COMMENT

SEE YOU LATER . . . "AUER"-GATOR: TIME TO END JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS OF THEIR OWN MATERIALS*

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* J.D. Candidate, University of Houston Law Center, 2018. Thank you to Boards 55 & 56 of the Houston Law Review for their work editing this Comment.

I. INTRODUCTION

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[1]

1. THE FEDERALIST No. 47, at 219 (James Madison) (Jacob E. Cooke ed., 1961).

For more than seventy years, the courts of the United States have been burdened by the practice of judicial deference to agency interpretations of regulations promulgated by those same agencies.[2] In 1945, the Supreme Court decided *Bowles v. Seminole Rock & Sand Co.*, holding that federal courts must defer to an administrative agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation."[3] In more recent years, the deference afforded by the decision in *Seminole Rock* has been referred to as "*Auer* deference."[4] The practice of deferring the role of regulatory interpretation to administrative agencies is noteworthy as it allows the executive branch to implement rules, which bind with the force of legislative statute, that are unreviewable by the courts unless the agency's interpretation is clearly wrong.[5] After decades of deference, it is time for the Supreme Court to reassess the practice of "*Auer* deference" and reassert judicial review over administrative agencies. However, given the Court's repeated hesitance to do so,[6] perhaps the solution to deference problems lies in one of the other branches of government.

This Note will lay out the arguments in favor of doing away with "*Auer* deference." Section II will give a brief historical overview of the cases and law that have shaped "*Auer* deference" and allowed it to remain in effect. Section III will discuss the increase in skepticism of *Auer* throughout the federal judiciary. Section IV will discuss the circuit split that has developed between the Fifth Circuit, which has taken steps to walk back *Auer*, and other circuit courts that have continued to defer to agencies. Additionally, this section will consider the Supreme Court's most recent denial of certiorari for a case touching on the principles of *Auer*. Finally, Section V considers the changing political climate and discusses the proposed changes in the executive branch that could do away with the *Auer* problem altogether. Section VI will conclude this Note.

II. A HISTORY OF DEFERENCE

In order to understand *Auer* deference and its impact on the

2. Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 789 (2014).

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

4. Gonzales v. Oregon, 546 U.S. 241, 257 (2006); *see* Leske, *supra* note 2, at 789 n.4 (discussing the unexplained appearance of the term "*Auer* deference" in the last decade).

5. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 615 (1996).

6. *See* discussion *infra* Section IV.C.

law in this country, it is vital to look at the case law that allowed it to develop and remain in effect for the past several decades. This section will offer a brief history of the seminal cases in administrative law dealing with judicial deference to agency interpretation of laws and regulations starting with *Seminole Rock*, which began the deference regime that would be reinforced in *Auer* and ending with more recent decisions following the Court's decision in *United States v. Mead Corp*.[7]

A. Bowles v. Seminole Rock & Sand Co.

Seminole Rock arose from a dispute regarding price controls on crushed stone during World War II.[8] The Office of Price Administration derived the power to implement price controls through regulations from the Emergency Price Control Act of 1942.[9] The issue presented involved the amount a seller of crushed stone could charge in a month for stone ordered versus stone actually delivered.[10]

The Fifth Circuit determined that the agency was in error in finding that the maximum permissible price was based on the amount of crushed stone actually delivered during a month.[11] The court laid out two criteria for which agency interpretations of laws or regulations would be binding upon and enforceable by the courts: first, the interpretations must be "in harmony with and tend to effectuate the cardinal purposes of the law," and second, the interpretations "may not be unreasonable."[12] Using these two criteria, the court went on to determine that the agency's interpretation was "unreasonable" and at odds with the "letter and spirit of the Act."[13]

The Supreme Court reversed the Fifth Circuit and in doing so created, without any detailed reasoning,[14] the standard of

7. United States v. Mead Corp., 533 U.S. 218 (2001).

8. *Seminole Rock*, 325 U.S. at 412 (1945).

9. Emergency Price Control Act of 1942, 50 U.S.C. § 901(a) (1946) ("It shall be the policy of those departments and agencies of the Government dealing with wages . . . within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.").

10. *See* Bowles v. Seminole Rock & Sand Co., 145 F.2d 482, 484 (5th Cir. 1944), *rev'd*, 325 U.S. 410 (1945).

11. *Id.*

12. *Id.*

13. *Id.* at 485.

14. Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 636–37 n.31 (2014) (citing Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617–18

deference that remains over seventy years later. In its brief analysis the Court noted that the case "involves an interpretation of an administrative regulation," and as such, the Court should "look to the administrative construction" when reviewing the interpretation.[15] While briefly noting that congressional intent may be relevant when choosing between various constructions, without any further explanation the Court stated that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[16] However, the Court's explanation that follows this strong statement in favor of deference involves a strict textual analysis of the regulations in question.[17] The Court provided what it believed to be the "evident" meaning of the regulation[18] and only used the agency's interpretation of the rule as a means to bolster the Court's own interpretation.[19] The Court ultimately reversed the decision of the lower courts, not because they failed to afford proper deference to the agency's interpretation, but instead because "[t]he two courts below erred in their interpretation of this regulation."[20] In sum, although *Seminole Rock* is the case that established the rule of deference to an agency's reasonable interpretation of its own regulations, the Court in deciding the case, did not apply this standard as a determinative factor.[21]

(2013) (Scalia, J., concurring in part and dissenting in part)) (detailing Justice Scalia's concern regarding the Court's decision to create a rule supporting deference to agency interpretations without first justifying that result through a reasoned opinion); *see also* Manning, *supra* note 5, at 614–16; Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1454 (2011).

15. *Seminole Rock*, 325 U.S. at 413–14.

16. *Id.* at 414.

17. *Id.* (analyzing Section 1499.153(a) of Maximum Price Regulation No. 188, which defines what the "highest price charged during March, 1942" means).

18. *Id.* at 415 (determining that the facts of each case should be tested by "rule (i); only if that rule is inapplicable may rule (ii) be utilized; and only if both rules (i) and (ii) are inapplicable is rule (iii) controlling"). Rule (i) defined the highest price as the highest price charged for delivery during the month in question. *See* Maximum Price Regulation No. 188, 7 Fed. Reg. 7968, 7968 (Oct. 8, 1942). Rule (ii) came in effect if there were no deliveries in the month in question and set the highest price as the seller's highest offering price to a purchaser in that month. *Id.* Rule (iii) came into effect if there was neither a delivery nor an offering price and set the highest price as the price charge "to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers." *Id.* at 7869.

19. *See Seminole Rock*, 325 U.S. at 417.

20. *Id.* at 418.

21. Healy, *supra* note 14, at 636–37 n.31.

B. Auer's *Progeny*

1. Enactment of the Administrative Procedure Act ("APA") The next significant development in administrative law occurred in the year following the *Seminole Rock* decision with the enactment of the APA.[22] The purpose of the APA was to "improve the administration of justice by prescribing fair administrative procedure."[23] The APA prescribed the procedure for rulemaking, public notice, agency adjudication, and set the limits of agency jurisdiction.[24] The APA includes a section on judicial review that defined who had the right to review, the form and action of review, reviewable acts, interim relief, and the scope of review.[25] While the APA laid out the scope of judicial review, it did nothing to influence the Court's understanding of the proper standard of review,[26] causing judicial deference to agency interpretation to survive the codification of agency procedures.

2. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. The Court's decision in *Chevron* represented a more formal approach to agency deference with a particular emphasis on the separation of powers.[27] The opinion identifies two questions that confront the Court when reviewing an agency's construction or interpretation of a statute.[28] First, the Court must find

22. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 500 *et seq*.).

23. 60 Stat. at 237.

24. *Id.* §§ 2–5, 60 Stat. at 237–40.

25. *Id.* § 10 at 243–44.

26. Healy, *supra* note 14, at 640–44. Healy discusses two cases in which the Court adopted the reasoning in *Seminole Rock* after the implementation of the APA and highlighted a continued willingness to adopt deference to agency interpretations of their own materials. *Id.* at 640–44. *See also* Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, 367 U.S. 396, 408 (1961) ("We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision."); Udall v. Tallman, 380 U.S. 1, 4 (1965) ("The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it.").

27. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); Michael P. Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 675–76 (2002). Healy details the role separation of powers played in the *Chevron* decision as a canon of construction, specifically noting that "[t]he canon clearly recognizes the primacy of the legislature by holding unambiguously expressed congressional intent determines the content of law and must be given effect." *Id.* at 675 (citing *Chevron*, 467 U.S. at 843 n.9) (internal quotation marks omitted).

28. *Chevron*, 467 U.S. at 842–43.

"whether Congress has directly spoken to the precise question at issue," and then, if the answer to this question is that Congress was silent or ambiguous, the Court should ask whether the agency's construction is "based on a permissible construction of the statute."[29] Additionally, the Court reemphasized the considerable weight that should be given to an executive department's construction of a statutory scheme it has been assigned to administer, as well as the principle of deference to agency interpretations.[30] Ultimately, *Chevron* requires only that an agency's interpretation be one of any number of reasonable constructions, removing any judicial inquiry into the ultimate wisdom of that interpretation.[31]

C. Auer v. Robbins

The case from which "*Auer* deference" takes its name involved a dispute regarding overtime wages for police sergeants based on the Secretary of Labor's (the "Secretary") interpretation of the Fair Labor Standards Act of 1938 ("FLSA").[32] The opinion, written by the late Justice Scalia, discussed deference to the agency on two levels. First, it discussed deference to the "salary-basis" test as a permissible interpretation of the FLSA; second, it discussed deference to the Secretary's interpretation of the agency's own test.[33]

Scalia began by recognizing that Congress gave the Secretary the power to "defin[e] and delimi[t]" the scope of exemptions under the FLSA for executive, administrative, and professional employees.[34] Additionally, Scalia pointed out that the "salary-basis" test had been in existence for decades prior to its application in this instance.[35] As the "salary-basis" test used by the Secretary was an interpretation of federal law, the Court applied the two-step test from *Chevron* to determine the level of deference to afford

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29. *Id.* This two-step process was simplified and put into song and dance by a group of law students at NYU. Lewie Briggs, *The Chevron Two Step*, YOUTUBE (May 4, 2014), https://www.youtube.com/watch?v=uHKujqyktJc.

30. *Chevron*, 467 U.S. at 844.

31. *Id.* at 866.

32. Auer v. Robbins, 519 U.S. 452, 455 (1997). More specifically, the question was whether the Secretary's "salary-basis" test for determining exemption from the FLSA was a permissible reading of the statute. *Id.* at 454.

33. *Id.* at 454–55.

34. 29 U.S.C. § 213(a)(1) (2012).

35. *Auer*, 519 U.S. at 457; *see also* 19 Fed. Reg. 4405, 4406 (1954) (showing existence of the "salary-basis" test in 1954); 29 C.F.R. §§ 553.2(b), 553.32(c) (1996) (showing the salary-basis test's applicability to public sector employees).

the test.[36] The Court determined that Congress had not "directly spoken" to the validity of the test, and further determined that the test was a "permissible construction of the statute."[37]

The next question the Court considered was whether the application of the "salary-basis" test to public-sector employees was proper.[38] The Court noted that the "salary-basis test is a creature of the Secretary's own regulations," and in doing so, applied the "plainly erroneous or inconsistent" test from the *Seminole Rock* decision.[39] Scalia then stated that the "deferential" standard was easily met in this instance, and the Court extended deference to the Secretary's interpretation of the test.[40]

Notably, it does not appear that the *Chevron* decision had any effect on the standard of deference given to agency interpretations of their own regulations.[41] In other Supreme Court decisions post-*Chevron*, the Court alludes to the interplay between *Chevron* and *Auer*/*Seminole Rock* in their legal effect[42] and perhaps offers a clearer understanding of the rationale behind granting agencies deference.[43]

D. United States v. Mead Corp.

The next addition to administrative law doctrine came in 2001 with the *Mead* decision. In *Mead*, the Court added another factor for consideration when determining the deference used to evaluate an agency decision—congressional intent.[44] This new step requires the Court to first determine whether there is an "express delegation of authority to the agency to elucidate" a certain statute through regulation.[45] When Congress has directly delegated

36. *Auer*, 519 U.S. at 457.

37. *Id.* (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

38. *Id.* at 458.

39. *Id.* at 461. For *Seminole Rock* reasoning, *see supra* Section II.A.

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

41. Healy, *supra* note 14, at 648. Specifically, Scalia does not apply a two-step test to the deference decision as in *Chevron*, the first step presumably being to determine the presence of ambiguity in the regulation, but instead simply restates the single level of analysis from the *Seminole Rock* decision. *Id.*

42. *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (explaining that *Seminole Rock*/*Auer* deference does not require the Court to choose the best interpretation, only that the interpretation used by the agency is an acceptable one).

43. *See* Healy, *supra* note 14, at 656.

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

45. *Id.* at 227 (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)).

authority to the agency, then the proper standard of review is the *Chevron* standard.[46] If the Court finds there is no express delegation of authority, then a *Skidmore* analysis should be applied.[47] Identifying the source of the law being reviewed allows the Court to determine whether there has been a delegation of authority. If the source of the material being reviewed is the agency, then the agency has exercised lawmaking authority delegated to it by Congress.[48] However, when the source is Congress and an agency has "simply decided what it believes the ambiguous statute means," there has been no delegation of authority.[49]

E. Decisions Post-Mead

The Court's decision in *Mead* created a change from the typical reflexive adherence to *Auer* deference in favor of the older *Skidmore* regime.[50] This shift is especially evident with respect to a series of cases decided after *Mead*, reflecting the Court's reluctance to utilize the *Auer* standard as readily as it had in the past.[51]

1. Gonzalez v. Oregon. In *Gonzalez v. Oregon*, the Court reviewed a lower court's decision to afford *Auer* deference to the United States Attorney General's decision to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide.[52] Applying the source of law analysis outlined in *Mead*, the Court determined that the regulation in question did "little more than restate the terms of the statute itself," and therefore, deference under *Auer* was inappropriate.[53] The Court then determined that the interpretation of the statute was unlawful under a *Skidmore*

46. *Id.* (stating that there is an express delegation of authority to the agency when Congress explicitly leaves a gap for the agency to fill). For an explanation of *Chevron* analysis, *see supra* Part II.B.2.

47. *See Mead*, 533 U.S. at 237. *Skidmore* was a 1944 case in which the court looked to the agency administrator's rulings, opinions, and interpretations as "a body of experience and informed judgment" that courts could rely on for guidance. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

48. Michael P. Healy, *Reconciling* Chevron*,* Mead*, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 39–40 (2011).

49. *Id.* at 40.

50. Healy, *supra* note 14, at 657–58.

51. *Id.* 657–58.

52. Gonzalez v. Oregon, 546 U.S. 243, 248–49 (2006).

53. *Id.* at 257.

analysis.[54] The decision in *Gonzalez* is noteworthy because the Court put agencies on notice, making it clear that an agency cannot simply restate statutory ambiguity in its own regulations as a means of obtaining *Auer* deference.[55]

2. Talk America, Inc. v. Michigan Bell Telephone Co. Talk America dealt with the question of whether a local telephone provider "must make certain transmission facilities available to competitors at cost-based rates."[56] Under review was the Federal Communication Commission's ("FCC") interpretation of the Telecommunications Act of 1996.[57] After determining that both the statute and agency regulation were ambiguous,[58] the Court looked to the FCC's interpretation of its regulations as presented in its *amicus* brief.[59] Ultimately, the Court afforded the FCC's interpretation *Auer* deference, but only after conducting a thorough review of the steps the agency took in reaching its interpretation.[60] This decision represents the Court's adherence to the *Auer* regime while signaling a movement towards a more thorough review under the previously more lenient standard.[61]

3. Christopher v. SmithKline Beecham Corp. Christopher involved the legal status of drug representatives for pharmaceutical companies under the Fair Labor Standards Act ("FLSA").[62] In conducting its analysis, the Court identified a list of circumstances where *Auer* deference is improper:

> [1] when the agency's interpretation is "plainly erroneous or inconsistent with the regulation," . . . [2] when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in

54. *Id.* at 269.

55. *See* Stephenson & Pogoriler, *supra* note 14, at 1464, 1467–68 (discussing the idea that agencies could copy statutory ambiguity into their regulations as a means to avoid a *Mead* analysis).

56. Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 53 (2011).

57. *Id.* at 53–54. *See* 47 U.S.C. § 251(c)(2) (2012).

58. *Talk Am.*, 564 U.S. at 57–59.

