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Auer Evasions

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Abstract

Auer v. Robbins requires federal courts to defer to federal agency interpretations of ambiguous regulations. *Auer* built upon, and arguably expanded, the Court's long-standing practice of deferring to agency interpretations of their own regulations born in *Bowles v. Seminole Rock*. Although initially uncontroversial, the doctrine has come under fire from legal commentators and prominent jurists, including *Auer*'s author, the late Justice Antonin Scalia. As Justice Scalia came to recognize, *Auer* deference enables agencies to evade a wide range of legal constraints that are otherwise imposed upon agency behavior, the ability of agencies to take action with the force of law in particular. This brief Article seeks to explain how the practice of *Auer* deference undermines – and facilitates the evasion of – basic administrative law principles of accountability, notice, responsibility and finality. After reviewing *Auer* history and considering these evasions, the Article, ponders whether we are approaching *Auer*'s end.

AUER EVASIONS

Jonathan H. Adler*

Introduction

Auer v. Robbins requires that federal courts defer to federal agency interpretations of ambiguous regulations.[1] Writing for a unanimous Court, the late Justice Antonin Scalia explained that a federal agency's interpretation of its own regulation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation."[2] What matters is that the agency has put

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[1] 519 U.S. 452 (1997)

[2] *Id.* at 461 (cleaned up).

forward an official interpretation, not that the agency has made the best sense of the relevant text.[3] This is true whatever form in which the interpretation arrives, provided the reviewing court has no reason to suspect "the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[4] Even an interpretation first articulated in an amicus brief submitted upon court request may suffice if necessary to elucidate the meaning of ambiguous regulatory text.[5]

Auer built upon, and arguably expanded, the Court's long-standing practice of deferring to agency interpretations of their own regulations.[6] As Justice Scalia noted, the principle that a reviewing court must accept a permissible agency interpretation of its own regulation was fairly well-established in the Court's jurisprudence.[7] So grounded, *Auer* is best broadly understood as a cousin of other administrative law deference doctrines that likewise developed during the post-War period.[8] "In practice," Justice Scalia would note in a later case, "*Auer* deference is *Chevron*

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[3] As applied in *Auer*, the question was whether the relevant regulatory text could "comfortably bear the meaning the Secretary assign[ed]," not whether the Secretary had articulated the best or most plausible interpretation. 519 U.S. at 461; *see also* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991)(" it is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference." (citations omitted)); Ehlert v. United States, 402 U.S. 99, 105 (1971) (the agency's interpretation need only be a "plausible construction of the language of the actual regulation").
[4] 519 U.S. at 462 ("that the Secretary's interpretation comes to us in the form of a legal brief . . . does not, in the circumstances of this case, make it unworthy of deference. . . . There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."). The interpretation at issue in *Auer* was articulated in an *amicus* brief submitted at the request of the Court. *Id.* at 461.
[5] *Id*.
[6] *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989); Ford Motor Co. v. Milhollin, 444 U.S. 555, 565-67 (1980); United States v. Larionoff, 431 U.S. 864, 872-73 (1977); INS v. Stansic, 395 U.S. 62, 72 (1969); Thorpe v. Housing Auth. Of Durham, 393 U.S. 268, 276 (1969); Udall v. Tallman, 380 U.S. 1, 16 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). Because a variant of this doctrine was first articulated in *Bowles v. Seminole Rock*, it is often referred to as *Seminole Rock* deference as well. *See infra* __.
[7] *See Auer*, 519 U.S. at 461.
[8] *See, e.g.*, Talk America v. Mich. Bell Telephone Co., 564 U.S. 50, 67 (2011) (Scalia, J., concurring) ("On the surface, it seems to be a natural corollary—indeed, an a fortiori application—of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing, see *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*" (citing 467 U.S. 837 (1984)); *see also* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. W. L. REV. 1449, 1449 (2011) ("*Chevron* deference and *Seminole Rock* deference are closely related"). For a discussion of the doctrines parallel development, see Michael P. Healy, *The Past Present and*

deference applied to regulations rather than statutes."[9] And, like *Chevron*, it has been a doctrine with the potential to provide a bright-line rule for lower courts to administer.[10]

Although Justice Scalia authored *Auer*, he did not remain a fan of it for long. Within fifteen years of *Auer*, he began to critique the doctrine and its implications.[11] Before he would leave the Court, Justice Scalia would characterize *Auer* as one of the Court's "worst decisions ever."[12] Among other things, Justice Scalia became concerned that the practice of deferring to an agency's own interpretation of its own ambiguously drafted regulation created undue incentives for administrative mischief and undermined "fundamental principles of separation of powers."[13]

Were Justice Scalia's second thoughts about *Auer* justified? *Auer* deference has become quite controversial in the legal academy,[14] as well as on the bench.[15] In *Is Administrative Law*

Future of Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633 (2014).

[9] *Decker v. Nw. Envtl. Defence Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring-in-part, dissenting-in-part); *see also* ADRIAN VERMEULE, LAW'S ABEGNATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 86 (2016) (suggesting *Auer* accords with "the logic underlying *Chevron*").

[10] Some have suggested that Justice Scalia's desire for a bright-line rule motivated his approach *Auer*. *See*, *e.g.*, Aaron L. Nielson, Cf. *Auer v. Robbins*, 21 TX. REV. L. & POL. 303, 304 (2017).

[11] *See, e.g.*, See Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211-12 (2015) (Scalia, J., concurring) (calling for "abandoning *Auer*"); Decker v. Nw. Envtl. Defense Ctr., 568 U.S. 597, 616 (2013) (Scalia, J., concurring-in-part and dissenting-in-part) ("For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of "defer[ring] to an agency's interpretation of its own regulations."); Talk America v. Mich. Bell Telephone Co., 564 U.S. 50, 67 (2011) (Scalia, J., concurring) ("while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity").

[12] *See* Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE. L.J. 1600, 1603 (2017)("a few Terms ago, as we came off the bench after hearing arguments in a case involving judicial deference to agencies, Nino announced that *Auer v. Robbins* was one of the Court's "worst decisions ever." Although I gently reminded him that he had written Auer, that fact hardly lessened his criticism of the decision or diluted his resolve to see it overruled."); *see also* Adam Liptak, *At Memorial, Scalia Remembered As Happy Combatant*, N.Y. TIMES (Mar. 1, 2016),http://www.nytimes.com/2016/03/02/us/politics/at-memorial-scalia-remembered-as-happy-combatant.html.

[13] *See* Talk America, 564 U.S. at 68. This separation of powers critique of *Auer* and *Seminole Rock* is developed most fully in John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). *See also infra* __.

[14] For a sampling of contemporary academic views of *Auer* and *Seminole Rock* deference, see Aaron Nielson, et al., Aaron Nielson, et al., *Reflections on* Seminole Rock*: The Past, Present and Future of Deference to Agency Regulatory Interpretations* (Oct. 4, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847668.

[15] In addition to the late Justice Scalia, three members of the current Court have raised questions about *Auer* and expressed a willingness to reconsider the doctrine. *See, e.g.*, United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari); Perez v. Mortgage Bankers Assn., 135 S.Ct. 1199, 1210 (2015) (Alito , J., concurring);; *id*., at 1213-25 (Thomas, J., concurring in judgment); Decker v. Nw.

Unlawful?, Professor Philip Hamburger critiques administrative law for, among other things, its "evasion" of constitutional rights, institutions and processes.[16] This evasion renders administrative law "unlawful" and "extralegal" as it enables administrative agencies to enforce legal constraints on the public without proper authorization in law.

