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## ADVANCING *AUER* IN AN ERA OF RETREAT

STEPHEN M. JOHNSON\*

At the dawn of the modern administrative state, the Supreme Court held, in *Bowles v. Seminole Rock & Sand Company*, that an agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>1</sup> A half century later, the Court retained that approach in *Auer v. Robbins*,<sup>2</sup> a decision authored by Justice Scalia. *Auer* deference is generally regarded as the most accommodating standard of judicial review applied by courts to agency decision-making.<sup>3</sup>

Although the Supreme Court created *Seminole Rock/Auer* deference more than seventy years ago, the Court has created exceptions to the doctrine over the years<sup>4</sup> and Justices Scalia,<sup>5</sup> Thomas,<sup>6</sup> Roberts<sup>7</sup> and Alito<sup>8</sup> have questioned or criticized the basic premise of the doctrine in recent years.<sup>9</sup> Further, legislators have indicated their displeasure with *Auer*

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<sup>1</sup> *Bowles v. Seminole Rock & Sand Company*, 325 U.S. 410, 414 (1945).

<sup>2</sup> *Auer v. Robbins*, 519 U.S. 452 (1997).

<sup>3</sup> See Richard J. Pierce, Jr., & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 516 (2011).

<sup>4</sup> See *infra* notes 75–80, and accompanying text.

<sup>5</sup> See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 U.S. 1199, 1210 (2015) (Scalia, J., concurring in the judgment) (raising concern about a conflict between the deference and the Administrative Procedures Act and a concern that the deference provides an incentive to agencies to draft vague rules); *Decker v. Nw. Env'tl. Def. Ctr.*, 133 U.S. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) (criticizing the deference on separation of powers grounds); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 U.S. 2254, 2266 (2011) (Scalia, J., concurring) (raising separation of powers concerns). Although he authored *Auer*, Justice Scalia became its harshest critic over time.

<sup>6</sup> See *Perez*, 135 U.S. at 1199, 1214 (2015) (Thomas, J., concurring in the judgment).

<sup>7</sup> See *Decker*, 133 U.S. at 1326, 1339 (2013) (Roberts, C.J., concurring) (suggesting that it "may be appropriate to reconsider" *Auer* in a case where "the issue is properly raised and argued").

<sup>8</sup> See *Perez*, 135 U.S. at 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment) (indicating concerns about *Seminole Rock*, but preferring to await a case in which the validity of the doctrine could be "explored through full briefing and argument").

<sup>9</sup> See Kevin O. Leske, *Chipping Away at the Rock: Perez v. Mortgage Bankers Association and the Seminole Rock Deference Doctrine*, 49 LOY. L.A. L. REV. 101, 106–07 (2016); see

deference by introducing bills in Congress in 2016 and 2017 that would require courts to interpret the constitution, statutes and regulations *de novo*,<sup>10</sup> rather than to accord agencies deference under *Auer* or *Chevron*.<sup>11</sup>

While legislators and a few Supreme Court Justices are suggesting that *Auer* deference should be narrowed or eliminated, critics are concerned that some federal courts may be *expanding* the reach of *Auer* and according that level of deference to agency interpretations of *guidance that interprets regulations*, as opposed to simply interpretations of *regulations*.<sup>12</sup> Those critics refer to this as “second level” *Auer* deference.<sup>13</sup> This concern was raised most recently in a petition for certiorari to the United States Supreme Court filed by the Pacific Legal Foundation (“PLF”) in *Foster v. Vilsack*.<sup>14</sup> PLF argued that the United States Court of Appeals for the Eighth Circuit inappropriately accorded *Auer* deference to

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also Michael P. Healey, *The Past, Present and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 KAN. L. REV. 633, 657 (2014).

<sup>10</sup> See Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong., 1st Sess., § 2; Regulatory Accountability Act of 2017, H.R. 5, 115th Cong., 1st Sess.; Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong., 2d Sess.; Separation of Powers Restoration and Second Amendment Protection Act, H.R. 4321, 114th Cong., 2d Sess. (2016).

<sup>11</sup> See Orrin Hatch, *Congress Must Act to Restore Accountability to the Regulatory Process*, YALE J. REG. (Sept. 22, 2016), <http://yalejreg.com/nc/congress-must-act-to-restore-accountability-to-the-regulatory-process-by-senator-orrin-g-hatch/> [<https://perma.cc/AA5S-FWAS>]. The Supreme Court, in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), created a deferential review standard that courts use when reviewing agencies’ interpretations of *statutes* (rather than regulations, the focus of *Auer*) if the agencies have been given, and exercised, authority to make decisions having the force of law. While the proposed legislation would eliminate *Chevron* deference and *Auer* deference, the bills would not eliminate all deference to agency decision-making. Prior to creating the *Auer* and *Chevron* deference standards, the Supreme Court, in *Skidmore v. Swift*, 323 U.S. 134 (1944), created a deferential review standard of judicial review for agency decision-making that continues to apply today to decisions that are not governed by *Auer* or *Chevron*. The legislative history for the bills that have been introduced to eliminate *Chevron* and *Auer* deference indicates that Congress does not intend, through the legislation, to eliminate *Skidmore* deference. See William Funk, *Why SOPRA is Not the Answer*, YALE J. REG.: NOTICE AND COMMENT (Sept. 22, 2016), <http://yalejreg.com/nc/why-sopra-is-not-the-answer-by-william-funk/> [<https://perma.cc/H26Y-RJ7T>] (last visited Apr. 4, 2017).

<sup>12</sup> See Petition for Writ of Certiorari, *Foster v. Vilsack* (U.S. Aug. 8, 2016) (No. 16-186), <http://www.pacificlegal.org/file/documents/Foster-1-1523-Cert-Petition.pdf> [<https://perma.cc/TE3L-Z59Q>] [hereinafter PLF Cert. Petition]. The term “guidance” is used in this Article broadly to refer to the full panoply of non-legislative rules that interpret agency regulations.

<sup>13</sup> *Id.* at 18; see also Brief for the Cato Institute as Amicus Curiae in Support of Petitioners, *Foster v. Vilsack*, No. 16-186 (U.S. Sept. 12, 2016) (No. 16-186), <http://www.pacificlegal.org/file/Cato-Institute-Amicus-Brief.pdf> [<https://perma.cc/V833-YP8R>].

<sup>14</sup> See PLF Cert. Petition, *supra* note 12, at 20.

the Natural Resource Conservation Service's interpretation of a guidance document interpreting a regulation when the court upheld the agency's determination that the petitioners, Arlen and Cindy Foster, were converting wetlands to farmland in violation of the Food Security Act of 1985.<sup>15</sup>

The Supreme Court ultimately denied the cert. petition,<sup>16</sup> so the Court did not provide any guidance regarding whether courts owe *any* deference, or how much deference courts owe, to agency interpretations of *guidance that interprets regulations*—the “second level” *Auer* deference issue.<sup>17</sup> Although the Court did not provide guidance, it is clear that courts should accord agencies *some* deference when reviewing the agencies' interpretations of guidance interpreting regulations and should not review the interpretations de novo. For several reasons outlined in this Article, courts should at least accord agencies *Skidmore* deference and possibly much more.<sup>18</sup> After all, if a court were reviewing the underlying guidance that the agency interpreted, rather than the agency's interpretation of the guidance, the court would accord the guidance *Skidmore* deference if it interpreted a statute<sup>19</sup> and *Auer* deference if it interpreted a regulation.<sup>20</sup> It is not clear, therefore, why a court should abandon all deference when it is reviewing the agency's interpretation of that guidance.

While *Skidmore* deference would seem to be a minimal requirement, if *Auer* deference survives in its current form or in some modified form outlined in this Article, there are strong arguments to suggest that courts should accord *Auer* deference or a modified *Auer* deference to agencies' interpretations of guidance interpreting regulations just as they apply that deference to agencies' interpretations of regulations. Here's why: first, all of the reasons that courts and academics have identified

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<sup>15</sup> *Id.* at 3–11, 21.

<sup>16</sup> See Order Denying Petition for Writ of Certiorari, *Foster v. Vilsack* (U.S. Jan. 9, 2017) (No. 16-186), [https://www.supremecourt.gov/orders/courtorders/010917zor\\_c07d.pdf](https://www.supremecourt.gov/orders/courtorders/010917zor_c07d.pdf) [<https://perma.cc/TS32-38QB>].

<sup>17</sup> The focus in the case and in this Article is not broadly the level of deference to agency interpretations of guidance documents, but specifically the level of deference to agency interpretations of guidance documents that themselves interpret regulations. That is the “second level” of *Auer* deference.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *U.S. v. Mead*, 533 U.S. 218, 226–27 (2001) (holding that *Skidmore* applies to review of an agency interpretation of a statute when the agency has not been delegated authority to make decisions having the force of law); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (indicating that agency interpretations articulated in opinion letters, policy statements, agency manuals, and enforcement guidelines, “all of which lack the force of law,” are entitled to *Skidmore* deference, rather than *Chevron* deference).

<sup>20</sup> See *infra* Part III (noting that courts will defer to agency interpretations of regulations under *Auer*, regardless of the manner in which the agency reached the interpretation).

as justifications for deferring to an agency's interpretation of its own *regulation* under *Auer* (including expertise, the agency as the drafter and uniformity) apply equally to an agency's interpretation of its own guidance interpreting a regulation.<sup>21</sup> Second, the criticisms that have been raised to applying *Auer* deference to an agency's interpretation of its own *regulation* (that *Auer* encourages agencies to draft vague rules) do not apply as forcefully to applying *Auer* deference to an agency's interpretation of its own *guidance interpreting a regulation*.<sup>22</sup> Finally, the negative repercussions outlined in this Article that would flow from eliminating *Auer* deference for an agency's interpretations of its *regulations* will flow equally from refusing to accord *Auer* deference to an agency's interpretations of its *guidance interpreting its regulations*.<sup>23</sup>

Part I of this Article begins by examining several cases cited by PLF in its cert. petition to determine whether there *is*, as PLF asserts, a trend toward "second level *Auer* deference" in the federal courts. Part II of the Article focuses on the traditional application of the *Auer* standard, exceptions to the standard, the rationales for the standard, criticisms raised to the application of the standard and several suggestions advanced by academics to reform the standard. Part III then outlines the reasons why courts should accord *Skidmore*, *Auer* or a modified version of *Auer* deference when reviewing an agency's interpretation of its own guidance interpreting regulations.