59. *Id.* at 59.

60. *Id.* at 59–61.

61. *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 277–78 (2009) (representing another instance where the Court found ambiguity in both the statute and the agency regulation, and afforded *Auer* deference after conducting its own analysis of the agency's interpretation).

62. Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 147 (2012). Specifically, the dispute arose from the term "outside salesman," which was not defined by statute, but delegated to the Department of Labor to provide a definition. *Id.* at 147.

> question," . . . [3] when the agency's interpretation conflicts with a prior interpretation . . . [4] or when it appears that the interpretation is nothing more than a "convenient litigating position," . . . or [5] a "post hoc rationalizatio[n]" advanced by an agency seeking to defend past agency action against attack.[63]

Under this reasoning, the Court decided not to grant *Auer* deference, citing the agency's decision to change its interpretation of the regulation without providing sufficient notice.[64] The Court's reasoning essentially added a preliminary step into the *Auer* analysis similar to the test for applying *Chevron* deference set out in *Mead*.[65]

III. *AUER* SKEPTICISM

The last decade has seen an increased call for skepticism when applying *Auer* deference to agency interpretations of their own regulations.[66] This section will highlight a few of the key points raised by skeptics in the Supreme Court and circuit courts as well as in the scholarly community.

A. Supreme Court Skeptics

In *Decker v. Northwest Environmental Defense Center*, Chief Justice Roberts, joined by Justice Alito, wrote a brief concurring opinion focusing solely on the idea that it may be appropriate to reconsider the deference principles set forth by *Seminole Rock* and *Auer*.[67] Justice Scalia took it a step further: "For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.'"[68]

Later, in *Perez v. Mortgage Bankers Association*, Justice Alito expressed interest in hearing "a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."[69] Justice Scalia chimed in again, arguing strongly for

63. *Id.* at 155 (citations omitted) (alteration in original).

64. *Id.* at 155–56.

65. Healy, *supra* note 14, at 669.

66. *Id.* at 657 (tracing the recent skepticism of *Auer* to the *Mead* decision in 2001).

67. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring).

68. *Id.* at 616 (Scalia, J., concurring in part and dissenting in part) (alteration in original).

69. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J.,

the abandonment of *Auer* and for application of the APA as it was originally written.[70] Justice Thomas added that the deference afforded to agencies by *Auer* raises constitutional questions related to the separation of powers and the judiciary's ability to provide a check on the other branches.[71]

Most recently, Justice Thomas reiterated his opinion of the need to do away with *Auer* deference and lambasted the Court's denial of a case that would have afforded that opportunity.[72]

B. Circuit Court Skeptics

1. Second Circuit. In 2013, the Second Circuit heard *Berlin v. Renaissance Rental Partners, LLC*, a case in which the Consumer Financial Protection Bureau ("CFPB") and the Department of Housing and Urban Development ("HUD") were seeking deference from the court to their interpretation of one of their own regulations.[73] The court ultimately held that the CFPB and HUD interpretations should be afforded deference based on the idea that "[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation."[74] Under this standard, the court determined that the agency interpretation was "reasonable and . . . warrant[ed] deference."[75]

In his dissent, Chief Judge Jacobs criticized the court for adopting what he believed to be the agency's improper interpretation of the regulation in question.[76] Judge Jacobs saw

concurring).

70. *Id.* at 1211–13 (2015) (Scalia, J., concurring in the judgment).

71. *Id.* at 1213 (2015) (Thomas, J., concurring in the judgment).

72. United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608–09 (2016) (Thomas, J., dissenting from denial of certiorari).

73. Berlin v. Renaissance Rental Partners, LLC, 723 F.3d 119, 121, 125 (2d Cir. 2013). The regulation defined "lot" in part as an interest in land that "includes the right to the exclusive use of a specific portion of land"; the interpretation in question applied this definition to a condominium in a multi-story building. *Id.* at 121. *See* 12 C.F.R. § 1010.1(b) (2017) ("*Lot* means any portion, piece, division, unit, or undivided interest in land located in any state or foreign country, if the interest includes the right to the exclusive use of a specific portion of the land.").

74. *Berlin*, 723 F.3d at 125 (quoting Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 613 (2013)).

75. *Id.* The main factor the court analyzed in determining the reasonableness of the interpretation was its consistent and long-standing use by the agency. *Id.* at 125–26.

76. *Id.* at 130–131 (Jacobs, C.J., dissenting). Chief Judge Jacobs believed that the statute and regulation were clearly written to only include transactions in land and that because individual condominiums do not sit on land they should not be included in the "lot" definition. *Id.* at 129–30.

the agency's interpretation as a means of expanding its regulatory jurisdiction and through such action, expanding its own power.[77] Echoing the words from Justice Scalia's dissent in *Decker*, Judge Jacobs declined to "give effect to a reading of [the] regulations that is not the most natural one, simply because [the agency] says that it believes the unnatural reading is right."[78] In support of his opinion that the agency interpretation was unreasonable, Judge Jacobs looked to the congressional intent of the original act and came to the conclusion that the agency interpretation was not in line with what Congress originally intended.[79]

2. Sixth Circuit. In 2013, the Sixth Circuit was presented with a case in which it had to determine whether a HUD policy involving the Real Estate Settlement Procedures Act was binding and should be afforded deference by the court.[80] Violations of the act, which concerned real estate agent conduct, constituted a crime.[81] The policy statement had the effect of creating an additional requirement for defendants to fall under the safe harbor exemption included in the Act.[82] The court determined that the agency's interpretation of the act in the policy statement was not due any type of judicial deference.[83]

More relevant for a discussion of *Auer* deference is the concurring opinion prepared by Judge Sutton, which explores the implications of *Auer* deference on the rule of lenity.[84] The first

77. *Id.* at 131–33.

78. *Id.* at 130 (quoting *Decker*, 568 U.S. at 616 (Scalia, J., dissenting)) (alterations in original).

79. *Id.* at 131–32. The Land Sales Act was originally intended to protect against fraudulent sale of undeveloped land in areas that could not be easily developed. *Id.* at 132. The Act was meant to protect unimproved lots, which a condominium by any definition is not. *See id; see also* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 778 (1976) (stating that the act was "designed to prevent false and deceptive practices in the sale of unimproved tracts of land").

80. Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 724 (6th Cir. 2013).

81. *See* 12 U.S.C. § 2607 (2012).

82. *Carter*, 736 F.3d at 726. The statute provides three prerequisites for the safe harbor, which the defendants in this case met. The plaintiffs attempted to claim, however, that they did not qualify for safe harbor based on the fourth prerequisite created by the policy statement. *Id.*

83. *Id.* at 726–27. The court walked through the analyses for both *Skidmore* and *Chevron* deference and determined that the agency interpretation was due no deference under either line of reasoning. *Id.* at 726–28.

84. *Id.* at 732–33 (Sutton, J., concurring). The rule of lenity instructs the courts to construe ambiguous penal statutes in favor of defendants. United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("[A]lthough penal laws are to be construed strictly, the intention of the legislature must govern in their construction."). The concept of the rule of lenity arises out of a desire to ensure that defendants have fair notice of the law and that elected

issue with the interplay between judicial deference and the rule of lenity is that the rule of lenity acts to forbid judicial deference to executive agency's interpretations of criminal statutes.[85] In the words of Justice Scalia, allowing agencies like the Department of Justice to fill in the gaps through interpretations of criminal statutes would "turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with a doctrine of severity."[86] Additionally, the rule of lenity would defeat deference to an agency interpretation of a criminal statute in the first step of a *Chevron*-type analysis.[87] An interesting wrinkle develops when applying the rule of lenity to a situation that would normally be afforded *Auer* deference.[88]

Judge Sutton's concern is that unless the rule of lenity is applied to agencies, *Auer* deference would allow agencies to defeat the purpose of the rule by construing criminal laws against defendants.[89] Even more concerning is the broader scope of documents that are eligible for deference under *Auer*, including something as simple as a brief prepared by the agency.[90] Judge Sutton offers the hyperbolic scenario of a government lawyer with a laptop computer creating new federal crimes by simply adding a footnote to a brief to the court.[91] While this scenario is not likely to play out, it offers a strong critique to the broad deference allowed by *Auer*, at least as it relates to criminal law.

