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The Future of Administrative Deference

ANDREW HESSICK*

If one looks at how law affects day-to-day life, administrative law is arguably the most important area of law. Agencies make most laws and adjudicate most disputes. Despite its importance, administrative law is very unsettled. While the basic rules of tort and property law have not changed much over the past one hundred years, that is not the case for administrative law. There are still fights today over the scope of agency power and even the constitutionality of agency action.

One reason for these fights is that agencies do not squarely fit into the constitutional systems of separation of powers. Agencies combine the power of the three branches of government into one body. Still, we need agencies—we depend on them to make policies and adjudicate disputes. At the same time, they are anomalies, and we are still working out how to effectively balance the need for administrative agencies against the need to constrain their power.

Another source of tension in administrative law is that judicial review has been the way to constrain agency action. There is a real mismatch when courts review agency actions. Agencies are policymakers. Courts are the opposite. Courts do not make policy; they ensure compliance with the law. Nowhere is this mismatch more apparent than in judicial review of interpretations by agencies.

The endeavor of judicial interpretation is entirely different for agencies than it is for courts. When courts interpret the law, they try to give effect to what they think the law actually means. There is some variation among judges' interpretive methods. Some think that they should look only at the text; others think they should also consider legislative purpose. But even with those differences, the overall process is the same: start with the law, and the law leads to the ultimate conclusion. For agencies, the process is the opposite. Agencies do not start with the statute and then try to figure out what it means; instead, they make policy decisions and then seek to justify them under the statutory language. For courts, laws are the rails that guide; for agencies, law is the box that constrains.

I.

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How courts handle agency interpretations is one of the biggest issues in administrative law. Should courts defer to agency interpretations, or should they review laws *de novo*? By deference, I mean that a court gives weight to the interpretation rendered by the agency instead of just interpreting the law independently. In North Carolina and the federal system, the courts have opted for deference—though they are of different sorts.

In the federal system, courts have two doctrines of binding deference. The first is called *Chevron* deference, which derives from *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*¹ It applies when a court reviews an interpretation by an agency of a statute that the agency is charged with administering. *Chevron* involves two steps. A court will first ask if the statute is clear; if so, it will give effect to that statute—rejecting any contrary interpretation by the agency.² But if the court concludes that the statute is ambiguous, the court will treat the agency's interpretation as binding—so long as the agency's interpretation of the statute is reasonable.³

The second type of binding deference is *Auer* deference, which derives from *Auer v. Robbins*.⁴ It applies when an agency interprets one of its own regulations, as opposed to a statute.⁵ The *Auer* test mirrors the *Chevron* test—a court will ask if the regulation is clear; if so, it will give effect to that regulation.⁶ But if the court concludes that the regulation is ambiguous, the court will treat the agency's interpretation as binding—so long as the agency's interpretation of the regulation is reasonable.⁷

Compared to the federal system, North Carolina law is a bit trickier. On the one hand, the state supreme court has consistently rejected *Chevron* and *Auer* deference.⁸ It has held that state agency interpretations of the statutes they administer and of the regulations they promulgate are entitled to great weight—but they are not binding.⁹ This is often called *Skidmore* deference

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

2. *Id.* at 842–43.

3. *Id.* at 843.

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

5. *Id.* at 461. See also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

6. See *Bowles*, 325 U.S. at 414.

7. *Auer*, 519 U.S. at 461.

8. See *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 821 S.E.2d 376, 379 (N.C. 2018) (rejecting *Chevron*); *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 501 S.E.2d 75, 77 (N.C. 1998) (rejecting *Auer*).