## I. A TREND TOWARD "SECOND LEVEL" *AUER* DEFERENCE?

Before focusing on whether courts *should* accord *Auer*, *Skidmore* or *any* deference to an agency when reviewing the agency's interpretation of guidance interpreting a rule, it is useful to examine whether courts *are* according any deference to agencies in those cases. In its cert. petition for *Foster v. Vilsack*, PLF cited three federal appellate court decisions that allegedly addressed "second level" *Auer* deference.<sup>24</sup>

The first case, *Elgin Nursing and Rehabilitation Center v. United States Department of Health and Human Services*, involved a challenge to a determination by the Center for Medicare and Medicaid Services ("CMS"), an agency within the Department of Health and Human Services, that Elgin violated federal food safety regulations that require long-term care facilities to "serve food under sanitary conditions" when Elgin served

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<sup>21</sup> See *infra* Part II.

<sup>22</sup> See *infra* Part II.

<sup>23</sup> See *infra* notes 171–72, and accompanying text.

<sup>24</sup> See PLF Cert. Petition, *supra* note 12, at 18–23.

eggs that were “soft cooked” to several of its nursing home residents.<sup>25</sup> CMS had adopted an interpretive manual, the State Operations Manual, to provide guidance to facilities regarding when the agency would conclude that food was not “served under sanitary conditions” as required by the regulations.<sup>26</sup> While the manual included directions regarding the proper preparation of eggs to ensure that they were “served under sanitary conditions,” the directions in the manual regarding the temperature and consistency of eggs were ambiguous, and CMS interpreted the language in the manual to prohibit facilities from serving “soft cooked” eggs.<sup>27</sup>

When the case reached the United States Court of Appeals for the Fifth Circuit, the Department of Health and Human Services asked the court to accord *Auer* deference to the agency’s interpretation of the State Operations Manual (which interpreted the regulation).<sup>28</sup> The court noted that *Auer* deference traditionally applies to an agency’s interpretation of its own rules, rather than the interpretation of a manual interpreting its rules, which the court referred to as “*Seminole Rock* squared” deference.<sup>29</sup> The court refused to accord the agency such deference, arguing that to do so would encourage agencies to write ambiguous interpretive manuals based on ambiguous regulations, would entirely cede the judicial function of the judicial branch of interpreting the law to the executive branch and would allow punishment of violations for which no person would have fair warning.<sup>30</sup> After rejecting the Department’s request for *Auer* deference, the court interpreted the manual using “traditional tools of textual interpretation” and did not accord *any* deference to the agency.<sup>31</sup>

The second case cited by PLF, *Atrium Medical Center v. United States Department of Health and Human Services*, also involved judicial review of CMS’ interpretation of a manual.<sup>32</sup> PLF characterized the decision as a case where the United States Court of Appeals for the Sixth Circuit applied *Auer* deference to an agency’s interpretation of a manual,<sup>33</sup> but the court’s opinion is far more complex than PLF implies.<sup>34</sup>

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<sup>25</sup> 718 F.3d 488 (5th Cir. 2013).

<sup>26</sup> *Id.* at 491.

<sup>27</sup> *Id.* at 491–92.

<sup>28</sup> *Id.* at 492.

<sup>29</sup> *Id.* at 493.

<sup>30</sup> *Id.* at 493–94.

<sup>31</sup> *Elgin*, 718 F.3d 488 at 494–95.

<sup>32</sup> 766 F.3d 560 (6th Cir. 2014).

<sup>33</sup> See PLF Cert. Petition, *supra* note 12, at 23.

<sup>34</sup> Judge Stranch begins the opinion for the court by describing the Medicare statutes and regulations as “the most completely impenetrable texts within human experience” and



The case centered on CMS' determination regarding whether certain costs incurred by hospitals in rural Iowa and Cincinnati, Ohio should be treated as "wages," "wage related costs" or "paid hours" for purposes of calculating local and national wage indices used to calculate reimbursement levels under the Medicare Act.<sup>35</sup> Since the court was reviewing CMS' interpretation of the terms "wages," "wage related costs" and "paid hours" that were used in a Provider Reimbursement Manual that clarified requirements in the Medicare Act and regulations, it would appear, at first glance, that the Sixth Circuit was being asked to review an agency's interpretation of a guidance document that interpreted a regulation.<sup>36</sup> Working from that assumption, one might conclude that when the court accorded *Auer* deference to the agency's interpretation of terms in the manual, the court would be employing "second level" *Auer* deference, as PLF asserts.

However, in its analysis of CMS' decision to treat various costs as "wages" and "paid hours" for purposes of calculating wage indices, the court noted that the *rulemaking* announcing the wage index "*specifically reference[d] and incorporate[d]*" the sections of the manual that the agency was interpreting in the case.<sup>37</sup> Although the court stressed that the manual was not a "substantive rule" because the actual text of the manual was not published in the Federal Register, the court noted that the agency solicited and received comments on the sections of the manual at issue when it promulgated the regulation establishing the wage index and incorporated those sections of the manual in the rulemaking notice.<sup>38</sup> The court also noted that the manual functions "as an essential part of the wage index."<sup>39</sup> In light of those factors, the court concluded that the manual should be accorded *Chevron* deference.<sup>40</sup> Although the court refused to characterize the manual as a rule, it accorded the *manual itself* the deference that is traditionally accorded to a regulation. To the extent that the court subsequently accorded *Auer* deference to the agency's *interpretation of the manual*,<sup>41</sup> therefore, one might view the court's action as more closely resembling traditional *Auer* deference to an agency's

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advises readers that there are "slim hope[s] of rendering a comprehensible opinion." *Atrium*, 766 F.3d at 564.

<sup>35</sup> *Id.* at 564–65.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 564 (emphasis added).

<sup>38</sup> *Id.* at 571–72.

<sup>39</sup> *Id.* at 572.

<sup>40</sup> *Atrium*, 766 F.3d at 572–73.

<sup>41</sup> *Id.* at 574–75.

interpretation of its rules than “second level” *Auer* deference to an agency’s interpretation of guidance that interprets a rule.

The final case cited by PLF was the Eighth Circuit decision that PLF was asking the Supreme Court to overturn, *Foster v. Vilsack*.<sup>42</sup> In that case, Arlen and Cindy Foster were challenging a determination of the Natural Resource Conservation Service (“NRCS”) that the Fosters had converted prairie pothole wetlands for agricultural use in violation of the Food Security Act of 1985.<sup>43</sup> The statutory definition of wetlands includes a requirement that land support a prevalence of hydrophytic vegetation “under normal circumstances.”<sup>44</sup> Regulations adopted by the U.S. Department of Agriculture (“USDA”), NRCS’ parent agency, provide that when the vegetation on a site has been removed, in order to evaluate whether that site meets the statutory requirements to be classified as a wetland, the agency should determine “if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions.”<sup>45</sup> In practice, USDA has interpreted the “local area” requirement in the regulation to mean that comparison sites must be located within the same “Major Land Resource Area” (“MLRA”) as the site being evaluated.<sup>46</sup> Consistent with that interpretation of its regulation, NRCS examined an unaltered prairie pothole site in the same MLRA as the site on the Fosters’ land with the same hydric soils as the site on their land and with similar wetland hydrology as the site on their land.<sup>47</sup> Based on the data from that comparison site, NRCS concluded that “a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions,” per USDA regulations, so that the prairie pothole that the Fosters converted would support a prevalence of hydrophytic vegetation “under normal circumstances,” and, thus, meet the statutory definition of wetlands.<sup>48</sup>

The Fosters challenged the NRCS’ decision to use the comparison site that the agency chose to determine whether the site on the Fosters’

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<sup>42</sup> 820 F.3d 330 (8th Cir. 2016).

<sup>43</sup> *Id.* at 331–32.

<sup>44</sup> See 16 U.S.C. § 3801(a)(27) (2012).

<sup>45</sup> 7 C.F.R. § 12.31(b)(2)(ii) (2016).

<sup>46</sup> 820 F.3d at 331, 335. MLRAs are “‘geographically associated land resource units’ demarcated by NRCS scientists ‘after a consideration of characteristics such as their ‘physiography, geology, climate, water, soils and land use.’” See PLF Cert. Petition, *supra* note 12, App. B27 n.10 (quoting Administrative Record (A.R.) 403).

<sup>47</sup> *Foster*, 820 F.3d at 335.

<sup>48</sup> *Id.* at 331–33.



property was a wetland, but the Eighth Circuit upheld the agency's decision on the grounds that the decision was not arbitrary, capricious or contrary to the law.<sup>49</sup> The Eighth Circuit did not cite *Auer* and did not discuss any deference standards in its decision. Perhaps the Court *could* have accorded *Auer* deference to NRCS' interpretation of the term "local area" in its regulation to mean "within the same MLRA," but none of the parties asked the Court to do so, and such deference would be traditional *Auer* deference to an agency's interpretation of its own rule, as opposed to "second level" *Auer* deference.<sup>50</sup> Despite the complete absence of any discussion of *Auer* or agency deference, PLF characterized the case as an example of a court according an agency "second level" *Auer* deference in its cert. petition,<sup>51</sup> which the Supreme Court ultimately rejected.<sup>52</sup>

Of the three cases cited by PLF to demonstrate a judicial trend toward adoption of "second level" *Auer* deference, therefore, one rejected *Auer* and reviewed the agency's interpretation de novo,<sup>53</sup> one reviewed the agency's decision under the arbitrary and capricious standard without discussing *Auer*, *Skidmore* or other deference regimes<sup>54</sup> and one schizophrenic opinion applied *Auer*, but arguably not in a "second level" manner.<sup>55</sup> While there may be courts that are beginning to expand *Auer* to apply to agency interpretations of guidance that interpret regulations, PLF's cert. petition failed to identify strong examples of such a trend.