As Justice Scalia came to recognize, the practice of *Auer* deference is among the most egregious examples of the sort of evasion that Professor Hamburger fears. Insofar as this doctrine requires courts to defer to agencies' interpretations of their own ambiguous regulations, it enables agencies to evade a wide range of legal constraints that are otherwise imposed upon agency behavior, particularly the ability of agencies to take action with the force of law. Indeed, even if one rejects Professor Hamburger's critique of administrative law and agency evasion generally, the evasions of *Auer* deference are still of concern.[17]

This brief Article seeks to explain how the practice of *Auer* deference undermines—and facilitates the evasion of—basic administrative law principles. Part I provides an abbreviated history of the doctrine, and explains how *Auer* deference, as it is practiced today, is more expansive and permissive than the foundation provided by *Bowles v. Seminole Rock* requires. Part II explains how, despite their operational similarity, the *Chevron* and *Auer* doctrines are

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Envtl. Defense Ctr., 568 U. S., at 615-16 (Roberts, C.J., concurring). *See also Perez*, 135 S.Ct. at 1208 n.4 (noting *Auer* deference is "not an inexorable command in all cases").

[16] *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 29 (2014) ("Administrative law evades not only the law but also its institutions, processes and rights.").

[17] Professor Hamburger's work has garnered substantial attention and favorable notice in court opinions. *See e.g.* Dept. of Transp. v. Ass'n of Amer. Railroads ,135 S.Ct. 1225, 1243 (2015) (Thomas, J., concurring); Lorenzo v. SEC, __ F. 3d. __, 2017 WL 4320272 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring); Esquivel-Quintana v. Lynch, 801 F.3d. 1019, 1027 (6th. Cir. 2016) (Sutton, J., concurring-in-part, dissenting-in-part). At the same time, it has prompted strong reactions, for and against, within the academy. *See, e.g.*, Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEX. L. REV. 1521 (2015) (supportive of Hamburger thesis); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (critical of Hamburger thesis); Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* (Univ. of Oxford Legal Research Series, Paper No. 44, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802784 (same).

actually quite distinct: *Chevron* and *Auer* rest on separate foundations and thus have separate domains. Building on this analysis, Part III identifies multiple ways in which *Auer* facilitates the potential evasion of traditional administrative law. Part IV identifies the practice of evasion in the context of a recent controversy, and Part V ponders whether we are approaching *Auer*'s end.

I. *Auer* History

The doctrine of deferring to agency interpretations has its roots in the price controls of the 1940s.[18] In 1942, Congress enacted the Emergency Price Control Act (EPCA)[19] in an effort to curb wartime inflation.[20] The EPCA delegated power to the Office of Price Administration (OPA) to impose price ceilings and other price stabilization measures. Among the measures OPA adopted was Maximum Price Regulation No. 188, which barred sellers from charging prices higher than those charged during March of 1942.[21] Although this may have seemed like a straightforward rule, disputes would arise over how to apply the relevant price ceilings in particular contexts.

One such dispute involved the Seminole Rock & Sand Company, which had contracted to sell crushed rock in March 1942 for $1.50 per ton, but never made delivery.[22] According to the

[18] For a thorough discussion of this history, see Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47 (2015); *see also* Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of* Seminole Rock, 22 GEO. MASON L. REV. 647 (2015); [CITE POJANOWSKI, THIS VOLUME].
[19] Pub. L. No. 77-421, 56 Stat. 23.
[20] *See* Knudsen & Wildermuth, *Unearthing*, *supra* note __ at 56-57.
[21] *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413 (1945); *see also* 7 Fed.Reg. 5872 (July 30, 1942).
[22] *See Seminole Rock*, 325 U.S. at 412.

company, it was entitled to continue selling crushed rock at this price. The OPA, on the other hand, did not believe the unfulfilled contract set the ceiling price under the Maximum Price Regulation, as it was not the "highest price charged during March 1942" for materials that were actually delivered.[23] Rather, according to the OPA, the ceiling price was only $0.60 per ton, as that was the most the Seminole Rock & Sand Company had received for crushed rock that was actually delivered during the relevant time period.[24]

In *Bowles v. Seminole Rock & Sand Co.*, the Supreme Court sided with the OPA. Focusing on the text, a unanimous Court concurred with the OPA's reading of its Maximum Price Regulation. Recognizing the complexity of the question, however, the Court went on to note that, insofar as the text was unclear, the OPA's interpretation mattered:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. . . . In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.[25]

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[23] *See id.* at 414.
[24] *See id.* at 415.
[25] *See id.* at 413-14.

While the Court offered that the agency's interpretation could be of "controlling weight," its reasoning "placed greater weight" on the actual text of the regulation at issue.[26] In considering whether Seminole Rock had violated the federal price controls, the Court engaged in its own assessment of the relevant text, independently reaching the same conclusion as the OPA as to the meaning of the relevant rules.[27] The "plain words" here were enough to decide the case. Only after concluding that the price ceiling was to be based on "what actually was delivered, not with what might have been delivered," did the Court turn to the OPA's administrative interpretation.[28] The Court here noted that "any doubts" as to its conclusion were "removed" by the OPA's contemporaneous interpretation of the Maximum Price Regulation offered in a guidance document issued and distributed to manufacturers when the rule was first promulgated.[29] This "consistent" interpretation, offered "concurrently" with the issuance of the rule, confirmed that the Court's interpretation aligned with the OPA's intent in promulgating the rule.[30] The contemporaneously published guidance materials were "relevant interpretations" and were probative of the agency's intent in drafting the regulatory text.[31] Nonetheless, the OPA's interpretation merely confirmed what the Court had concluded on its own. It did not control—and may not even have influenced—the outcome of the case.

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[26] Knudsen & Wildermuth, *Unearthing*, *supra* note __ at 60.
[27] For a brief discussion of the drafting of the *Seminole Rock* opinion, see Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, in Aaron Nielson, et al., *Reflections on* Seminole Rock*: The Past, Present and Future of Deference to Agency Regulatory Interpretations* 5-6 (Oct. 4, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847668.
[28] *See* 325 U.S. at 417.
[29] *See id*.
[30] *See id*.
[31] *See id*.

The Court's cursory *Seminole Rock* opinion did not offer much explanation for the principle of deference it appeared to announce.[32] As Justice Scalia would later note, *Seminole Rock* "offered no justification whatever—just the *ipse dixit* that 'the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"[33] Perhaps due to this lack of explication—or perhaps due to the narrow context in which the *Seminole Rock* case arose—commentators largely ignored the decision.[34] The Court itself would not rely upon *Seminole Rock* to justify deferring to an agency's regulatory interpretation for another two decades.[35]

In the years immediately following, *Seminole Rock* was rarely cited outside the price control context, and even then, courts tended to apply it in a limited fashion, only giving meaningful consideration to public, contemporaneous interpretations.[36] In this regard, courts seemed to take their cues from the Court's narrow method in *Seminole Rock* –and the fact that the Court's decision was in line with other decisions reviewing agency interpretations[37]--rather than from its potentially expansive language.

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[32] As Aditya Bamzai notes, the draft opinion circulated by Justice Murphy included language indicating that the task for the Court was to determine what the agency had intended when it issued the regulation at issue. As Justice Murphy wrote, "the sole issue is to resolve a dispute as to the meaning that an administrative agency intended to attach to one of its regulations." *See* Bamzai, *supra* note __, at 5.

[33] *Decker v. Northwest Environmental Defense Center*, 568 U.S. at 617-18 (Scalia, J., concurring-in-part, dissenting-in-part); *see also* Manning, *supra* note __, at 619 ("the Court in *Seminole Rock* did not offer any detailed rationale for binding deference.").

[34] In a 1950 article, Kenneth Culp Davis characterized the Court's discussion of deference to regulatory interpretations as "hardly more than dictum." *See* Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 596 N.179 (1950). As Knudsen and Wildermuth note, academics and commentators "had little to say" about the decision. Knudsen & Wildermuth, *Unearthing*, *supra* note __ at 63.