9. See *N.C. Acupuncture Licensing Bd.*, 821 S.E.2d at 379 (“This Court gives great weight to an agency's interpretation of a statute it is charged with administering; however, an agency's interpretation is not binding.” (internal quotation marks omitted)); *Britt*, 501 S.E.2d at 77 (“[T]he interpretation of a regulation by an agency created to administer that regulation is traditionally accorded some deference by appellate courts.”).

in the federal system.¹⁰ The state supreme court's adoption of *Skidmore* deference should mean that the state courts should not afford binding deference to agency interpretations, but that is not what has happened. Federal doctrines tend to affect state decisions, and it is relatively easy to find recent intermediate state appellate decisions—decisions that post-date the North Carolina Supreme Court decisions—that state that agency interpretations of statutes should receive *Chevron* deference,¹¹ and that state agency interpretations of regulations should receive *Auer* deference.¹²

Conceptually, the North Carolina Supreme Court's approach makes much more sense. The reasons for deferring to agency interpretations of ambiguous statutes are pragmatic. Under *Skidmore* deference, the resolution of ambiguity in a statute is no longer simply a legal question; instead, interpretation calls for value-laden judgments.¹³ Agencies, more than courts, are the appropriate bodies to make those determinations because they are hired by politicians precisely to make policy determinations.¹⁴ They have expertise in the areas to be regulated and are better situated to coordinate regulations across statutory schemes.¹⁵ Agencies may also have greater public policy initiative because they are not bound by jurisdictional restrictions, and they can update interpretations more quickly in response to changing circumstances.¹⁶

10. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

11. *Blue Ridge Healthcare Hosps. Inc. v. N.C. Dep't of Health & Human Servs.*, 808 S.E.2d 271, 276–77 (N.C. Ct. App. 2017) (“‘It is well settled that when a court reviews an agency’s interpretation of a statute it administers, the court should *defer to the agency’s interpretation of the statute . . . as long as the agency’s interpretation is reasonable and based on a permissible construction of the statute.*” (quoting *Craven Reg’l Med. Auth. v. N.C. Dep’t of Health & Human Servs.*, 625 S.E.2d 837, 844 (N.C. Ct. App. 2006))).

12. *WASCO LLC v. N.C. Dep’t of Env’t & Nat. Res.*, 799 S.E.2d 405, 409 (N.C. Ct. App. 2017) (“[T]his Court has stated that “an agency’s interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation’s plain language.” (quoting *Hilliard v. N.C. Dep’t of Corr.*, 620 S.E.2d 14, 17 (N.C. Ct. App. 2005))).

13. F. Andrew Hessick, *Remedial Chevron*, 97 N.C. L. REV. 1, 7 (2018) (“When the tools of statutory interpretation run out, the resolution of ambiguity in a statute is no longer simply a legal question. Rather, interpreting the statute also calls for value-laden judgments.”).

14. See *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (stating that resolving ambiguity in statutory text is a policy question, and sensitivity to the policy interpretations of agencies whose job it is to make policy decisions is proper).

15. *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (stating that lack of judicial expertise is a primary reason for deference).

16. See Hessick, *supra* note 14, at 7 (listing additional advantages).

A second pragmatic driver of deference is uniformity.¹⁷ While agency interpretations are nationwide or statewide, the decisions of lower courts are not.¹⁸ The United States Supreme Court is the only body that can truly obtain uniformity, but requiring the Court to resolve disagreements on the meaning of thousands of administrative statutes could overload its docket.¹⁹ Deference ameliorates the problem because it prevents lower courts from disagreeing with agency interpretations.

These pragmatic considerations are good reasons for courts to defer strongly to agency interpretations, but they are not sufficient reasons to be *bound* by the interpretations of the agency.²⁰ What if the agency's interpretation is not the product of expertise? What if the agency is not coordinating across statutes? What if the agency itself has adopted inconsistent interpretations of similar statutes? The point of judicial review, after all, is to be a check on agency action.²¹ If an agency is not doing what it is supposed to be doing, then wouldn't that be a good reason to second-guess the agency instead of blindly accepting its interpretation?

It should come as no surprise then that from the outset, there have been lots of critics of the federal binding deference doctrines.²² In recent years, the complaints have intensified. There are a handful of Justices on the United States Supreme Court who have said that they would overturn the

17. See Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1115 (2000) (“[J]udicial acceptance of agency legal interpretations of ambiguous statutory terms will promote uniformity in interpretation . . .”).

18. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1122 (1987) (“[H]aving courts in [different states or districts] . . . accept the [a]dministrator's “reasonable” judgments about statutory meaning [will] make it more likely that the statute will have the same effective meaning in each circuit.”).

