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Auer, Chevron, and the Future of Kisor

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INTRODUCTION

To most observers' surprise, the *Auer* doctrine,[1] which provides that agencies' interpretation of their own regulations should receive deference from reviewing courts, survived reconsideration by the Supreme Court. In *Kisor v. Wilkie*,[2] Justice Kagan, joined by three other justices, wrote a qualified endorsement of the doctrine. Justice Gorsuch, also joined by three others, disagreed vigorously in a

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1. So called from its application in Auer v. Robbins, 419 U.S. 452 (1997).

2. 139 S. Ct. 2400 (2019).

concurring opinion.[3] The deciding vote was Chief Justice Roberts, who upheld the doctrine on grounds of stare decisis and asserted that the diametrically opposed plurality and concurring opinions were not very far apart.[4] Justice Gorsuch took this to mean that *Auer* had in fact been given only a partial and temporary reprieve,[5] a view shared by immediate commentators on the decision.[6]

This Article argues that the *Auer* doctrine has been misconstrued by courts and commentators, including the Justices who wrote the various opinions in *Kisor*. The reason is that it has been treated as an abstract proposition, a way of assessing agency decisions that depends on generalized legal arguments. Instead, *Auer* should be viewed in context, that is, in terms of the way that situations to which it applies actually arise in the administrative process. Doing so reveals that *Auer* is not a separate rule, but a necessary implication of the dominant decision in this field, *Chevron U.S.A. v. NRDC*.[7] In the future, *Chevron* might be overruled,[8] although this Article will further argue that the Court would be ill-advised to do so.[9] But as long as *Chevron* remains in force, *Auer* is likely to remain in force as well. Reviewing courts will continue to employ *Auer* because it establishes a viable and sensible role for them in the administrative process.

It is generally recognized, of course, that the *Auer* doctrine has a close relationship to *Chevron*. Although the doctrine can be traced back to a pre-*Chevron*, decision, *Bowles v. Seminole Rock & Sand Co.*,[10] the

3. *Id.* at 2425 (Gorsuch, J., concurring). This opinion, a dissent from the plurality's reasoning, is a concurrence because the plurality, joined by Chief Justice Roberts, remanded on the grounds that the lower court upheld the agency without taking account of various factors that the Court held to be elements of the *Auer* doctrine, as upheld. *See id.* at 2423-24; *see also infra* p. 724-25.

4. *Kisor*, 139 S. Ct. at 2424.

5. *Id.* at 2448 (Gorsuch, J., concurring). Justice Kavanaugh's brief concurrence, the fourth opinion in the decision, makes a similar point. *Id.* (Kavanaugh, J., concurring).

6. *See, e.g.*, Jessica L. Gustafson & Adrienne Dresevic, *The Supreme Court Limits Agency Deference: Implications of* Kisor v. Wilkie, 32 HEALTH LAW. 25 (2019); Paul J. Larkin, Jr., *Agency Deference after* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105 (2020); Paul J. Larkin, Jr., *Baseball, Legal Doctrines, and Judicial Deference to an Agency's Interpretation of the Law:* Kisor v. Wilkie, 2018-2019 CATO SUP. CT. REV. 69 (2018-2019); Erin Murphy, *The Future of Agency Deference after* Kisor v. Wilkie, 51 TRENDS 12 (2019); William Yeatman, *The Auer Doctrine Suffers a Pyrrhic Victory in* Kisor v. Wilkie, CATO AT LIBERTY (June 27, 2019, 10:39 AM), https://www.cato.org/blog/auer-doctrine-suffers-pyrrhic-victory-kisor-v-wilkie [https://perma.cc/5Z24-4TGB].

7. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

8. *See infra* notes 83 and 125.

9. *See infra* Part III.

10. 325 U.S. 410, 413-14 (1945). The decision did not seem particularly startling at the time. It was part of a group of decisions, emerging from a general New Deal perspective, and perhaps the perceived exigencies of wartime, that granted deference to administrative decisions on a variety of policy and prudential grounds. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134 (1944); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941). In a leading treatise published shortly after the decision, Kenneth Culp David wrote that the Court's conclusion regarding deference to the agency interpretation of

form in which the *Kisor* Court considered it came from the post-*Chevron* decision in *Auer*. But in that case, and more explicitly in the *Kisor* plurality decision, the relationship between *Auer* and *Chevron* is based on what can be called an *a fortiori* argument: if an agency is granted deference when interpreting its authorizing statue, then it should be granted deference when interpreting its own regulation.[11] After all, if the agency is assumed to have some significant level of expertise in determining what Congress meant when granting the agency authority, it should be assumed to have still greater expertise in determining what it itself meant when enacting rules pursuant to that authority. As Justice Kagan says: "Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. . . . Want to know what a rule means? Ask its author."[12]

This is plausible enough, but it is a verbal, or at best doctrinal formulation. When viewed in the context in which it arises, *Auer* deference is revealed as structurally related to *Chevron*. It operates as an application of *Chevron* at the enforcement stage of administrative action, where the rules that have been granted *Chevron* deference are applied. The *Chevron* doctrine is already complicated enough, given all its present caveats and exceptions;[13] overruling *Auer* would create a new set of cross-cutting and conflicting distinctions.

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its regulation was "hardly more than dictum." KENNETH CULP DAVIS, ADMINISTRATIVE LAW 912 (1951). Several scholars have noted that *Seminole Rock* meant something different from what its supposed successor, *Auer*, means in a post-*Chevron* world. Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 52-53 (2015); Aaron L. Nielson, Cf. Auer v. Robbins, 21 TEX. REV. L. & POL. 303, 304 (2016); Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J.L. & PUB POL'Y 87, 88 (2018). The argument here is that *Auer* is correct and derives its validity from *Chevron*, regardless of its purported relationship to a pre-APA decision.

11. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2412 (2019); Auer v. Robbins, 519 U.S. 452, 461 (1997); *see also* DAVIS, *supra* note 10, at 912; Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 516-17 (2011) (noting this rationale but questioning it); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 GEO. WASH. L. REV. 1449, 1454 (2011). Justice Scalia identified this argument as such in an opinion that repudiated his earlier position as the author of *Auer*. Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring) ("On the surface, [*Auer*] 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*.") (citation omitted). In fact, Justice Scalia made a stronger *a fortiori* argument in *Auer*: "A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." *Auer*, 519 U.S. at 463. This goes too far, for reasons stated in Part I. *See infra* pp. 730-32.

12. *Kisor*, 139 S. Ct. at 2412.

13. King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015) (holding that some agency actions involve issues too politically controversial to be granted *Chevron* deference); United States v. Mead Corp., 533 U.S. 218, 234 (2001) (holding that low-level agency decisions without precedential effect are not entitled to *Chevron* deference); *see also* Lisa Shultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1457-74 (2005) (lower courts have been confused about the Court's decision that Chevron deference

This deeper connection between *Auer* and *Chevron* is not the limit of the link between the two decisions, however. In addition to being an essential component of the *Chevron* doctrine at the operational level, *Auer* is also derived from the same conceptual or theoretical insight that has made *Chevron* such a transformative development in American law. To demonstrate this point, it will first be necessary to explicate the theory that underlies *Chevron*. The literature on the decision is of course voluminous, but much of it focuses on its operational aspect, the well-known two-step process,[14] or on the accepted and rejected exceptions to its application.[15] It will be useful, therefore, to recapitulate and clarify the theory of the case, specifically the way it redefines agency interpretation of the law, the way it redefines the idea of ambiguous statutory language, and the way it redefines the relationship between reviewing courts and administrative agencies. The *Auer* doctrine can then be shown to derive from these same theoretical considerations. It is therefore an element of *Chevron* in theory as well as in practice.[16]

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only applies to agency actions that have the force of law); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836-37 (2001) (discussing generally the *Chevron* doctrine's range of applicability); Miriam Seifter, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633, 639 (2014) ("Step Zero became so confounding that it could scarcely be applied. Befuddled lower courts developed a practice of '*Chevron* avoidance.'") (footnote omitted). *See generally* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) (discussing cases that determine whether the *Chevron* test applies and the resulting levels of discretion). This complexity is sometimes taken to be a defect of the *Chevron* doctrine itself. *See, e.g.*, Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 738-51 (2014) (providing examples of Roberts Court decisions evincing uncertainty about the applicability or operation of the *Chevron* doctrine); Kristen E. Hickman & Mark R. Thomson, *The* Chevron*ization of* Auer, 103 MINN. L. REV. HEADNOTES 103 (2019) (arguing that *Chevron* doctrine has become excessively complex due to exceptions and that *Auer* doctrine suffers from a similar problem). But the problem may arise from the cases limiting that doctrine or from the inevitable complexity of legal rules in the modern world, not from any inherent defect in *Chevron* itself.

14. *See, e.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 624-25 (2009); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255 (1988); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017); Gary Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377 (1997); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV 597 (2009); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 155-61 (2010).

15. *See, e.g.*, Bressman, *supra* note 13 (discussing the confusion that has resulted from the Court's decision to add the force of law rule to Step Zero); Merrill & Hickman, *supra* note 13 (discussing Chevron's range of application as Step Zero); Thomas W. Merrill, *Step Zero after* City of Arlington, 83 FORDHAM. L. REV. 753 (2014); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. LJ. 2225 (1997) (discussing cases where the courts must decide whether Chevron or prior precedent controls); Seifter, *supra* note 13 (discussing the role of federalism in Chevron Step Zero); Sunstein, *supra* note 13 (discussing components of Chevron Step Zero).

16. Justice Gorsuch's concurrence also attacked the plurality opinion and thus the *Auer* doctrine on constitutional grounds, arguing that it violated the separation of powers. *Kisor*, 139 S. Ct. at 2437-39 (Gorsuch, J., concurring). It seems to me that this argument is

Part I will show how *Auer* is an aspect of *Chevron* at the operational level. Part II will discuss the theoretical basis for the *Chevron* doctrine. Part III will then demonstrate that the *Auer* doctrine rests upon these same theoretical considerations. The conclusion is that courts are likely to continue relying upon *Auer* when confronted with typically complex administrative cases.

I. CONTEXTUALIZING THE *AUER* DOCTRINE

A. The Administrative Context of Auer*: Law as Applied*

Justice Kagan's opinion in *Kisor* is written in a refreshingly conversational style and often speaks directly to the reader.[17] In this same style, she dispenses with the stance (which can be properly described as a conceit) that the Court is simply deciding a dispute between the litigants, rather than declaring nation-wide policy. She states: "Truth be told, nothing recounted in this [statement of the facts] has much bearing on the rest of our decision. The question whether to overrule *Auer* does not turn on any single application, whether right or wrong, of that decision's deference doctrine."[18] There is one aspect of the facts that is highly relevant, however, which is that the Court is reviewing an agency adjudication. Kisor, the plaintiff, applied to the Veteran's Administration for benefits and, upon being denied, appealed to the Board of Veteran's Appeals, where an Administrative Law Judge (ALJ) upheld the denial. He then appealed to the federal courts, raising the interpretative issue that Justice Kagan addressed in her opinion for the Court.[19]

Auer cases almost always involve review of an administrative adjudication of some sort, that is, a review of the statute as applied. The reason is that the interpretation of an agency regulation, as opposed to a statute, will generally occur in the adjudicatory setting. When the agency is promulgating a rule, it will typically do so on the basis of the statute; federal regulations always begin with a recitation of their statutory basis. Once the regulation is promulgated, it becomes the law governing agency action, that is, the law governing the way that the agency applies the statute (as specified and elaborated by the agency's rules) to private parties. It is at that stage that the agency's interpretation of its own regulations occurs. All of the illustrative

adequately answered by Justice Kagan. *See id.* at 2421-22 (majority opinion). In any case, this issue has been adequately canvassed, and will not be addressed in this article, which is limited to administrative law. *But see infra* note 58, which sketches a partial answer.

17. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2410 (2019) ("You might view this Part as 'just background' because we have made many of its points in prior decisions. But even if so, it is background that matters."); *id.* at 2423 ("You may remember that his retroactive benefits depend on the meaning of the term 'relevant' records in a VA regulation.").

18. *Id.* at 2408-09.

19. *Id.* at 2409.

examples of the *Auer* rule that Justice Kagan provides in the Court's opinion involve a challenge to the application of the interpreted rule.[20]

B. *The Doctrinal Context of* Auer: *The* Chevron *Doctrine*

Auer has been treated as a separate doctrine from *Chevron*,[21] and its connection with *Chevron*, is typically grounded on the *a fortiori* argument described above.[22] Focusing on the adjudicatory context of *Auer*, however, it becomes apparent that the real connection between the two doctrines is structural. Typically, *Chevron* and *Auer* function at successive stages of the implementation process, each imposing the same standard of permissible interpretation on the agency, thereby granting agency officials a similarly wide range of discretion. *Chevron* will provide the standard for reviewing the agency's interpretation of the statute if the rule is challenged on its face, that is, challenged as a misinterpretation of the statutory authorization. It also applies if the rule is challenged as applied and the agency relies on the statutory language to justify the action it has taken. Quite often, however, agency enforcement is based on a rule that it has promulgated, and in that case, the *Auer* doctrine applies as well.

