns out to be extremely hard to test empirically. See Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 904-9 (2014) (describing various difficulties with measuring circuit splits).

116. For a similar set of points, see Manning, *supra* note 5, at 693.

117. Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 117-18 (2000).

118. It seems plausible that participation in notice-and-comment might also help an entity’s ex post judicial challenge, but I know of no data on or detailed discussions of this topic.

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total uncertainty of regulations is mired in uncertainty of its own. (This is a fact to which Manning seems more attuned than Scalia.¹¹⁹)

This uncertainty is related to a second concern about abandoning *Auer* and *Seminole Rock*: the longstanding reliance interests. Part of the fear with *Auer* is that it lets agencies surprise regulated entities: the interviewer at Abercrombie won't know what the EEOC demands; the pharmaceutical company won't know what to pay its "salesmen." But regulated entities might be more uncertain about dismantling the doctrine—and casting doubt on many thousands of longstanding agency interpretations. This concern seems especially noteworthy because the notice and reliance concerns of regulated entities seem like the great themes of recent developments in the *Auer* doctrine. And, more generally, it's worth noting that these reliance interests are stronger here than in most other areas of administrative law: because *Seminole Rock*—decided in 1945—preceded the APA, every agency interpretation of a legislative rule was presumably offered in an era when both agencies and regulated entities thought of those interpretations as controlling.

These heightened reliance interests may also help explain a puzzling asymmetry between *Auer* and other areas of administrative law. Two recent commentators—otherwise convinced that there are good pragmatic justifications for *Auer*—observe that the general policy justification ("agencies need flexibility") seems sound, but confess that they can "think of no reason why this justification for deference is more powerful in the context of agency interpretations of agency rules" than in other contexts, like agency policy decisions or agency findings of fact.¹²⁰ The implication is this: sure, agencies need flexibility, but why do they need more flexibility when interpreting regulations than when finding facts? One potential answer is that regulated entities need to rely on agency interpretations—"will this apply to me in the future?"—in a manner that does not apply to an agency's case-specific factual findings.

The longstanding nature of *Auer* deference connects with a final concern about abandoning the doctrine: like *Chevron*, it can also be thought of as a clear, stable background rule for Congress. It is sometimes argued slyly that *Auer* and *Chevron* create "opposite incentives"¹²¹: *Chevron* prods Congress to write clear statutes; *Auer* tempts agencies to write vague regulations. What this ignores is that the clarity of statutes *also* affects *Auer*'s reach. *Chevron* puts the burden on Congress: if Congress doesn't like the agency's regulations, it can write a clearer

119. Manning, *supra* note 5, at 691 ("The shift away from *Seminole Rock* . . . entails some uncertainty.").

120. Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 517 (2011).

121. Case Note, *supra* note 12, at 332; *see also* *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) ("While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations.").

statute. But *Auer* can be thought of in similar terms: if Congress is concerned about the agency's one-two punch of vague regulation and surprising interpretation, it can *also* rectify the matter by writing a clearer statute. In that sense, *Auer*, like *Chevron*, offers what Scalia once described as "a background rule of law against which Congress can legislate,"¹²² which is preferable to judicial case-by-case considerations that create (in Scalia's words) "a font of uncertainty and litigation."¹²³

Of course, it is unsurprising that Scalia would not favor a *Mead*-like doctrine in the *Auer* context. (To wit, Scalia on *Mead*: "[i]ts consequences will be enormous, and almost uniformly bad."¹²⁴) But Scalia's change of heart nonetheless seems sudden and dramatic: he dissented sharply in *Gonzales v. Oregon*, reproaching Kennedy's "antiparrotting" logic and defending "our unanimous decision in *Auer*," which made clear that "broadly drawn regulations are entitled to no less respect than narrow ones."¹²⁵ As recently as 2011, Scalia joined the Court's unanimous opinion upholding and applying *Auer* in *Chase Bank*.¹²⁶

What explains his shift? One theory is that the Court has started applying *Mead*'s controversial flexible deference regime in the previously uncontroversial *Auer* context. In this regard, it is interesting to consider Souter's description of his disagreement with Scalia in his *Mead* majority opinion:

If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account.¹²⁷

"Justice Scalia's first priority over the years has been to limit and simplify," Souter concluded. "The Court's choice has been to tailor deference to variety."¹²⁸ One could imagine the same being said about the debate over *Auer*. The Court's gradual development of the *Auer* doctrine into a *Mead*-like tailored deference regime may help explain why Scalia would be so quick to sweep away *Auer*'s once simple rule in favor of case-by-case "fairest readings." And if that's right, then it's the debate over *Mead*, not *Auer*, that matters most.

122. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

123. *Id.* at 516.

124. *United States v. Mead Corp.*, 533 U.S. 218, 261 (2001) (Scalia, J., dissenting).

125. *Gonzales v. Oregon*, 546 U.S. 243, 277 (2006) (Scalia, J., dissenting).

126. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011).

127. *Mead*, 533 U.S. at 236-37.

128. *Id.*

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Mead is not an object of universal affection. For some, it has created chaos and muddle in the lower courts.¹²⁹ For more sympathetic commentators, some kind of judicial effort to limit the scope of *Chevron* is desirable.¹³⁰ But the debate over *Mead*'s utility is unlikely to be settled soon: in a sense, it may simply constitute one instance of the longstanding contrast between the ex post flexibility of standards and the ex ante clarity of rules.

But, in this regard, there is one important difference between the worlds of *Mead* and *Auer*. Critics of *Mead* crave the clarity of a strong *Chevron* presumption; critics of *Auer* want either *Skidmore* or Scalia's alternative. Those latter alternatives are hardly invitations to clarity—as Scalia might know better than anyone else. Elsewhere, he has described *Skidmore* as “a recipe for uncertainty, unpredictability, and endless litigation.” “To condemn a vast body of agency action to that regime,” he wrote, “is irresponsible.”¹³¹ Condemning *Auer* to the ash heap might be equally irresponsible, and fearing that fate does not require overlooking *Auer*'s faults. The doctrine is a compromise: better than the alternatives, but—to borrow from Scalia once more—“not without its warts.”¹³²

129. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

130. See Merrill & Hickman, *supra* note 100, at 837 (“We argue that the presumption in favor of *Chevron* deference should be subject to rebuttal based on the totality of the statutory circumstances.”).

131. *Mead*, 533 U.S. at 250 (Scalia, J., dissenting).

132. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 856 (1988).