19. See *id.* at 1098–99, 1133 (highlighting the enormous growth of cases heard before federal courts compared to the relatively small number of cases that the United States Supreme Court is capable of hearing each year).

20. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (“If it is, as we have always believed, the constitutional duty of the courts to say what the law is, we must search for something beyond relative competence as a basis for ignoring that principle when agency action is at issue.”).

21. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2086 (1990) (“[T]he text and background of the APA suggest a firm belief in the need for judicial checks on administration, particularly with respect to the interpretation of law.”).

22. See VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., LSB10204, DEFERENCE AND ITS DISCONTENTS: WILL THE SUPREME COURT OVERRULE *CHEVRON*? 2 (2018) (“[T]he *Chevron* framework has long been subject to criticism . . .”).

doctrines,²³ and the attacks against *Auer* deference have even more support than those against *Chevron*.²⁴ This Term, the Court has decided to reconsider *Auer*.²⁵ We should pay attention to it, not only because of the gravitational force of federal law, but also because the federal deference schemes apply in state court when federal law is at issue.²⁶

II.

The case before the United States Supreme Court that directly implicates *Auer* is *Kisor v. Wilkie*.²⁷ James Kisor is a veteran who fought in Vietnam, and has Post-Traumatic Stress Disorder (PTSD) as a result of his experiences there.²⁸ Because of his PTSD, Kisor receives disability benefits—but he has only received them since 2006.²⁹ Kisor wants unpaid benefits for suffering from PTSD prior to 2006.³⁰ To be awarded the benefits retroactively, he had to provide to the Department of Veterans Affairs (VA) records that were “relevant” in establishing that he had PTSD before 2006.³¹ In an effort to show he had PTSD prior to 2006, Kisor gave documents to the VA showing that he was in combat in Vietnam.³²

The whole case turns on what the word “relevant” means. The usual legal definition of relevance—the one that we teach in evidence—is anything that tends to prove or disprove a fact of consequence.³³ Under that definition, Kisor’s documents are relevant because being in combat tends to make it more likely that one suffers PTSD.³⁴ Not dispositive, but more likely.

The VA did not follow the usual legal definition, but instead adopted a narrower one.³⁵ The VA’s definition of a relevant document was that it had

23. See Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J.L. & PUB. POL’Y 87, 91 n.23, 100–01 nn.92–94 (2018) (noting opinions by Justices Thomas, Gorsuch, and Roberts); see also *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (criticizing *Chevron*).

24. For example, although he recently supported *Chevron*, Justice Alito has voiced criticism of *Auer* deference. See *Pereira*, 138 S. Ct. at 2121–29 (Alito, J., dissenting); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210–13 (2015) (Alito, J., concurring in part and concurring in the judgment).

25. *Kisor v. Wilkie*, 139 S. Ct. 657 (Dec. 10, 2018) (granting petition for writ of certiorari).

26. See Strauss, *supra* note 19, at 1099–100.

27. See *Kisor*, 139 S. Ct. at 657 (granting petition for writ of certiorari).

28. See Brief for Respondent at 7–8, *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (No. 18-15).

29. *Id.* at 8–9.

30. *Id.*

31. *Id.*

32. Brief for Petitioner at 17, *Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (No. 18-15).

33. FED. R. EVID. 401.

34. See Brief for Petitioner, *supra* note 33, at 17.

35. *Id.* at 18; Brief for Respondent, *supra* note 29, at 9.

to more specifically contain a diagnosis that supported the claim.³⁶ The VA said that Kisor's combat records weren't relevant because they didn't specifically say that Kisor had PTSD, and the VA therefore denied Kisor's claim.³⁷ The government will win with *Auer* deference; it might not without it.³⁸

III.