Nevertheless, the question of whether courts should accord deference to an agency's interpretation of guidance that interprets a regulation is worth asking. The Fifth Circuit, in *Elgin*, interpreted the agency's guidance document de novo, without according the agency any deference.<sup>56</sup> That seems misguided. In addition, simply because courts have not yet applied *Auer* to agency interpretations of guidance that interpret regulations doesn't mean that courts should not do so. Although it is unlikely that courts will expand *Auer* in light of the more general assault on the

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<sup>49</sup> *Id.* at 334–35.

<sup>50</sup> In the administrative proceedings that spawned the judicial proceedings, the deputy director of the NRCS cited *Auer* as support for upholding the agency's interpretation of the regulatory term "local area" to mean within the same major land use area." See PLF Cert. Petition, *supra* note 12, at C27.

<sup>51</sup> Regarding the Eighth Circuit's decision, PLF argued "the deference afforded is that established by *Auer*, even if the Eighth Circuit cited other types of deference." *Id.* at 20 n.10.

<sup>52</sup> See *supra* note 17.

<sup>53</sup> See *supra* notes 28–34 and accompanying text.

<sup>54</sup> See *supra* notes 49–50 and accompanying text.

<sup>55</sup> See *supra* notes 32–41 and accompanying text.

<sup>56</sup> See *Elgin Nursing and Rehabilitation Center v. United States Department of Health and Human Services*, 718 F.3d 488, 494–95 (5th Cir. 2013).

doctrine, there are strong arguments to support the application of the same standard of review to an agency's interpretation of guidance that interprets a regulation as to an agency's interpretation of a regulation.

## II. AUER—BACKGROUND, CRITICISMS AND SUGGESTED REFORMS

### A. Background

In 1945, the United States Supreme Court was asked to review the decision of the Administrator of the Office of Price Administration, under the Emergency Price Control Act of 1942, to limit the maximum price of crushed stone to \$.60 per ton.<sup>57</sup> The Administrator set the maximum price based on his interpretation of a regulation adopted by the agency.<sup>58</sup> The Court, in *Bowles v. Seminole Rock & Sand Company*, upheld the agency's decision, holding that the Administrator's interpretation of agency regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>59</sup> The Court did not, however, explain why such deference was due.<sup>60</sup>

The decision arose in the context of price controls and was only applied in that context for many years.<sup>61</sup> In addition, early decisions applying the standard limited deference to cases where the agency's decision was announced in an official publication.<sup>62</sup> Further, in *Seminole Rock* and in many of the early cases applying *Seminole Rock*, courts only accorded deference to agencies' interpretations of regulations *after* engaging in an independent and searching review of the language of the regulations.<sup>63</sup>

Over time, though, courts began applying the doctrine in much broader contexts to a broader range of formats of agency decisions and with a much more lenient review of the language of the regulations. The Supreme Court articulated some basis for the *Seminole Rock* deference in two cases in 1991, *Martin v. Occupational Safety and Health Review Commission*<sup>64</sup> and *Pauley v. BethEnergy Mines, Inc.*,<sup>65</sup> when the Court

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<sup>57</sup> See *Bowles*, 325 U.S. at 411–12.

<sup>58</sup> *Id.* at 413–15.

<sup>59</sup> *Id.* at 414.

<sup>60</sup> See Healey, *supra* note 9, at 636.

<sup>61</sup> See Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 52, 54 (2015).

<sup>62</sup> *Id.* at 54–55.

<sup>63</sup> *Id.* at 60–61; see also Healey, *supra* note 9, at 639–40.

<sup>64</sup> 499 U.S. 144 (1991).

<sup>65</sup> 501 U.S. 680 (1991).

suggested that Congress' delegation of lawmaking powers to agencies justified the deference.<sup>66</sup>

By 1997, the Court had greatly expanded the reach of *Seminole Rock*, and the Court, in *Auer v. Robbins*, applied it to uphold the Secretary of Labor's interpretation of a regulation used to determine exemptions from overtime pay requirements under the Fair Labor Standards Act, even though the Secretary advanced the interpretation of the regulation for the first time in an amicus brief in the litigation surrounding the implementation of the rule.<sup>67</sup> Even though the Court issued its *Auer* opinion more than a decade after the Court created a deferential standard of review for agency regulations in *Chevron v. NRDC* (identifying numerous rationales for the deference), the Court did not discuss the relationship between the *Auer* and *Chevron* standards or provide any post-*Chevron* rationale for the deference to an agency's interpretation of its own regulations.<sup>68</sup>

The deference that courts accord agencies under *Auer* is generally regarded as stronger than *Chevron*, *Skidmore* or any other deference standard.<sup>69</sup> One study suggests that the Supreme Court upholds agencies' interpretations of their own regulations 91% of the time under *Auer*.<sup>70</sup> By comparison, the rate of judicial approval of agency decisions across all appellate courts under *Chevron* ranges from 64–81% based on a variety of studies, and the rate of approval under *Skidmore* ranges from 55–71%.<sup>71</sup> Although *Auer* has traditionally been regarded as the most deferential

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<sup>66</sup> See Leske, *supra* note 9, at 110.

<sup>67</sup> 519 U.S. 452, 454–57, 459–63 (1997).

<sup>68</sup> See Healey, *supra* note 9, at 648.

<sup>69</sup> See Knudsen & Wildermuth, *supra* note 61, at 48; see also Nicholas R. Bednar, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, De Novo, MINN. L. REV., June 24, 2015, <http://www.minnesotalawreview.org/2015/06/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association/> [<https://perma.cc/F7KE-N44G>].

<sup>70</sup> See William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1104 (2008); Pierce & Weiss, *supra* note 3, at 516; Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 83 ADMIN. L. REV. 77, 83 (2011). As Professor Richard Pierce notes, however, the 91% rate was based on a review of a very small number of cases (11) in the Supreme Court. See Richard J. Pierce, Jr., *Why Empirical Examination of Seminole Rock Is Important*, YALE J. REG.: NOTICE AND COMMENT (Sept. 13, 2016), <http://yalejreg.com/nc/why-empirical-examination-of-seminole-rock-is-important-by-richard-j-pierce-jr/> [<https://perma.cc/8DH2-ACFN>].

<sup>71</sup> See Pierce & Weiss, *supra* note 3, at 520. Based on a review of empirical studies, Professor David Zaring has suggested that courts uphold agency actions in about 70% of cases regardless of which deference standard is used. *Id.* at 520 (citing David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169 (2010)).

review standard, a recent study suggests that the rate at which agency decisions are being approved under *Auer* in the lower federal courts is not significantly greater than the rate at which agency decisions are being approved under *Chevron*.<sup>72</sup>

Traditionally, courts will defer to agency interpretations of their own regulations under *Auer* regardless of the process or tool that the agency uses to articulate that interpretation. Courts have accorded agency interpretations deference under *Auer* regardless of whether the interpretations are long-standing, whether they were formulated contemporaneously with the regulation, whether they are advanced in testimony at a congressional hearing, or whether they are advanced for the first time in amicus briefs in litigation.<sup>73</sup> This is different from the approach that courts take under *Chevron*, where courts make a threshold determination that an agency has been delegated authority to make a decision with the force of law and has exercised that authority in making the decision before according the agency deference with regard to its interpretation of a statute.<sup>74</sup>

While *Auer* is a very deferential standard, courts have carved out exceptions which have narrowed the standard over time.<sup>75</sup> For instance, courts will not accord deference to an agency's interpretation of a regulation when the regulation merely parrots the language of a statute;<sup>76</sup> when regulated parties have not had fair notice of the conduct that is

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<sup>72</sup> See Pierce & Weiss, *supra* note 3, at 519–20. Professors Pierce and Weiss examined 219 cases in the federal district and appellate courts between 1991 and 2007 where the court applied *Auer* or *Seminole Rock* deference. *Id.* They found that courts upheld agency interpretations in 76.26% of the cases, and that the rate of affirmance was similar in the district and circuit courts. *Id.* In a separate study, Professor Cynthia Barmore found that the rate at which circuit courts approve agency decisions under *Auer* has declined from 82.3% in 2011–2012 to 76% after the Supreme Court's *Talk America* decision. See Cynthia Barmore, *An Empirical Analysis of Auer Deference in the Courts of Appeals*, YALE J. REG.: NOTICE AND COMMENT (Sept. 13, 2016), <http://yalejreg.com/nc/an-empirical-analysis-of-auer-deference-in-the-courts-of-appeals-by-cynthia-barmore> [https://perma.cc/92UK-8MCR]. Professor Steve Johnson also notes that agencies receive little deference under *Auer* in Tax Court. See also Steve R. Johnson, *Seminole Rock in Tax Cases*, YALE J. REG.: NOTICE AND COMMENT (Sept. 15, 2016), <http://yalejreg.com/nc/seminole-rock-in-tax-cases-by-steve-r-johnson-2/> [https://perma.cc/XA9H-DRJE].

<sup>73</sup> See Knudsen & Wildermuth, *supra* note 61, at 48–49; see also Daniel Mensher, *Seminole Rock in Environmental Law: A Window into Weirdness*, YALE J. REG.: NOTICE AND COMMENT (Sept. 15, 2016), <http://yalejreg.com/nc/seminole-rock-in-environmental-law-a-window-into-weirdness-by-daniel-mensher/> [https://perma.cc/SJZ4-YHJP].

<sup>74</sup> See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

<sup>75</sup> See Johnson, *supra* note 72.