[35] Prior to 1965, the only case in which the Supreme Court cited *Seminole Rock M. Kraus & Bros. v. United States*, 327 U.S. 614 (1946). *See* Knudsen & Wildermuth, *Unearthing*, *supra* note __ at 63.

[36] *See* Knudsen & Wildermuth, *Unearthing*, *supra* note __ at 65-66.

[37] *See* Pojanowski, *supta* note __ (noting the Court's method in *Seminole Rock* was in line with a traditional application of *Skidmore* deference).

It is also possible that *Seminole Rock* was applied in so limited a fashion due to the Administrative Procedure Act (APA). The APA, after all, was enacted in 1946, one year after *Seminole Rock* was decided.[38] Among other things, it provides that reviewing courts are to determine the "meaning . . . of an agency action,"[39] which would seem to suggest that abject deference to agency interpretations is inappropriate.

Seminole Rock's relative obscurity would not last. In the 1960s, lower courts began to adopt a more robust reading of the decision and its implications for judicial review of agency actions.[40] Across the circuits, courts increasingly applied *Seminole Rock* as a limit on courts' ability to resolve regulatory ambiguity, rather than as a guide for how to discern the regulatory meaning.[41] Although the Supreme Court had not previously indicated that *Seminole Rock* should be read as a limitation on court's interpretive power, the Court embraced this understanding in 1965 in *Udall v. Tallman.*[42] As in *Seminole Rock*, the Court articulated a broader rule than it seemed to apply, and did so without much explication.[43] As in *Seminole Rock*, the interpretation at issue had been public record and consistent over time. Also as in *Seminole Rock*, the Court did not articulate a limiting rationale. To the contrary, in *Udall* the Court pronounced a broad rule of deference to agency interpretations of their own regulations: "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in

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[38] *See* Bamzai, *supra* note __, at 7 ("An important question is whether the APA's scope-of-review provision leaves in place, or rejects, Justice Murphy's approach in *Seminole Rock.*").
[39] *See* 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, *and determine the meaning or applicability of the terms of an agency action.*" (emphasis added)).
[40] *See* Knudsen & Wildermuth, *Unearthing*, *supra* note __ at 69-77 (discussing the evolution of *Seminole Rock*'s application in the lower courts).
[41] *Id.* at 75.
[42] 380 U.S. 1 (1965).
[43] *See* Knudsen & Wildermuth, *Unearthing*, *supra* note __ at 80 (noting *Tallman* Court "did not set out any particular rationale as to why deferring to agency interpretations of their own regulations would be appropriate as a general matter.").

order."[44] Lower courts took this cue, and a more robust and formidable deference doctrine emerged.

By the time *Auer v. Robbins* reached the Court, *Seminole Rock* had "metastasized" well beyond its origins.[45] *Auer* completed the transformation. Contrary to *Seminole Rock*'s tacit suggestion, the task for reviewing courts was not to make sense of potentially ambiguous or insufficiently precise regulatory texts. Instead, insofar as a regulation is ambiguous, the agency's interpretation would be "controlling" unless "plainly erroneous or inconsistent" with the relevant text.[46] As the Court had concluded a few years earlier, courts should accept proffered agency interpretations, even if not offered contemporaneously with promulgation of the rule at issue, and even if the interpretation offered was not "the best or most natural one by grammatical or other standards."[47] Determining the precise meaning of agency regulations was a task for the agencies themselves, and not for the courts.

In a few paragraphs, Justice Scalia's *Auer* opinion dispatched with nearly all of *Seminole Rock*'s contextual limits.[48] Whereas *Seminole Rock* deferred to a contemporaneous interpretation, the interpretation in *Auer* was offered decades after the rule at issue had been promulgated.[49] Whereas the interpretation in *Seminole Rock* had been issued in a public document signed by the OPA Administrator and distributed to the regulated community, thereby providing notice of how the rule would be applied, the interpretation in *Auer* came in an amicus brief drafted in response

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[44] 380 U.S. 1, 16 (1965).
[45] *See, e.g.*, United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) ("The doctrine has metastasized").
[46] *Auer*, 519 U.S..at 461.
[47] Pauley v. Bethenergy M ines, Inc., 501 U.S. 680, 702 (1991).
[48] *See* Nielson, Cf., *supra* note __ at 304 ("Under *Auer*, many of the limits on *Seminole Rock* deference are gone.").
[49] *See Auer*, 519 U.S. at 457 ("The salary-basis test has existed largely in its present form since 1954").

to the Court's invitation, years after the litigation had begun.[50] Whereas the *Seminole Rock* Court seemed to be concerned with discerning the intended meaning of a potentially ambiguous regulation, the *Auer* Court was ready to defer to the agency's interpretation of its own "creature," so long as the interpretation was permissible and there was "no reason to suspect" that it did "not reflect the agency's fair and considered view."[51] In this regard, *Auer* could be seen as a decision as much about constraining judges (and empowering executive agencies) as about anything else.[52]

Whatever the Court had intended in 1945, by 1997 a full-fledged deference doctrine had emerged—and one as potentially powerful as its more famous cousin, *Chevron*.[53] The problem, as discussed below, is that a more robust doctrine of deference to agency interpretations of their own regulations facilitates agency evasion of important administrative law norms. Thus, it should be no surprise that jurists, commentators, and even *Auer*'s author, have raised second thoughts about this approach.[54]

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[50] *Id.* at 461.
[51] *Id.* at 462.
[52] In this regard, *Auer* would fit comfortably with some rationales offered for other deference doctrines, such as the comparative institutional competence and relative political accountability of agencies. It is also in line with Justice Scalia's oft-stated concern for clear legal rules that constrain judicial discretion. *See generally* Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
[53] *See, e.g.*, WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 392 (4th ed. 2010) ("an agency's interpretation of its own regulations may receive stronger deference than its interpretation of a statutory provision"); Richard J. Pierce, Jr. *What Do the Studies of Judicial Review of Agency Action ?Mean?*, 63 ADMIN .L. REV. 77, 85 (2011) (noting "the Supreme Court seems to be sending the lower courts an unmistakable, if implicit, message that they should confer extraordinary deference on agency interpretations of agency rules."). According to one treatise, deference to an agency's interpretations of its own regulations is "[o]ne of the most venerable doctrines in administrative law." CHARLES H. KOCH, JR. & RICHARD MURPHY, 3 ADMIN. L. & PRAC. § 10:26 (3d ed., 2010)
[54] Likely the most thorough, and influential, critique of deference to agency interpretations of their own regulations is John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

II. *Auer* Foundation

Auer deference is often seen as a variant or extension of *Chevron* deference.[55] If courts are to defer to a federal administrative agency's interpretation of an ambiguous statute that the agency has been entrusted to administer, might it follow that the agency should receive deference in interpreting the regulations implementing that statute as well? It is a reasonable question to pose.

In form, the two doctrines are quite similar. Under *Chevron*, the reviewing court first considers "whether Congress has directly spoken to the precise question at issue" in the relevant statutory text.[56] If so, the statute controls. If the statute is "silent or ambiguous," however, the reviewing court must defer to the agency's statutory interpretation, so long as it "is based on a permissible construction of the statute."[57] Similarly under *Auer* deference, the reviewing court must defer to the agency's interpretation of an ambiguous regulation, provided that the interpretation is reasonable and not at odds with the regulatory text. The same policy justifications for deferring in one case—agency expertise,[58] agency accountability,[59] and a desire

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[55] *See Decker v. Nw. Envtl. Defence Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring-in-part, dissenting-in-part) ("*Auer* deference is *Chevron* deference applied to regulations rather than statutes."); *see also* VERMEULE, *supra* note __, at 75 (noting arguments for *Auer* track those for *Chevron*).
[56] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984).
[57] *Id.* at 843.
[58] *See*, *e.g.*, Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 589–90 (1985); *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field"); *see also* Manning, *supra* note __, at 629-30 (noting the "relative expertise of agencies and courts" as a reason for a deference regime).
[59] *See*, *e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (such policy determinations are "not for the courts but for the political branches"); Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD.. 85, 91 (2011) ("A powerful additional argument for [deference] invokes the importance of political accountability: changes in an agency's interpretive position may reflect changes in the agency's political priorities—often triggered by a change in the presidential administration . . . ."); *Chevron*, 467 U.S. at 865 ("Judges are not . . . part of either political branch of Government."); *see also* Manning, *supra* note __, at 629 (noting political accountability as a reason for a deference regime).

for uniformity in federal law[60]—seems to apply equally in each case as well.[61] Yet the underlying doctrinal foundation for *Chevron* deference, as articulated by the Supreme Court, does not fit *Auer*.