There are two arguments against *Auer* and *Chevron* deference. One argument is a constitutional; the other is a statutory. The constitutional argument turns on Article III, which provides that the "judicial [p]ower . . . shall be vested in" the federal courts.³⁹ Some commentators—most notably Justices Thomas and Gorsuch—have made a historical argument that this judicial power includes the power to interpret the law independently.⁴⁰ As Justice Thomas put it, "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."⁴¹

Various sources in the eighteenth century support this view. An example is the 1770 edition of Mathew Bacon's digest, which says that "[e]very question of law . . . is to be tried by the court," and that "it is the province of the justices to determine what the meaning of a word or sentence in an act of parliament is."⁴² This language suggests that it is the job of the courts to determine the meaning of statutes, and that they accordingly should not defer to the interpretations of others. Language similar to that used by Bacon found its way via *The Federalist Papers* into *Marbury v. Madison*, where the Court said "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁴³ From this line, up until the

36. See *supra* note 36.

37. See *supra* note 36.

38. See Brief for Respondent, *supra* note 29, at 11 (citing Brief for Petitioner at 15a, *Kisor v. Shulkin*, 869 F.3d 1360, 1368 (Fed. Cir. 2017)). The Court of Appeals determined the word "relevant" was ambiguous under the *Seminole Rock* standard, leaving the only remaining question to be whether the VA's interpretation was plainly erroneous, which the court found it was not. *Kisor*, 869 F.3d at 1368.

39. U.S. CONST. art. III, § 1.

40. *Michigan v. EPA*, 135 S. Ct. 2699, 2713–14 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

41. *EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring) (alteration in original) (internal quotation marks omitted).

42. 5 MATHEW BACON, A NEW ABRIDGMENT OF THE LAW 217 (London, J. Worrall & Co. 3d corr. ed. 1770).

43. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

1930s, the Court consistently held that courts could not defer to agency interpretations.⁴⁴

I do not foresee this constitutional argument getting much traction this Term. The Court has only two obviously committed originalists—Justices Thomas and Gorsuch. Justice Kavanaugh might fall into that camp too, but we don't know yet.⁴⁵ Even if Justice Kavanaugh is an originalist, his addition makes only three Justices who would support the originalist argument for overturning *Auer*. The other conservative Justices are not going to simply follow suit: Justice Alito is very much not an originalist, nor is Chief Justice Roberts.⁴⁶ Justice Alito and the Chief Justice might think *Chevron* and *Auer* are bad ideas, but I doubt they are ready to declare them unconstitutional. And the more liberal Justices are also not likely to adopt this originalism argument. After all, they are not committed originalists.⁴⁷ They do not think that they should be confined to the eighteenth century understanding of the Constitution when interpreting it.

In this light, it is unsurprising that the parties in *Kisor* haven't even made the originalist argument.⁴⁸ They have focused mostly on the statutory argument.⁴⁹ They have also half-heartedly devoted a page or two to a different constitutional argument—that separation of powers prohibits the same entity from both writing regulations and interpreting them.⁵⁰ But they have not pressed the originalist argument.

44. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 98 (Max Farrand ed. 1911) (statement of Rufus King) (“Judges ought to be able to expound the law as it should come before them . . .”); see *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (stating that the “judicial power” entails independent determinations of legal questions); see also THE FEDERALIST NO. 78, at 381 (Alexander Hamilton) (Lawrence Goldman ed. 2008) (“The interpretation of the laws is the proper and peculiar province of the courts.”). See generally PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 507, 508 (2008) (explaining that courts historically exercised independent judgment in interpretation); F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 722–24 (2018) (discussing this line of precedent).

45. Robert Keren, *Law Professors Debate ‘Courts in the Age of Trump,’* MIDDLEBURY: NEWSROOM (Oct. 31, 2018), <https://perma.cc/2AVV-GUEK> (quoting Professor Fleming as saying “Kavanaugh is no more originalist than [Chief Justice John] Roberts or [Justice Samuel] Alito.” (alteration in original)).

46. Josh Blackman, *SCOTUS After Scalia*, 11 N.Y.U. J.L. & LIBERTY 48, 112 (2017) (stating that “Roberts and Alito[] ‘aren’t originalists of the same stripe’” as the other conservative justices (citation omitted)).

47. Eric Posner, *Why Originalism Will Fade*, ERIC POSNER: BLOG (Feb. 18, 2016), <https://perma.cc/4U5V-RZW4> (stating that the more liberal justices on the Court “don’t care about originalism”).