<sup>76</sup> See *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006).

required or prohibited by the agency's interpretation of a regulation;<sup>77</sup> when the agency's interpretation is not a settled or authoritative expression of the agency's position;<sup>78</sup> when the interpretation "does not reflect the agency's fair and considered judgment on the matter in question";<sup>79</sup> and when a regulation is clear and unambiguous.<sup>80</sup>

While the Supreme Court has not provided significant guidance regarding the reasons for *Auer* deference, academics argue that it is justified for many of the same reasons that *Chevron* deference is justified.<sup>81</sup> First, agencies have greater expertise than courts in interpreting the law in a manner to advance the statutorily assigned mission of the agency.<sup>82</sup> Congress has delegated policymaking authority to the agency and it is better equipped than courts to exercise that authority.<sup>83</sup> Second, agencies are generally viewed as more politically accountable than the judiciary, so it is appropriate for agencies to make the policy decisions within the authority delegated to them by Congress.<sup>84</sup> Third, deference advances the

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<sup>77</sup> See *Christopher v. SmithKline Beecham Corp.*, 132 U.S. 2156, 2167–68 (2012).

<sup>78</sup> See *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837–38 (Fed. Cir. 2006).

<sup>79</sup> See *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

<sup>80</sup> See *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

<sup>81</sup> See William M. Yeatman, *The Simple Solution to Auer Problem 5* (Aug. 29, 2016) (working paper), <https://ssrn.com/abstract=2831651> [<https://perma.cc/JC75-3TAK>] (last visited Apr. 4, 2017); Cass R. Sunstein & Adrian Vermeule, *Auer, Now and Forever*, YALE J. REG.: NOTICE AND COMMENT (Sept. 19, 2016), <http://yalejreg.com/nc/auer-now-and-for-ever-by-cass-r-sunstein-adrian-vermeule/> [<https://perma.cc/7XCE-Z9SL>]. While noting that *Auer* deference can be justified by many of the same reasons as *Chevron* deference, Professors Richard Pierce and Joshua Weiss suggest that there do not seem to be any reasons to accord agencies *greater* deference under *Auer* than under *Chevron*. See Pierce & Weiss, *supra* note 3, at 519.

<sup>82</sup> See Pierce & Weiss, *supra* note 3, at 517. Senator Orrin Hatch argues, however, that businesses, trade associations, non-profits, and think tanks frequently have superior expertise than agencies and that courts are well equipped to analyze the evidence provided by all of those parties as well as the agency in determining an appropriate interpretation of the law. See Hatch, *supra* note 11. In addition, Hatch argues that agencies are experts on fact questions, whereas courts are experts on legal questions, so courts should not defer to agencies on legal questions. *Id.*

<sup>83</sup> Justice Clarence Thomas, however, disagrees, and has argued that Congress cannot delegate an agency authority to develop a judicially binding interpretation of a law or regulation because Congress does not have that authority to delegate. See *Perez v. Mortg. Bankers Ass'n*, 135 U.S. 1199, 1224 (2015) (Thomas, J., concurring in the judgment). Under separation of powers principles, he argues, courts, rather than Congress or agencies, retain the power to interpret the law. *Id.*

<sup>84</sup> See William Funk, *Saving Auer*, ADMIN. LAW JOTWELL (June 23, 2016), <http://adlaw.jotwell.com/saving-auer/> [<https://perma.cc/U7JQ-4W62>] (last visited Apr. 4, 2017). Senator Hatch disagrees, and argues that "[b]y the time a case ends up in court, the policy

goal of uniformity in interpretation of the law. Agencies with national jurisdiction can interpret and apply the law consistently in a way that is not possible when interpretation is left to federal courts with limited jurisdiction that are likely to reach conflicting conclusions regarding the law.<sup>85</sup>

In addition to those *Chevron-esque* reasons for deference, there is a more fundamental reason for deferring to an agency's interpretation of its own regulation. Since the agency drafted the regulation that it is interpreting, it will know better than courts what it intended when it drafted the regulation.<sup>86</sup>

### B. Criticisms

While *Auer* and *Seminole Rock* deference has survived for more than seventy years, it has been increasingly criticized over the past few decades and pressure is mounting to eliminate or reform the doctrine. There are several bases upon which critics challenge the deference.

Perhaps the most fundamental challenge to *Auer* / *Seminole Rock* deference was raised by Professor John Manning in a law review article published the year before the Supreme Court issued its opinion in *Auer*.<sup>87</sup> Manning argued that deferring to an agency's interpretation of its own rule effectively authorizes the agency to make and interpret the law, which violates fundamental principles of separation of powers.<sup>88</sup> In order

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judgment has already been made . . . [so] the question is which organ of government is the proper forum for construing a binding legal text." See Hatch, *supra* note 11.

<sup>85</sup> See Pierce & Weiss, *supra* note 3, at 517.

<sup>86</sup> *Id.* at 516–17. See Funk, *supra* note 84. Professors Pierce and Weiss criticize this rationale, though, for a few reasons. First, since agency interpretations are frequently made long after a regulation is promulgated, the agency officials interpreting the regulation are unlikely to have been involved in the initial development of the regulation and will not have any superior knowledge of the drafter's original intent. *Id.* at 516. Second, courts accord agencies *Auer* deference even when agencies change their interpretation of a regulation, which suggests that the court may not be concerned with whether the agency's interpretation is consistent with some original intent. *Id.* Justice Clarence Thomas has also criticized this rationale, arguing that the focus of interpretation should be on the text of the rules, rather than an agency's intent. See *Perez v. Mortg. Bankers Ass'n*, 135 U.S. 1199, 1223–24 (2015) (Thomas, J., concurring in the judgment).

<sup>87</sup> See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

<sup>88</sup> *Id.* Many other academics and policymakers have identified the separation of powers concern as a fundamental criticism of the *Auer* / *Seminole Rock* deference. See, e.g., Leske, *supra* note 9, at 104; Aaron Nielson, *Beyond Seminole Rock*, 105 GEO. L. J. 2 (forthcoming 2017), <https://ssrn.com/abstract=2821341> [<https://perma.cc/C52S-GF8B>]; Hatch, *supra* note 11. However, Professors Cass Sunstein and Adrian Vermeule argue that the separation of powers concerns are overblown. They argue that when agencies are acting within



to avoid those separation of powers concerns, Manning and others argue, an independent judiciary must be free to interpret regulations without deferring to an agency.<sup>89</sup> While Justice Scalia authored the Court's unanimous opinion in *Auer*, he eventually embraced Manning's view and criticized *Auer* on separation of powers grounds in recent years in concurring opinions in *Talk America v. Michigan Bell Telephone Company*<sup>90</sup> and *Decker v. Northwest Environmental Defense Center*.<sup>91</sup> Justice Thomas also joined in the separation of powers criticism of *Auer* in a concurring opinion in *Perez v. Mortgage Bankers Association*.<sup>92</sup>

Closely related to the separation of powers concern, critics argue that *Auer* deference violates the requirement in the Administrative Procedures Act ("APA")<sup>93</sup> that courts reviewing agency actions "shall decide all relevant questions of law."<sup>94</sup> If courts must defer to agencies'

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a legislative grant of statutory authority, all of their actions, including making and interpreting rules, are simply exercises of executive power. See Sunstein & Vermeule, *supra* note 81. Sunstein and Vermeule view the criticisms as a more fundamental attack on basic principles of administrative law and delegation of authority to agencies. They note, "[t]he argument in favor of independent judicial judgment reflects an emerging, large-scale distrust of the administrative state, and perhaps a belief that it is constitutionally illegitimate. In our view, that belief is utterly baseless. But even if it is not, the appropriate response is hardly to say that judges, with their own institutional weaknesses and potential biases, should make the judgments that are entailed by resolving ambiguities in regulations." See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer 2* (Harvard Public Law, Working Paper No. 16-02, 2016), <https://ssrn.com/abstract=2716737> [<https://perma.cc/KFH4-AG38>] (last visited Apr. 4, 2017).

<sup>89</sup> See Manning, *supra* note 87, at 617–18. Justice Thomas has argued that the abandonment of the critical check of independent judicial review "permits precisely the accumulation of governmental powers that the framers warned against." See *Perez*, 135 S. Ct. 1199, 1221 (2015) (Thomas, J., concurring in the judgment) (citing *The Federalist* No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>90</sup> *Decker v. Northwest Env'tl. Def. Ctr.*, 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring in the judgment).

<sup>91</sup> See *Perez*, 133 U.S. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part). Scalia wrote "[w]hen the legislative and executive powers are united in the same person, . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." *Id.* (quoting Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–52 (O. Piest ed., T. Nugent transl. 1949)). He also indicated that he would abandon the doctrine because it had "no principled basis." *Id.* at 1342.

<sup>92</sup> See *Perez*, 135 S. Ct. 1199, 1217–20 (2015) (Thomas, J., concurring in the judgment).

<sup>93</sup> See 5 U.S.C. § 706 (2012).

<sup>94</sup> See Hatch, *supra* note 11; Allyson N. Ho, *Why Seminole Rock should Be Overruled*, YALE J. ON REG.: NOTICE AND COMMENT (Sept. 19, 2016), <http://yalejreg.com/nc/2039-2/> [<https://perma.cc/P5XB-M4QN>] (last visited Apr. 4, 2017); Leske, *supra* note 9, at 105; Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L. J. 1, 9–10 (1996).

interpretations of regulations, critics complain, they are not deciding all relevant questions of law.<sup>95</sup> In the view of those critics, de novo review of the regulation would be more consistent with the language of the APA.<sup>96</sup> Supporters of that argument also stress that while agencies may have expertise in administering complex regulatory statutes, courts have expertise in interpreting the law.<sup>97</sup> Opponents of the argument counter, though, that interpretation of the law rarely involves purely legal skills. Instead, it involves consideration of policy issues, an area of agency expertise and agency delegated authority.<sup>98</sup>

*Auer* critics also complain that the difference between *Auer* deference and *Chevron* deference creates an incentive for agencies to draft ambiguous regulations and interpret them informally.<sup>99</sup> If agencies interpreted statutes clearly in regulations, the critics argue, courts would review the regulations under the *Chevron* standard.<sup>100</sup> If, however, agencies draft ambiguous regulations to interpret statutes and then interpret those regulations informally, courts will review the interpretation of the regulations under the more deferential *Auer* standard, regardless of the procedures

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<sup>95</sup> Professor Kathryn Kovacs criticizes the Supreme Court for developing “administrative common law” that violates the APA and argues that the Court’s failure to address the tension between *Auer* deference and the language of the APA in *Perez v. Mortgage Bankers Association* demonstrates the Court’s “continued comfort with administrative common law.” See Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 125 YALE L.J. F. 31 (2015), <http://www.yalelawjournal.org/forum/pixelating-administrative-common-law-in-perez-v-mortgage-bankers-association> [https://perma.cc/DJ3W-D7VT].