Expertise, accountability, and uniformity provide policy rationales for the adoption of a deference regime. They do not, however, provide a *legal* rationale for a binding deference requirement, particularly when Congress has appeared to assign primary interpretive responsibility to the courts in the text of the APA by declaring that courts are to "decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action."[62] Congress has the option of adopting laws that take advantage of agency expertise, encourage greater political accountability, and provide uniformity in application, but it is not constitutionally required to do so.

While *Chevron* itself may have been less than clear about its foundations,[63] subsequent decisions have made clear that a theory of delegation provides the underpinning for *Chevron*

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[60] *See*, *e.g.*, Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 861 (2001) ("Other than the Supreme Court, the only entities with the power to adopt nationally uniform interpretations are the federal administrative agencies. Consequently, if uniformity cannot be achieved by pushing interpretational conflicts up to the Supreme Court, it may be necessary to resolve these conflicts by pushing them down to the agency level.").

[61] An additional justification for deference to agency interpretations of their own regulations is the "'common sense' idea that an agency 'is in a superior position to determine what it intended when it issued a rule.'" *See* Manning, *supra* note __, at 614 (quoting 1 KENNETH C. DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE §6.10, at 282 (3d. ed. 1994)); *see also* Richard Piece & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 516-17 (2011). This justification does not, as a general matter apply to agency interpretations of statutes. *Id.* at 630. *But see* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1037 (2015) (noting many agencies report playing a role in the process of drafting statutory provisions that they administer).

[62] *See* 5. U.S.C. § 706.

[63] *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 195 (2006)(" ("[T]he [*Chevron*] Court "announced its two-step approach without giving a clear sense of the theory that justified it."). Indeed, it's not clear that the Supreme Court in *Chevron* understood that it was announcing a new approach at all, let alone providing the basis for a canonical doctrine in administrative law. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES (Peter L. Strauss ed., 2006). Nonetheless, "compared to *Seminole Rock*, *Chevron* is a model of thorough and transparent legal reasoning." Stephenson & Pogoriler, *supra* note __, at 1454.

deference.[64] *Chevron*, the Court has repeatedly explained, is "rooted in a background presumption of congressional intent."[65] This presumption is that where Congress has delegated authority to an agency to administer a statute, Congress understands and assumes "that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[66] As Chief Justice Roberts explained in *King v. Burwell*, *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[67]

Grounding *Chevron* in a theory of congressional intent to delegate interpretive authority provides a constitutional basis for giving agencies the authority to adopt legally binding interpretations of federal statutes.[68] After all, agencies do not have any inherent power to impose binding constraints on private actors.[69] They only have that power which has been delegated to them by Congress, the power to offer authoritative interpretations of statutory provisions included.[70]

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[64] *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, U. ILL. L. REV. 1497, 1525-27 (2009) (discussing delegation basis for *Chevron*).
[65] City of Arlington v. FCC, 569 U.S. 290, 296 (2013); *see also* Merrill and Hickman, *supra* note __, at 836 ("*Chevron* rests on implied congressional intent."); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) ("The threshold issue for the court is always one of congressional intent: did Congress intend the agency's interpretation to bind the courts?").
[66] Smiley v. Citibank (South Dakota), N. A., 517 U. S. 735, 740–741 (1996); *see also* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) ("A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme.").
[67] *See King v. Burwell*, 135 S.Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 159 (2000)); *see also* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) (""A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").
[68] *See* Adler, *Restoring*, *supra* note __ at 990-91.
[69] *See* Bowen v. Georgetown U. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").
[70] As readers are likely aware, some scholars argue that the pervasive practice of delegation is itself constitutionally problematic. *See, e.g.*, HAMBURGER, *supra* note __; DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW

Delegation also provides a basis for reconciling *Chevron* deference with the text of the APA.[71] So long as courts first determine that a delegation has occurred—thereby fulfilling their obligation to decide the relevant question of law as to whether interpretive authority has been delegated—there is no conflict created by letting the agency's statutory interpretation control.[72] The deference that agencies receive is a product of the legislature's choice to delegate that power to them.[73]

The delegation theory of *Chevron* has also caused the Court to constrain *Chevron* deference, most significantly by articulating a "step zero" analysis that must precede the granting of deference.[74] As articulated in *Mead* and related cases, ambiguity alone is not enough to trigger *Chevron* deference.[75] More is required. Specifically, courts must be able to conclude that Congress delegated to the agency the power to act with the force of law, such as through notice-and-comment rulemaking or formal adjudication.[76] In addition, the agency's interpretation must have come from the exercise of such delegated authority, and the agency much have fulfilled all the relevant procedural requirements.[77]

CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). The implications of such arguments for review of agency interpretations of ambiguous statutes are beyond the scope of this paper.

[71] *See* Sales & Adler, *supra* note __ at 1538.

[72] *See* Sunstein, *Step Zero*, *supra* note __ at 208 ("If the underlying theory involves implicit (and fictional) delegation, the real question is when Congress should be understood to have delegated law-interpreting power to an agency.").

[73] *See* Manning, *supra* note __, at 623 ("binding deference is the product of Congress's right to delegate legislative authority to administrative agencies.").

[74] *See* Merrill & Hickman, *supra* note __, at 836 (defining the "step zero" inquiry as "the inquiry that must be made in deciding whether courts should turn to the Chevron framework at all"); *see also id.* at 912-13 (outlining "step zero" inquiry); Sunstein, *Step Zero*, *supra* note __.

[75] *See* U.S. v. Mead Corp., 533 U.S. 218, 226-27 (2001).

[76] *Mead*, 533 U.S. at 240 ("We have recognized a very good indicator of delegation meriting Chevron treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

[77] *See Encino Motorcars*, 136 S.Ct. at 2125, ("*Chevron* deference is not warranted where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.").

In practice, "step zero" means that if an agency wishes to obtain the benefits of *Chevron* deference, it must invest agency time and resources in developing and promulgating its interpretation. It must "pay now," in the form of investing agency resources to exercise delegated power to act with the force of law, or it will "pay later" when faced with more demanding judicial review.[78] Insofar as "step zero" requires going through the rulemaking process or other procedural steps, this can be a significant burden. Should an agency choose to forego such efforts, however, the agency cannot claim *Chevron*'s protection if its interpretation is subsequently challenged in court. As the Court has made clear, interpretations offered in opinion letters, guidance manuals, and amicus briefs are insufficient, as Congress has not delegated agencies to bind the public in such instances.[79]

Neither *Auer* nor *Seminole Rock* provides an equivalent foundation for a doctrine of deference to agency interpretations of their own regulations.[80] Nor is there any statutory provision, in the APA or anywhere else, suggesting Congress intended to give agencies the power to bind courts to agency interpretations of their own regulations. Congress may well have the power to delegate such power to federal agencies,[81] but it has not done so. Neither the APA, nor any other cross-cutting statute, indicates that Congress intended to give agencies the power to bind courts to the agency's views about how the agency's rules should be interpreted. To the contrary, the text of the APA would suggest the opposite.[82] If anything, Congress's expectation

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[78] *See* Stephenson & Pogoriler, *supra* note __ at 1464 (discussing how agencies have the choice to "pay me now or pay me later").
[79] *See* Christensen v. Harris County, 539 U.S. 576, 587 (2000).
[80] *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67 (2011) (Scalia, J., concurring) ("On the surface, it seems to be a natural corollary--indeed, an a fortiori application--of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing, But it is not." (citation omitted)).
[81] *See* VERMEULE, *supra* note __, at 75 ("Congress may allocate between courts and agencies the power to interpret ambiguous regulations.")