48. See Brief for Petitioner, *supra* note 33, at 21–25.

49. *Id.* at 26–33.

50. *Id.* at 43–45.

IV.

The statutory argument contends that *Auer* deference violates the Administrative Procedure Act (APA). Section 706 of the APA, which is the provision for judicial review, provides that a “reviewing court shall decide all relevant questions of law” and “interpret . . . statutory provisions.”⁵¹ That sounds awfully like courts should defer to agency interpretations—it’s hard to imagine a clearer way to say that courts should decide legal questions for themselves. Herculean efforts have been made to say that this is not what the statute means,⁵² but they’ve come up pretty short.⁵³ The history leading up to the APA suggests that the drafters perhaps thought that courts should give weight to agency interpretations—but not that they should treat them as binding.⁵⁴

For its part, the Court has concluded that *Chevron* is consistent with the APA by saying that the law *itself* requires courts to defer to agency interpretations.⁵⁵ The Court has stated that each organic statute conferring rulemaking and adjudicatory authority on agencies includes an implicit provision which states that the courts are bound by reasonable interpretations rendered by the agency.⁵⁶ This is the first point where *Auer* critics find a difference between *Chevron* and *Auer*. The critics say that, even though we might read statutes to confer authority on agencies to interpret statutes, there is no law that says agencies have the authority to interpret their own rules.⁵⁷

This theory is a bad argument on both scores. First, it is a bad justification for *Chevron* because it is obviously a fiction.⁵⁸ Members of

51. 5 U.S.C. § 706 (2012).

52. See, e.g., Cass R. Sunstein, *Chevron as Law*, GEO. L.J. (forthcoming 2020) (manuscript at 29–31) (arguing that *Chevron* is consistent with the APA).

53. The two strongest arguments that the APA permits *Chevron* review come from Professor Sunstein and Dean Manning. See John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635 n.123 (1996); *Chevron as Law*, *supra* note 53, at 29–31. They argue that the pre-APA historical backdrop against which the APA was enacted supports deference. But that historical practice cannot easily overcome the text of the APA and the Attorney General’s Committee majority report leading to the APA, both of which indicate independent judicial review. See FINAL REP. OF THE ATTORNEY GENERAL’S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8 at 75–96 (1st Sess. 1941).

54. See *Chevron as Law*, *supra* note 53, at 27–32.

55. See *Smiley v. Citibank (South Dakota)*, N.A., 517 U.S. 735, 740–41 (1996) (“We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency . . .”).

56. See *id.*

57. See, e.g., Brief for Petitioner, *supra* note 33, at 33–36.

58. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (acknowledging that this argument rests on a “legal fiction”).

Congress ordinarily do not think one way or the other about judicial review of agency interpretations (though their staffers might).⁵⁹ More importantly, *Chevron* deference is given to interpretations of statutes enacted before the *Chevron* decision, and Congress could not have prognosticated the doctrine.⁶⁰

Second, the argument does not provide a principled way of distinguishing *Auer*. If *Chevron* is a fiction, why not create a fiction for *Auer*? We could equally imagine a fiction under which Congress says that agencies can both write regulations and dispositively resolve any ambiguities in those regulations. Indeed, the Court has essentially recognized this point, stating that the “power” for an agency “authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.”⁶¹

There may be an inclination to say that if *Chevron* and *Auer* are fictions, we should get rid of them. Maybe we should, but there is *stare decisis*. *Stare decisis* is strong in the interpretation of statutes because Congress can fix the problem.⁶² That is sometimes a silly justification because Congress generally does not pay attention to court decisions. But here, deference is a big enough deal that it’s probably been on Congress’s radar, and Congress has not overturned it.⁶³

Still, *stare decisis* isn’t absolute.⁶⁴ It can be overcome when maintaining the precedent is poorly reasoned or leads to bad consequences.⁶⁵ The main argument against *stare decisis* for *Auer* is that *Auer* lets agencies game the system. The theory goes as follows: Normally, agencies only get

59. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 996–97 (2013) (reporting from an empirical study on Congress that “decisions to leave statutory terms ambiguous are typically made without regard to whether the courts will later defer to an agency interpretation”).