3. Seventh Circuit. More recently, in 2015, the Seventh Circuit denied an en banc rehearing to determine whether it would be proper to afford *Auer* deference to a Department of Education interpretation of a regulation regarding student loan repayment.[92]

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representatives, not courts, are defining what should be considered criminal activity. United States v. Bass, 404 U.S. 336, 348 (1971).

85. *Carter*, 736 F.3d at 730 (Sutton, J., concurring).

86. Crandon v. United States, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment).

87. *Carter*, 736 F.3d at 731 (Sutton, J., concurring). The rule of lenity would operate to resolve any statutory ambiguity during the first step of a *Chevron* analysis, removing any ambiguity that the agency would need to clarify through a differing interpretation. *Id.*

88. *Id.* at 732–33.

89. *Id.* at 733. Judge Sutton mentions two ways that an agency could construe a criminal law against a defendant: first, "by resolving ambiguities in the criminal statute"; second, "by resolving ambiguities in any regulation." *Id.*

90. *Id.; see also* Auer v. Robbins, 519 U.S. 452, 462 (1997) (stating that although the interpretation being argued is in the form of a brief prepared by the Secretary, this form does not make the interpretation unworthy of deference).

91. *Carter*, 736 F.3d at 733 (Sutton, J., concurring).

92. *See* Bible v. United Student Aid Funds, Inc., 799 F.3d 633, 650 (7th Cir.), *reh'g*

No active judge requested a vote on the rehearing, and each judge on the original panel voted to deny the rehearing.[93] Judge Easterbrook authored a concurring opinion to explain the court's hesitance to approach the *Auer* issue.[94] After reciting the facts and procedural history of the case,[95] Judge Easterbrook called into question the soundness of the *Auer* doctrine, and ultimately, concluded that it would be imprudent to rehear the issue based on how *Auer* should apply when "*Auer* may not be long for this world."[96]

IV. THE CIRCUIT SPLIT CREATED BY THE FIFTH CIRCUIT

A. The Fifth Circuit Tosses a Bad Egg

As discussed above, the Supreme Court and several circuit courts have expressed varying degrees of skepticism regarding the future of *Auer* deference in the federal courts.[97] The Fifth Circuit took its skepticism a step further in *Elgin Nursing and Rehabilitation Center v. U.S. Dep't of Health and Human Services*, creating precedent in favor of cabining *Auer* and offering a framework under which the deferential doctrine could meet its end.[98]

1. Background

a. History. In February 2010, Elgin Nursing and Rehabilitation Center ("Elgin") was investigated by the Texas Department of Aging and Disability ("TDAD") for serving "soft

denied, 807 F.3d 839 (7th Cir. 2015).

93. *Bible*, 807 F.3d at 839.

94. *Id.* at 840–41 (Easterbrook, J., concurring in the denial of rehearing en banc).

95. *Id.* This case involved the transfer of student loan debt and an attempt by the new owner of the debt to collect the debt even in the presence of a "rehabilitation agreement". *Id.* at 840. The key issue was whether the agency correctly interpreted that a "rehabilitation agreement" amounted to a "repayment agreement." *Id.* If the agreement at issue was a "repayment agreement," then it would forbid the addition of collections cost to a debt. Each of the judges on the original panel wrote separate opinions, and the majority ultimately decided to defer to the agency interpretation. *Id.*

96. *Id.* at 841. Judge Easterbrook cites the opinions of the three justices in *Perez v. Mortgage Bankers Ass'n* as signaling a trend towards reservations against automatic deference to agency interpretation made outside the rule-making process, specifically noting that Justice Scalia, *Auer*'s author, was among the justices expressing reservations. *Id.*; *see supra* Section III.A; *see also* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012); Manning, *supra* note 5, at 614–16.

97. *See supra* Part III.

98. *See infra* Sections IV.A.2, IV.A.3.

cooked" unpasteurized eggs to its elderly residents.[99] Federal law required long-term care facilities to "(1) [p]rocure food from sources approved or considered satisfactory by Federal, State, or local authorities; (2) [s]tore, prepare, distribute, and serve food under sanitary conditions; and (3) [d]ispose of garbage and refuse properly."[100] TDAD found Elgin to be in noncompliance with the regulation, concluding that unpasteurized eggs served "soft-cooked" could lead to serious illness or death.[101]

In March 2010, the Center for Medicare and Medicaid Services ("CMS") "adopted TDAD's findings and imposed . . . penalties [including]: a civil monetary fine of $5,000, termination of Elgin's provider-of-care agreement, a denial of payment for new admissions, and withdrawal of Elgin's approval to conduct nurse training."[102] Elgin then requested a hearing in front of an administrative law judge to contest the finding of a safety deficiency and the fine.[103] Elgin presented evidence in support of the safety of its culinary operations including: an affidavit of Mary Abershire, Elgin's dietary consultant;[104] an affidavit of Gary Jefferson, the cook who prepared the eggs;[105] and an affidavit and video of Pamela Sue Brummit, "a registered dietician and food-safety instructor."[106] CMS simply offered TDAD's statements of deficiencies, a CMS letter, and a report from the Department of Agriculture discussing the safe preparation of eggs.[107] In upholding CMS's finding of deficiency and the reasonableness of the monetary penalty, the administrative law judge "found that the yolks were too soft, the whites uncongealed, and the final product not safely edible. CMS had made a *prima facie* case of noncompliance . . . ."[108]

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

100. 42 C.F.R. § 483.35(i)(1)–(3) (2013) (current version at 42 C.F.R. § 483.60(i) (2017)).

101. *Elgin*, 718 F.3d at 490.

102. *Id.* at 489–90. All the penalties except the civil monetary penalty of $5,000 were later rescinded by CMS. *Id.* at 490.

103. *Id.*

104. *Id.* ("[S]he had conducted temperature checks on eggs cooked during TDAD's survey and found them to be above the required 145°F. in all instances.").

105. *Id.* ("He described his method of cooking the eggs . . . [and] added that no TDAD surveyor observed him cooking eggs, spoke with him, or took temperatures in the course of the survey.").

106. *Id.* The video showed her experiment replicating Johnson's cooking techniques in which she cooked eggs with temperatures ranging from 153 to 156 degrees that still had yolks that were soft or slightly runny. *Id.*

107. *Id.*

108. *Id.*

Elgin next appealed to the Department of Health and Human Services ("DHHS") Departmental Appeals Board, which upheld the finding of the administrative law judge.[109] Under federal law, the Fifth Circuit has jurisdiction to review the Appeals Board decision.[110]

b. Levels of Deference and Interpretation. The court noted that in order to determine what level of deference to give the DHHS's legal interpretations it must look at "three levels of interpretation nested within one other".[111] These levels include interpretation of the Code of Federal Regulations, the CMS's State Operations Manual ("SOM"), and the CMS's interpretation of that the SOM.[112]

The first level involves interpretation of the Code of Federal Regulations, specifically that long-term care facilities are required to "[s]tore, prepare, distribute, and serve food under sanitary conditions."[113] The Court found that language to be sufficiently vague to require further specification, specifically the term "sanitary conditions."[114]

The second level of interpretation is the CMS's interpretive manual, the SOM, which provided:

> Cooking is a critical control point in preventing foodborne illness. Cooking to heat all parts of food to the temperature and for the time specified below will either kill dangerous organisms or inactivate them sufficiently so that there is little risk to the resident if the food is eaten promptly after cooking. Monitoring the food's internal temperature for 15 seconds determines when microorganisms can no longer survive and food is safe for consumption. Foods should reach the following internal temperatures: . . . Unpasteurized eggs when cooked to order in response to resident request and to be eaten promptly after cooking; 145 degrees F for 15 seconds; until the white is completely set and the yolk is congealed.[115]

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109. *Id.* The Appeals Board rejected Elgin's contention "that the evidence of smeared yolk alone was not sufficient to make a *prima facie* case of noncompliance." *Id.*

110. 42 U.S.C. § 1320a–7a(e) ("Any person adversely affected by a determination of the Secretary under this section may obtain a review of such determination in the United States Court of Appeals . . . .").

111. *Elgin*, 718 F.3d at 491.

112. *Id.*

113. 42 C.F.R. § 483.35(i)(2) (2013).

114. *Elgin*, 718 F.3d at 491.