Thus, *Auer* is the articulation of the *Chevron* standard that applies when agency enforcement action is based on the agency's rule, rather than the original statute. Justice Kagan's opinion in *Kisor* implicitly recognizes this by holding that the recognized limits on *Chevron*

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20. *Id.* at 2410-11; *see also* Auer v. Robbins, 519 U.S. 452, 455 (1997) (challenge brought by police officers to agency decision that they did not meet the salary basis test for overtime pay "because, under the terms of the St. Louis Metropolitan Police Department Manual, their compensation could be reduced for a variety of disciplinary infractions related to the 'quality or quantity' of work performed"); Actavis Elizabeth LLC v. FDA, 625 F.3d 760 (D.C. Cir. 2010) (challenge brought by manufacturer of a generic version of an anti-hyperactivity drug to an agency decision that the original manufacturer of the drug was entitled to five years exclusivity); Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 582 (D.C. Cir. 1997) (challenge to design of basketball arena under the Americans with Disabilities Act, where the District Judge "determined that the regulation, as actually applied, did not require that *every* wheelchair seat have a line of sight over standing spectators"); Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993) (challenge, brought by mine owners, to a series of Program Policy Letters specifying that a certain type of X-ray finding, according to a particular procedure for reading the X-ray, constitutes a diagnosis of a reportable disease); Laba v. Copeland, 3:15-CV-00316-RJC-DSC, 2016 WL 5958241, (W.D.N.C. Oct. 13, 2016) (police had probable cause to arrest airline passenger, the underlying dispute that lead to the arrest, as described by Justice Kagan, being whether TSA officials were correct in classifying his jar of truffle pâté as a liquid, gel or aerosol). The same is true of the seminal case, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 411 (1945) (challenge brought by seller of crushed stone to agency imposition of maximum price involving "the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188").

21. Justice Gorsuch does not suggest, in his lengthy *Kisor* concurrence savaging the *Auer* doctrine, that *Chevron* should be overruled. *Kisor*, 139 S. Ct. at 2425-48 (Gorsuch, J., concurring).

22. *See supra* p. 721.

deference should also apply to *Auer* deference.[23] After conceding that it has not always been clear about the applicable standards for *Auer* deference,[24] the Court holds that this form of deference should only be granted if the reviewing court concludes (1) that the terms in the regulation are genuinely ambiguous,[25] once the agency has deployed all the standard interpretive tools,[26] (2) that the agency's action falls "within the bounds of reasonable interpretation,"[27] and (3) that "the character and context of the agency interpretation entitles it to controlling weight."[28] In fact, these considerations govern the result of the case, which is a remand to the court below to reconsider its grant of deference in light of the *Chevron*-based limits that the Court articulated.[29]

The structural connection between *Chevron* deference and *Auer* deference is underscored by the fact that, as a practical matter, it will often be difficult for a reviewing court to distinguish between them. The reason is that the court may not be able to determine whether the agency is relying on the statute or on a rule promulgated on the basis of the statute when it carries out an enforcement action. In the typical case, *Chevron* creates a zone of permissibility for agency action pursuant to its authorizing statute. The agency's rule, which is designed to implement that statute, necessarily falls within that zone

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23. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2405, 2414-2418 (2019); *see also* Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227 (2013) (recommending that an adaptation of *Chevron*'s two-step formulation be used when granting *Auer* deference); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Survey*, 16 GEO. J.L. & PUB. POL'Y 103, 110 (2018) (summarizing brief submitted by Ron Cass, Chris DeMuth, and Christopher Walker arguing that "*Auer*'s domain should be reconciled with *Chevron*'s domain").

24. *Id.* at 2414-15. In other words, the Court is declaring new law.

25. *Id.* at 2415 (citing Christensen v. Harris Cty., 529 U.S. 576 (2000), a decision delineating the limits of *Chevron* deference).

26. *Id.* at 2415 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

27. *Id.* at 2415-16 (citing referencing *Chevron* and quoting City of Arlington v. FCC, 569 U.S. 290 (2013), a case delineating the extent of *Chevron*).

28. *Id.* at 2416 (citing United States v. Mead Corp., 533 U.S. 218 (2001) and Christensen v. Harris Cty., 529 U.S. 576 (2000), both decisions delineating the limits of *Chevron* deference). The elements of this determination are that the decision must be the agency's definitive or official position, must rely on the agency's substantive expertise, and must be the actual grounds for the agency's decision, not a post hoc rationalization. *Kisor*, 139 S. Ct. 2400, 2416-18 (2019). These are all recognizably related to *Chevron*.

29. Kisor v. Wilkie, 139 S. Ct. 2400, 2423-24 (2019). Although Justice Kagan cited the rejection of *Auer* deference in Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012), it did not endorse an interesting suggestion, based on this case, that *Auer* deference should generally be limited to situations where the regulated parties had adequate notice of the agency's interpretation. *See generally* Derek A. Woodman, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721 (2014). The suggestion is consistent with a pre-*Chevron* decision dealing with the extent to which instructions in an agency's internal employee manual can control its enforcement practices. *See infra* note 138. But the plurality may have felt that this sort of requirement would be excessively restriction of agency enforcement strategy.

of permissibility or it would have been struck down on its face, that is, before it was applied.[30] The *Auer* question is whether the agency's action falls within the zone of permissibility of a rule that already exists within a zone of permissibility. Under these circumstances, *Auer* becomes absorbed into *Chevron*; it is, in effect, an aspect of the same legal standard for agency action.

Overruling *Auer* might make sense if there were no *Chevron* doctrine.[31] In that situation, an agency would be required to promulgate a rule that reached the correct interpretation of the statutory provision, that is, the conclusion that a reviewing court would reach. Courts could then review an agency interpretation of any agency rule de novo, striking it down if it reached a conclusion that the reviewing court would not have reached. But once the agency is granted a permissible range of action under *Chevron*, the reviewing court will have difficulty imposing a de novo standard at the enforcement level because it will not be able to rely on the statutory language to support its analysis of the rule. Relying on the statutory language would violate the *Chevron* doctrine, which explicitly allows the agency to reach a different conclusion as long as that conclusion is permissible. The court would need to decide that the agency's interpretation of its implementing rule was not the conclusion that the court would have reached about that language, while simultaneously reminding itself that the language it was interpreting could be valid even if it interpreted the statute in a way that the reviewing court would not have done.

C. *The Doctrinal Context of the* Auer *Doctrine as Illustrated by* Auer

Auer itself provides a useful example. The issue was whether sergeants in the St. Louis police department were supervisory employees exempt from the general requirement of the Fair Labor Standards Act that employees be paid extra for overtime work.[32] The statutory provision at issue was in fact fairly detailed,

30. As a practical matter, the rule may not be challenged until it is applied to someone, since litigation against the government costs money. This will often depend on the presence of an active trade association or public interest group, these being the organizations that typically bring facial challenges. But this does not end the matter, because if there is a basis for a facial challenge, that issue can be raised in response to the attempted application. *See, e.g.*, United States v. Nova Scotia Food Prods., 568 F.2d 240 (2d Cir. 1977). Thus, the reviewing court will only reach the *Auer* doctrine if it concludes that the rule that is being interpreted is valid.

31. Another way to say this is that the Supreme Court could have overruled *Seminole Rock* before *Chevron* was decided without causing serious disruption in administrative law.

32. Pub. L. No. 75-718, ch. 676, 52 Stat. 1060, 1063, 1067 (1938) (codified as amended at 29 U. S. C. §§ 207, 213 (2010)). One of the petitioners was a lieutenant, but they will all be referred to here as sergeants for simplicity. *See* Auer v. Robbins, 519 U.S. 452, 455 (1997).

specifying criteria and exceptions for supervisory status.[33] However, the Department of Labor, as the implementing agency, had authority to issue regulations further defining its terms.[34] The Department promulgated a rule providing that employees would be considered supervisory if they were paid "on a salary basis," which meant, inter alia, that their pay was "not subject to reduction because of variations in the quality or quantity of the work performed."[35] It concluded that the sergeants were in fact paid on a salary basis and thus fell within the exemption from the overtime pay requirement.[36]

The Court, in a unanimous opinion by Justice Scalia, cited *Chevron* for the principle that it must sustain the agency's approach "so long as it is 'based on a permissible construction of the statute.'"[37] Later in the opinion, it cited *Seminole Rock* for the principle that "[b]ecause the

33. 29 U.S.C. § 213(a)(1) (The exception is for "activities not directly or closely related to the performance of executive or administrative activities.").

34. *Id.* § 213(e); *see also* Auer v. Robbins, 519 U.S. 452, 454-55 (1997). The Fair Labor Standards Act provision, like so many others, illustrates the unreality of non-delegation demands that Congress enact more specific statutes. *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM. THE SECOND REPUBLIC OF THE UNITED STATES 105-26 (2d ed. 1979); DAVID SCHOENBROD; POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) In its present form, the implementing statute, 29 U.S.C. § 213(a)(1),(3),(5)-(6),(10),(12),(15), lists twelve different job categories, several of which have multiple components, for which Congress concluded the agency needed to specify the requirement in greater detail, including, agricultural workers, switchboard operators, computer systems analysts, border patrol agents, baseball players, and workers at religious conference centers. It would be impossible for Congress to provide such detail for every provision it enacts without adding tens of thousands of staff members, which would destroy its identity as a legislature. Moreover, even this might not be enough; Exemption 12 applies to "any employee employed as a seaman on a vessel other than an American vessel," and a reviewing court might conclude that this does not provide sufficient detail. 29 U.S.C. § 213(a)(12). Requiring Congress to provide this level of specification is not demanding that Congress fulfill its responsibilities but rather precluding it from doing so. *See infra* pp. 740-41 (discussing advantages of delegation to administrative agencies).

35. 29 CFR § 541.602(a) (2020); *see also Auer*, 519 U.S. at 454-55.

36. *Auer*, 519 U.S. at 461-62. The Department of Labor had not ruled on the issue at the time when the case came before the Court. Rather, it provided its interpretation in an amicus brief. The Court concluded that that this did not affect the authoritative nature of the agency's decision, stating that "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462.

37. *Id.* at 457 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984)). The challenge to the agency's interpretation of the statute, i.e, the *Chevron* issue, as opposed to the challenge to its interpretation of its rule, i.e., the *Auer* issue, was that the qualification about disciplinary deductions was an invalid criterion for the salary basis test in the case of public employees. *Id.* This is because, the sergeants argued, pay reductions are commonly used in the public sector for disciplining executive level employees due to the absence or difficulty of other disciplinary mechanisms. *Id.* The Act did not originally apply to public employees but had been extended to include them in 1974. *Id.* (citing changes that occurred in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 58-62). The salary basis test was established by the Act prior to this extension, and the sergeants were arguing that it should have been modified to account for the difference between public and private employees. *See id.* at 457.

salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is . . . controlling unless 'plainly erroneous or inconsistent with the regulation.'"[38] In other words, the Court held that the agency's rule was a permissible interpretation of the statute and its application to the sergeants was a permissible interpretation of the rule.

The objection raised by police sergeants to the interpretation of the agency's rule was that the Department of Labor should have read the St. Louis police department manual as allowing deductions to their pay for disciplinary violations.[39] In fact, the manual listed some fifty-eight disciplinary infractions applicable to all employees, and some of these could result in pay deductions.[40] The Department concluded, however, that, these deductions were not intended to apply to the sergeants and thus were not within its interpretation of the rule for determining whether the person was being paid on a "salary basis."[41] In this situation, if the Department's rule is granted *Chevron* deference, it means that the term "salary basis" is a permissible interpretation of the statutory term "supervisory employees." There is really no way to know whether that conclusion refers to the range of meanings for "supervisory employees" (the standard established by the statute) or for "salary basis" (the standard established by the agency rule) or for a combination of the two. In order to apply a de novo standard of review to the Department's conclusion that the rule, as applied to the police sergeants, was incorrectly interpreted, it would be necessary for the Court to determine the definitive meaning of a term that had already been recognized as having a permissible range. This is not only difficult to do, but it serves no particular function; the agency has already been granted deference for its implementation of the statute by *Chevron*.

D. The Implications of Contextualization

For the *Auer* issue to arise as a separate consideration, the agency would need to argue as follows: We (the agency) have promulgated a rule that satisfies the *Chevron* standard, that is, it falls within the zone of reasonable interpretation that *Chevron* establishes. We have now interpreted that rule in a way that lies outside *Chevron*'s range of permissible interpretation of the statute. However, it is a permissible interpretation of the rule, and thus should be sustained under *Auer*. In other words, the argument would be that *Auer* expands the agency's range of allowable interpretation of the statute by interpreting its own rule, rather than the original statute. The agency, in effect, would be

38. *Id.* at 461 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))).

39. *Id.* at 459-60.

40. *Id.* at 461-62.

41. *Id.* at 462.

cantilevering successive rules into the space beyond the range of interpretation permitted by the *Chevron* standard.