60. See Sunstein, *supra* note 22, at 2091–104.

61. *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991).

62. See *Shepard v. United States*, 544 U.S. 13, 23 (2005) (stating that precedent has a particularly “powerful” pull in the context of “settled statutory meaning” because “Congress remains free to alter what [the courts] have done.” (internal quotation marks omitted)).

63. Professor Kozel has made the intriguing argument that *Chevron* and *Auer* should be seen as doctrines of statutory interpretation, which traditionally do not receive *stare decisis* effect. Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, TEXAS L. REV. (forthcoming) (manuscript at 160–65) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312818). The Court, however, has not viewed those doctrines this way. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1214 n.1 (2015) (Thomas, J., concurring in the judgment) (“[T]he Court has appeared to treat our agency deference regimes as precedents entitled to *stare decisis* effect . . .”).

64. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command . . .” (emphasis omitted)).

65. See *id.* at 827.

Chevron deference for rules when they go through notice and comment, which is a long and expensive process.⁶⁶ For *Auer* deference, agencies don't have to do that. *Auer* deference applies to an interpretation that an agency renders in any document—not just interpretations that are the product of notice and comment.⁶⁷ If an agency issues an interpretive rule without notice and comment or renders an interpretation in a letter, amicus brief, or somewhere else, the agency's interpretation potentially gets *Auer* deference.⁶⁸ This means that an agency can minimize notice and comment costs by going through notice and comment only once, and writing ambiguous, broad rules.⁶⁹ As a result, agencies can set the meaning of the rules through interpretations that get *Auer* deference.

This problem appears to be more theoretical than actual.⁷⁰ Often, agencies do not want to preserve discretion for future heads of their agencies; they want to limit their successors' discretion.⁷¹ That's because agency heads want to preserve the rules that they write. For example, I doubt that Obama's Environmental Protection Agency (EPA) wanted to maintain discretion for Trump's EPA to roll back the clean power rules. Therefore, agencies probably do not want to write broad ambiguous rules, but rather narrow precise ones, and that prevents the *Auer* deference problem.

66. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking . . .”).

67. See, e.g., *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Transp.*, 770 F.3d 1260, 1270 (9th Cir. 2014) (“We afford *Auer* deference to an agency’s interpretation of its own regulations regardless of whether that interpretation was adopted through notice-and-comment rulemaking.”).

68. See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (providing *Auer* deference in adjudication of regulation); *Gardebring v. Jenkins*, 485 U.S. 415, 429–30 (1988) (providing *Auer* deference to position first espoused in amicus brief); *Eisai, Inc. v. FDA*, 134 F. Supp. 3d 384, 394 (D.D.C. 2015) (providing *Auer* deference to interpretation in letter).

69. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) (“To expand this domain [of *Auer* deference], the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment.”).

70. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 308 (2017) (“[W]e are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely and broadly.” (footnote omitted)).

71. *Id.* at 309 (criticizing this argument against *Auer* because “[i]f an agency leaves a regulation ambiguous, it cannot be certain that a subsequent interpretation will be made by an administration with the same or similar values.”).

Still, agencies sometimes write ambiguous rules. But why do they do so, given that it gives power to their successors who might hold different views? One reason is that agencies are not precisely sure how to regulate a matter. They would rather leave the rule to be clarified through adjudication on a case-by-case basis, which makes a good deal of sense. Our common law system operates on the premise that rules should be clarified through adjudication.⁷² Still, this doesn't mean that the *agency's* interpretation has to be binding. The same goals of achieving good law can be accomplished through *Skidmore*-type deference.⁷³

It is obviously hard to predict how the Court will rule on this issue. There are three solid votes against *Auer*—Justices Thomas, Alito, and Gorsuch. Justice Kavanaugh will probably also go that way. The remaining Justices are hard to predict, but I do not think that the Court would have taken the case—a decision that took four votes⁷⁴—unless there was a good chance for a fifth vote.

V.