<sup>96</sup> See Ho, *supra* note 94. Allyson Ho argues that the drafters of the bill believed that courts should review agency interpretations outside of the rulemaking context “precisely because the APA exempts them from the safeguards of notice-and-comment rulemaking.” *Id.*, citing Staff of S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945), *excerpted in* Administrative Procedure Act: Legislative History, 79th Congress, 1944–46 at 18 (1946). Professors Cass Sunstein and Adrian Vermeule argue, on the other hand, that the “argument in favor of independent judicial judgment reflects an emerging, large-scale distrust of the administrative state, and . . . a belief that it is constitutionally illegitimate,” which they believe is baseless. See Sunstein & Vermeule, *supra* note 81.

<sup>97</sup> See Hatch, *supra* note 11.

<sup>98</sup> See Funk, *supra* note 84; Sunstein & Vermeule, *supra* note 81 (noting that Justice Scalia insisted that interpretation necessarily involves consideration of policy consequences).

<sup>99</sup> See Pierce & Weiss, *supra* note 3, at 518; Leske, *supra* note 9, at 104–05; Hatch, *supra* note 11. Justice Alito raised this concern in his opinion in *Christopher v. SmithKline Beecham*, 132 U.S. 2156 (2012) and Justice Scalia raised the concern in his concurring opinions in *Talk Am., Inc. v. Mich. Bell. Tel. Co.*, 131 U.S. 2254, 2266 (2011) (Scalia, J., concurring) and *Perez v. Mortg. Bankers*, 135 U.S. 1199, 1211 (2015) (Scalia, J., concurring in the judgment).

<sup>100</sup> See Funk, *supra* note 84.

or methods that the agency used to interpret the regulation or announce that interpretation.<sup>101</sup> Those critics suggest that eliminating *Auer* deference will force agencies to draft clearer regulations.<sup>102</sup> Even without *Auer* deference, though, agencies have incentives to draft vague regulations that are fleshed out informally, because the interpretations can be adopted without the cost and delay of the notice and comment process and without the risk of legal challenge, depending on the manner in which the interpretations are announced.<sup>103</sup>

There are other flaws in the “ambiguous rulemaking” criticism to *Auer* deference. First, there is very little evidence that agencies draft ambiguous regulations simply to obtain greater judicial deference for a policy interpretation.<sup>104</sup> In a survey of federal agency staff tasked with writing regulations, only about half of the staff even knew about the *Auer* doctrine and fewer than 40% indicated that they consider the doctrine when drafting rules.<sup>105</sup> Reviewing that research, Professor Cynthia Barmore suggests that “at least some agency officials view their interests as better served by writing clear rules for regulated entities to follow, rather than by writing vague rules to be manipulated in litigation.”<sup>106</sup> Professors Cass Sunstein and Adrian Vermeule also note that agencies have a counter incentive to draft clear rules so that the agency interpretation will remain in place when there is a change in administration unless the new administration

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<sup>101</sup> *Id.*

<sup>102</sup> See Knudsen & Wildermuth, *supra* note 61, at 51.

<sup>103</sup> See Pierce & Weiss, *supra* note 3, at 518.

<sup>104</sup> See Sunstein & Vermeule, *supra* note 81; Funk, *supra* note 84; see also Ronald M. Levin, *Auer and the Incentives Issue*, YALE J. REG.: NOTICE AND COMMENT (Sept. 19, 2016), <http://yalejreg.com/nc/auer-and-the-incentives-issue-by-ronald-m-levin/> [<https://perma.cc/6XPG-AW3A>] (last visited Apr. 4, 2017). Professor Ronald Levin notes that in none of the cases where Supreme Court Justices raised concerns about the incentive to draft ambiguous rules did any Justice find that an agency had drafted a deliberately vague rule and he notes that critics of *Auer* have not even produced any anecdotes, let alone specific cites, of cases where agency regulators had deliberately drafted ambiguous rules. *Id.* While agencies may not deliberately draft ambiguous regulations to obtain *Auer* deference, Professor Levin admits that other factors could encourage agencies to draft vague regulations, *id.*, and Professor Aaron Nielson suggests that agencies frequently “accept ambiguous regulations because obtaining specificity requires more resources.” See Nielson, *supra* note 88, at 11.

<sup>105</sup> See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STANFORD L. REV. 999, 1019–20 (2015). Professor Ronald Levin also points out that when, in 2015, the GAO conducted a survey of officials at four federal agencies regarding what factors they considered in deciding whether to issue guidance or regulations, none of the officials identified judicial review as a factor. See Levin, *supra* note 104.

<sup>106</sup> Barmore, *supra* note 72.

pursues the burdensome task of repealing the rule through notice and comment procedures.<sup>107</sup>

Regardless of whether agency officials draft vague rules in order to take advantage of *Auer* deference, though, there is a deeper flaw in the “ambiguous rulemaking” criticism. As Professor Aaron Nielson and others have pointed out, agencies frequently have statutory authority to choose to interpret laws to advance specific policies in a variety of procedural ways.<sup>108</sup> It is rare that a statute will *require* an agency to announce its interpretation of the statute in rulemaking. When an agency has a choice of procedures for interpreting a statute, such as rulemaking and adjudication, it is a bedrock principle of administrative law that courts will defer to the agency’s choice of procedure.<sup>109</sup> Thus, if *Auer* deference were eliminated, an agency that wanted to retain discretion to interpret a statute and would have issued an ambiguous rule under *Auer* to retain that discretion will likely choose to forego the time and expense of issuing a regulation (which may be challenged in court upon issuance) or choose to leave the issue on which the agency wishes to retain discretion unaddressed in any regulation.<sup>110</sup> The agency can then interpret the statute in accordance with the agency’s preferred policy reading of the statute in a subsequent adjudication (and apply it retroactively) or announce it in a guidance document (which consumes less time and resources and normally cannot be immediately challenged).<sup>111</sup> Depending on the procedures that the agency uses to interpret the statute at that time, the agency’s interpretation may be accorded *Chevron* deference.<sup>112</sup>

*Auer* critics also complain that, since courts accord deference to agencies’ interpretations of regulations regardless of the procedures that agencies use to announce those interpretations, regardless of the timing of the announcement of those interpretations, and regardless of whether the interpretations change prior interpretations of law or are unexpected, the standard encourages agencies to interpret the laws that they administer in ways that do not provide adequate notice to the regulated community regarding the requirements of the laws.<sup>113</sup> At the extreme, critics argue

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<sup>107</sup> See Sunstein & Vermeule, *supra* note 81; see also Nielson, *supra* note 88, at 25.

<sup>108</sup> See Nielson, *supra* note 88, at 3.

<sup>109</sup> SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

<sup>110</sup> See Nielson, *supra* note 88, at 3–5.

<sup>111</sup> *Id.*

<sup>112</sup> See *Mead*, 533 U.S. at 218, 226–27 (2001); *Christensen*, 529 U.S. 576, 587 (2000).

<sup>113</sup> See Kevin M. Stack, *Seminole Rock, Step One*, YALE J. REG.: NOTICE AND COMMENT (Sept. 14, 2016), <http://yalejreg.com/nc/seminole-rock-step-one-by-kevin-m-stack/> [<https://perma.cc/R38X-MFD7>]; see also Brief for the Cato Institute as Amicus Curiae in Support

that application of *Auer* deference conflicts with the rule of lenity, in that it leads to punishment of persons who do not have notice that their conduct is prohibited.<sup>114</sup> Despite those criticisms, as noted above, if *Auer* deference were eliminated, agencies would likely interpret laws in less formal ways that would provide the regulated community less notice than agencies are providing when they adopt ambiguous rules and clarify them through guidance documents.<sup>115</sup>

In addition to the preceding criticisms, opponents of *Auer* deference argue that it is inappropriate to accord deference to agency interpretations of regulations without regard to the procedural manner in which those interpretations were made. The critics note that courts defer to agencies' interpretations of *statutes* under *Chevron* only after making a threshold determination that Congress gave the agency the authority to interpret the statute in a way that has the force of law and that the agency exercised

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of Petitioners, *Foster v. Vilsack* (U.S. Sept. 12, 2016) (No. 16-186), <http://www.pacificlegal.org/file/Cato-Institute-Amicus-Brief.pdf> [<https://perma.cc/94MF-55VD>]; Amici Curiae Brief of American Farm Bureau Federation & South Dakota Farm Bureau Federation in Support of Petition for Certiorari, *Foster v. Vilsack* (U.S. Sept. 12, 2016) (No. 16-186), <http://www.scotusblog.com/wp-content/uploads/2016/09/16-186-cert-amicus-AFBF.pdf> [<https://perma.cc/2LMW-X9Q6>] [hereinafter American Farm Bureau Amicus Brief]. The American Farm Bureau suggests that application of *Auer* deference raises "serious due process concerns" and "effectively biases and prejudges the case". *Id.* Professor Kevin Stack argues that the notice concern could be addressed, to some extent, by limiting *Auer* to require courts to give great weight to the preamble in an agency's regulation when interpreting the agency's subsequent interpretation of that regulation. Stack argues that this is appropriate because the preamble for the regulation "is the agency's official justification of the regulation, issued contemporaneously with the regulation, . . . [t]he basis for judicial review of the validity of the regulations . . . [and] preambles undergo extensive consideration and vetting both inside the agency and by other executive branch officials." *Id.* Stack suggests that focusing on the preamble in determining whether to uphold an agency's interpretation of a regulation would provide more notice to the regulated community regarding the requirements of the regulation (by narrowing the scope of permissible interpretations of the regulation) and will encourage agencies to provide more guidance to the regulated community in preambles (in order to obtain deference for the subsequent interpretations). *Id.* While critics complain that *Auer* diminishes notice for the regulated community, Professors Cass Sunstein and Adrian Vermeule counter that *Auer* is frequently invoked to support an agency's response to a request for clarification from a regulated class or to support an agency's assurance that it will not overreach under an ambiguous provision of a regulation. *See* Sunstein & Vermeule, *supra* note 81. In those cases, "*Auer* is . . . an engine of predictability and . . . deregulation—though the Supreme Court, and even academic commentators, are not likely to see that." *Id.*

<sup>114</sup> *See* Amicus Brief of the Cato Institute, *supra* note 113, at 10–12. In the amicus brief in *Foster v. Vilsack*, lawyers for the Cato Institute argued that *Auer* deference allows "[a]ny government lawyer with a laptop [to] create a new federal crime by adding a footnote to a friend of the court brief." *Id.* at 11.