While this is a possible argument, it is not one that agencies are likely to advance. Prior to *Chevron*, it might have been used by an agency to obtain deference for its interpretation of a regulation, even though the regulation's validity was being determined by a de novo standard. But after *Chevron*, the regulation's validity will be determined by a deferential standard (as long as it satisfies the preliminary requirements, i.e., Step Zero).[42] That is all the agency will need, since it now has a zone of permissibility for its decisions, whether they are based on a regulation or directly on the language of the statute. If the agency does make a further, *Auer*-based claim for a regulation, and the reviewing court finds this troublesome in any way, the solution is readily at hand. All the court would need to say is that *Chevron* is the standard for all agency action, and the enforcement action in question, whether or not it is based on an agency rule, must satisfy that standard.[43] Such a decision, as a practical matter, would leave the operation of the *Auer* doctrine unaffected. The agency could not extend its rule beyond the limits of *Chevron* deference, but it would continue to receive deference when it applied the rule in an enforcement proceeding.

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42. *See generally* Merrill & Hickman, *supra* note 13 (coining the term and discussing generally the *Chevron* doctrine's range of applicability); Sunstein, *supra* note 13 (discussing cases that determine whether the *Chevron* test applies and the resulting levels of discretion). A long-standing question about the scope of agency discretion—whether the agency would be given deference on determinations that involved its own scope of jurisdiction—was resolved by the Court in favor of the agency's discretion in *City of Arlington v. FCC*, 569 U.S. 290 (2013), which in effect subtracts this issue from Step Zero. *See generally* Thomas W. Merrill, *Step Zero after* City of Arlington, 83 FORDHAM L. REV. 753 (2014).

43. *See generally* Cynthia Barmore, Auer *in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813 (2015) (empirical study indicating that courts are currently able to reject *Auer* deference in situations where it seems inapposite). A related issue has arisen regarding agency guidance documents, which are often issued by agencies as interpretive rules under the exception to notice and comment in the APA, 5 U.S.C. § 553(b)(3)(A). *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like: Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992); Kristen E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013). Several scholars have proposed that the validity of this practice can be determined at the enforcement stage: if the interpretive rules were deemed invalid at that juncture, the reviewing court would not allow the agency to rely on it in its enforcement action. Jacob E. Gerson, *Legislative Rules Revisited*, 74, U. CHI. L. REV. 1705, 1708, 1710-12 (2007); John Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 931-33 (2004). Critics of this proposal have pointed out that it would not adequately police guidance practices because courts defer to agencies at the enforcement stage. *See* Stephenson & Pogoriler, *supra* note 11, at 1460-65. Perhaps it is true that deference at this level impairs the reviewing court's ability to police compliance with § 553, and some other means should be found for doing so. For my own suggestion, see Edward L. Rubin & Joanna K. Sax, *Administrative Guidance and Genetically Modified Food*, 60 ARIZ. L. REV. 539, 579-86 (2018) (reviewing courts should base decision on whether a rule is interpretive on whether notice and comment would serve a useful public purpose). But it would not impair the Court's ability to police compliance with *Chevron*. The reviewing court simply would not defer to any action that fell outside of *Chevron's* permissible range, whether it claimed reliance on statutory language or the language of an agency rule.

Another context in which overruling *Auer* would create confusion for administrative law is where there are alternative modes of enforcement. Statutes assigned to an administrative agency can be either transitive or intransitive.[44] A transitive statute states the rules that private parties are expected to obey, and the agency's role is to sanction parties who disobey the rules.[45] In effect, the legislatively created rules simply pass through the agency and communicate directly with those subject to them. An intransitive statute does not state rules that are directly applicable to private parties. Rather, it instructs the agency to develop such rules, either by rulemaking or adjudication, or perhaps by guidance. Intransitive statutes are characteristic of administrative governance and might even be described as the essence of that form of governance.[46]

Many regulatory statutes include both transitive and intransitive provisions. To take one example, the National Traffic and Motor Vehicle Safety Act,[47] authorizes the agency it establishes (the National Highway Traffic and Safety Administration, or NHTSA) to promulgate rules, called motor vehicle safety standards, that implement its general policy of automobile safety.[48] The best-known provisions of this Act involve the recall of vehicles that pose safety problems. They apply when a vehicle "contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard prescribed under this chapter."[49] Thus, there are two situations in which a manufacturer will be required to issue a recall: first if it violates a rule that NHTSA has promulgated, and second, if it violates the statute itself which broadly "includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment."[50]

The determination in question, which is of course made by NHTSA, can be challenged in an administrative proceeding and the result of that proceeding, if unsatisfactory to the manufacturer, can then be challenged in federal court.[51] Because the agency's finding that a vehicle contained a defect is an interpretation of the statute, it will receive *Chevron* deference from the reviewing court. But the agency's

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44. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 380-85 (1989).

45. *See id.* at 381.

46. *Id.* at 383-85.

47. Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 49 U.S.C. §§ 30101, *et seq.*).

48. 49 U.S.C. § 30111.

49. *Id.* § 30118. This section provides for notice of the defect or violation. § 30120 requires manufacturers to correct the defect by issuing recalls or by some other means. *Id.* § 30120.

50. *Id.* § 30102(a)(3).

51. *Id.* §§ 30118(e), 30121; *see also* 5 U.S.C. § 702 (general APA provision authorizing judicial review of agency and waiving the sovereign immunity of the United States).

finding that a vehicle contained a violation of a motor vehicle safety standard will receive *Auer* deference because it is an agency interpretation of its own rule.

If *Auer* were overruled, then the interpretation of the standard in a recall order based on that standard would be reviewed de novo, while the interpretation of the statutory language in a recall order based on the term "defect" would be reviewed with the deference to the agency that *Chevron* affords. But an agency rule is likely to be fairly detailed and may well include extensive engineering specifications. It seems odd to review it using a demanding de novo standard while granting deference to applications of a vague and essentially undefined statutory term such as "defect."[52] The traditional way to state the problem with this result is that it would give the agency an incentive to avoid promulgating standards, since it would receive more deference when it acted on the basis of the statutory language. But that is probably not true; the agency is concerned with implementing the statute and will issue standards whenever it thinks advisable substantively and perhaps politically. The real problem is simply that the result, which would apply to many regulatory statutes, imposes a more demanding level of review on the agency's implementation efforts in those cases where such review is less necessary. This is a different sort of confusion from the confusion that would result from trying to sort out *Chevron* and *Auer* elements within a single administrative decision, but it is confusion nonetheless.

E. Contextualization as an Answer to Separation of Powers Concerns

Contextualizing *Auer* provides an answer to what has become the leading criticism of the decision. This is John Manning's argument that the apparent oddity of reviewing an agency's interpretation of its own rules more strictly than its interpretation of a legislative enactment can be resolved by separation of powers considerations.[53] Statutes are enacted by an institution that is separate from the agency and over which the agency has no control, Professor Manning notes.[54] But, regulations are enacted by the agency itself, the same institution

52. The standard can also be challenged on its face, prior to enforcement, under 49 U.S.C. § 30161 ("A person adversely affected by an order prescribing a motor vehicle safety standard under this chapter may apply for review of the order by filing a petition for review in the court of appeals of the United States for the circuit in which the person resides."). This raises the problem described above, where the standard would receive *Chevron* deference but the interpretation of the standard, potentially involving the same statutory language, would be judged de novo. Note also that the statute, as is often the case, provides for direct appeal to an appellate court, which lacks the fact-finding capacity that might assist in sorting out these overlapping interpretations. *Id.*

53. *See* John F. Manning, *Constitutional Structures and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612, 638-40, 655-60 (1996).

54. *See id.* at 638-40.

that is interpreting them. Consequently, the argument runs, when the agency interpretation is granted deference under *Auer*, a sort of moral hazard results, where the agency can purposely draft a vague and ambiguous regulation to provide itself with leeway to interpret the regulation in any way it wishes.[55]

Justice Kagan responds to this argument in her *Kisor* opinion,[56] citing an article by Cass Sunstein and Adrian Vermeule which points out the absence of any empirical evidence that agencies take advantage of *Auer* to draft vague regulations.[57] She then argues an agency generally wants to draft clear regulations to induce compliance, and regulated parties would object if it failed to do so.[58] This is convincing, but the more basic point is that the separation that Professor Manning favors generally exists in *Auer* situations. Those who draft the rules and those who apply them are typically two separate groups of agency officials, having no direct contact with each other.

Agency rules are typically drafted by higher level staff in the agency's operating units, or sometimes by a separate unit.[59] Any rule that is intended to go through the notice and comment process, or is regarded as an equivalent enactment that is explicitly identified as falling within the statutory exceptions to that process,[60] is likely to receive sustained attention at that level, and will often be initiated or reviewed at the very highest level of the agency.[61] Once enacted,

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55. Justice Scalia makes this same argument in his concurring opinion in Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50, 68-69 (2011) (Scalia, J., concurring) (citing Professor Manning's article).

56. Kisor v. Wilkie, 139 S. Ct. 2400, 2421 (2019).

57. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 309-10 (2017).

58. *Kisor*, 139 S. Ct. at 2421.

59. *See* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 17-61, 68-81 (5th ed. 2018) (regulations are typically drafted by the agency's policy staff); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 204-08 (4th ed. 2006) (same). *See generally* David Nelson & Susan Webb Yackee, *Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking*, 74 J. POL. 339 (2012) (lobbyists address policy staff, not agency adjudicators, when they want to influence content of regulations); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185 (1994) (describing decisions by policy level agency officials regarding whether to promulgate rules or employ other means of implementation).

60. That is, a rule that is promulgated as a direct final rule or interim rule, taking advantage of the exceptions to the notice and comment requirement in 5 U.S.C. § 553(b)(3)(B). *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1-3 (1995); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 902-03 (2008).

61. Accounts of the way that particular agencies enact rules confirm that rules having significant effects are planned and drafted at the policy level. *See* RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES 140-224 (2d ed. 1996) (FTC rulemaking during shift of regulatory policy under the Reagan

however, the rule will be applied by operations level staff, not by the staff members who drafted the rule. In most agencies, the staff engaged in enforcement constitute a separate unit within the agency. They follow standardized procedures in carrying out their responsibilities, and continue to do so, since regulations exist in perpetuity unless repealed, long after the drafters of the regulations are gone.[62] The basic point is that agencies are complex, highly specialized, and differentiated institutions. The image of them as a small cabal of power-hungry bureaucrats plotting to circumvent legal controls in order to oppress private citizens is an anti-administrative illusion.[63]

In fact, the separation between agency officials who draft rules and those who apply them is likely to be even more pronounced in many of the cases that reach the federal courts. As a matter of both practice and result of statutory exhaustion requirements,[64] a person who objects to adverse agency action will typically challenge that action in a proceeding before an ALJ or AJ. In most of the agencies where there are a significant number of such challenges, ALJ's, and often even AJ's, are part of their own agency bureau, separate from both the rule makers and the bureau charged with enforcement.[65] By statute, ALJ's

Administration); *id.* at 235-77 (EPA rulemaking during shift of regulatory policy under the Reagan Administration); MICHAEL R. LEMOV, CAR SAFETY WARS: ONE HUNDRED YEARS OF TECHNOLOGY, POLITICS, AND DEATH 109-74 (2015) (NHTSA rulemaking regarding safety standards). *See generally* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) (same); MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT (1982) (FTC rulemaking regarding consumer protection).

62. *See* Stephenson & Pogoriler, *supra* note 11, at 1486-89.

63. Although this article is limited to administrative law issues, and does not discuss the constitutional argument against *Auer*, the above considerations can be seen to provide an adequate answer to this argument. Rulemaking and rule application are in fact separated within the agency. Any effort to merge them, that is, to use a rule to impose a penalty on a private party without a separate enforcement action, would violate the due process clause. The only basis on which these pragmatic and legal separations would be deemed inadequate is if the combination of executive, legislative and judicial functions in administrative agencies were itself deemed a violation of the separation of powers—in other words, if administrative agencies were held to be unconstitutional per se, which is absurd. *See generally* Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions–A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

64. Originally a judicially developed doctrine to coordinate administrative remedies and judicial review, see Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-52 (1938), exhaustion was partially codified in the Administrative Procedure Act (APA) at 5 U.S.C. § 704. That section establishes that statutes requiring that a person exhaust administrative remedies before seeking judicial review will be controlling. In Darby v. Cisneros, 309 U.S. 137, 153-54 (1993), the Supreme Court held that only statutory requirements will compel exhaustion of administrative remedies.