What happens if the Court does away with *Auer*—and *Chevron*? Regarding *Auer*, it would not change anything for most matters. Without *Auer*, agencies will continue to issue circulars and letters, and they will continue to render adjudications interpreting their regulations. Those interpretations would not be formally binding, but courts will give them weight. Dispensing with *Auer* is only going to matter when an agency wants to receive binding deference on its position. When that happens, agencies will have to go through more formal mechanisms to provide its interpretation. The easiest, cheapest way of creating binding interpretations is to proceed by adjudications that interpret organic statutes.⁷⁵ Interpretations of statutes rendered in those adjudications *do* receive *Chevron* deference.⁷⁶ So in the long run, if the Court tosses *Auer* but keeps *Chevron*, we should expect fewer rules promulgated by notice and comment,

72. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1806 (2009) (“[C]ommon law courts constructed and clarified legal norms through a case-by-case process of adjudication . . .”).

73. See *supra* notes 9–17 and accompanying text.

74. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957) (Harlan, J., concurring and dissenting) (noting the rule of four). The rule is not codified in Supreme Court rules, but rather is an informal practice.

See Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 423 n.64 (2019).

75. See Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 964–72 (2017) (arguing that adjudication of statutes is the likely substitute for *Auer* deference).

76. See *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001).

and more doctrine developed through adjudication. But I don't want to say that it will be extreme.

And what if the Court overturns *Chevron*? Doing away with *Chevron* might also increase adjudications. Many agencies have the authority to develop policy through rulemaking and adjudication,⁷⁷ and they ordinarily can pick which device they wish to use.⁷⁸ Rules are expensive to promulgate,⁷⁹ and why would an agency bear all those costs if it's not confident that the court will agree that the law supports the rule? Adjudications may be cheaper.⁸⁰ Agency adjudications would still be reviewed and courts would not defer to agency interpretations, but because the cost of the adjudication is lower, it would be less drastic if a court rejected the agency's interpretation.⁸¹

But, again, the shift towards more adjudications would probably not be dramatic. Even if *Auer* and *Chevron* are overturned, courts will still afford *Skidmore* deference. Just as a reminder, *Skidmore* is the type of deference applied in the North Carolina courts.⁸² It is not binding deference.⁸³ It is a pragmatic doctrine under which courts give weight to agency interpretations and will defer to them when it makes sense to do so.⁸⁴ Although *Skidmore*

77. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1402 (2004) ("Agencies often have the ability to choose among various methods of making policy while implementing a single statutory provision."). Of course, some agencies do face restrictions on the methods they can use to develop policy. Some provisions of the Clean Air Act, for example, require the EPA to develop policy by rulemaking instead of adjudication. *See, e.g.*, 42 U.S.C. § 7661a(b) (2012 & Supp. 2017) (stating that the EPA shall adopt regulations to establish "minimum elements of a permit program to be administered by any air pollution control agency").

78. *See* Magill, *supra* note 78, at 1405 ("The core of the principle that an agency is free to choose its policymaking form was established long ago . . .").

79. Zachary J.F. Kolodin, *Standing to Challenge Regulatory Failure in the Age of Preemption*, 22 N.Y.U. ENVTL. L.J. 157, 165 (2015) ("Notice and comment regulation is very costly to undertake . . .").

80. Johnny C. Burris, Symposium, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 FLA. ST. U. L. REV. 661, 671 (1991) ("[A]dministrative agencies also believe that it is much cheaper to develop public policy through adjudication rather than rulemaking.").

81. Even under today's *Chevron* regime, the relative inexpensiveness of adjudication leads some agencies to formulate policy through adjudication instead of rulemaking. *See* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 274 (1991) ("Despite having been granted both rulemaking and adjudicatory power in its statutory charter more than half a century ago, the [NLRB] has chosen to formulate policy almost exclusively through the process of adjudication." (footnotes omitted)).

82. *See supra* notes 9–17.

83. *See id.*

84. *See id.*

is not binding, the abandonment of *Auer* and *Chevron* could very well lead courts to treat *Skidmore* as essentially binding deference. Thus, although courts might not be *obligated* to defer to agency interpretations rendered in rule or adjudications if *Auer* and *Chevron* are overturned, courts still often will—at least for the foreseeable future. One reason is that binding deference is what judges are used to and already know. Another reason is that interpretations of regulatory provisions are policy laden. There’s a pretty strong ethos today that judges shouldn’t make policy decisions;⁸⁵ they should let policymakers do it.⁸⁶ Judicial deference to agency interpretations results in policymakers making the policy choices; de novo review does not.⁸⁷ None of this is to say that judges will always defer. They will not. Rather, it is to suggest only that deference will still be very common.