115. *Id.* CMS has since issued interpretive guidance for the preparation of eggs in

The court identified further ambiguity in the SOM, particularly involving the "potentially dueling requirements regarding temperature and consistency of the egg."[116]

The third level of interpretation is the CMS's interpretation of the SOM's requirements.[117] The CMS interpreted the SOM "as imposing a conjunctive requirement . . . that . . . the egg must be cooked at 145°F., *and* the white must be completely congealed and the yolk firm."[118]

There is no question as to the level of deference the first and second levels of interpretation receive; however, it is less clear for the third level.[119] The court lays out three reasons that it should not afford deference: (1) to avoid ambiguous regulations, enforcement, and interpretation; (2) to protect the role of the courts; and (3) to enforce the right to fair notice.[120]

2. The Court's Reasoning

a. Avoiding Ambiguous Regulations, Enforcement, and Interpretation. Affording this type of deference to agencies is dangerous because it would allow agencies to "issue ambiguous regulations" and "to write and enforce ambiguous interpretations of them."[121] The court notes that several Supreme Court Justices have also expressed concern over this type of deference for this very reason.[122]

In *Thomas Jefferson Univ. v. Shalala*, Justice Thomas states that "[i]t would be . . . understandable . . . for an agency to issue vague regulations . . . [as] doing so [would] maximize[] agency power and allow [] agenc[ies] a greater [ability] to make law through adjudication" instead of through the "cumbersome rulemaking process."[123] Justice Scalia notes in *Decker* that there

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nursing homes, which states: "Unpasteurized eggs when cooked to order in response to resident request and to be eaten promptly after cooking must be cooked until all parts of the egg are completely firm." THOMAS E. HAMILTON, CTRS. FOR MEDICARE & MEDICAID SERVS.,, U.S. DEP'T OF HEALTH & HUM. SERVS., REF: S&C: 14-34-NH, ADVANCED COPY OF REVISED F371; INTERPRETIVE GUIDANCE AND PROCEDURES FOR SANITARY CONDITIONS, PREPARATION OF EGGS IN NURSING HOMES (2014), https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-14-34.pdf [https://perma.cc/6NBH-TRYU].

116. *Elgin*, 718 F.3d at 491.

117. *Id.*

118. *Id.* at 492.

119. *Id.*

120. *Id.* at 493.

121. *Id.*

122. *Id.* at 493 n.6.

123. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J.,

is an "incentive . . . to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect."[124] In that same case, Chief Justice Roberts acknowledges the serious questions set forth in *Seminole Rock* and *Auer* and indicates that the Court should stand ready to answer them when properly raised.[125]

b. Protecting the Role of the Courts. Granting CMS's interpretation of the SOM judicial deference would leave no further role for the courts. "[T]aken to its logical conclusion, it could effectively insulate agency action from judicial review."[126] Just as it is not the province of the Executive Branch to interpret the final meaning of a contract it enters into, it is not within the province of the Executive Branch to determine the final meaning of a "vague document interpreting a regulation."[127]

c. Enforcing the Right to Fair Notice. Finally, extending judicial deference to agency interpretations of their own regulations would give agencies the ability to sanction "wrongdoers" without fair notice of the wrong.[128] In *Christopher v. SmithKline Beecham Corp.*, the Supreme Court refused to defer to an agency that changed a long-held position in an enforcement action expressing concern for the lack of notice:

It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretation for the first time in an enforcement proceeding and demands deference.[129]

The Court goes on to say that allowing an agency to apply its own interpretation of a vague regulation "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires,'" and the regulation should not unfairly surprise sanctioned parties.[130]

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dissenting).

124. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part).

125. *Id.* at 615–16 (Roberts, C.J., concurring).

126. *Elgin*, 718 F.3d at 493.

127. *Id.*

128. *Id.*

129. Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 158–59 (2012).

130. *Id.* at 158.

3. The Final Determination. In order to encourage predictable rulemaking and prevent the usurpation of power by the executive,[131] the Court determined that it would be inappropriate to defer to DHHS's interpretation of the SOM.[132] The Court used traditional tools of textual interpretation to determine that the temperature and consistency requirements were disjunctive.[133] Based on this interpretation, the Court determined that CMS failed to present sufficient evidence to establish a *prima facie* case of noncompliance by failing to provide any evidence as to the temperature, cooking time, or cooking method of the eggs in question.[134]

B. Clinging to the Past

The Fifth Circuit created a circuit split by deciding not to extend *Auer* deference to the Texas Department of Aging and Disability in *Elgin*. Across the rest of the country, the other circuits have continued to follow *Auer*, affording administrative agencies *Auer* deference. The following section describes cases in the Fourth, Sixth and Ninth Circuit where *Auer* deference maintains a strong presence.

1. The Fourth Circuit: United States v. Deaton. In 2003, the Fourth Circuit heard an appeal of a case in which the government sued the Deatons under the authority of the Clean Water Act ("CWA").[135] The issue in this case was whether the U.S. Army Corps of Engineers properly interpreted its own regulation extending its jurisdiction under the CWA to "tributaries" to include roadside ditches.[136] The court summarized the interpretive problem: "the Deatons are arguing here that the Corps is misinterpreting its own regulation by using the tributaries

131. Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring).

132. *Elgin*, 718 F.3d at 494.

133. *Id.* at 495. The Court reasoned that if the phrases were read conjunctively one would be rendered meaningless. *Id.*; *see also* Duncan v. Walker, 533 U.S. 167, 174 (2001) (analyzing the proposed construction of a statute that would render the inclusion of "state" in "state and federal review" insignificant).

134. *Elgin*, 718 F.3d at 496.

135. United States v. Deaton, 332 F.3d 698, 701 (4th Cir. 2003). The Deatons failed to obtain a permit from the U.S. Army Corps of Engineers when they dug a ditch on their property and dumped the excavated dirt into the wetlands on their property. Those wetlands drained into a roadside ditch adjacent to the property that eventually flowed into navigable waters. *Id.* at 701–02.

136. *Id.* at 704. The court also discusses Congress's authority under the Commerce Clause to regulate tributaries of navigable waters under the CWA. *Id.* at 704–08.

provision, 33 C.F.R. § 328.3(a)(5), to assert jurisdiction over the roadside ditch."[137] Based on previous cases giving *Auer* deference to agencies, the analysis of this issue should have been as simple as determining whether the Corps' interpretation was "plainly erroneous," and if not, deferring to that interpretation. Here, however, the court combines *Chevron* and *Seminole Rock* into a muddled deference analysis to conclude that the agency's interpretation was proper.[138]

The court's analysis renders *Auer* and *Seminole Rock* practically unnecessary. The court begins with step one of the *Chevron* analysis, determining that the CWA was sufficiently ambiguous in its definition of "tributary".[139] The court recognizes that the next step in a typical *Chevron* analysis would be to determine whether the regulation was a reasonable construction of the statute.[140] Then, perhaps realizing that an agency's interpretation of its own regulation would be subject to *Auer*, the court discusses whether the agency's interpretation was "plainly erroneous".[141] Accordingly, the court examines whether the term "tributaries" is sufficiently ambiguous to allow for agency interpretation.[142] This is strikingly similar to step one of the *Chevron* test, in which the court determines whether the relevant statute speaks directly to the issue at hand.[143] The court then determined that the Corps' interpretation of the regulation was not plainly erroneous.[144] The court was then able to complete the

137. *Id.* at 708. Section (a)(5) references a more detailed definition of "tributary" in section (c)(3) of the same regulation which provides that "[a] tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches . . . ." 33 C.F.R. § 328.3(c)(3) (2017).

138. *See Deaton*, 332 F.3d at 708–12.

139. *Id.* at 709. The court points to the term "waters of the United States" as the ambiguous term allowing the *Chevron* analysis to continue. *Id. See supra* II.C, discussing the two-step *Chevron* analysis.

140. *Deaton*, 332 F.3d at 709.

141. *Id.* at 709–11.

142. *Id.* at 710. The court looked to the regulation itself and to dictionary definitions to determine whether "tributaries" was an ambiguous term. *Id. See* 33 C.F.R. § 328.3(a)(5) (2014) (defining "waters of the United States" to include tributaries); *see also Tributaries*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1993) (defining tributary); *Tributaries*, Webster's II New Riverside University Dictionary (1988) (defining tributary); Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 418 (1992) (suggesting that a word with multiple definitions, like "tributary," could be ambiguous).