65. *See, e.g.*, *U.S. Department of Veterans Affairs Functional Organization Manual – v3.1*, U.S. DEPARTMENT OF VETERANS AFFAIRS, at 2, 20 (2016), https://www.va.gov/ofcadmin/docs/VA_Functional_Organization_Manual_Version_3-1.pdf [https://perma.cc/9ZRQ-9B8K] (last visited July 4, 2021); *Federal Trade Commission Organization Chart*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/system/files/attachments/about-ftc/ftc_org_chart.pdf [https://perma.cc/D9JK-6SMR] (last visited May 11, 2021); *Securities*

are nearly as insulated from agency influence as an Article III judge. Their salaries are set by the Office of Personnel Management, not by the agency.[66] They can only be dismissed for cause, and only by a separate federal agency, the Merit Systems Protection Board.[67] Cases are assigned to individual ALJ's by rotation, not by the agency.[68] Admittedly, AJ's are ordinary agency staff members without any of these specialized protections, but they are also operations level employees, not policy-level officials.[69] They are, moreover, constrained by the Due Process Clause, which applies to all agency adjudications of an individual's rights or interests.[70]

Contextualizing *Auer* also provides an answer to Justice Gorsuch's argument that *Auer* allows an agency to circumvent the rulemaking requirements of the Administrative Procedure Act (APA) by relying on interpretations,[71] "even ones that appear only in a legal brief, press release, or guidance document issued without affording the public advance notice or a chance to comment."[72] He is perhaps referring to interpretive rules, which are one of the types of rules that are exceptions to the APA's notice and comment requirements.[73] But those rules are interpretations of the statute, and are thus subject to *Chevron*, not *Auer*. There is controversy about whether agency guidance can be fit within this exception, and thus exempted from notice and comment,[74] but that is a different issue. It is controlled by the APA, and thus a matter for the courts to decide since the APA is

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and Exchange Commission Organization Chart, SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/about/secorg.pdf [https://perma.cc/9YQ9-RNGD] (last visited May 11, 2021); *Social Security Administration Organization Chart*, SOCIAL SECURITY ADMINISTRATION (Jan. 2, 2021), https://www.ssa.gov/org/ssachart.pdf [https://perma.cc/PM5F-BCF3]. *See generally* Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 Admin. L. Rev. 109 (1981).

66. 5 U.S.C. § 5372b(b).

67. *Id.* §§ 3105, 7521.

68. *Id.* § 3105.

69. Their use, which is extensive, has been subject to criticism. *See, e.g.*, Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016). The criticism, however, is that they are not as independent as ALJs. But no other agency officials are as independent as ALJs. AJs are as distant from the policy level officials who initiate and draft administrative rules, as are most other enforcement officials such as inspectors, investigators and analysts.

70. *See* Marcello v. Bonds, 349 U.S. 302, 311-13 (1955). *See generally*, Judith K. Meierhenry, *The Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. Rev. 551 (1991).

71. Kisor v. Wilkie, 139 S. Ct. 2400, 2417-18 (2019) (Gorsuch, J. concurring).

72. *Id.* at 2434.

73. 5 U.S.C. § 553(b)(3)(A).

74. *See, e.g.*, Anthony, *supra* note 43; Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 ADMIN. L. REV. 631 (2002); Hickman, supra note 43; Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 ECOLOGY L.Q. 657 (2008).

not enforced by the agency.[75] If an interpretive rule is a legally valid exception to notice and comment, then an agency enforcement action can rely on it, just as it can rely on a rule promulgated under the "good cause" exception.[76] If it is invalid, the agency action will be reversed.[77] This would be true whether or not the agency is given *Auer* discretion to interpret the interpretive rule. In interpreting a valid rule, whether promulgated through notice and comment or through an exception to that requirement, an agency enforcement official might indeed rely on press releases, guidance documents, and other agency materials, just as a federal judge might rely on committee reports, floor statements and sponsor speeches in interpreting a statute. The question for the reviewing court is whether such reliance leads to a valid or invalid interpretation. The court's theory of interpretation will determine whether such materials should be considered—a textualist would say no—but the level of deference is, again, a different matter.

In short, *Auer* is not a separate doctrine from *Chevron*. It developed at an earlier date because there is an immediate and obvious logic to granting an agency the authority to interpret a legal provision that the agency itself created. In addition, it involves adjudication, and the role of statutory interpretation in adjudication was well recognized by analogy to trial courts. *Chevron*, in contrast, is mainly concerned with the interpretation of statutes in the rulemaking context, which both courts and commentators had failed to focus on until the decision itself brought this function into the spotlight.[78] But once *Chevron* was decided, *Auer* was absorbed into the general principle that it established.

II. THEORIZING *CHEVRON* AND ITS CONCEPTUAL REVOLUTION

The discussion thus far has been at the operational level, that is, the rules that courts use for reviewing agency actions. The more basic argument in support of the *Auer* doctrine is theoretical. The theory, not surprisingly, is derived from *Chevron*. Both Justice Kagan's plurality opinion and Justice Gorsuch's concurrence recognize the obvious ways in which the two doctrines are connected. Neither,

75. One might say that it is enforced by the courts. This means, of course, that the reviewing court interprets APA questions de novo, which is in fact the case. As Justice Kagan notes in *Kisor*, the Court has held that guidance documents generally do not fit within the interpretive rule exception, and thus do not have the force of law. *Kisor* 139 S. Ct. at 2420 (citing Perez v. Mortgage Bankers Ass'n, 575 U.S. 92 (2015)). Thus, agency enforcement officials cannot base their actions on these rules, regardless of the level of deference that a reviewing court accords to them.

76. 5 U.S.C. § 553(b)(3)(B); *see also* Levin, *supra* note 60, at 22-24 (describing the way agencies use the good cause exception to issue rules that are not subject to notice and comment requirements); O'Connell, *supra* note 60, at 929-37 (same).

77. Unless the petitioner's attorney is careless, the reviewing court will never even reach the *Auer* issue in this situation. The petitioner will argue that no enforcement action based on the rule can be valid, and if the court agrees it will reverse or vacate on that basis.

78. *See infra* pp. 736-38.

however, identifies the underlying theory of modern governance that forges the connection. To do so, it is necessary to begin with *Chevron* and to delineate its consequences for the entire concept of judicial review of agency action.

A. Agency Interpretation: From a Component of Action to a Separate Stage of Implementation

The most essential basis of *Chevron* is that statutory interpretation is an intrinsic part of an administrative agency's implementation process, and that the agency is thus the first, and often the sole interpreter of the statute. In effect, *Chevron* revealed a proximate, pervasive but previously unrecognized realm that is a central component of our current legal system—the realm of statutory interpretation by administrative agencies.[79] This insight is not explicitly stated in the opinion, and its significance does not seem to have been apparent to the Justices when they handed down the decision.[80] In fact, *Chevron*'s significance only became clear after it was applied in subsequent cases.[81]

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79. Since the decision, there has been a small but growing body of academic work on this issue. *See e.g.*, Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871 (2015); Jerry L. Mashaw, *Norms, Practice and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005); Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285 (Daniel A. Farber & Anne Joseph O'Connell, eds., 2010); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990).; Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015). Notably, however, there was virtually no such literature before *Chevron* was decided.

80. *See* Thomas W. Merrill, *The Story of* Chevron USA Inc v. Natural Resources Defense Council, Inc.*: Sometimes Great Cases Are Made Not Born*, *in* STATUTORY INTERPRETATION STORIES 164, 180-84 (William N. Eskridge, Jr. et al. eds., 2011) (evidence from Court's internal deliberations indicates that none of the Justices regarded the case as being of great significance); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENV'T L. REP. 10,606, 10,613 (1993) (concluding, on the basis of Justice Marshall's private papers, that the *Chevron* Test was not discussed during the Court's internal deliberations). The *Chevron* opinion is unanimous, a relative rarity for an important case, and presents itself as a mere extension of prior precedents. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984). That may be incorrect—see generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2016)—but it was not necessarily insincere.

81. Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 829-32 (2010) (after *Chevron* was decided, it was not cited in cases where it was applicable); Beermann, *supra* note 13, at 741-50 (providing examples of Roberts Court decisions where uncertainty about the applicability or operation of the *Chevron* doctrine continues); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1138 (2008) (Supreme Court only applied *Chevron* in around one quarter of the relevant cases); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-93 (1992) (as of 1990, Supreme Court was only relying on *Chevron* deference in half the cases where it was relevant, and was continuing to employ a variety of other decision rationales). *Cf.* Gary

Of course, it was well known before the *Chevron* decision that when a legislature enacts a regulatory statute and assigns its implementation to an administrative agency, the agency will enforce the statute by making rules, adjudicating cases, imposing sanctions, and carrying out various other actions. In addition, it was well known that the agency had to base these various implementation actions on the authorizing statute. It was also understood that this required the agency to interpret the language of the statute;[82] that is, after all, the basis of the principle that *Chevron* reversed, which is that reviewing courts should consider agency interpretations of law, as opposed to agency findings of fact, de novo.[83] What the *Chevron* case reveals is that statutory interpretation by the agency is a distinct function, the first and essential step in the process of implementation. It also reveals that this function is inherent in the meaning of a regulatory statute. The agency cannot enforce the statute without consulting its language and determining what the language is instructing it to do.[84]

Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 3-4 (2013) (*Chevron* doctrine as it exists today is not derived from the *Chevron* opinion but from subsequent lower court decisions adopted by the Supreme Court).

82. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134 (1944) (recognizing the role of an administrative agency in using its expertise to interpret the statute it administers); DAVIS, *supra* note 10, at 194-205 (discussing the interpretation of statutes by agencies in the process of making legislative and interpretive rules).

83. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 435-44, 461-71 (1993); RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 379-413 (5th ed. 2009). Kenneth Culp Davis famously distinguished between the types of facts that are involved in agency decisions, noting that many such decisions involve "legislative" as opposed to "adjudicative" facts and adumbrating the Chevron doctrine. DAVIS, *supra* note 10, at 874-914.

84. It is noteworthy that the Court, while it has sometimes struggled with the way that *Chevron* applies to a particular situation, has not revised the basic principle of *Chevron* since the case was decided. The major cases go to the scope of *Chevron*, that is, Step Zero, not to its content. *See* King v. Burwell, 135 S. Ct. 2480, 2483, 2488-89 (2015) (holding that some agency actions involve issues too politically controversial to be granted *Chevron* deference); City of Arlington v. FCC, 569 U.S. 290, 290, 296-301 (2013) (holding that agency actions that affect the agency's jurisdiction are entitled to *Chevron* deference); Mead Corp. v. U.S., 533 U.S. 218, 226-27 (1992) (holding that agency actions must have the force of law to receive *Chevron* deference). *See generally* National Cable & Telecomm. Ass'n v. Brand X Internet Serv., 546 U.S. 967 (2005) (holding that an agency whose decision is construed by a court before it has definitely interpreted the authorizing statute remains eligible for *Chevron* deference); Barnhardt v. Walton, 535 U.S. 212 (2002) (holding that agency actions other than formal notice-and-comment rulemaking can receive *Chevron* deference). *But see* Walker, *supra* note 23, at 110-20 (documenting judicial opinions that express reservations about *Chevron*). This may change with the appointment of Justices Gorsuch and Kavanaugh to the Court. *See* Kent H. Barnett, Christina L. Boyd & Christopher J. Walker, *Judge Kavanaugh,* Chevron *Deference and the Supreme Court*, REGULATORY REV. (Sept. 3, 2018), https://www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/ [https://perma.cc/G3HX-DAVL]. *See generally* Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and* Chevron *Deference*, 70 ALA. L. REV. 733 (2018) (exploring the extent of Justice Gorsuch's hostility to *Chevron*). Neither Justice Gorsuch's nor Justice Kavanaugh's opinion in *Kisor* contains an explicit attack on *Chevron,* although they can be read as an indication that such an attack is forthcoming.

A second insight that follows from this recognition of agency interpretation is that the agency will be the initial and often sole interpreter of the statutory language. It is virtually impossible to mount a facial challenge to a statutory provision on non-constitutional grounds.[85] The challenge is almost always to the manner in which the agency has used its statutory authority to issue a rule or adjudicate a case, meaning the agency has already interpreted the statute. The agency is the sole interpreter of most statutory provisions because challenges to regulatory actions must be brought by private parties, and there are many practical impediments to doing so. Often, there will be no colorable legal basis for a suit. Even if there is, it may be cheaper for the private party to comply than to litigate, or it may be possible for that party to negotiate with the agency and reach a satisfactory compromise on its actual level of compliance.[86] Finally, the agency is always the primary interpreter of the statute because it is administering the statute on a daily basis and interacting, often intensively, with the regulated parties. Judicial review is occasional and episodic. Even if a court overturns a major agency rule and disrupts the agency's entire enforcement strategy, the agency will remain in control and will be the institution that designs and implements the rejected strategy's replacement.[87]

Chevron thus creates a type of figure-ground reversal in the way that reviewing courts deal with agency decisions involving implementation of an administrative statute. In place of the presumption that the reviewing court should determine questions of law, the decision's rationale presumes that the agency should make

85. A constitutional challenge lies outside the scope of the *Chevron* doctrine. If a regulatory statute is challenged on constitutional grounds before the agency has taken any action, then a court will be the first interpreter of its provisions, but only with respect to their constitutionality. *Chevron* obviously applies only to valid statutes, that is, statutes whose constitutionality has been unquestioned or resolved.

86. This point has been made in connection with the use of guidance as a technique of agency enforcement. *See* Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for* De Novo *Review*, 8 J. LEGAL ANALYSIS 47, 61-68 (2016) (arguing that courts should suspend standing and finality limits so that private parties can challenge guidance documents when they are promulgated); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Shortcut*, 120 YALE L.J. 276, 303-24 (2010) (arguing that proposals to control guidance by not giving legal force to it when challenged in court are insufficient). *See generally* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011) (arguing that courts should allow regulated parties to challenge the legal validity of guidance documents at the time they are promulgated).