Still, over time, if the Court were to stay committed to a course against binding deference, we should expect an increasing willingness by the courts to disagree with agency interpretations, as the memories of the old practice disappear and as judges simply become more accustomed to the role of making policy by not deferring. This process would likely track what happened with the Federal Sentencing Guidelines. First created in 1984, the Guidelines were binding until 2005, when the Court held that the Guidelines were only advisory.⁸⁸ Although the Guidelines are no longer binding, sentencing judges continue to sentence within the Guidelines to a good degree.⁸⁹ Judges presumably continue to use the Sentencing Guidelines because that’s what they are used to, and because the sentencing commission

85. Phillip Dane Warren, *The Impact of Weakening Chevron Deference on Environmental Deregulation*, 118 COLUM. L. REV. ONLINE 62, 65 (2018) (noting the continuing weight of the notion that the role of courts is to “say what the law is.” (citation omitted)).

86. Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 769 (1996) (“If representative self-government is the norm, policy judgments are for electorally responsible officials, not judges.”).

87. Kathryn M. Baldwin, Note, *Endangered Deference: Separation of Powers and Judicial Review of Agency Interpretation*, 92 ST. JOHN’S L. REV. 91, 108 (2018) (“Rather than defer to agency decisions, judges make policy choices in de novo review.”); Michael Ray Harris, *Breaking the Grip of the Administrative Triad: Agency Policy Making Under A Necessity-Based Doctrine*, 86 TUL. L. REV. 273, 275 (2011) (“Judicial oversight of agency policy making, however, is by definition not de novo, but must come with some measure of deference to the agency . . .”).

88. *United States v. Booker*, 543 U.S. 220, 241 (2005) (“The . . . approach, which we now adopt, would . . . make the Guidelines system advisory . . .”).

89. Paul J. Hofer, *Federal Sentencing After Booker*, CRIME AND JUSTICE (forthcoming) available at <https://www.journals.uchicago.edu/doi/full/10.1086/701712?mobileUi=0&> (reporting only a 10% drop of within guidelines sentences following Booker).

is the expert. But, in the last few years, judges have been more willing to stray from the Guidelines.⁹⁰

There is another consequence of abandoning *Chevron* that's important to highlight. Even if courts uphold agency interpretations at the same rate under the two types of deference, the consequence of doing so would be different. The theory of *Chevron* is that agencies have been delegated interpretive authority. When courts defer under these doctrines, they do not "say what the law is"; they simply evaluate whether the agency properly exercised its delegated power.⁹¹ This means that agencies are not stuck with one interpretation; they can switch their interpretations so long as the interpretation is reasonable.⁹²

But under a regime of *Skidmore* deference, courts *do* give their own interpretation. They give weight to the agency's interpretation, but they are not bound by it. Therefore, courts in North Carolina are the ultimate arbiters of the meaning of a statute. An agency's views are relevant only in helping the court determine what a statute means. Thus in North Carolina, a court's interpretation actually does set the agency's law. Agencies accordingly have significantly less leeway in changing interpretations that have been upheld by the courts. The decision that upholds the interpretation of the statute should set that interpretation as the law.

If the federal courts abandon *Chevron* and follow the North Carolina approach, the initial interpretation of a rule rendered by an agency potentially becomes more important. A court reviewing that agency interpretation will defer to it, but in doing so will make the agency's view the law. Future employees of that agency will be significantly constrained in deviating from that interpretation. In other words, whoever is in charge when a law is first interpreted and challenged will have much more influence over the content of that law.

90. *Id.*

91. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–84 (2005); Warren, *supra* note 86 (citation omitted).

92. *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 793 (D.C. Cir. 2009) ("A change in interpretation, however, is no reason to withhold *Chevron* deference provided the agency explained the basis for its reconsidered view.").