[82] *See infra* notes __ and accompanying text.

that agencies would go through various administrative processes, such as notice-and-comment rulemaking or formal adjudication, before setting down legislative rules or imposing binding orders suggests Congress did not intend to give agencies power to bind courts merely by offering a regulatory interpretation.

As Justice Scalia noted in his *Talk America* concurrence, courts presume that a gap or ambiguity in a statute is an implicit delegation of authority to the implementing agency to resolve the ambiguity.[83] In such cases, Congress has given up control over how the ambiguities will be resolved. In the case of regulations, however, an ambiguity cannot be understood as the agency delegating to itself. An agency that leaves an ambiguity in a promulgated regulation does not cede control to another branch. Rather it cedes control to itself.

Even if courts conclude that agencies have a comparative institutional advantage over courts in determining how ambiguous regulatory provisions should be interpreted, either due to agency expertise or greater political accountability, it is not clear why this should translate into a rule of deference.[84] After all, under existing precedent, deference to agency interpretations of statutes is based upon a theory of delegated power, not prudential limits on judicial discretion or a recognition of comparative institutional competence. It is even less clear why such concerns should give agencies the ability to impose binding interpretations of regulatory text when those interpretations do not purport to represent the best interpretation of a given regulation's meaning and intent.

If an agency interpretation is based upon the agency's intention at the time the regulation was promulgated or the agency's understanding of how a given regulation will operate in

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[83] *Id.*
[84] *See* Stephenson & Pogoriler, *supra* note __ at 1458.

practice, nothing prevents the agency from making this case to a reviewing court. The effect of *Auer* is to relieve the agency of making any such argument—of being able to point to any plausible interpretation, adopted at any time, and for any reason. Such broad deference can neither be justified under the umbrella of *Chevron*'s domain, nor by appeal to the agency's superior knowledge. Yet, in practice, the deference agencies receive under *Auer* is as great—if not greater—than the deference they receive under *Chevron*—in terms of the contexts in which such deference may be obtained, the interpretations to which courts will defer, and (at least according to one study) the rate at which agencies prevail.[85]

III. *Auer* Evasions

Whatever their superficial similarities, *Auer* deference lacks the sort of legal foundation that provides for *Chevron*'s domain. More troubling, the doctrine of granting controlling deference to agency interpretations of their own regulations contradicts some of the core premises underlying the Constitution's separation of powers. As a consequence, *Auer* facilitates the evasion of multiple administrative law norms.[86]

Even before *Auer* was decided, John Manning warned that deferring to agency interpretations of their own regulations "contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-

[85] *See* William Yeatman, *An Empiriacl Defense of* Auer *Step Zero*, 106 GEO. L.J. (2018, forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2831651.
[86] *See* HAMBURGER, *supra* note __, at 114 ("guidance and other such modes of 'interpretation' are a mode of evasion."). Hamburger would go even farther, calling deference to agency interpretations "an abandonment of judicial office." *Id.* at 316.

exposition is especially dangerous to our liberties."[87] At the founding, "a core objective of the constitutional structure was to ensure meaningful separation of lawmaking from the exposition of a law's meaning in particular fact situations."[88] Yet *Auer* enables agencies to act as both the maker and interpreter of the laws. As Manning explained in his highly influential article, "given the reality that agencies engage in 'lawmaking' when they exercise rulemaking authority," deference to agency interpretations of their own regulations "contradicts the constitutional premise that lawmaking and law-exposition must be distinct."[89]

The combination of the law-making and law-interpreting functions was viewed with suspicion at the time of the nation's founding because it was feared that such concentration of power facilitated the abuse of government power. As Montesquieu warned, "When legislative power is united with executive power in a single person or in a single person of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[90]

In more concrete terms, by enabling agencies to provide legally binding interpretations of their own regulations and allowing agencies to do so in letters, guidance documents, and even legal briefs, *Auer* facilitates the evasion of multiple administrative law norms: accountability, responsibility, notice, and finality. It is to these evasions this Article now turns.

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[87] Manning, *supra* note __, at 617.
[88] Manning, *supra* note __, at 644.
[89] Manning, *supra* note __, at 654.
[90] Manning, *supra* note __, at 645 Montesquieu, The Spirit of the Laws bk. XI, ch. 6, at 157 (Anne Cohler et al. eds. & trans., 1989) (1768)

A. Evasion of Accountability

Under *Mead*, for an agency's statutory interpretation to be eligible for *Chevron* deference, there must be an indication that Congress has delegated to an agency the authority to act with the force of law, such as through notice-and-comment rulemaking.[91] In addition, the agency must have exercised such power when putting forth its interpretation.[92] These limits on *Chevron*'s domain help ensure greater accountability within the regulatory process.[93]

The rule development process provides an opportunity for potentially affected groups to mobilize support or opposition to a given rule. Adopting a controversial position may trigger critical media coverage or prompt legislative oversight of the rulemaking at issue. If an agency may avoid going through a rulemaking and may instead offer an authoritative interpretation in a guidance letter or other informal document, it can avoid having to justify its decision on the record. At the same time, it may reduce the likelihood that its action prompts critical attention from regulated entities, interest groups, Congress, and the press. Failure to respond to the objections made on the record during the rulemaking process is an easy basis for a reviewing court to reject a rule. This is no less true when the question at issue is one of statutory interpretation.

As the Court recently reiterated in *Encino Motorcars v. Navarro*, an agency must explain why it adopted one statutory interpretation as opposed to another.[94] As the Court explained,

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[91] *See Mead*, 533 U.S. at 226-27.
[92] *Id.*
[93] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) ("notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.").
[94] 136 S. Ct. 2117, 2125 (2016).

agencies are required to "give adequate reasons" for their decisions, including the reasons they adopt one potential statutory interpretation over another.[95] In practice this means that an agency interpretation developed through notice-and-comment rulemaking must take account of objections and counter-interpretations offered by commenters. This process helps ensure that agencies are accountable for their choices, both in the context of judicial review and in the political process.

Insofar as agencies may offer regulatory interpretations without going through any formalized process, agencies are freed from having to take account of the concerns of the regulated community and are held less accountable for their interpretive choices. To the extent *Auer* deference enables agencies to adopt interpretations and policies without going through the rulemaking process, it short-circuits the ability of these administrative processes to provide for accountability within regulatory policy.[96] In this way, agencies may "insulate" themselves from "broader political accountability".[97]

[95] *Id.*
[96] *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J. concurring) ("By deferring to interpretive rules, [courts] have allowed agencies to make binding rules unhampered by notice-and-comment procedures").
[97] Manning, *supra* note __ at 680

B. Evasion of Notice

"Fair notice" of what the law requires is a "fundamental principle" of "our legal system."[98] Yet *Auer* deference also facilitates the evasion of notice.[99] When an agency adopts a regulatory interpretation through notice-and-comment rulemaking, it provides the public with notice as to the interpretation it is considering adopting and the basis for the interpretation. By alerting the public, those who will be subject to the interpretation are made aware of what agencies will require of them. Once the agency finalizes the interpretation, as when an agency promulgates a final rule, the regulated community is on notice of what the law will require, and has the assurance that these requirements will not change without additional notice being given.