87. *See, e.g.*, MASHAW & HARFST, *supra* note 61, at 84-171 (describing the way an agency responded after the Court struck down its major regulation and required it to devise a new regulatory strategy); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994) (describing the way agencies that administered aid to Families with dependent children, education for the handicapped and food stamps responded after courts struck down various regulations).

this determination as part of its implementation function.[88] It is this rationale, as operationalized by the two-step decision process established by the decision, that leads to the conclusion that a reviewing court should defer to permissible or reasonable agency interpretations of ambiguous statutory language.

B. Statutory Language: From the Defect of Ambiguity to the Virtues of Open-Endedness

In addition to shifting the locus of interpretation, *Chevron* also alters our understanding of statutory language. While it continues to employ the term "ambiguity," for language whose meaning a reviewing court cannot readily discern, *Chevron* treats such language in a manner that makes this term inapposite, and perhaps irrelevant. "Ambiguity" suggests a type of drafting defect. It might be a virtue in a creative work (Do Hamlet's speeches indicate that he is feigning madness? What is a Ticket to Ride?),[89] but this virtue is not relevant to a legal enactment whose interpretation has real and potentially disadvantageous consequences for human beings.[90] Instead, ambiguity

88. Bamzai, *supra* note 80, at 931-41, argues that the *Chevron* Principle is not supported by precedent to the extent that the opinion claims. When courts before the New Deal Era deferred to executive interpretations, he observes, they were doing so because those interpretations were contemporaneous with the statute's enactment or consistent with the customary understanding of its text, not because the interpretation was stated by the executive. *Chevron*'s partial departure from precedent is not surprising, however. What is important about *Chevron* is that it represents a new insight, one that provides an understanding of law in the administrative state that was not previously available. As Gillian Metzger points out, *Chevron* is a federal common law decision. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298-1303 (2012); *see also* Merrill & Hickman, *supra* note 13, at 833. It also uses precedent in the way that common law courts frequently do when they are making new law: not to support the precise conclusion of the decision, but to connect the decision with prior doctrine and to indicate that the change being implemented is an incremental one. In fact, the Supreme Court is well aware of *Chevron*'s malleable approach to precedent. *See* Mayo Found. for Educ. & Research v. United States, 562 U.S. 44 (2010) (holding that the *Chevron* doctrine prevails over a contemporaneous interpretation of the statute).

89. Both New Criticism and myth criticism (in some sense its rival) emphasize the value of ambiguity as a contribution to the work of art's overall effect. For New Criticism, see, *e.g.*, CLEANTH BROOKS, THE WELL WROUGHT URN: STUDIES IN THE STRUCTURE OF POETRY 124-77 (1942) (analysis of Wordsworth's *Intimations*, Keats' *Ode to a Grecian Urn*, and Tennyson's *Tears, Idle Tears*); WILLIAM EMPSON, SEVEN TYPES OF AMBIGUITY (1966). For myth criticism, see NORTHROP FRYE, ANATOMY OF CRITICISM 270-93 (rev. ed. 1971) (inherent ambiguity in lyric mode of literary expression due to its reliance on associational thought).

90. EMPSON, *supra* note 89, at 1, defines ambiguity as "any verbal nuance, however slight, which gives room for alternative reactions to the same piece of language." One can see that a citizen, conscientiously trying to obey the law, would be distressed that her own reaction to legal language, a criminal statute, for example, might differ from the reaction of the police or of the courts. According to Lon Fuller, if such ambiguity becomes too pronounced, it undermines the statute's claim to lawfulness. *See* LON L. FULLER, THE MORALITY OF LAW 63-65 (rev. ed., 1969). This jurisprudential claim is doctrinally instantiated in the void for vagueness doctrine. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999) (striking down ordinance requiring gang members who were "loitering" to disperse because the term loitering was too vague); City of Houston, Texas v. Hill, 482 U.S. 451 (1987)

suggests that the statutory drafter was attempting to be clear but wrote words subject to multiple interpretations, perhaps due to its inability to find the best verbal formulation, perhaps due to failure to envision the full range of applications, perhaps due to simple carelessness.

What *Chevron* implies, however, is that a range of possible interpretations is a desirable outcome when the statute is being implemented by an administrative agency. It provides the agency with latitude, or discretion, to implement the legislation within the bounds established by the statute. There is nothing careless or irresponsible about this; it is a basic feature of administrative government. A preferable description is that the legislature is using indeterminate or open-ended language. Statutes that opt for judicial implementation by creating private rights of action need to be precisely drafted because the language of their provisions is directly applicable to private citizens. Transitive statutes implemented by administrative agencies must be similarly precise, for the same reason. Most administratively implemented statutes are intransitive, however; they are instructions to the agency, and the only rules, commands or benefits that apply directly to private citizens will be those promulgated by the agency. The level of precision that the statutory language achieves depends on the extent to which the legislature wants to direct the agency's implementation process, and that is matter for the legislature to decide.

Open-ended language is not only acceptable in an intransitive administrative statute, but often desirable as well, and for familiar reasons.[91] A legislature that assigns implementation of a statute to an

(striking down an ordinance prohibiting people from interrupting police officers from performing their duties because the prohibited conduct was not sufficiently defined); Smith v. Goguen, 415 U.S. 566 (1974) (striking down a state law prohibiting people from treating the U.S. flag "contemptuously" because the operative term was too vague). Another instantiation is the interpretive canon of lenity, which is that criminal laws whose meaning is contested will be construed in the manner most favorable to the defendant. *See, e.g.*, United States v. Santos, 553 U.S. 507 (2008) (uncertainty about whether the term "proceeds" in the federal money laundering statute means receipts or profits is resolved by choosing profits, a more demanding standard for obtaining a conviction); United States v. Bass, 404 U.S. 336, 347-49 (1971) (uncertainty about whether term "interstate commerce" applies to possession as well as transportation of a firearm is to be resolved by applying it to possession as well, leading to acquittal of defendant whose possession of the firearm did not involve interstate commerce); McBoyle v. United States, 283 U. S. 25, 27 (1931) ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.").

91. *See generally* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (discussing reasons why delegation is good policy, including agency expertise and ability to respond to changing circumstances); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1998) (discussing democratic features of agencies that justify delegation, including accountability and accessibility); Rubin, *supra* note 44 at 387-97 (1989) (delegation is not a surrender of power by the legislature but an exercise of power, since it can only enforce its

administrative agency is creating an institutional structure where the agency is expected to develop a comprehensive implementation strategy. It is best if the different parts of that strategy fit together. This will avoid internal conflicts, assist agency staff in carrying out their roles, and facilitate supervision of those staff members by agency leaders.[92]In addition, the agency must operate within the resources that the legislature has allocated to it, a standard institutional problem that is best solved through comprehensive planning.[93]

In addition, the legislature often lacks the technical expertise necessary to be more precise. It is simply unreasonable to expect legislators, or their staffs, to be fully versed in all the complex, technical fields are involved in creating and maintaining our modern society.[94] Often, the necessary technical expertise does not exist at the time the legislation is enacted, and the agency is supposed to develop it as an essential part of its mission. A common goal of modern legislation is to encourage or compel the development of new technology for keeping people safe from the novel dangers that our society creates for workers, consumers, and others. Then again, circumstances might change in unexpected ways, and the legislature is unlikely to have time to keep pace with all the changes produced by a fast-paced, dynamic economic system. Still more basically, any conscientious statutory drafter will recognize an essential dilemma: it does not know what it does not know. Attempts to make statutory language more precise can readily backfire because the drafters were unable to envision new circumstances that arose in the future, and that the language cannot accommodate. The demand for greater

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policies through other institutions); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989) (agencies undertake sustained effort to act lawfully and follow legislative directives); Lisa Shultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000) (arguing that delegation to agencies is valid, but agencies are obligated to limit their discretion by adopting rules); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952 (2007) (arguing that delegation is desirable, but that agencies are obligated to limit their discretion by giving reasons for their actions).

92. In pragmatic terms, the agency controls the behavior of its staff through direct supervisory commands, training programs, and employee manuals. *See* Auer v. Robbins, 519 U.S. 451, 461-62 (1997). *See generally* Morton v. Ruiz, 415 U.S. 199 (1974). All of these mechanisms work better if they are based on a consistent and coherent strategy.

93. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Although Fuller approaches the issue from a doctrinal perspective, he arrives at an institutional analysis.

94. *See* JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 146-47, 152-56 (1997) (the complexity of modern regulation demands that agencies exercise an extensive role in the implementation process); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293, 294 (2004) (one purpose of delegation is to take advantage of superior expertise by delegee); DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 18-33, 53-74 (1999) (agency expertise is one of several considerations that determines decision to delegate); Mashaw, *supra* note 91, at 91-94 (agency expertise provides a policy justification for delegation).

statutory precision fails to take seriously the manifold uncertainties that confront policy makers in a rapidly changing technological society. Consider, for example, the urgent demand for motor vehicle safety legislation in the mid-1960s and the sense that the technology to solve the problem was not known, a sense that hindsight based on decades of subsequent experience with seatbelts, airbags, tire pressure monitoring and other devices definitively confirms.[95]

Conceiving open-ended statutory language as ambiguous, and thus a lapse from the acceptable or preferred mode of statutory drafting, can thus be understood as an essentially doctrinal approach. Its effect, when applied to modern statutes is anti-regulatory and thus outdated.[96] It hearkens back to the era when our legal system was dominated by common law. Legislation, while acknowledged as an expression of democratic governance, was generally treated as an exception, an intrusion into a coherent legal framework based on abiding principles and elaborated incrementally by the judiciary.[97] As such, a declaration by the legislation that replaced common law provisions with statutory rules of equal or greater precision was supposed to be precise and delimited. As Lisa Bressman has pointed out, precision or specificity can no longer be regarded as a general norm for legislation.[98] The relevant norm for the modern state is that the legislature should frame the language of its statutes in a manner that is appropriate to the institution it has chosen to implement the

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95. *See* LEMOV, *supra* note 61 at 67-86 (public demand for safer cars and uncertainty about the necessary technology); MASHAW & HARFST, *supra* note 61, at 47-68. The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified as amended at 49 U.S.C. §§ 30101 *et seq.*), discussed above at *supra* pp. 730-31, is pervaded by the sense that *Congress* needed to regulate the safety of automobiles, but had no clear idea of how to do so itself, and thus needed to assign the task to an agency that would both possess more expertise at the outset and develop such expertise as it proceeded. *See* the Preamble of the National Motor Vehicle Act (stating the need to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents"); *id.* § 103(a) (granting agency general authority to promulgate more vehicle safety standards); *id.* § 103(f) (urging agency to take account of existing knowledge about auto safety); *id.* § 104 (establishing a National Motor Vehicle Safety Advisory Council of industry representatives to consult with agency); *id.* § 106 (authorizing agency to "conduct research, testing, development and training"); *id.* § 107 (authorizing agency to share information with other "Federal departments and agencies").

96. *See generally* Gillian E. Metzger, *The Supreme Court: 2016 Term: Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073 (2005).

97. *See generally* Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950); Barbara Page, *Statutes in Derogation of the Common Law: The Canon as an Analytic Tool*, 1956 WIS. L. REV. 78 (1956); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908). The principle goes back at least as far as ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA Part I-II, Q. 97 at 1022-25 (Fathers of the English Dominican Province, trans., 1948). *See id.* at Q. 97, art. 2, 1023 ("[W]hen a law is changed, the binding power of law is diminished, in so far as custom is abolished.").

98. *See* Lisa Schultz Bressman, Chevron's *Mistake*, 58 DUKE L.J. 549, 571-75 (2009).

statute. The level of precision in statutory language does not make the language more or less lawful or legitimate according to this perspective. Instead, it indicates the amount of control that the Congress has decided to exercise over the subordinate agency.

C. The Role of the Judiciary: From Direct Supervisor to Collateral Monitor

A third implication of Chevron is that the de novo standard for review of interpretations of law, although a familiar feature of our legal system, is not a theoretically grounded one. Instead, it is traditional; it was the appropriate standard in a pre-modern system where courts were the dominant means for implementing common or statutory law. It continues to be appropriate when judicial implementation is employed. But where an agency is the mode of implementation, the de novo standard is no longer preferable and needs to be replaced by a different one. In other words, *Chevron* reconceptualizes de novo review as a standard that is specific to the institutional setting in which it arose, and not a universal feature of our legal system.

The reasons for this are institutional. When an appellate court reviews a trial court decision, it is reviewing the work of another component of the same institution, namely the judiciary. The officials who staff the two component parts have the same training, the same type of experience before being appointed to their positions, and the same relationship to the general public.[99] The difference in the standards for reviewing different parts of the decision, therefore, is based primarily on access to information. The trial court has more extensive access than the reviewing court to the relevant information when finding facts, but no better access to the relevant information when interpreting the law.