<sup>115</sup> *See* Nielson, *supra* note 88, at 5.

that authority when interpreting the statute (frequently through notice and comment rulemaking or formal adjudication).<sup>116</sup> They suggest that it is anomalous that courts do not require something similar before deferring to agencies' interpretations of regulations under *Auer*.<sup>117</sup> Allyson Ho criticizes the willingness of courts to accord *Auer* deference to agency interpretations of regulations regardless of the context in which an agency interpretation arises as offensive to "the principle that there should be either more rigorous process on the front end of agency action (i.e., notice and comment rulemaking) or less deference on the back end (i.e., plenary judicial review)."<sup>118</sup>

The criticisms by academics and Supreme Court Justices have fueled speculation that *Auer* could be overruled.<sup>119</sup> However, while Justices Alito, Scalia and Thomas criticized *Auer* in their concurrences in *Perez v. Mortgage Bankers Ass'n*, six Justices, including Justice Kennedy and the Chief Justice, joined the court's opinion in that case, which recognized the continuing vitality of *Auer*.<sup>120</sup> In addition, in May, 2016, by a 7–1 vote, the Court denied a cert. petition in *United Student Aid Funds v. Bible* that asked the Court to overturn *Auer*.<sup>121</sup> While the Supreme Court may not be ready to overrule *Auer* yet, it is possible that the Court could further limit its reach in the near future. In October, 2016, the Court granted cert. in *Gloucester County School Board v. G.G.*<sup>122</sup> While the petitioner initially asked the Court to overturn *Auer*, the Court only agreed to consider whether it was appropriate for the lower court to accord *Auer* deference to a unpublished letter ruling of the Department of Education.<sup>123</sup> In resolving that question, though, the Court could adopt further limitations on *Auer*, without overruling it.

### C. Suggested Reforms

In light of the criticisms outlined in the preceding section, academics have suggested a range of reforms to *Auer*. The most extreme "reform" is the elimination of deference to agency interpretations of regulations.<sup>124</sup>

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<sup>116</sup> See Mensher, *supra* note 73; Ho, *supra* note 94.

<sup>117</sup> See Mensher, *supra* note 73; Ho, *supra* note 94.

<sup>118</sup> See Ho, *supra* note 94.

<sup>119</sup> See Leske, *supra* note 9, at 107; Sunstein & Vermeule, *supra* note 81.

<sup>120</sup> 135 U.S. 1199 (2015).

<sup>121</sup> 136 U.S.1607 (2016).

<sup>122</sup> See 2016 U.S. LEXIS 6408 (U.S., Oct. 28, 2016), [https://www.supremecourt.gov/orders/courtorders/102816zr\\_feag.pdf](https://www.supremecourt.gov/orders/courtorders/102816zr_feag.pdf) [<https://perma.cc/D2FP-JCM6>] (last visited Apr. 4, 2017).

<sup>123</sup> *Id.*

<sup>124</sup> See Sunstein & Vermeule, *supra* note 88, at 1; Funk, *supra* note 84.



Supporters of this option argue that courts should review agency interpretations of regulations de novo, since that is required by the APA and separation of powers principles.<sup>125</sup> Proposed federal legislation would codify this approach.<sup>126</sup>

Other reform proposals are more moderate. In response to the concern that *Auer* is applied too broadly to interpretations that are made informally, many commentators have advocated for a “step zero” approach to *Auer*.<sup>127</sup> Under such an approach, courts would first focus on the manner in which the agency articulated its interpretation and several other factors related to the nature of the interpretation to determine whether the interpretation is entitled to *Auer* deference. Professors Sanne Knudsen and Amy Wildermuth suggest that courts applied a “step zero” approach to *Seminole Rock* in its early years, so a modification of the modern *Auer* test would be consistent with its historical roots.<sup>128</sup> They suggest that courts should not defer to agency interpretations of regulations unless the interpretations appear in a public and widely available document and unless the interpretations were published near in time to the regulation or were consistently held over a long period of time.<sup>129</sup> Many commentators argue that courts should not apply *Auer* when agencies use informal procedures to interpret regulations, since courts would not apply *Chevron* when agencies use informal procedures to interpret statutes.<sup>130</sup> The petitioners in *Gloucester County School Board v. G.G.* asked the Court to limit *Auer* in that manner.<sup>131</sup> In an amicus brief in the

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<sup>125</sup> See *supra* notes 88–98 and accompanying text.

<sup>126</sup> Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong., 1st Sess., § 2; Regulatory Accountability Act of 2017, H.R. 5, 115th Cong., 1st Sess.; Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong., 2d Sess.; Separation of Powers Restoration and Second Amendment Protection Act, H.R. 4321, 114th Cong., 2d Sess. (2016).

<sup>127</sup> See Conor Clarke, *Why the Supreme Court Might Not Overrule Seminole Rock*, YALE J. REG.: NOTICE AND COMMENT (Sept. 21, 2016), <http://yalejreg.com/nc/why-the-supreme-court-might-not-overrule-seminole-rock-by-conor-clarke/> [<https://perma.cc/Y5GH-WZPM>]; Yeatman, *supra* note 81, at 1–5, 7–9.

<sup>128</sup> See Knudsen & Wildermuth, *supra* note 61, at 54–61. Professors Knudsen and Wildermuth argue that *Seminole Rock* deference was only accorded to official agency interpretations, usually published contemporaneously with the regulation. *Id.* at 52–55.

<sup>129</sup> *Id.* at 102–04.

<sup>130</sup> See, e.g., Yeatman, *supra* note 81, at 1–5. Critics argue that failing to consider the procedures used by agencies before deferring under *Auer* creates a loophole through procedural safeguards put in place by *Chevron*’s focus on procedures. *Id.* at 5. William Yeatman argues that all of the reasons that are advanced as justification for limiting deference to agencies under *Chevron* through a “step zero” analysis apply equally to limiting deference to agencies under *Auer*. *Id.* at 9–12.

<sup>131</sup> See Brief of Petitioner, *Gloucester County School Board v. G.G.* (U.S. Jan. 3, 2017) (No. 16-273), <http://www.scotusblog.com/wp-content/uploads/2017/01/16-273-pet-merits-brief>

same case, Professors Ronald Cass, Christopher Demuth, and Christopher Walker, advocated for a “step zero” approach that considers the following factors: (1) whether the interpretation was adopted simultaneously with the regulation; (2) whether the interpretation was broadly disseminated; (3) whether Congress authorized the agency to make such interpretations with the force of law; (4) whether the agency used relatively formal procedures to interpret the regulation; and (5) the degree of public accessibility to the interpretation.<sup>132</sup>

Other commentators have advocated for an *Auer* “two step” analysis, similar to the *Chevron* “two step.”<sup>133</sup> While several different “two step” alternatives have been suggested, all of the reformers propose the same first step. As in *Chevron*, advocates for an *Auer* “two step” propose that courts should begin the *Auer* analysis by examining the language of the regulation that the agency is interpreting to determine whether the regulation is truly ambiguous.<sup>134</sup> Supporters of this reform argue that the Supreme Court only deferred to the agency regulation in the original *Seminole Rock* decision after engaging in a searching examination of the regulation.<sup>135</sup> While all of the “two step” proponents agree on a new *Auer* “step one,” they part ways on the appropriate level of deference at “step two.” Professors Sanne Knudsen and Amy Wildermuth suggest that courts should accord the agency interpretation the traditional strong level of deference that courts accord agencies under *Auer* today.<sup>136</sup> Professor Michael Healy suggests that courts should accord agencies *Skidmore*

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.pdf [https://perma.cc/QCK3-GR33]. The petitioners argued, “[t]he most plausible solution that preserves *Auer* is to maintain the symmetry and consistency of the *Chevron* and *Auer* deference doctrines. If the Department [of Education] wants documents . . . to have controlling weight in court, it should follow procedures sufficient to give them the force of law. If the Department does not want to follow those procedures, it should not expect its positions to merit controlling deference.” *Id.* at 59.

<sup>132</sup> See Brief of Professors—Dean Ronald A. Cass, Christopher C. Demuth, Sr., and Christopher J. Walker—as Amici Curiae in Support of Petitioner, Gloucester County School Board v. G.G. (U.S. Jan. 10, 2017) (No. 16-273), [http://www.scotusblog.com/wp-content/uploads/2017/01/16-273\\_amicus\\_pet\\_professors\\_dean\\_ronald\\_a\\_cass\\_christopher\\_c\\_demuth\\_sr\\_and\\_christopher\\_j\\_walker.pdf](http://www.scotusblog.com/wp-content/uploads/2017/01/16-273_amicus_pet_professors_dean_ronald_a_cass_christopher_c_demuth_sr_and_christopher_j_walker.pdf) [https://perma.cc/3EN5-P52N].

<sup>133</sup> See Kevin Leske, *Between Seminole Rock and a Hard Place*, YALE J. REG.: NOTICE AND COMMENT (Sept. 20, 2016), <http://yalejreg.com/nc/between-seminole-rock-and-a-hard-place-a-new-approach-to-agency-deference-by-kevin-leske/> [https://perma.cc/QNP6-P4HB]; Knudsen & Wildermuth, *supra* note 61, at 104–05; Healey, *supra* note 9, at 677–78.