As the dissenting justices in *Thomas Jefferson University v. Shalala*[100] warned, deferring to an agency's interpretation of its own ambiguous regulation risks depriving the regulated community of adequate notice of what a regulatory agency may impose upon them. Deferring to the agency's previously unarticulated interpretation undermines the principle that agency rules binding private conduct should be "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law."[101] This is of particular concern because *Auer* deference applies when a regulation is ambiguous—that is, when the requirements

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[98] FCC v. Fox Television Stations, Inc., 567 U.S. 239 (2012)("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *see also* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law").

[99] *See* Manning, *supra* note __, at 669 (such deference "disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it"); *see also* Derek A. Woodman, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. U. L. REV. 1721, 1725 (2014) (""the concern surrounding deference to an agency's interpretation of its regulations is fair notice.").

[100] 512 U.S. 504 (1994).

[101] 512 U.S. at 525 (Thomas, J., dissenting).

an agency is imposing are not clear. In other words, *Auer* deference applies when the regulated community lacks notice of what is required unless and until the agency issues its interpretation. *Auer* gives agencies the opportunity to cure any ambiguity or imprecision in the regulations they promulgate. As Professor Manning has noted, *Auer* "relieves the agency of the cost of imprecision that it has produced."[102] Consequently, agencies are "less likely" to "give clear notice of its policies either to those who participate in the rulemaking process prescribed."[103]

Auer deference may also facilitate the evasion of notice of conditions placed upon the receipt of federal funds. Under *Pennhurst State School and Hospital v. Halderman*, state recipients of federal funds must have notice of conditions imposed upon the receipt of such funds in order for such conditions to be constitutional.[104] As the Supreme Court explained in *South Dakota v. Dole*, "if Congress desires to condition the States' receipt of funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[105] In some cases, the relevant conditions are defined and delimited in agency regulations. If such regulations are ambiguous and agencies receive *Auer* deference for their interpretations of such regulations, then *Auer* may facilitate the evasion of constitutional constraints upon the imposition of conditions on the recipients of federal funds. This is particularly true because even if a legal challenge to a new interpretation might be successful, a grant recipient challenging an agency's newly announced interpretation of a regulatory requirement may risk a temporary cut-off of funds in the interim.

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[102] *See* Manning, *supra* note __, at 617.
[103] *Id.*
[104] 451 U.S. 1, 17 (1981).
[105] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting *Pennhurst*, 451 U.S. at 17).

C. Evasion of Responsibility

Auer deference also encourages agencies to evade their responsibility to provide detailed guidance and explication of legal requirements when developing and promulgating regulations. It is inevitable that statutes will leave some potential questions unaddressed. As James Madison counseled in *The Federalist No. 37*: "All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[106] As Manning notes, "no lawmaker can write a law that resolves all issues in advance and removes all discretion from the interpreter."[107]

Because any ambiguity or gap left in a statute constitutes an implicit delegation of authority to the implementing agency, Congress is aware that insofar as it fails to provide greater specificity or detail in a statute, it is ceding the power to make such decisions to the executive branch—and Congress is well aware that the executive branch may be controlled by those with different political priorities. This gives members of Congress a powerful incentive to consider when and whether it is worthwhile to provide greater detail and precision in a regulatory statute.

Agencies are in a quite different position. When an agency fails to provide greater detail or precision in a regulation, the agency is not ceding control to another branch of government. To the contrary, the agency is effectively ceding such authority to itself.[108] Yet the shift in power is

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[106] The Federalist No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).
[107] *See* Manning, *supra* note __, at 647.
[108] Manning, *supra* note __, at 647-48 ("when a lawmaker controls the interpretation of its own laws, an important incentive for adopting transparent and self-limiting rules is lost because any discretion created by an imprecise, vague, or ambiguous law inures to the very entity that created it.").

not merely temporal in nature.[109] The agency that fails to resolve statutory ambiguities in its implementing regulations may actually give itself greater power and flexibility to define a law's requirements in the future.[110]

Drafting and promulgating regulations can be time-consuming and costly, both in terms of agency resources and political capital. It may take substantial effort for an agency to imbue a regulatory proposal with greater detail and precision. It may be difficult to accurately foretell how a particular regulatory mechanism may operate in practice. Under *Auer*, however, filling such gaps at a later date is actually *easier* than doing so through the regulatory process. Attempting to resolve a difficult question raised by a given regulatory proposal in the rulemaking process is costly. Resolving the same question later through a guidance, "Dear Colleague" letter, or even an amicus brief is comparatively easy—and less prone to challenge.

D. Evasion of Finality

As a general rule, an agency action cannot be challenged in court unless it is final.[111] When a final rule is promulgated, there is no question that there has been a final agency action,

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[109] *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J. concurring) ("Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, 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.").

[110] *See* Stephenson & Pogoriler, *supra* note __, at 1464 ("an agency confronted with a statutory ambiguity might try to bootstrap its way into the equivalent of *Chevron* deference by promulgating a legislative rule that preserves or restates the statutory ambiguity, and then issuing an interpretive rule that purports to interpret not the *statute*, but the *regulation*."). *But see* Gonzales v. Oregon, 546 U.S. 243 (2006) (embracing an "anti-parroting" rule).

[111] *See* Bennett v. Spear, 520 U.S. 154, 177-78 (1997)(" As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process, --it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"(citations omitted)).

and judicial review is available. When agencies engage in other actions, however, there is often a dispute as to whether the action in question is final and therefore ripe for review.[112] This creates an incentive for agencies to adopt regulatory interpretations in forms that are less vulnerable to judicial review.[113]

Under *Auer*, agency interpretations of their own regulations need not be offered in the form of regulations or other readily reviewable agency actions. Instead, these interpretations may be offered in interpretative rules, guidance documents, "Dear Colleague" letters, and other forms that are generally not subject to judicial review as they are not generally recognized to be final agency action. Consequently, when agencies rely upon such actions and documents to offer authoritative interpretations of their own regulations, this enables agencies to argue that their interpretations are not immediately subject to judicial review as final agency actions. This evasion of finality makes it more difficult for regulated entities and affected interests to challenge the interpretations that agencies may claim are eligible for *Auer* deference. Even where an agency action substantively alters the legal obligations of the regulated community, agencies retain the incentive to characterize such actions as merely interpretative rules, so as to

[112] *See*, *e.g.*, U.S. Army Corps. Of Engineers v. Hawkes Co., 136 S.Ct. 1907 (2016) (Army Corps alleged jurisdictional determinations under the Clean Water Act were not reviewable because such determinations did not constitute final agency actions).

[113] *See generally* Bryan Clark & Amanda Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can't) Do to Limit Judicial Review*, 52 BOST. COLL. L. REV. 1687 (2011); *see also* Jennifer Nou, *Agency Self-Insulation under Presidential Review*, 126 HARV. L. REV. 1755, 1789 (2013) ("[A]gencies can choose between simple inaction, adjudication, guidance documents, or nonsignificant rules as instruments that are more likely as a class to bypass presidential review."); Michael S. Greve & Ashley C. Parrish, *Administrative Law without Congress*, 22 GEO. MASON L. REV. 501, 522 (2015) (noting "perennial danger that agencies might manipulate their choice of procedures . . . to evade review").

circumvent APA requirements and forestall judicial review. Yet agencies need not give up *Auer* deference in the process.[114]

Some courts have gotten wise to this form of evasion, looking to the substance of an agency action in order to determine whether it is final and subject to judicial review, rather than looking merely at the label attached to the action by the agency.[115] The U.S. Court of Appeals for the D.C. Circuit, in particular, has found guidance documents to be reviewable despite agency protestations that the relevant documents were not final agency actions.[116] Scrutinizing agency actions thus limits—though does not eliminate—the threat of evasion in this context. Regulated entities may not always recognize a guidance document or letter as a substantive limitation and courts may sometimes accept agency arguments that a guidance is, in fact, only a guidance, and does not impose substantive requirements. Further, the threat that an agency's regulatory interpretation may, in subsequent litigation, receive *Auer* deference means that regulated entities must often invest resources in immediate challenges to such actions in order to preserve their claims.[117] Under some statutes, such as the Clean Water Act, certain regulatory determinations are subject to relatively short limitation periods and may not be challenged in the context of an

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[114] *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 555 (2000) ("the agency has an incentive to mischaracterize a legislative rule as interpretative to circumvent the APA rulemaking procedure").