When an appellate court reviews an agency decision, however, the institutional structure is distinctly different. The court is not reviewing the decisions of another component of the judicial system, but rather the decisions of an administrative agency. That agency has its own internal structure and reaches a complete decision, that is, a decision that represents the best judgment of a separate institution. To review such a decision is different from reviewing a decision made

99. The similarity of training, experience and accountability is underscored by the widespread practice of having district judges sit on appellate panels. This is regarded as so unproblematic that the Judiciary Act provides that the chief judge of a circuit may designate any district judge within the circuit to sit on its appellate court "whenever the business of that court so requires." 28 U.S.C. § 292(a).

by another component of one's own institution. It might be expected, therefore, that it would utilize different standards of review.[100]

In addition to the difference in their institutional positions, there is also an important difference in the character of the decision makers. When judges review an administrative decision, they are reviewing decisions by those with distinctly different training and experience. The difference, moreover, is not random but intrinsic to the meaning of an administratively implemented statute. Agencies are designed so that their staff members possess specialized knowledge in the area that is assigned to the agency.[101] Even if the judges reviewing the agency's decision have the same information available to them, they would not be able to evaluate it as effectively; one need only think of the specifications for design of an automobile or the safety plan for a nuclear power plant. There is, moreover, a difference in the extent to which judges and administrative agents are supervised by elected officials, and again the difference is not random but intrinsic to our mode of government. Administrative agents are subject to a type of

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100. *See* Thomas Reed Powell, *Separation of Powers: Administrative Exercise of Legislative and Judicial Power*, 28 POL. SCI. Q. 34, 35 (1913) ("Where the administrative action is in the nature of an adjudication, the court may reexamine the evidence and determine the fact for itself or apply some other rule of law than that adopted by the administration. It may itself do the very work entrusted to the administration, if in its opinion this work was improperly performed. But if for any reason the court disapprove of an administrative regulation, judicial relief must be confined to nullifying the administrative action and treating the matter in litigation as though no provisions beyond those contained in the statute had been promulgated or authorized. The court cannot put forth a new regulation . . ..") (footnotes omitted).

Thus, from the early days of the American administrative state, it was recognized that review of an agency adjudication could be assimilated to review of a trial court, but that review of an administrative regulation was an essentially different enterprise, requiring a different judicial stance. Subsequent to Powell's article, courts recognized that review of agency interpretation was different as well, and should be regarded as similar to review of an agency regulation, rather than a trial court. *See, e.g.*, SEC v. Chenery Corp., 322 U.S. 194, 207-08 (1947) (Chenery II) ("The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. . . . The very breadth of the statutory language precludes reversal of the Commission's judgment . . .."); Gray v. Powell, 314 U.S. 402, 411 (1941) ("In a matter left specifically by Congress to the determination of an administrative body . . . the function of the courts is fully performed when they determine that there has been . . . an application of the statute in a just and reasonable manner."). Thus, the *Chevron* principle of treating review of agency interpretations differently from review of trial courts represents the next stage in the recognition of the administrative state's distinctive character.

101. The basic insight comes from Max Weber. *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 956-63, 973-78 (Guenther Roth & Claus Wittich, eds., 1978). The point is fully recognized by modern observers, of course. *See, e.g.*, MASHAW & HARFST, supra note 61, at 69-123; JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363 (1976); Kevin M. Stack, *Reclaiming "the Real Subject" of Administrative Law: A Critical Introduction to* BRUCE WYMAN'S THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS III (Lawbook Exch. 2014) (1903),; Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097 (2015).

supervision or control from which trial court judges are exempt. Thus, when an appellate court reviews a trial court decision, it is imposing the only supervision to which the trial court is subject. When an appellate court reviews an agency decision, it is reviewing a decision that has already been subject to supervision by the President, by Congress, and within the agency itself.

The view that the de novo standard of review for interpretations of law is a universal rule of our legal system, and that *Chevron* represents a suspect departure from it, once again results from a pre-modern concept of our legal system. When virtually all statutes were enforced by courts, and most of the law creation was carried out by courts as well, the de novo review standard did in fact predominate.[102] There is, in addition, a more conceptual reason why the de novo standard was generalized from its role in reviewing trial court determinations into a universal rule. This is the prevalent belief that the administrative state represents a departure from our basic legal principles, and that administrative rules and decisions are not real law.[103] Real law, according to this view, is common law, the law established by judges and embedded in Anglo-American legal tradition.[104] The substantive due process decisions of the Lochner Era

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102. It can be fairly said that this standard serves as the basis for American legal education. C.C. Langdell developed a distinctly American approach to legal education by replacing the European practice of teaching from treatises with reliance on primary source material. But the only primary sources he used were appellate court decisions. *See* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN LEGAL EDUCATION 22-28 (1994); ROBERTS STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 35-50 (1983). *See generally* Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979); Bruce A. Kimball, *"Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870-1883*, 17 LAW & HIST. REV. 57 (1999). Langdell' s students at Harvard–and, for the most part, American law students ever since–did not read any of the other primary source materials that practicing lawyers use, such as statutes, regulations, contracts, leases or wills. *See generally* Edward Rubin, *What's Wrong with Langdell's Method and What to Do About It*, 60 VAND. L. REV. 609 (2007) (arguing that Langdell's emphasis on case law, although perhaps appropriate in the 1870s, was out of date by the twentieth century due to the development of the administrative state, the rise of academic social science, and the changing concept of pedagogy).

103. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 93-105 (1985) (regulatory statutes that decrease property values violate the law); F.A. HAYEK, THE ROAD TO SERFDOM 80-96 (1994) (statutes that provide for central planning and redistribution violate the law); LOWI, *supra* note 34, at 90-126 (statutes authorizing discretionary action by agencies violate the law).

104. The great champion of this view is Edward Coke; the Parliamentary and Glorious Revolutions can be regarded as a validation of the linkage he secured between common law and the idea of English rights. *See* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 30-55, 124-47, 306-88 (1987). By the time of Blackstone, this perspective is so securely established that he could present a treatise on the common law as, in effect, the law of England, with statutes playing a subordinate role as either declaring common law or correcting delimited defects in its operation. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 48-67 (David Lemmings, ed., Oxford Univ. Press 2016) (1765-69)*; see also id.* at 52 ("[H]ow are these customs or maxims [of common law] to be known, and how is their validity

were grounded on the premise that economic regulation altering common law rights needed a particular public policy justification.[105] But the Supreme Court definitively rejected this view in 1937, holding that statutes that altered common law rights, and in particular, common law property rights, needed no special justification.[106] *Erie v. Tompkins*,[107] decided the following year, held that there is no general common law that federal courts could impose on the states, a historically accurate understanding of common law that also denied it any higher status.[108]

We now understand that nothing in our legal system gives common law a higher status that statutory law.[109] Within the boundaries established by the Constitution, all legal rules are in the control of the

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to be determined? The answer is, by the judges in the several courts of justice."); *id.* at 63 (Statutes, in addition to being either general or special, "also are either *declaratory* of the common law, or *remedial* of some defects therein.").

105. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); NOGA MORAG-LEVINE: CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE (2003); KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND THE LIBERAL DEVELOPMENT OF THE UNITED STATES (1991). Some recent scholarship has attempted to rehabilitate the Lochner Era decisions, pointing out that the Supreme Court did not strike down all social legislation, but demanded special justification for regulatory legislation on the basis of principled positions. *See generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011) (regulatory legislation seen as undermining the natural rights that supported social contract theory); HOWARD GILMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) (regulatory legislation regarded as favoring some private parties over others); DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011) (regulatory legislation seen as impinging on the liberty that Americans had fought for in the Revolution); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1983) (regulatory legislation impairs the property rights that are essential to liberty). But these efforts recognize that it was the intrusion on common law rights that triggered the Court's concern, whatever the basis for such heightened scrutiny. Therefore, they concede that the decisions were based on the view that common law rights merit special treatment, a view that is clearly inconsistent with our current legal system. *See* Edward L. Rubin, *Lochner and Property*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 398 (Nicholas R. Parrillo ed., 2017). For a general response to revisionist views of Lochner, see Barry Friedman, *A History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383 (2001).

106. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

107. 304 U.S. 64 (1938).

108. *Id.* at 78 ("There is no federal general common law."); *see also id.* at 79 (there is no "transcendental body of law outside of any particular State but obligatory within it") (quoting Black and White Cab v. Brown and Yellow Cab, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Homes, J., dissenting) ("The title to real estate in general depends on the statutes and decisions of the state in which it lies.").

109. *See* W.L. WARREN, HENRY II 317-61 (1973) (describing the twelfth century statutes that initiated common law). These statutes were designed to achieve a particular purpose central to pre-modern states, that is, the maintenance of civil order. Thus, common law cannot claim to be superior to statutory law on the basis of its origins.

legislature, to be determined through the democratic process.[110] This means that there is no reason to treat the standard for reviewing legal determinations made by a lower court as more basic or more justifiable than the standard for reviewing legal determinations made by an agency.[111]

III. THEORIZING THE *AUER* DOCTRINE

The account of the *Chevron* doctrine in Part II applies to the *Auer* doctrine as well and provides a theoretical basis for the conclusions reached in Part I on operational grounds. At first impression, it might appear that theory of *Chevron*, which derives from institutional considerations, would not be applicable to *Auer*. *Chevron*, after all, involves judicial review of the relationship of two distinctly different institutions, Congress and an agency, which are typically described as being located in separate branches of government. *Auer* involves judicial review of a single type of institution, the administrative agency, that comprises a portion of one branch according to our traditional categorization. But the idea that the agency is a unitary institution is another version of the image of the agency as a cabal of self-aggrandizing bureaucrats that undergirds Justice Gorsuch's concurrence in *Kisor*. In fact, agencies are complex institutions, typically with component elements serving different functions.

A. Agency Interpretation as Implementation

Regarding the first element of Chevron's theoretical basis, the agency is the primary interpreter, and often the sole interpreter, of the

110. For example, Congress has enacted a number of statutes that require rules to be reviewed on the basis of the substantial evidence standard that the APA establishes for adjudicatory orders. *See, e.g.*, Federal Coal Mine Health & Safety Act, 15 U.S.C. § 1193(e)(3); Flammable Fabrics Act, 15 U.S.C. § 57a(e)(3)(A); Occupational Safety & Health Act, 30 U.S.C. § 816 (a)(1). This variation does not make sense, since the idea of substantial evidence, as used in the APA, is based on an assessment of the amount of evidence that appears in the record, see *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), and there is no closed record in the rule-making procedure. *See* Ass'n of Data Processing Orgs., Inc. v. Bd. of Governors, 745 F.2d 677, 683 (1984) (holding by then-Judge Scalia that substantial evidence test, when applied to rulemaking, does not mean anything different from the general arbitrary and capricious test). Nonetheless, Congress has the authority to enact it.

111. This perspective became a source of controversy among the Supreme Court Justices in Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 970 (2005) (reviewing court should uphold an agency's interpretation of a statute even if that interpretation directly conflicts with a prior judicial interpretation, so long as the prior interpretation was reached at *Chevron* Step Two, and not Step One). Justice Scalia dissented from this conclusion on the ground that "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers." *Id.* at 1017. He went on to say that that when "a court interprets a statute without *Chevron* deference to agency views, its interpretation . . . is the law." *Id.* at 1019. The premise of this assertion is that a judicial decision, even if made provisional by a prior judicial decision that serves as the controlling precedent, has some sort of intrinsic force. That is essentially the traditional and now rejected view that judge-made law is superior to statutory law, the view that motivated substantive due process and general common law.

rules it enacts, just as it is the primary and often sole interpreter of the statutory provisions. The reasons for deferring to the agency's interpretation of the statute on this basis apply to interpretation of its rules as well. While agency rules, unlike Congressional enactments, can be challenged on their face for violating the APA's arbitrary and capricious standard, most are not challenged, and most challenges do not succeed.[112] Here again, judicial intervention will necessarily be occasional and adventitious. It will represent intermittent incursions into the administrative process, rather than any sort of systematic supervision.

In this regard, the basic rationale for *Chevron* should be recalled. *Chevron* holds that when Congress assigns enforcement of a statute to an administrative agency, the meaning of the statute is that the agency should be the primary interpreter of its language. While some passages in *Chevron* itself and in several of its successor cases state this rationale explicitly,[113] both Justices Breyer and Scalia,[114] and many academic commentators as well, [115] have found it to be an

112. See Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 28 (2017) (agencies prevailed in 71.4% of statutory interpretation cases decided by Circuit Courts between 2002 and 2013); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1100 (2008) (agencies prevailed in 68.3% of statutory interpretation cases decided by the Supreme Court between 1984 and 2006); Peter H. Schuck & E. Donald Eliot, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1003 (1990) (agencies prevailed in 76.7% of all direct review cases decided by circuit courts in 1984 and 1985). Barnett & Walker, *supra* note 112, at 50, found that the win rate for agencies, when separated on the basis of subject matter, was generally in the 70-80% range, with only civil rights below 60%.

113. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 865 ("Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level"); *see also* City of Arlington v. FCC, 569 U.S. 290, 296 (2013) ("*Chevron* is rooted in a background presumption of congressional intent"); United States v. Mead Corp., 533 U.S. 218, 221 (2001) (*Chevron* deference should not apply to a customs ruling, "there being no indication that Congress intended such a ruling to carry the force of law."); *id.* at 229 (*Chevron* deference should apply to a decision when the statute indicates that "Congress would expect the agency to be able to speak with the force of law."); Chemical Mfr's Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 126 (1985) (Court should defer to the agency's interpretation of the statute "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress.").

114. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (*Chevron* is better understood as recognizing administrative expertise); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

115. *See, e.g.*, David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (2001) ("Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how best to allocate interpretive authority."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 998 (1992) (*Chevron* relies on the "dubious fiction of delegated authority."); Mark

unconvincing explanation of the case. Their basic argument is that the explanation rests on the illusory idea that Congress can be said to have particular or identifiable intentions. Instead, they argue, Congress is a collective body that cannot be treated as an individual with subjective intentions. It is a "they" not an "it" according to Kenneth Shepsle's well-known formulation.[116] Attempts to rescue intentionalism by defining it as the conscious thoughts of the individual legislators who voted to enact the statute in question,[117] or as the actions of a collective entity,[118] fail to remedy the implausibility of asserting that legislators were consciously delegating interpretive authority to an agency when they voted for a vaguely-worded statute.

But these criticisms of legislative intent do not truly address the *Chevron* decision's rationale. Only the first of the three sources of ambiguous or inadequately specific statutory language that Justice Stevens identifies rests on the idea of Congress' conscious intent. The second source he mentions is that the legislators "simply did not consider the question" that is at issue.[119] This sounds like carelessness or inadvertence, but it might equally result from the intrinsic unpredictability of future events. The third source, which can be fairly described as a public choice analysis,[120] is that legislators have no intention whatsoever regarding the substance of the legislation they

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Seidenfeld, Chevron's *Foundation*, 86 NOTRE DAME L. REV. 273, 278 (2011) ("By most accounts, Congress does not directly address the question of which institution—agency or court—is authorized to fill gaps or resolve ambiguities in the vast majority of regulatory statutes. In that sense, congressional intent about interpretive primacy is a fiction.") (footnotes omitted); Russell L. Weaver, *The Emperor Has No Clothes: Christenson,* Mead *and Dual Deference Standards,* 54 ADMIN. L. REV. 173, 175 (2002) ("by focusing on whether Congress intended to delegate 'authority to the agency generally to make rules carrying the force of law,' a question which is particularly difficult to answer or satisfactorily resolve, the Court diverts itself from more fundamental questions about why, and when, deference ought to be given.") (footnote omitted).

116. Kenneth A. Shepsle, *Congress Is a "They." Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992); *see id.* at 239 ("Legislative intent is an internally inconsistent, self-contradictory expression. Therefore, it has no meaning."). Another classic statement of the point is an earlier article by Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that of several hundred men each will have the exact same determinate situations in mind . . . are infinitesimally small.").

117. For arguments that members of Congress in fact intended the agency to interpret a statute they were enacting, see generally Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009 (2011) (providing empirical evidence that members of Congress are aware of the delegation and interpretation argument).

118. For arguments that it is meaningful to speak about the intentions of a collective body such as a legislature, see ROBERT A. KATZMANN, JUDGING STATUTES 34-35 (2014); ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 119-40 (2d ed., 2005).

119. Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

120. The argument is that legislators are rational actors motivated by material self-interest, which in their case generally translates into the desire to maximize their chance of re-election. *See, e.g.*, MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974). For general descriptions of public choice, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

adopt.[121] Their goal is to maximize their individual, material, self-interest—in this case their chance of re-election. Justice Stevens does not openly subscribe to this somewhat cynical view, but the opinion accommodates it, and explicitly states that the particular source of ambiguity makes no difference in its result.[122]

In fact, it is possible to argue that agency interpretation represents the intent of Congress as a fact and not a fiction. Every member of Congress who votes for a regulatory statute is likely to be consciously aware of the fact that the statute assigns implementation to an agency, and aware as well of the particular agency to which the assignment is being made. Even those who have not read the bill, or, having read it or not, have no interest in it beyond its effect on their chances for re-election, will know the identity of the implementing agency. This will typically be apparent from the subject matter of the bill, it will appear in every summary of the bill's provisions, however abbreviated, and it will be mentioned repeatedly in any floor debate.[123] It will be revealed, moreover, by the identity of the legislative committee that is considering the bill and bringing it to the chamber floor. Both the House and the Senate assign bills to committee on the basis of the implementing agency that the bill identifies. This task is generally carried out by the chamber's parliamentarian, a ministerial official who does not exercise policy making discretion.[124] Thus, the identity of the committee that introduces the bill will generally indicate the agency charged with implementation of the statute.[125]

As stated above, *Auer* functions as an element of the *Chevron* doctrine. Eliminating *Auer* deference would represent a substantial impairment of the Congressional decision that the agency should be the primary interpreter of a statute that Congress has assigned to it for implementation. The agency would continue to receive deference for facial challenges to its rules, but these rules only have effect—they only enforce the statute as a matter of fact—when they are applied. If

121. *See Chevron*, 467 U.S. at 865.

122. *Id.* ("For judicial purposes, it matters not which of these things occurred.").

123. For a general description of the legislative process in Congress, see NELSON W. POLSBY, CONGRESS AND THE PRESIDENCY 138-58 (4th ed. 1986); STEVEN S. SMITH, THE AMERICAN CONGRESS 31-46 (1995).

124. WALTER J. OLESZEK, MARK J. OLESZEK, ELIZABETH RYBICKI & BILL HENIFF, JR., CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 107 (10th ed., 2016) ("The vast majority of referrals are routine. . . . [R]eferrals generally are cut-and-dried decisions."); BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 11-12 (2007); CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 111-13 (1989).

125. It is not tautological to invoke the expectations of the members as an argument for *Chevron* deference. To be sure, *Chevron* doctrine holds that the agency should be the primary interpreter of a statute assigned to that agency by Congress. But it is entirely implausible to argue that the members have this technical legal doctrine in mind when they vote for a bill. Their goal is to advance some substantive policy, and their focus will be on the agency's basic operations in implementing that policy, not on the possibility that some aspect of those operations will be subject to judicial review.

reviewing courts did not defer to reasonable agency interpretations of the agency's rules, it would effectively restore the de novo review standard for review of agency enforcement actions.

Here again, to impose a de novo standard on the application of agency rules to private parties undermines the basic principle of *Chevron*, the idea that Congress wants the agency to which it assigns the statute to be its primary interpreter. Every rule that the agency enacts in accordance with a statutory assignment of enforcement authority is necessarily an interpretation of the statute, and every application of the rule is necessarily an interpretation of that rule. To deny an agency deference when it applies the rule is to deny the agency deference, that is, to overrule the basic operation of the *Chevron* doctrine and reject its underlying principle. That might be something that Justice Gorsuch is prepared to do,[126] but he does not claim to do so in his *Kisor* concurrence, and he does not provide any convincing rationale for effectuating such a major change in administrative law.

B. Agency Interpretation as Authorized by Open-Ended Language

The second theoretical basis for the *Chevron* doctrine also applies to *Auer*. Statutory language that does not provide detailed instructions should be regarded as legitimately open-ended rather than defectively ambiguous, and agency rules should be regarded the same way. At first impression, it might seem that the opposite should be the case. The argument for treating statutory language as legitimately open-ended is that Congress generally promulgates intransitive rules, namely rules that are addressed to the enforcing agency rather than private parties. The agency, in contrast, as the implementing institution in this situation, is in fact promulgating rules that address private parties, and it might appear that these rules are thereby transitive and should be drafted with a precision that enables those parties to understand them and comply with them.

But this, once again, is grounded on an inaccurate analogy between judicial enforcement and agency enforcement. The reason judicially enforced rules should be relatively unambiguous is that the enforcement process depends entirely on the initiative of private parties; the courts are passive or reactive institutions that cannot initiate the cases they decide. This is certainly not true of administrative agencies. Most regulatory programs are initiated by the agency, whether by inspection of physical locations, review of submitted documents, or the receipt and assessment of private party

126. *See, e.g.*, De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015) (An opinion by Justice Gorsuch overturning agency action contrary to judicial precedent on the basis of the *Brand X* principle on grounds that the action was essentially retroactive). *See generally* Niki Ford, *Tax Reform in a "World Without* Chevron*": Will Tax Regulation Withstand the Review of Justice Gorsuch*, 7 TAX LAW. 975 (2018); Hickman, *supra* note 84; Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 950-51 (2018).

complaints. In addition, many administrative agencies operate institutions such as parks, prisons, hospitals, research laboratories, satellite launching facilities, and innumerable others. Agencies, unlike courts, are proactive; they develop consciously designed programs to carry out their functions. It is the need for enforcement of this type in the modern world that has resulted in the growth of the administrative state.

The agency promulgates rules at various levels of specificity to implement these regulatory or institutional programs,[127] but the operations staff that carries out the program will invariably need to make detailed judgments about the way the rules apply. There is thus an inevitable element of intransitivity in a regulatory rule that is not present in a statute which establishes private rights of action enforced by the judiciary. Even if private parties are expected to understand and obey the rule the agency has enacted, the rule is likely to include a separate group of provisions instructing the operations staff how to carry out its mission. These provisions are almost certain to be stated with open-ended terms that the staff must interpret and here too, as in the case of interpretation of the statute by the agency, the interpretative process should be granted a range of permissibility. To do otherwise is to substitute the judgment of the reviewing court for that of the agency, and to violate the *Chevron* principle that the meaning of a statute assigned to an agency is that the agency should interpret it.

Auer itself is, once again, a useful illustration. The case was an appeal from a suit brought by the police sergeants in federal district court. If the basis of the suit had been a transitive statute committed to the judiciary for enforcement, the court would have had to reach its own judgment about whether the denial of overtime pay to the sergeants violated the Act. But because the Act is regulatory legislation, the Department of Labor is the primary interpreter of the Act and had promulgated a regulation to implement its terms. The salary basis test appears in that regulation.[128] Therefore, instead of interpreting the statute itself, the district court relied on an amicus brief filed by the agency that provided the agency's interpretation.[129]

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127. This is generally an important consideration in the implementation of an administrative program. *See, e.g.*, DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 284-304 (rev. ed. 2002); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985).

128. 29 CFR §§ 541.1(f), 541.2(e), 541.3(e) (2018).

129. Auer v. Robbins, 519 U.S. 452, 461 (1997). The Court also rejected the sergeants' argument that Labor's position was only a post hoc rationalization because it was contained in a brief filed during the litigation. *Id.* at 462; *see also supra* note 34. It is well established that the agency cannot fulfill its obligation to give reasons for its action by a subsequent explanation in a judicial review proceeding. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S.

It was this interpretation that received deference from the Supreme Court. The salary basis test is considerably more specific than the statue, which states only that "executive, administrative, or professional" employees are exempted from the overtime requirements.[130] It is, in fact, exactly the sort of specification that is expected when Congress assigns implementation of a statute to an agency with rulemaking authority.

But the complexity of modern society is such that this level of specification is not sufficient. In order to determine whether the sergeants were being paid on the salary basis established by its rule, the Department had to analyze the St. Louis Police Department manual, which, according to the Court, "lists a total of 58 possible rule violations and specifies the range of penalties associated with each."[131] It can be safely assumed that larger police departments have equally complex manuals with different provisions.[132] A general rule promulgated by agency could not possibly prescribe the meaning of "salary basis" in all these different and complex settings with no uncertainty. The term is not ambiguous, in the sense of being a defectively vague formulation that a court should clarify. Rather, it is an open-ended intransitive provision, stating a general principle for the enforcement staff of the administrative agency to apply in specific situations. As in the case of *Chevron*, the difference in perspective translates into the question of whether the judiciary or the agency will be responsible for implementation of the statute. By assigning the statute to the Department of Labor, Congress has answered that question.

The facts of *Kisor* provide another illustration of this theme, although some of them are different from the ones that Justices Kagan and Gorsuch recited. As both opinions noted, Kisor is a veteran who was seeking disability benefits based on new evidence regarding his symptoms of post-traumatic stress disorder.[133] In this situation, the rights of the eligible veterans are governed by transitive regulations, that is, regulations that communicate with private persons who then

204, 212 (1988); Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 419 (1971); Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962); Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 87 (1943). It accepted the assertion that the brief was stating the agency's enforcement level assessment of the St. Louis police manual.

130. 29 U.S.C. § 213(a)(1) (2018).

131. *Auer*, 519 U.S. at 461-62.

132. The Houston police department has about four times as many employees as St. Louis, Los Angeles about eight times as many, Chicago nearly ten times as many and New York City more than 28 times as many. *See* Michael Maciag, *Police Employment, Officers Per Capita Rates for U.S. Cities*, GOVERNING (May 7, 2014), https://www.governing.com/archive/police-officers-per-capita-rates-employment-for-city-departments.html [https://perma.cc/P7E8-AYGL].

133. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2409 (majority opinion); *id.* at 2431 (Gorsuch, J., concurring).

initiate requests for those benefits.[134] Unlike contract claims, however, where legislation such as the Uniform Commercial Code is fully transitive, the rights to veterans' benefits are provided by the Department of Veterans Affairs. This is a cabinet-level agency created in 1988.[135] Its budget in 2019 was 419 billion dollars, comprised mainly of paying benefits to veterans and operating hundreds of health care facilities throughout the nation.[136] Another set of regulations are needed to create, structure, and manage this enormous public institution. Some of these can be characterized as internal, establishing the command structure and pay rates for the employees of the institution for example,[137] and others are intransitive regulations, in that they tell the employees how to administer the benefits to the private persons.[138]

The regulations at issue in *Kisor* belonged to this latter category. Both sets of regulations would appear in employee manuals and both would govern the day-to-day activities of the agency's staff members. Here again, the only plausible understanding of the authorizing statutes is that the agency should manage this operation, and the only plausible understanding of *Chevron* is that the agency should be granted deference in doing so. Treating terms in the governing regulations adopted by the agency as open-ended provisions that are

134. There are a wide variety of mass market books that provide advice about what benefits are available and how to obtain them. *See, e.g.*, BRUCE C. BROWN, THE COMPLETE GUIDE TO VETERANS' BENEFITS: EVERYTHING YOU NEED TO KNOW EXPLAINED SIMPLY (2014); ROD POWERS, VETERANS BENEFITS FOR DUMMIES (2009); VETERANS INFORMING VETERANS, LLC., VETERANS BENEFITS: A COMPLETE GUIDE TO YOUR ENTITLEMENTS (2019). There is also an active bar that assists veterans in making claims and advertises on the internet. *See, e.g.*, BERRY LAW, https://ptsdlawyers.com/ [https://perma.cc/PM7R-QLJD] (last visited May 11, 2021) ("Don't Go To Battle Alone"); HILL AND PONTON, https://va-law.hillandponton.com/b-veterans-lawyer/ [https://perma.cc/TGK9-4NPN] (last visited May 11, 2021) ("Let us focus on your claim; you focus on your health."); VETERANS LAW GROUP, https://www.veteranslaw.com/ [https://perma.cc/JZJ4-ZTYP] (last visited May 11, 2021) **Error! Hyperlink reference not valid.**("Need help getting the VA disability pay you deserve?") *see also* NATIONAL VETERANS LEGAL SERVICES PROGRAM, VETERANS BENEFITS MANUAL (2020-2021) (comprehensive guide for veterans benefits attorneys).

135. Department of Veterans Affairs Act of 1988, Pub. L. No. 100-527, 102 Stat. 2635 (codified at 39 U.S.C. §§ 101 *et seq.*). It is the successor to an independent agency created in 1930, which in turn unified several separate government programs that ultimately dated back to the founding of the Republic. *See* Exec. Order No. 5398 (July 21, 1930).

136. DEPARTMENT OF VETERANS AFFAIRS, AGENCY FINANCIAL REPORT 2019, at 41 (2019).

137. These are classically defined by H.L.A. Hart as secondary rules. See H.L.A. HART, THE CONCEPT OF LAW 79-99 (1961).

138. The Supreme Court addressed the issue of provisions in an internal document, in fact another employee manual, that affect the general public in *Morton v. Ruiz*, 415 U.S. 199 (1974) (holding that the agency could not apply a policy stated in an internal document that denied benefits to a group of people who were presumptively eligible for the benefit without publicizing that policy and obtaining comments on it). This is an issue that needs further attention. *See* Woodman, *supra* note 29. But adjusting the level of deference does not seem to be the best way to go about it. Rather, a due process analysis that balances the value of notice and the effect on the affected parties would seem to be in order.

to be interpreted and applied by operations-level staff is an intrinsic part of that deference. For courts to regard such terms as defectively ambiguous and impose their own interpretations, in other words, to deny *Auer* deference, reverses *Chevron* with respect to a significant range of the agency's action. While it would not necessarily destroy the agency, it would increase costs, serve little purpose, and constitute a misunderstanding of the authorizing statues.

C. Judicial Review of Agency Interpretation as Collateral Monitoring

The final theoretical consideration that underlies *Chevron* is applicable to *Auer* deference directly, and without qualification. In both cases, the judiciary is reviewing the decisions of a separate institution, not the decision of subordinate members of their own institution. Thus, the de novo standard, which was developed for situations when the reviewing court exercised direct supervisory authority over the decision maker being reviewed, is not necessarily the correct or even presumptive standard for reviewing either interpretations of the authorizing statute by agency rule makers or interpretations of agency rules by agency enforcement personnel. Those enforcement personnel are as securely located within the agency as the rule makers and are equally subject to its institutional structure.

In both *Chevron* and *Auer* situations, moreover, the officials whose work is being reviewed have different training, different experience, and different roles from the federal judges who are reviewing their decisions. In the *Auer* situation, this is subject to a caveat. Rule makers who are reviewed by federal courts on the basis of *Chevron* are always distinctly different from the reviewing court. Even if they are trained as lawyers, they are likely to possess expertise and experience in a substantive field, and they are never in the same role because federal judges do not draft extensive, legislative-type rules. In contrast, the agency officials who receive *Auer* deference will not be rule makers, but enforcement or operations level staff. Some of them will in fact be functioning in an adjudicatory capacity that is essentially equivalent to the role of a federal trial or appellate judge; these include most ALJ's, some AJ's and the members of many appellate boards and some other officials as well.[139] Of course, they may also be granted *Chevron* deference if they are interpreting statutory language, but this is a smaller proportion of cases where

139. Perhaps the members of appellate administrative boards can always be categorized as AJ's if they are not ALJ's, but perhaps not. Unlike ALJ, AJ is not a legally defined category, and its usage varies.

Chevron applies, made smaller perhaps by the Supreme Court's decision in *United States v. Mead Corp.*[140]

The fact remains, however, that most agency officials to whom *Auer* deference would apply are acting in an administrative capacity rather than a judicial capacity, and are carrying out tasks that are very different from those of the trial judges whose legal interpretations appellate courts review de novo. The full range of administrative enforcement—and one of the main reasons why Congress uses agencies to implement its policies—includes complaint handling, investigation, compliance instructions, technical analysis, and case initiation, all based on agency rules as well as statutory language.[141] Very often, the knowledge and experience which needs to be deployed to carry out these tasks at the operational level is even more technical and more remote from adjudication than those needed to make rules.[142]

It will often be difficult, if not impossible, to separate the legal interpretation component of these enforcement activities from their technical and substantive elements. Both *Auer* and *Kisor* were of course reviews of appellate court decisions, as are almost all Supreme Court cases, and in *Kisor* the appellate court received the case as an appeal from a decision by an ALJ. But in both cases, the basic decision that is at issue—the interpretation of a regulation that is or is not being given *Auer* deference by the various reviewing institutions, was made by operations level staff on a technical basis. In *Auer*, Department of Labor officials reviewed the St. Louis police manual to decide whether its treatment of certain police officers placed them in the category of supervisory employees who are excluded from coverage in many labor statutes.[143] In *Kisor*, VA physicians assessed new evidence offered by an applicant to determine whether to reverse a previous decision that he was not suffering from post-traumatic stress disorder.[144] It seems difficult to maintain that an appellate judge is in as good a position to interpret the regulations governing these

140. 533 U.S. 218 (2001) (holding that low-level adjudicatory decisions by agency officials that lack the force of law are not entitled to *Chevron* deference).

141. *See, e.g.*, EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1977); DANIEL A. MAZMANIAN & PAUL A. SABATIER, IMPLEMENTATION AND PUBLIC POLICY WITH A NEW POSTSCRIPT (Univ. Press of Am., Inc. 1989) (1983); Robert A. Kagan, Neil Gunningham & Dorothy Thornton, *Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects*, *in* EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 37 (Christine Parker & Vibeke Lehmann Nelsen eds., 2011). For studies of the implementation process for specific programs, see, e.g., EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (Transaction Publishers 2002) (1982) (implementation of the Occupational Safety and Health Act); ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED (1986); R. SHEP MELNICK, THE TRANSPORTATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION (2018); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994).

142. *See* EDWARD L. RUBIN, MAKING REGULATION WORK 158-65, 239-52 (2021).

143. Auer v. Robbins, 519 U.S. 452, 461-62 (1997).

144. Kisor v. Wilkie 139 S. Ct. 2400, 2409 (2019).

decisions as the officials who are trained in the field that the regulations address, and who work with these regulations on a regular basis.

The fact that some agency actions are purely adjudicatory in nature, and resemble trial or appellate court decisions, is relevant to the *Auer* doctrine, but points in the direction of deference, not de novo review. When an appellate court reviews a trial court decision, it is typically hearing the first and only appeal from that decision.[145] When it reviews an agency decision, even if the case goes directly from the agency to the appellate court, the court is often reviewing a decision that has already gone through a full appellate process within the agency.[146] Most agencies have their own system for reviewing decisions, often with a three-level structure that parallels that of the federal judiciary.[147] Once again avoiding the view of agencies as self-aggrandizing cabals, it appears that a system of this sort would provide a considerable degree of protection against corrupt or inaccurate decisions. Federal courts still have a role in ensuring fairness, of course, but that role is fulfilled by the *Chevron* process of determining that the agency decision falls within the range of permissibility.

These theoretical considerations also provide an answer to the most common criticism of *Auer* and one that occupied a central place in Justice Gorsuch's *Kisor* concurrence. It is the argument that *Auer* violates the APA because that statute requires federal courts to decide questions of law. [148] The argument is not convincing on its own terms. Justice Gorsuch states this argument by quoting from § 706 of the APA as follows: "That provision instructs reviewing courts to 'decide all relevant questions of law' and 'set aside agency action . . . found to be . . . not in accordance with law.'"[149] He reads this as requiring the courts to decide all questions of law, thereby ignoring the word "relevant" as a qualifying adjective, and also ignoring the introductory phrase that governs the entirety of § 706: "To the extent necessary to decision . . .."[150] It is odd to offer an argument based on the literal language of a statute and then ignore some of that language. These qualifications suggest, at the very least, that the

145. *See* Judiciary Act of 1789, §§ 3-5, 1 Stat. 73, 73-75 (1789); Fed. R. App. P. 3, 4, 5.

146. See 5 U.S.C. § 704 (providing judicial review for "[a]gency action made reviewable by statute and final agency action"). Thus, the court will ordinarily require a litigant to have taken advantage of any internal appeals process that has been established within the agency. *See, e.g.*, Ticor Title Ins. v. Fed. Trade Comm'n, 814 F.2d 731 (D.C. Cir., 1987) (review is precluded by doctrine of exhaustion, finality or ripeness when litigant appealed to courts before completing agency appeal process).

147. *See generally* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996).

148. Kisor v. Wilkie, 139 S. Ct. 2400, 2432-34 (2019) (Gorsuch, J., concurring).

149. *Id.* at 2432.

150. See 5 U.S.C. § 706 (preamble).

courts have discretion to determine the considerations needed for them to carry out their responsibilities. If they conclude the agency should be given discretion to interpret its authorizing statute as it sees fit, then the courts' view of what would be its own interpretation of the statute is not relevant or necessary to the decision.

Moreover, it can be readily argued that the Court has in fact determined the law that applies when an agency interprets its authorizing statute. That determination is the *Chevron* decision. The fact that *Chevron* creates a presumption of validity for agency determinations does not make subsequent decisions based on that presumption failures to decide the law. Rather, they are decisions of law based on the presumption the Supreme Court has established. For the first third of the twentieth century, federal courts evaluated economic legislation to determine whether it was a constitutionally valid response to a specific problem.[151] In *West Coast Hotel v. Parrish*, the Court declared that the validity of economic legislation was to be presumed.[152] That was not an abandonment of legal responsibility but a change in the substantive rule by which such responsibility is exercised.

While these linguistic and doctrinal considerations provide a sufficient answer to Justice Gorsuch's objection, the theory presented in this Part suggests a further answer. It argues for a conceptual shift from the idea of judicial review as a means of correcting legal judgment to the idea of review as a mode of monitoring a different institution. From this perspective, the APA does not require the federal courts to decide questions of law de novo. What is does is give the federal courts a role in supervising the actions taken by administrative agencies. Inherent in the concept of supervision is that the supervisor determines the level of detail with which it acts. It can choose to micromanage, or it can choose to grant its subordinate a range of discretion. When a court is reviewing the decisions of a complex institution, dealing with technical areas where it possesses expertise and the court does not, and which has its own internal mechanisms for error correction, micromanagement seems like a poor choice of strategy.

CONCLUSION

Far from being a temporary respite on the way to ultimate demise, *Kisor* reaffirms a doctrine that courts reviewing administrative action

151. The emblematic case was *Lochner v. New York*, 198 U.S. 45 (1905) (striking down New York maximum hours law as a violation of due process liberty of contract). *See generally* CUSHMAN, *supra* note 105; PAUL KENS, LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL (1998); MORAG-LEVINE, *supra* note 105.

152. 300 U.S. 379, 391 (1937) ("regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"); *see also* CUSHMAN, *supra* note 105, at 227.

will continue to use and continue to find useful. To overrule *Auer* would have made a muddle of administrative law at the operational level by creating complex and cross-cutting tensions with the prevailing *Chevron* doctrine. In addition, it would have conflicted with the theory on which that doctrine is based, creating additional confusion as new situations arise. It is difficult to resist the suspicion that this is in fact what the opponents of *Auer* want, that the vociferous assault on this technical doctrine in a technical field is motivated by a generalized hostility to modern administrative governance.[153] There may be no objective way to argue that this hostility is wrong, and it seems to have achieved significant victories at the level of national politics. But that is where it should be advocated, and where the general value of regulatory governance should be debated. Attempting to advance this position by creating confusion at the level of legal doctrine is ill-advised, and perhaps an indication of a fear that the American public will ultimately reject this attack on our basic means of achieving our collective values.

153. *See generally* Metzger, *supra* note 96; Rubin, *supra* note 96.