143. Chevron, U.S.A., Inc. v. Nat. Res. Council, Inc. 467 v. 837 842 (1984).

144. *Deaton*, 332 F.3d at 710–11. The court's reasoning for its determination that the Corps' interpretation was not plainly erroneous resembles the second step of a *Chevron* analysis, recognizing that the Corps' construction of the meaning of "tributary" is one of many possible definitions and therefore not plainly erroneous. *Id.*

second step of the *Chevron* analysis, finding that the Corps' interpretation of the regulation was reasonable.[145] While the Fourth Circuit cited *Seminole Rock* in its analysis, this case is an example of how *Auer/Seminole Rock* deference can be replaced by a more reasoned and efficient *Chevron*-like analysis.

2. The Sixth Circuit: Atrium Medical Center v. U.S. Department of Health and Human Services. Like the Fourth Circuit in *Deaton*, in 2014, the Sixth Circuit deferred to an agency's interpretation of its own regulation under *Auer*, this time after a thorough analysis under *Mead*.[146] *Atrium Medical* involved an interpretation of the Medicare Act by the Department of Health and Human Services that calculated reimbursement amounts for two groups of hospitals.[147] The Medicare Act required the Secretary of Health and Human Services to adjust reimbursements for "wage-related costs" based on a "prospective payment rates" that accounts for differences in the cost of labor in different locations[148]—a task delegated to the Center for Medicare and Medicaid Services ("CMS") by regulation.[149]

The court first reviewed the dispute involving short-term disability calculations, and after a thorough discussion of whether to apply *Skidmore* or *Chevron* deference, determined that the Provider Reimbursement Manual ("PRM") should be given *Chevron* deference.[150] Only after deciding that "CMS's treatment of noninsurance short-term disability programs [was] simply not 'manifestly contrary' to section 1395ww(d)(3)(E)(i),"[151] the court, mentioned that the Secretary's use of the PRM to make her final decision deserved *Auer* deference.[152]

The court then moved to the issue of paying part-time weekend workers at full-time rates.[153] The court properly noted

145. *Id.* at 709–12.

146. Atrium Med. Ctr. v. U.S. Dep't of Health & Human. Servs., 766 F.3d 560, 566–75 (6th Cir. 2014).

147. *Id.* at 564. The disputed calculations include reimbursement for a short-term disability program paid from a hospital's general funds and reimbursement for a program that offered full-time pay for part-time weekend work. *Id.*

148. *Id.*; 42 U.S.C. § 1395w(d)(3)(E)(i) (2014).

149. 42 C.F.R. § 413.30 (2014).

150. *Atrium Med.l*, 766 F.3d at 570–73. *See also* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (supporting the court's view that *Chevron* review is proper).

151. *Atrium Med.*, 766 F.3d at 573 (quoting Henry Ford Health Sys. v. Dep't of Health & Human Servs., 654 F.3d 660, 666 (6th Cir. 2011)).

152. *Id.* at 574.

153. *Id.* at 574–75. The issue was how the unworked hours paid to the weekend workers should be treated under the PRM. *Id.*

that, in this instance, the Secretary's decision should be given *Auer* deference because it was based on relevant portions of the PRM.[154] However, instead of determining that the Secretary's interpretation was not "plainly erroneous," the court conducted a review of whether the Secretary's decision to apply one section of the PRM instead of another was "arbitrary, [and] capricious."[155] It appears that although the Sixth Circuit continues to recognize *Auer* as good law, the court, nonetheless, felt the need to supplement *Auer* with a more reasoned and analytical approach.[156]

3. The Ninth Circuit: Public Lands for the People, Inc. v. U.S. Department of Agriculture. This 2012 case dealt with the United States Forest Service's ("USFS") decision to limit the use of motor vehicles in the El Dorado National Forest.[157] Here, the court applied *Auer* without the additional reasoning discussed in the previous two cases, determining that the USFS's interpretation of its 2008 regulation[158] addressing the use of motor vehicles on public roads was not "plainly erroneous" and therefore deserved deference.[159] While this case presents a straightforward application of *Auer*, it also highlights a drawback to this type of broad deference—the tendency for agencies to create ambiguous regulations or read ambiguity into a plainly clear regulation, in order to provide themselves greater interpretive discretion.[160]

At issue was the USFS definition of "public road" which determined which roads in the El Dorado National Forest required prior approval for their use.[161] The court readily acknowledged that "the concept of a 'public road' may seem obvious," but it went on to defer to a definition that seems contrary to the term's obvious meaning.[162] The manual defines a public road, in relevant part, as "[o]pen to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on

154. *Id.* at 574.

155. *Id.* at 574–75. Arbitrary and capricious review is one of the standards given by the APA for judicial review of agency decisions. 5 U.S.C. § 706(2)(A) (2012).

156. Namely, that provided by the "arbitrary, [and] capricious" standard of review. *See Atrium Med.*, at 574–75; *see infra* notes 164–65 and accompanying text.

157. The USFS is an arm of the Department of Agriculture. Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 697 F.3d 1192, 1194 (9th Cir. 2012).

158. 36 C.F.R. § 228.4(a)(i) (2008).

159. *Public Lands*, 697 F.3d at 1199.

160. *See supra* Section IV.B.1. (discussing an example of ambiguous regulatory language and its enforcement by the promulgating agency).

161. *Public Lands*, 697 F.3d at 1199.

162. *Id.*

size, weight, or class of registration."[163] While the roads in question remain physically open to the public, the USFS determined that they did not fit the definition of "public road," because the 2008 regulation, worked to restrict the roads in the forest, effectively turning what seem to be obviously public roads into "non-public" roads.[164] Despite this, the court applies *Auer* and defers to the USFS interpretation of the term "public roads."[165] Particularly disturbing is the fact that the court spent a portion of its opinion acknowledging the potential damage to the owners of mineral interests in the forest, and, yet, with this application of deference, the appellants effectively lose the opportunity for any further recourse against the agency.[166]

C. The Court's Continued Reluctance to Step Back from Auer

While the Supreme Court has expressed skepticism as to the future of *Auer* deference,[167] the Court has also repeatedly denied granting certiorari to petitions from cases that would allow it to do away with the broad deferential standard.[168] Moreover, after the Fifth Circuit refused to afford *Auer* deference to the agency in *Elgin*, the agency did not petition the Supreme Court for review. Strategically, it would seem counterintuitive for an agency to seek review of a decision, like the one in *Elgin*, given the significant skepticism of *Auer*'s future. Why would an agency present the Supreme Court with a case that would allow the Court to put an end to *Auer* across the country instead of in only one circuit? It seems apparent that any decision by the Court would need to arise from a petition in a case decided by one of the circuits that continues to afford agencies deference under *Auer*.

This section discusses the Court's most recent opportunity to hear an argument in favor of cabining *Auer* and hypothesizes as to what criteria the Court is looking for in order to act on its well-

163. *Id*.

164. *Id*.

165. *Id*.

166. *Id*. at 1196. The miner's alleged injury involved the inability to access their mining claims, precluding them from the ability to benefit from their claims. *Id*.

167. *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339 (2013) (Scalia, J. concurring in part and dissenting in part); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part); United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).

168. *See* Deaton v. U.S., 541 U.S. 972 (2004) (denying certiorari); Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 568 U.S. 1194, 1194 (2013) (denying certiorari). These two examples of denial arise from petitions of two of the three cases discussed above. *See supra* Section IV.B.

documented skepticism of the doctrine.