[115] *See, e.g.*, Texas v. U.S., 201 F.Supp.3d 810 (N.D. Tex. 2016) (rejecting Department of Education argument that a "Dear Colleague" letter on the accommodation of transgender students under Title IX was not ripe for judicial review).

[116] *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (concluding EPA Clean Air Act periodic monitoring guidance was a final action for purposes of judicial review).

permits issued under the Clean Air Act, was final and reviewable despite its "Guidance" title)

[117] *See* Clark & Leiter, *supra* note __, at 1690-91 (noting that, under some federal statutes, the form of the agency action determines whether judicial review is available); *see also* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1420 (2004) ("[t]he form of the regulatory action dictates the . . . availability and nature of judicial review.").

enforcement action.[118] Thus, even when a guidance document does not impose new legal constraints or adopt a new regulatory interpretation, it may still impose costs on regulated entities.

IV. *Auer* Significance

The recent, high-profile dispute over the Department of Education's reinterpretation of the requirements of Title IX helps to illustrate how *Auer* facilitates the evasion of administrative law norms in practice.[119] This particular dispute arose when a high school student in Gloucester County, Virginia, Gavin Grimm, informed school officials that Grimm would like to use the school facilities that correspond with Grimm's gender identity instead of those that corresponded with Grimm's sex at birth. The school resisted Grimm's request, and litigation ensued, with Grimm insisting that the school's refusal to accommodate the request violated federal law.[120]

Under Title IX of the Education Amendments of 1972, no educational institution that receives federal funding may discriminate "on the basis of sex."[121] This prohibition applies to all fund-recipient operations and facilities. Title IX expressly allows for the maintenance of single-sex living facilities, such as dormitories, bathrooms, and the like.[122] Perhaps because questions of gender identity were not particularly salient at the time, Title IX did not define the term "sex."

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[118] *See, e.g.*, 33 U.S.C. § 1369(b) (requiring certain challenges to be filed within 120 days of promulgation of relevant agency action, and prohibiting review in the context of "any civil or criminal proceeding for enforcement" if review could otherwise have been obtained).

[119] Portions of this discussion are adapted from Jonathan H. Adler, *What "Sex" Has to Do with* Seminole Rock*, in* Aaron Nielson, et al., *supra* note __, at 30-32.

[120] *See generally* G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. 2016).

[121] *See* 20 U.S.C. § 1681(a).

[122] *See* 20 U.S.C. § 1686.

After Title IX's enactment, the U.S. Department of Education promulgated regulations to implement the statutory prohibition. One regulation of particular relevance provides that: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."[123] Like the statute, however, the Education Department's regulations do not define the term "sex."

Decades after these regulations were adopted, the Department of Education concluded that Title IX imposes obligations on educational institutions with regard to transgender students. Specifically, the Department decided that Title IX's prohibition on sex discrimination should be applied so as to take account of an individual's gender identity, as opposed to that individual's biological sex at birth. Had the agency conducted a notice-and-comment rulemaking, the resulting rule defining "sex" and detailing how Title IX's requirements would apply in the context of transgender individuals would have been eligible for *Chevron* deference. Yet no such rulemaking was ever conducted. Instead the Department wrote a letter.

In deciding to forego rulemaking on this question, the Department evaded the potential political consequences of taking a side on a contentious cultural issue. Rather than address this question through regulations—which would have required going through a lengthy (and likely controversial) notice-and-comment rulemaking, and would have prompted a certain legal

[123] *See* 34 C.F.R. § 106.33. The regulations also require all such facilities to be "comparable." 34 C.F.R. § 106.32(b).

challenge—the Education Department simply declared in letters[124] and guidance documents[125] that the federal prohibition "encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status."[126]

The Department further declared that it would treat "a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations," and that, as a consequence "a school must not treat a transgender student differently from the way it treats other students of the same gender identity."[127] In the Department's view, Title IX and its regulations require that once a student's parent or guardian "notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity."[128]

As the relevant guidance documents (and court filings) made clear, the Department wanted the benefits of judicial deference to its interpretation without having to go through the time and effort of a rulemaking. Not only would such an effort consume agency resources and potentially court controversy, it would result in a final agency action—a final rule—that would be a ready target for litigation.

In *G.G. v. Gloucester County School Board*, the Department argued that these interpretations were eligible for *Auer* deference—and the U.S. Court of Appeals for the Fourth

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[124] *See* Letter to Emily Prince, Jan. 7, 2015, http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf; *see also* Dear Colleague Letter on Transgender Students ("Dear Colleague" hereafter), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[125] *See, e.g.*, "Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities," Department of Education, Office of Civil Rights, December 2014, https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.
[126] *See* Dear Colleague, *supra* note __.
[127] *Id.*
[128] *Id.*

Circuit agreed. As the Fourth Circuit noted, the relevant regulations did not address whether or how transgender individuals should be accommodated under Title IX.

> Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with deference to gender identity.[129]

Concluding that "the regulation is ambiguous as applied to transgender individuals," the Fourth Circuit thebn concluded that it must defer to the Department's interpretation under *Auer*.[130]

Whether or not one believes the Department of Education adopted the best interpretation of Title IX—either as a matter of law or a matter of policy—deference to the agency's interpretation facilitated the evasion of administrative law norms. For starters, the relevant ambiguity is foundin the underlying statutory language as well as in the Department's regulations. It was the work of the legislature, not the regulatory agency. Consequently, by deferring to the Department's regulatory interpretation, the court effectively facilitated the evasion of the constraints traditionally placed upon *Chevron* deference.

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[129] *See* G.G., 822 F.3d at 720.
[130] *Id.* at 721.

Granting *Auer* deference in this case also enabled the agency to alter its longstanding interpretations and understandings of relevant legal requirements without going through the rulemaking process. In the case at hand, this enables the agency to sidestep difficult questions, such as how to balance accommodation of gender identity with concerns for privacy and modesty and whether schools may require a gender dysphoria diagnosis before providing an accommodation (as is often requirement before providing accommodations for certain disabilities), and so on. In the context of Title IX, it may also have given the Education Department a new means of circumventing the clear notice requirements for conditions placed on federal grants to states. In this way, the court's decision facilitated the evasion of accountability, responsibility, and notice.

It is quite clear that the Department of Education had sought to delay, if not avoid, judicial review of its interpretation. When the Department's "Dear Colleague" letter explaining how it would interpret its own regulations was challenged directly in separate litigation, the Department argued (unsuccessfully) that its interpretation did not constitute a final action and was not ripe for review.[131] The Department made this argument even though it was simultaneously claiming that its interpretation was binding under *Auer* in other litigation.

This episode also highlights how *Auer* deference is an uneasy fit with *Chevron*'s domain.[132] As discussed above, *Chevron* deference is premised upon a theory of delegation. Statutory gaps and ambiguities are understood to represent implicit delegations of authority from the legislature to the agency. When agencies promulgate ambiguous regulations, however, they cannot be said to be delegating anything to themselves.

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[131]. *See* Texas v. U.S., 201 F.Supp.3d 810 (N.D. Tex. 2016).
[132] *See infra* notes __ and accompanying text.