<sup>134</sup> See Knudsen & Wildermuth, *supra* note 61, at 104–05; Healey, *supra* note 9, at 637–40.

<sup>135</sup> See Knudsen & Wildermuth, *supra* note 61, at 60–61.

<sup>136</sup> *Id.* at 104–05.

deference in “step two” of a reformed *Auer* analysis,<sup>137</sup> and Professor Kevin Leske suggests that courts should accord agencies a level of deference that falls between *Chevron* and *Skidmore* in the new “step two.”<sup>138</sup>

In lieu of *de novo* review, *Auer* “step zero,” or an *Auer* “two step,” some academics have recommended that courts review agency interpretations of regulations under the *Skidmore* analysis.<sup>139</sup> Professors Knudsen and Wildermuth argue that the deference that courts accorded to agencies in the early cases applying *Seminole Rock* more closely resembled *Skidmore* deference than the strong deference of the modern *Auer* doctrine, so it is appropriate for courts to return to that level of deference.<sup>140</sup> In fact, they suggest that the Court’s *SmithKline Beecham* case signaled a shift in the nature of *Auer* deference toward something that more closely resembles *Skidmore* deference.<sup>141</sup> Professor William Funk has also suggested that courts should review agency interpretations of regulations under *Skidmore*, but his proposal is based on different reasoning.<sup>142</sup> Funk argues that when agencies are trying to determine whether to interpret a vague regulation by amending the rule or issuing a guidance document, agencies have strong incentives to interpret the rule by guidance, to avoid the cost, delay, and potential legal challenges associated with amending the rule.<sup>143</sup> If courts accorded *Skidmore* deference to an agency’s interpretations of regulations, rather than *Auer* deference, Funk argues, agencies would have an incentive to amend vague rules through rulemaking,

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<sup>137</sup> See Healey, *supra* note 9, at 678, 693.

<sup>138</sup> See Leske, *supra* note 133. Leske suggests that courts should apply four factors at “step two” to determine the extent to which to defer to an agency’s interpretation of an ambiguous regulation: “(1) the administrative agency’s stated intent at the time of the regulation’s promulgation; (2) whether the interpretation currently advanced has been consistently held; (3) in what format the interpretation appears; and (4) whether the regulation merely restates or ‘parrots’ the statutory language.” *Id.*

<sup>139</sup> See Knudsen & Wildermuth, *supra* note 61, at 94–95; Funk, *supra* note 84; Bednar, *supra* note 69; Healey, *supra* note 9, at 678, 693. Professors Cass Sunstein and Adrian Vermeule, however, disagree that *Skidmore* is an appropriate replacement for *Auer*. See Sunstein & Vermeule, *supra* note 88, at 21. First, they argue that if critics believe that *Auer* is flawed because according deference to the agency’s interpretation of a regulation vests it, for all intents and purposes, with law making and law interpreting power in violation of separation of powers, according *Skidmore* deference to the interpretation raises similar separation-of-powers concerns. *Id.* In addition, they argue that the *Skidmore* standard, as applied, is only marginally less deferential than *Auer*, so it doesn’t make sense to change the standards when *Auer* has worked well for decades. *Id.*

<sup>140</sup> See Knudsen & Wildermuth, *supra* note 61, at 94–95.

<sup>141</sup> *Id.* at 99.

<sup>142</sup> See Funk, *supra* note 84.

<sup>143</sup> *Id.*

rather than guidance, in order to obtain a greater level of deference for their interpretation.<sup>144</sup>

While academics have proposed a range of modifications for *Auer* deference, some commentators suggest that a change in the standard that courts use to review agency interpretations of regulations may ultimately have little effect on the outcome of judicial challenges to those decisions.<sup>145</sup> Although agency interpretations have been upheld in 91% of the *Auer* cases in the Supreme Court, studies suggest that the judicial approval rate in *Auer* cases in the lower federal courts is much closer to the approval rate for agency decisions under *Chevron*, *Skidmore*, or a range of other agency deference standards. Professors Richard Pierce and Joshua Weiss reviewed 219 cases in the federal district and appellate courts between 1999 and 2007 and found that courts upheld agency actions under *Auer* in 76.26% of the cases.<sup>146</sup> Prior studies by other researchers found that courts uphold agency decisions under *Chevron* between 64%–81% of the time and under *Skidmore* between 55%–71% of the time.<sup>147</sup> In a separate study, Professor Cynthia Barmore found that the rate at which courts approve agency decisions under *Auer* has fallen from 82.3% before *SmithKline Beecham* to below 70.6% since *Talk America*.<sup>148</sup> Professor David Zaring<sup>149</sup> and Professor Richard Pierce have separately concluded, after reviewing a variety of empirical studies of deference, that courts uphold agency decisions in 70% of cases regardless of the deference standard that the courts apply.<sup>150</sup> William Yeatman examined a sampling of cases in all of the federal appellate courts between 1993 and 2013 and he found that, since 2006, the government has only prevailed in 71% of the *Auer* cases, which is similar to the 69% government success rate in *Chevron* cases during his study period.<sup>151</sup> Yeatman suggests that replacing *Auer* deference with *Skidmore* deference over the twenty-year period of his study would have resulted in one fewer agency interpretation every five years surviving judicial review in each circuit.<sup>152</sup> He suggests that it would fall to one fewer agency interpretation every eight years if courts

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<sup>144</sup> *Id.*

<sup>145</sup> See Yeatman, *supra* note 81, at 7–8; Pierce & Weiss, *supra* note 3, at 515–16; Funk, *supra* note 11; Barmore, *supra* note 72.

<sup>146</sup> See Pierce & Weiss, *supra* note 3, at 519–20.

<sup>147</sup> *Id.* at 520.

<sup>148</sup> See Barmore, *supra* note 72.

<sup>149</sup> See Zaring, *supra* note 71, at 169.

<sup>150</sup> See Pierce, *supra* note 70, at 77.

<sup>151</sup> See Yeatman, *supra* note 81, at 7–8.

<sup>152</sup> *Id.* at 9.

added a “step zero” to the *Auer* analysis.<sup>153</sup> If *Auer* deference is not, in reality, significantly stronger than the other deference standards, modification of *Auer* deference may ultimately have little impact on the rate at which courts uphold agency interpretations of regulations. Professor Barmore argues, therefore, that overruling *Auer* “would accomplish little beyond removing a useful tool that facilitates judicial review, increases the predictability of regulatory action, and maintains political accountability in agency decision-making.”<sup>154</sup>

### III. THE STANDARD FOR REVIEW OF AN AGENCY’S INTERPRETATION OF GUIDANCE INTERPRETING REGULATIONS

While academics, policymakers, and the courts continue to grapple with the appropriate level of deference courts should accord to agency interpretations of *regulations*, a new debate has begun regarding the level of deference courts should accord to agency interpretations of *guidance interpreting regulations*. While some critics suggest that courts should review those interpretations *de novo*, without according agencies any deference,<sup>155</sup> there are compelling reasons for courts to accord those interpretations *Skidmore* deference or to accord them a level of deference equivalent to the deference courts accord to agency interpretations of regulations, whether that is *Auer* or some modification of *Auer*.

#### A. *The Case for Skidmore*

First, in almost every other situation when a court is reviewing an agency’s decision, the court accords the agency’s decision *some* deference, usually because Congress has entrusted the agency with the authority to make the decision and the agency is exercising some expertise in making the decision. When the court is reviewing an agency’s interpretation of a statute pursuant to a delegation of authority to interpret it with the force of law, the court accords the agency interpretation *Chevron* deference.<sup>156</sup> When the court is reviewing other agency interpretations of statutes, the court accords the agency *Skidmore* deference.<sup>157</sup> When the court is reviewing an agency’s interpretation of a regulation, the court accords the

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<sup>153</sup> *Id.*

<sup>154</sup> See Barmore, *supra* note 72.

<sup>155</sup> See, e.g., Amicus Brief of the Cato Institute, *supra* note 13, at 9; American Farm Bureau Amicus Brief, *supra* note 113, at 9.

<sup>156</sup> See *Chevron*, 467 U.S. at 837, 842–43 (1984).

<sup>157</sup> See *Mead*, 533 U.S. at 218, 226–27 (2001); *Christensen*, 529 U.S. at 576, 587 (2000).

agency *Auer* deference.<sup>158</sup> When the court is reviewing agency fact-finding, the court accords the agency varying levels of deference depending on whether the agency is finding the facts through formal or informal procedures.<sup>159</sup> The Administrative Procedure Act's judicial review provisions reserve *de novo* review for cases where agency actions, findings, or conclusions are "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court,"<sup>160</sup> and the Supreme Court has interpreted that section of the law to only apply to situations where an agency is adjudicating, and its fact-finding procedures are inadequate or issues that were not before an agency are raised in a proceeding to enforce non-adjudicatory agency action.<sup>161</sup> Since courts accord some deference to almost every other agency decision, it would seem strange to deny agency interpretations of their own guidance documents some level of deference. As perhaps the weakest form of deference, *Skidmore* deference, at a minimum, would seem to be appropriate. Under *Skidmore*, when determining whether to defer to an agency's decisions, courts consider the thoroughness of the agency's consideration, the formality of procedures used by the agency, the validity of the agency's reasoning, the consistency of the agency's interpretation, whether the interpretation is longstanding or contemporaneous, and the agency's level of expertise on the issue.<sup>162</sup>

*B. The Case for Auer or a Modified Auer*

While courts should, at a minimum, accord *Skidmore* deference to agency interpretations of guidance interpreting regulations, there are strong arguments that support according those interpretations the same level of deference that courts accord to an agency's interpretations of its regulations, whether that standard remains *Auer* or is modified in some manner.

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<sup>158</sup> See *Auer*, 519 U.S. at 452, 454–57 (1997).