1. Foster v. Vilsack: *The Most Recent Chance to Cabin* Auer. *Foster* is a case decided by the Eighth Circuit and involves a determination by the United States Department of Agriculture ("USDA") to designate a portion of the Foster's farmland as protected wetlands.[169] At the time of writing, the Supreme Court has met in conference and decided to deny certiorari to the Foster's petition.[170] This section will discuss the strength of the arguments made in the effort to review the Circuit Court's decision and better understand where these arguments might have fallen short.

a. Background. In 1985, Congress passed the Food Security Act of 1985, which authorized the USDA to make determinations as to what lands qualify as wetlands or converted wetlands under the Act.[171] The Fosters initially applied for a wetland determination to the National Resource Conservation Service ("NRCS"), an arm of the USDA, in 2002, and, after nearly a decade of agency proceedings, the site was certified as a wetland in 2011.[172] The Fosters appealed this decision to the USDA National Appeals Division, a separate agency tasked with hearing these types of matters.[173]

The first step of the appeals process required the Fosters to prove that the NRCS's determination was "erroneous by a preponderance of the evidence."[174] However, the NAD officer hearing the appeal determined that the Fosters failed to meet their burden of proof and ruled that the NRCS's determination was valid.[175] The next step of the appeals process was to appeal the NAD officer's determination to the NAD director's office.[176] The NAD director upheld the officer's determination, citing primarily that the NRCS proved the presence of the three controlling criteria

169. Foster v. Vilsack, 820 F.3d 330, 332 (8th Cir. 2016).

170. Foster v. Vilsack, 137 S. Ct. 620 (2017) (mem.). The decision denying certiorari was released on January 9, 2017, and it did not address the merits of the arguments presented in the briefs to the court. *See id.*

171. Clark v. U.S. Dep't. of Agric., 537 F.3d 934, 935 (8th Cir.2008); *see also* 16 U.S.C. § 3801(7)(A), (27) (2017) (defining "converted wetland" and "wetland," respectively); *id.* §§ 3821(f), 3822 (2012 & Supp. IV 2017) (authorizing the USDA to make such determinations); *id.* § 3821(d) (Supp. IV 2017) (detailing punishment for converting wetlands to include ineligibility to receive farm program payments).

172. *Foster*, 820 F.3d at 332.

173. *Id*.

174. *Id.* (quoting 7 C.F.R. § 11.8(e) (2017)).

175. *Id.*

176. 7 C.F.R. § 11.9 (2010).

for wetland determination.[177]

> The term "wetland", except when such term is part of the term "converted wetland", means land that— (A) has a predominance of hydric soils; (B) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and (C) under normal circumstances does support a prevalence of such vegetation.[178]

In 2013, the Fosters filed a complaint in federal district court seeking judicial review of the USDA's final agency decision.[179] In the complaint, the Fosters did not dispute the presence of hydric soils, but they did contest the other two criteria.[180] However, the district court determined that the Fosters had failed to show that the NAD acted "arbitrarily or capriciously" in concluding that the NRCS properly followed its wetland determination procedures and that the determination was erroneous.[181] Accordingly, the court granted summary judgment in favor of the USDA.[182]

b. Eighth Circuit Reasoning. Although the Foster's petition for certiorari specifically requests a resolution as to the propriety of *Auer* deference,[183] the Eighth Circuit makes no reference to *Auer* or *Seminole Rock* in deciding to defer to the agency's interpretation.[184] Instead, the court cites arbitrary and capricious review under the APA and references a case that provides a string of Eighth Circuit cases requiring the court to give "agency decisions a high degree of deference."[185]

The Foster's first point of contention was related to the lack

177. *Foster*, 820 F.3d at 332.

178. 16 U.S.C. § 3801(a)(27) (2012). The court in *Foster* offered clarifying definitions for the three controlling criteria. *Foster*, 820 F.3d at 333 nn.3–5. Hydric soil is "formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part." *Id*. at 333 n.3 (quoting Changes in Hydric Soils Database Selection Criteria, 77 Fed. Reg. 12234, 12234–35 (Feb. 29, 2012)). Hydrology is related to the degree of flooding or soil saturation of the land. *Id.* at 333 n.4. Hyrdophytic vegetation requires that plants grow in water for a period of time. *Id.* at 333 n.5.

179. *Id.* at 332–33.

180. *Id.* at 333.

181. Foster v. Vilsack, No. CIV. 13-4060-KES, 2014 WL 5512905, at *17 (D.S.D. Oct. 31, 2014), *aff'd*, 820 F.3d 330 (8th Cir. 2016).

182. *Id*.

183. Petition for Writ of Certiorari at i, Foster v. Vilsack, 137 S. Ct. 620 (No. 16-186).

184. *Foster*, 820 F.3d at 333–35.

185. *Id.* at 333; Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 763 (8th Cir.

of requisite hydrology for the area to qualify as a wetland.[186] The NRCS used aerial photos in order to determine the hydrology of the site, a practice that the Fosters conceded to being legitimate.[187] However, the Fosters disputed the agency's use of a particular agency form in conducting the aerial survey.[188] The court rejected the Foster's argument as simply an attack on an allegedly deficient form and determined that there was sufficient evidence to support the agency's final decision.[189]

The Foster's second point of contention was that the determination that hydrophytic vegetation would be prevalent at the site under normal conditions was faulty.[190] The NRCS chose a comparison site that was farther away than the two sites initially proposed by the Fosters, and the Foster's contention centered around the idea that the site chosen was not within the "local area" even though the Fosters failed to establish that the other proposed sites would have met the regulatory requirements.[191] Citing the NRCS's evidence that the comparison site was acceptable, along with relevant case law,[192] the court determined that the agency decision was neither arbitrary nor capricious.[193]

Unconvinced by the Fosters' two arguments, the Eighth Circuit affirmed the lower court, upholding the agency's wetland determination.[194]

c. Petition to the Supreme Court. In a final attempt to have the wetland determination overturned, the Fosters filed a petition

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2004)); Sierra Club v. EPA, 252 F.3d 943, 947 (8th Cir. 2001); Mo. Limestone Producers Ass'n v. Browner, 165 F.3d 619, 621 (8th Cir. 1999); Dubois v. Thomas, 820 F.2d 943, 948–49 (8th Cir. 1987).

186. *Foster*, 820 F.3d at 333.

187. *Id.*

188. *Id.* at 334. The engineer that conducted the survey used Form 28, which lists four shorthand abbreviations of the ten wetland signatures listed on Form 33, the form the Fosters believed should have been used in this instance. *Id.*

189. *Id.*

190. *Id.* Regulation allows the NRCS to determine the likelihood of the presence of hydrophytic vegetation by comparison to an unaltered site in the same "local area." 7 C.F.R. § 12.31(b)(2)(ii) (2017).

191. *Foster*, 820 F.3d at 335. The NRCS supported its choice of the farther comparison site, indicating that it was undisturbed and a similar formation to the site on the Foster's land, while the two sites offered by the Fosters were recently cropped, hayed, grazed and sprayed. *Id.*

192. Downer v. United States, 97 F.3d 999, 1003–04 (8th Cir. 1996) (upholding the USDA's use of a comparison site which satisfied the regulatory criteria, despite the landowner's complaint that the site was too far away).

193. *Foster*, 820 F.3d at 335.

194. *Id.* at 331.

for a writ of certiorari on August 8, 2016.[195] In their petition, the Fosters presented two questions for the Court to review.[196] The question relevant to this discussion is "[s]hould federal courts defer, under [*Auer*], to an agency construction of an interpretative field manual . . . as have the Sixth Circuit and the Eighth Circuit decision below, or not, as the Fifth Circuit has held?"[197] The Fosters' petition contains many of the same arguments presented earlier in this Note, including references to the growing skepticism of *Auer* in the Supreme Court and in courts across the country;[198] the circuit split that was created by the Fifth Circuit's decision in *Elgin*;[199] and even questions the propriety of the sheer number of agency field manuals available for interpretation across the county.[200] So, if the Fosters' petition contained all of these arguments in favor of walking back *Auer*, why did the Supreme Court deny granting certiorari?[201]

One possible answer to this question centers not around the law provided in the Fosters' petition but around the facts as they were applied to the law. The Fosters argue that the Court should "[c]abin[]" *Auer* because the Eighth Circuit afforded deference to the USDA interpretation of Agricultural Handbook 296.[202] However, they do not help their case when they admit "Handbook 296 would have no relevance to this case, but for the fact that when delineating Site 1 on the Fosters' farm, the Service construed, via staff testimony, the 'local area' of the Fosters' farm to be the 10,835-square-mile major land resource area."[203] Additionally, the Eighth Circuit never mentions affording *Auer* deference to the handbook in its arbitrary and capricious review of the agency determination.[204] These two factors indicate that the Supreme Court could have decided that this case simply did not have the

195. Foster v. Vilsack, SCOTUSBLOG (Jan. 16, 2017, 2:37 PM), http://www.scotusblog.com/case-files/cases/foster-v-vilsack/ [https://perma.cc/2D9F-7MYC].

196. Petition for Writ of Certiorari, Foster v. Vilsack, 137 S. Ct. 620 (No. 16-186).

197. *Id.* The second question asked whether the use of a remote comparison site was a violation of the Fosters' due process rights under the Fifth Amendment. *Id.*

198. *Id.* at 13–17. *See supra* Part III.