Insofar as Title IX is ambiguous, *Chevron* provides that Congress has delegated authority to the Education Department to fill in the details and clarify grant recipient obligations. *Chevron* and its progeny further make clear that such gap-filling and clarification is to come in the form of regulations or other agency actions that have the force of law—and not in the form of guidance letters or legal advocacy. So, to grant *Auer* deference to the Education Department's guidance letters here allows the Department to exercise its delegated power without having to fulfill the procedural requirements that ensure greater transparency and accountability in the exercise of such power. And if agencies are given this sort of opportunity to circumvent *Chevron*'s requirements, we should expect them to act accordingly. By facilitating the evasion of administrative law norms, courts enable the evasion of *Chevron*'s domain as well.

As a policy matter, the Education Department may well have been correct. Nothing in this discussion should be read to suggest that Title IX cannot or should not be interpreted and applied as the Education Department insisted. But for Title IX to be applied and enforced as the Education Department wants, it must promulgate an interpretation worthy of judicial deference—and any such interpretation must be adopted in the usual course and through the proper procedures.

The irony of the story is that the same evasions that facilitated the Department's effort to evade *Chevron* and the traditional constraints of administrative law were also the policy's undoing. After the 2016 election, partisan control of the Department of Education switched hands. Because the Department's transgender student policy was contained in "Dear Colleague" letters and guidance documents, it could be eliminated as easily as it was put in place. The Department of Education's policy was rescinded, and the decision in *G.G. v. Gloucester County*

was vacated by the Supreme Court,[133] and subsequently dismissed as moot, as Gavin Grimm had graduated high school, and no longer needed an accommodation.[134] In seeking to impose a policy without going through the traditional regulatory process, the Department made the policy particularly easy to undo.

V. *Auer* End?

It is possible that *Auer* is "on its last gasp."[135] As noted above, several justices on the Court have expressed misgivings about the doctrine.[136] The Court has not, as yet, been willing to reconsider the doctrine directly.

While not reconsidering *Auer*'s foundations, the Court has taken the opportunity to limit some of the doctrine's more extreme applications. In *Gonzales v. Oregon*, for example, the Court held that where a regulation merely parrots the relevant statutory language, agency interpretations are not eligible for *Auer* deference.[137] Whereas the regulation interpreted in *Auer* "gave specificity" to the underlying statutory scheme the agency was entrusted to implement, the regulation in *Gonzales* did "little more than restate the terms of the statute itself."[138] The language the agency sought to interpret came from Congress.[139] As a consequence, what the federal government claimed was a regulatory interpretation eligible for *Auer* deference was in

[133] 137 S.Ct. 1239 (Mem) (2017).
[134] 853 F.3d 729 (4th Cir. 2017).
[135] United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).
[136] *See infra* note __.
[137] 546 U.S. 243 (2006).
[138] *Id.* at 256.
[139] *Id.*

fact a statutory interpretation that could only receive deference if the requirements for *Chevron* deference were met. To conclude otherwise would have enabled agencies to use *Auer* to circumvent *Chevron*'s more demanding requirements.[140] In addition, the Court noted that, insofar as the interpretation at issue could not represent the agency's "intent at the time of the regulation's promulgation," this was a further reason to deny *Auer* deference.

While the *Gonzales* holding was limited, there is some reason to believe it has had an effect on the application of *Auer* in the lower courts—at least where lower courts pay attention.[141] According to one empirical study of *Auer* in federal appellate courts, agency win rates under *Auer* were lower between 2006 and 2013 than they had been between 1993 and 2006.[142] The agency win rate in *Auer* cases of 78 percent prior to 2006 dropped to 71 percent.[143] The comparable win rate for *Chevron* cases during the period of study was 68 percent.[144] Thus, while the precise holding of *Gonzales* was narrow, it may have had a disciplining effect on *Auer* in the circuit courts.

More recently, in *Christopher v. Smithkline Beecham Corporation*, the Court reaffirmed that *Auer*'s "general rule does not apply in all cases."[145] Citing language from *Auer* itself, the

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[140] Perhaps ironically, Justice Scalia dissented in *Gonzales v. Oregon*, maintaining the case called for a "straightforward application of our rule that an agency's interpretation of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation.'" 546 U.S. at 277 (Scalia, J., dissenting). According to Justice Scalia's dissent, "broadly drawn regulations are entitled to no less respect than narrow ones," even if the regulations at issue do little more than restate the relevant statutory language. *Id.* at 277-78. Justice Scalia also disputed the majority's claim that the regulation at issue parroted the relevant statutory text. *Id.* at 278.

[141] *See* G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. 2016) (applying *Auer* deference without any consideration of the *Gonzales* anti-parroting canon).

[142] *See* William Yeatman, *An Empiriacl Defense of* Auer *Step Zero*, 106 GEO. L.J. (2018, forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2831651; *see also* Cynthia Barmore, Auer *in Action: Deference after* Talk America, 76 OHIO ST. L.J. 813 (2015) (finding drop in rate at which circuit courts grant *Auer* deference after 2012).

[143] Yeatman, *supra* note __,.

[144] *Id.*

[145] 567 U.S. 142, 155 (2012).

Court noted that no deference is due where the interpretation is contradicted by the relevant regulatory text or where "there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter.'"[146] Such suspicions may arise where an agency alters a longstanding view or adopts what appears to be little more than a "convenient litigating position."[147]

In *Christopher* the Court refused to accord *Auer* deference to an interpretation that would have imposed significant liability for conduct that occurred prior to the issuance of the interpretation.[148] Providing deference in such a circumstance, the Court reasoned, would "seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires."[149] Citing concerns Justice Scalia had voiced the year before, Justice Alito's opinion for the Court warned of the threat posed by allowing agency's to offer definitive interpretations of "vague and open-ended regulations" long after the regulations were first issued.[150] As Justice Alito explained:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.[151]

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[146] *Id.* (quoting *Auer*, 519 U.S. at 462).
[147] *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).
[148] *Id.*at 155-56.
[149] *Id.* at 156 (internal quotation omitted).
[150] *Id.* at 158 (citing Talk Amer., Inc. v. Mich. Bell Tele. Co., 564 U.S. 50, 67 (2011) (Scalia, J., concurring)).
[151] *Id.*at 158-59.

In the wake of the *Christopher* decision, the Court has had several opportunities to revisit *Auer* deference, but has largely sought to evade the issue. Not only did the Court not reach the underlying issue in *Christopher* or *Decker*, it has rejected petitions for certiorari asking the Court to reconsider the doctrine from the ground up.[152] The Court accepted certiorari in *Gloucester County School Board v. G.G.*, but pointedly declined to include the reconsideration of *Auer* in the questions accepted for review.[153] One suspects, however, that the Court will not be able to evade the *Auer* question for long.

Overturning *Auer* would help prevent the evasion of administrative law norms identified above, but would not likely work a revolution in administrative law. Eliminating *Auer* deference would not require courts to dispose of the "common sense" idea that agencies are in a better position to understand what was intended when a regulation was adopted or how it was thought to operate. Without *Auer* to rely upon, agencies would still have ample opportunity to convince reviewing courts that their interpretations are preferable to the available alternatives. Under *Skidmore v. Swift & Co.*, agency "interpretations and opinions . . . while not controlling upon the courts by reason of their authority" are still worthy of significant respect, for they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[154] As the Court held in *Christopher*, in the absence of *Auer* deference, agency interpretations of their own regulations still receive "a measure of deference proportional to the

[152] *See, e.g.*, United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607 (2016) (denial of certiorari).
[153] 137 S.Ct. 369 (2016). The Court subsequently vacated the decision below and remanded the case back to the court of appeals after the regulatory interpretation at issue was rescinded by the Department of Education. 137 S.Ct. 1239 (2017).
[154] 323 U.S. 134, 140 (1944).

'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'"[155]

The Court should stop evading *Auer* so it can stop *Auer* evasions.

[155] Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012) (quoting *Skidmore*, 323 U.S. at 140).