<sup>159</sup> Courts review agency fact-finding under the "substantial evidence" test when agencies make decisions through formal rulemaking or formal adjudication, see 5 U.S.C. § 706(2)(E) (2012), and under the "arbitrary and capricious" test if they do not. In either case, the court accords the agency some level of deference.

<sup>160</sup> See *id.* at § 706(2)(F). Interestingly, while the federal legislation that has been introduced to eliminate *Chevron* and *Auer* deference, see Hatch, *supra* note 11, which provides for *de novo* judicial review of regulations, it does not explicitly provide for *de novo* judicial review of guidance documents.

<sup>161</sup> See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

<sup>162</sup> See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1281 (2007).



First, all of the justifications that have been advanced to support *Auer* deference for an agency's interpretation of its regulations apply with equal force to an agency's interpretation of its guidance interpreting regulations. In the same way that agencies are better equipped than courts to use their expertise in interpreting the law in a manner to advance the statutorily assigned mission of the agency when they interpret regulations,<sup>163</sup> they are better equipped than courts to use that expertise when they interpret guidance that interprets regulations. Similarly, as the drafter of guidance, the agency is in a better position than a court to interpret the intent of the drafter.<sup>164</sup> Agencies are not considering statutory interpretation canons when drafting guidance documents and are focusing heavily on policy considerations related to their mission when drafting guidance, so interpretation of the guidance documents should not turn simply on traditional tools of statutory interpretation, which would be within the expertise of the judiciary.<sup>165</sup> Additionally, just as according *Auer* deference to an agency's interpretation of its own regulations leads to greater uniformity in application of the law,<sup>166</sup> according similar deference to an agency's interpretation of its own guidance interpreting regulations achieves similar results. Finally, to the extent that the superior political accountability of agencies as opposed to courts justifies *Auer* deference,<sup>167</sup> agencies are equally accountable when interpreting guidance documents as when interpreting regulations. Consequently, all of the reasons that have been advanced to justify *Auer* deference to agency interpretations of regulations apply equally to agency interpretations of guidance interpreting regulations.

More importantly, though, most of the concerns that have been raised by *Auer*'s critics regarding deference to agency interpretation of regulations do not apply as forcefully to agency interpretations of guidance interpreting regulations.

For instance, critics cannot argue that according deference to an agency's interpretations of guidance will encourage the agency to draft vague guidance in the way that according deference to an agency's interpretations of regulations encourages the agency to draft vague regulations. Even if agencies truly adopted vague regulations so that they could

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<sup>163</sup> See Pierce & Weiss, *supra* note 3; Hatch, *supra* note 11; Funk, *supra* note 84, and accompanying text.

<sup>164</sup> See Pierce & Weiss, *supra* note 3; Hatch, *supra* note 11; Funk, *supra* note 84, and accompanying text.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See Funk, *supra* note 84, and accompanying text.

retain discretion to interpret them informally and obtain deference for the interpretations while avoiding the time, cost, and potential legal challenges associated with interpreting the regulation in a new or modified regulation, agencies have *no* incentive to adopt vague guidance documents to interpret regulations. A guidance document can be adopted with very few procedures and is not binding, so an agency is not retaining any significant interpretive discretion when it adopts a vague guidance document.<sup>168</sup> When agencies adopt guidance documents to interpret regulations, they can change those guidance documents with very few procedures, so they incur little cost or delay in adopting a new interpretation.<sup>169</sup> Similarly, neither the original guidance document nor any amended guidance document is likely to be subject to immediate judicial challenge.<sup>170</sup> Further, since the agency's interpretation of a regulation in the original guidance document would be entitled to *Auer* deference, the agency would not obtain a higher level of deference for its interpretation by articulating it as an interpretation of guidance, rather than simply incorporating it into amended guidance. All that an agency would "gain" by adopting a vague guidance document would be to confuse agency staff and the regulated community. Few commentators would suggest that those are goals that agencies typically seek to advance.

Since according strong deference to agency interpretations of guidance interpreting regulations will not encourage agencies to draft vague guidance, it is difficult to argue, as in the context of *Auer* deference to agency interpretations of regulations, that application of that strong deference will result in lack of notice to the regulated community regarding agencies' interpretations of the law and lead to unfair retroactive application of the law.<sup>171</sup> In fact, if courts were to review agency interpretations of guidance interpreting regulations *de novo*, instead of according them strong deference, while continuing to defer to agency interpretations of regulations under *Auer* or a similarly strong level of deference, *that* could encourage agencies to refrain from issuing guidance in the first place and to interpret regulations through adjudication, as they would likely have the option to do under Supreme Court precedent.<sup>172</sup>

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<sup>168</sup> See Stephen M. Johnson, *Good Guidance, Good Grief*, 72 MO. L. REV. 695, 698–700 (2007).

<sup>169</sup> *Id.* at 699.

<sup>170</sup> *Id.* at 700.

<sup>171</sup> See *supra* notes 113–14, and accompanying text.

<sup>172</sup> See *supra* notes 109–12, and accompanying text. This is the concern that Professor Nielson raised regarding the likely reaction of agencies if courts were to overrule *Auer* and refuse to accord deference to agency interpretations of regulations.

After all, if the agency interpreted the regulation through adjudication, courts would accord the interpretation strong deference under *Auer*. If, however, the agency adopted guidance to interpret the regulation and needed to interpret that guidance when applying it in adjudication, courts would review the agency's interpretation *de novo*. To the extent that application of a *de novo* review standard to agency interpretations of guidance interpreting regulations encouraged agencies to avoid issuing guidance to interpret regulations, the regulated community would have less notice about the agency's interpretation of their rights and obligations under the law. It would be more likely, in those cases, that the regulated community would first learn about the agency's interpretation of its regulations when the regulations were applied to them. Application of a *de novo* standard, rather than a strong deference standard, to agency interpretations of guidance interpreting regulations could, therefore, lead to the notice and retroactivity concerns that critics level against application of the *Auer* standard to agency interpretations of regulations.

Just as the "incentive to draft vague rules" criticism and the "lack of notice" and retroactivity criticisms could not be forcefully raised to challenge the application of *Auer* or similarly strong deference to agency interpretations of guidance interpreting regulations, the *Auer* separation-of-powers criticism, discussed above, would also be inapposite. While critics complain that according deference to an agency's interpretation of its regulations violates separation of powers because it allows the agency to make law and interpret the law,<sup>173</sup> the criticism should not carry any weight with regard to agency interpretations of guidance, since guidance lacks the force of law.

Therefore, most of the reasons that courts defer to agency interpretations of regulations under *Auer* would justify deference to agency interpretations of guidance interpreting regulations, while most of the criticisms raised against application of *Auer* do not apply, or apply less forcefully, when considered as challenges to *Auer* or *Auer*-like deference to agency interpretations of guidance interpreting regulations.<sup>174</sup>

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<sup>173</sup> See *supra* note 88, and accompanying text.

<sup>174</sup> While not discussed in the preceding paragraphs, the claim that *Auer* deference violates the APA, see *supra* notes 93–96, is no more persuasive when raised to challenge deference to agency interpretations of guidance interpreting regulations than when it has been raised to challenge deference to agency interpretations of regulations. Although the APA authorizes courts to "decide all relevant questions of law," see 5 U.S.C. § 706 (2012), the statute does not explicitly provide for *de novo* review and does not preclude judicial deference to agency interpretations, regardless of the context in which they arise. If the

## CONCLUSION

In an era when Supreme Court Justices, academics, and politicians are criticizing *Auer* deference for agency interpretations of regulations, and advocating reform or elimination of the deference, it may be unlikely that courts will expand the reach of *Auer* to cover agency interpretations of guidance interpreting regulations. However, for all of the reasons outlined above, it is clear that courts should accord those agency interpretations *some* deference, whether it is *Skidmore*, *Auer*, or some modified version of *Auer*.

In some ways, all of the hand-wringing over the appropriate level of deference for agency interpretations of regulations and for agency interpretations of guidance interpreting regulations is overblown. After all, at the end of the day, there is no guarantee that courts will uphold the ultimate decision that an agency makes merely because the courts uphold the agency's interpretation of a regulation or of guidance interpreting a regulation. If, for instance, a court upholds an agency's interpretation of guidance interpreting a regulation, the court could still find *either* that the guidance, as interpreted by the agency, is a plainly erroneous interpretation of the regulation under *Auer*, or that the regulation, as interpreted through the guidance and interpretation, is outside of the agency's statutory authority or unreasonable under *Chevron*.<sup>175</sup> Similarly, even though a court upholds an agency's interpretation of guidance interpreting a regulation, the court could find (1) that the agency's interpretation of the guidance, the guidance itself (as interpreted by the agency) or the regulation (as interpreted by the guidance and interpretation of the guidance) violates the constitution; or (2) that the agency's interpretation of the guidance, the guidance itself (as interpreted by the agency) or the regulation (as interpreted by the guidance and interpretation of the guidance) is arbitrary and capricious.<sup>176</sup> There are many ways that a court could invalidate an agency's ultimate decision while finding that the agency correctly interpreted the guidance that it wrote.

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Supreme Court ultimately modifies the level of deference accorded to agency interpretations of *regulations*, for all of the reasons outlined in this part of the Article, the level of deference accorded to agency interpretations of *guidance interpreting regulations* should be at least as strong as the modified level of deference adopted by the Court for interpretations of regulations.

<sup>175</sup> See Knudsen & Wildermuth, *supra* note 61, at 61; Sunstein & Vermeule, *supra* note 88, at 19.

<sup>176</sup> *Id.*

*Auer* may or may not survive as the standard of review for agency interpretations of regulations. Nevertheless, absent adoption of legislation that broadly eliminates judicial deference for agency decision-making, courts are unlikely to replace *Auer* deference with *de novo* review. Courts will likely continue to accord some deference to agency interpretations of regulations. As long as courts continue to accord some deference to agency interpretations of regulations, courts should accord the same amount of deference, or at least some deference, to agency interpretations of guidance interpreting regulations for all of the reasons outlined above.