199. Petition for Writ of Certiorari at 18–23, *Foster*, 137 S. Ct. 620 (No. 16-186).

200. *Id*. at 23–25.

201. To date any answer to this question is purely speculative, the denial was released on January 9, 2017 without an opinion attached. Foster v. Vilsack, 137 S. Ct. 620 (2017) (mem.). Perhaps an explanation will be provided in the weeks to come.

202. Petition for Writ of Certiorari at 7–8, 14–17, *Foster*, 137 S. Ct. 620 (No. 16-186).

203. *Id*. at 8.

204. *See* Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 697 F.3d 1192, 1199 (9th Cir. 2012).

factual background supporting an argument that would lead to an end to *Auer*.

2. What is the Supreme Court Looking For? The Court has not made it known what criteria it is looking for in a case to finally walk back the broad deference to agency interpretations of agency material. In each of the cases discussed above where the Court denied certiorari to review a grant of deference, the Court provided only denial orders with no explanation attached.[205] In the rare instance that a justice provided an opinion with a denial, we saw a perturbed Justice Thomas lamenting that fact that his colleagues did not see fit to review a case that was "emblematic of the failings of *Seminole Rock* . . . ."[206] Apparently, the fact that *Bible* offered a case in which the "Department's interpretation is not only at odds with the regulatory scheme but also defies ordinary English" was not factually sufficient to grant a review of the matter.[207] Perhaps, there will be a case in the future in which the agency's interpretation will be sufficiently egregious and the lower court will let that "plain error" slide by in order for the case to reach the Supreme Court.

What seems more likely would be for more circuits to follow the Fifth Circuit's lead in refusing to give administrative agencies deference when interpreting their own material.[208] Perhaps, then, the agencies involved in these decisions will be forced to petition the Court for a review of their own and the Court will have to accept a case that so clearly goes against precedent.

V. COULD THE OTHER BRANCHES SOLVE THE AUER PROBLEM?

As discussed above, it seems unlikely that the Supreme Court will provide a ruling that would do away with or redefined the deference standard set out in *Auer*. This was especially true considering the makeup of the Court following the death of Justice Scalia.[209] In 2017, President Trump's successfully nominated

205. *See* Deaton v. United States, 541 U.S. 972 (2004) (mem.) (denying certiorari); Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 133 S. Ct. 1464 (2013) (mem.) (denying certiorari); Foster v. Vilsack, 137 S. Ct. 620 (2017) (mem.) (denying certiorari).

206. United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting).

207. *Id.*

208. *See supra* Section IV.A.

209. Adam Liptak et. al., *How a Vacancy on the Supreme Court Affected Cases in the 2015-16 Term*, N.Y. TIMES (Jun. 27, 2016), https://www.nytimes.com/interactive/2016/02/14/us/politics/how-scalias-death-could-affect-major-supreme-court-cases-in-the-2016-term.html (discussing the potential for a 4-4 split on certain decision before the Court as

Judge Neil Gorsuch to succeed Justice Scalia.[210] Given his track record, Justice Gorsuch will likely continue Scalia's criticism of *Auer* deference and push the Court to make a stronger statement against agency deference.[211] In lieu of a decision from the Court, is it possible that the *Auer* conundrum could be solved by one of the other branches of government? This section will briefly discuss the possible actions that could be taken by both the legislative and executive branches.

A. Change from Congress?

It is not inconceivable that change could come from Congress. After all, Congress originally set out the guidelines for agency action when it passed the APA in 1946.[212] In fact, as recently as 2015, the Senate Subcommittee on Regulatory Affairs and Federal Management heard testimony from opposing sides regarding the role of administrative deference in the current administrative state.[213] Although the committee acknowledged the skepticism that was raised by certain Justices in previous decisions[214] and questioned the Court's ability to resolve the issue, the Committee has taken no further action towards a legislative solution.[215] Though it is not clear what the legislation would look like if Congress did elect to modify the deference framework, they could

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Scalia's seat remains vacant).

210. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES, Apr. 8, 2017, at A1.

211. Robert Barnes, *Neil Gorsuch Naturally Equipped for His Spot on Trump's Supreme Court Shortlist*, WASH. POST (Jan. 28, 2017), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-naturally-equipped-for-his-spot-on-trumps-supreme-court-shortlist/2017/01/28/91b00a46-e49b-11e6-a453-19ec4b3d09ba_story.html?tid=a_inl-amp&utm_term=.8646f68c39ca (noting Gorsuch's interest in curbing the deference courts give to federal agencies).

212. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in 5 U.S.C.).

213. Erica J. Shell, *The Final Auer: How Weakening the Deference Doctrine May Impact Environmental Law*, 45 ENVTL. L. REP. 10954, 10964 (2015) (citing *Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Reg. Aff. & Fed. Mgmt. of the S. Comm. on Homeland Security & Governmental Aff.*, 114th Cong. 1 (2015) (statement of Ronald Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis); *Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Reg. Affs. & Fed. Mgmt. of the S. Comm. on Homeland Security & Governmental Aff.*, 114th Cong. 1 (2015) (statement of Andrew Grossman, Adjunct Scholar, Cato Institute). Grossman expressed concern over the scope and weight of *Auer* deference, while Levin argued that its constitutional risks have been overstated. *Id.*

214. *See supra* Section III.A.

215. Shell, *supra* note 213, at 10964.

certainly model interpretive rulemaking requirements using the case law cited above.[216] Though Congress certainly could act to define the parameters of agency deference, the fact that there is no clear answer—as is evident in the conflicting opinions coming from the Court—indicates that creating such a framework would be more difficult than it would seem. Instead, perhaps the answer lies within the executive branch itself.

B. Change from the Executive?

Since his inauguration, President Trump has taken significant strides to curtail the power of federal agencies.[217] Trump described the current regulatory burden as an "impossible situation," promising to "solve it very quickly."[218] The President then signed an executive order requiring agencies to create a task force to review current regulation and mandating for each new regulation, two existing regulations must be scrapped.[219] In addition to the executive order, certain groups quickly petitioned President Trump to overrule an administrative ruling made during the Obama administration.[220] If these actions effectively halt federal agencies' ability to create new regulations, the deference issue may be solved through the administration's desire to cut through extensive bureaucratic red tape. However, these actions may only forestall the issue until an administration friendlier to agencies retakes the White House.

VI. CONCLUSION

While developments over the past five years have indicated

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216. *Id.* (suggesting Congress could create optional conditions, derived from a *Skidmore* analysis to clarify the agency's intentions and define what level of deference certain actions are given).

217. *See* Scott Horsley, *Trump Orders Agencies To Reduce Regulations*, NPR (Feb. 24, 2017, 2:11 PM), http://www.npr.org/2017/02/24/517059327/trump-orders-agencies-to-reduce-regulations [https://perma.cc/9PKW-4MW6] (detailing an executive action directing federal agencies to set up task forces that would identify costly regulations and scale them back).

218. Ben Wolfgang, *Trump Orders All Federal Agencies to Form 'Regulatory Reform Task Force'*, WASH. TIMES (Feb. 24, 2017), http://www.washingtontimes.com/news/2017/feb/24/trump-orders-agencies-regulatory-reform-task-force/.

219. *Id.*

220. *See US Pilots Ask Trump to Block Obama Admin Ruling They Say Would Kill Thousands of Jobs*, FOX NEWS (Jan. 24, 2017), http://www.foxnews.com/politics/2017/01/24/us-pilots-ask-trump-to-block-obama-admin-ruling-say-would-kill-thousands-jobs.html (discussing a petition from a group of airline pilots opposing the Department of Transportation's decision to allow Norwegian Air International to service the United States).

that it is time to reassess the doctrine of judicial deference promulgated by *Auer* and *Seminole Rock*, a case sufficient to overturn this long-standing practice has not yet presented itself to the Supreme Court. The Court's reluctance to deal with the issue suggests that the answer might need to come from outside the judiciary. A legislative solution would provide a more lasting standard for the Court to apply in the future. However, it would appear that the executive branch is more likely to affect any development in the law relating to *Auer* through the appointment of Scalia's successor, Neil Gorsuch, and any further actions taken to slash agency power. While the executive solution seems more immediate, there is no indication those efforts would be permanent, requiring the Court to re-approach the issue of deference in four to eight years.

Christopher Atmar