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Agencies can interpret ambiguous statutes and regulations due to their expertise in executing complex regulatory schemes and the presumption that, for certain issues, Congress prefers agencies, not courts, to retain such power. This proposition is commonly referred to as agency deference. A recent U.S. Supreme Court case, Kisor v. Wilkie*, challenged a core principle of agency deference called* Auer *deference, which allows agencies to interpret ambiguous regulations so long as the agency's interpretation of the regulation is not plainly erroneous or inconsistent with the regulation as a whole. While the justices vigorously debated whether* Auer v. Robbins *should have been overturned,* Kisor *stands for another principle.* Kisor *may have created a new deference standard that this Note calls "strict deference." This Note argues that strict deference is a unitary deference standard, which can be applied beyond contexts implicating* Auer. *Given the Court's concerns with another deference doctrine,* Chevron *deference, this Note hypothesizes how strict deference would function in a* Chevron *context by applying strict deference to three* Chevron *cases. This Note argues that, just as strict deference applies to* Auer *cases, it can also be a relevant standard for* Chevron *cases and one that addresses some of the criticism levied at agency deference in general.*

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INTRODUCTION

Chief Justice Roberts wrote that the administrative state "wields vast power and touches almost every aspect of daily life."[1] There are 454 federal agencies[2] adjudicating claims in such volume that they "tower over" the

1. City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).

2. *Agencies*, FED. REG., https://www.federalregister.gov/agencies [https://perma.cc/LYV8-RYAT] (last visited Apr. 12, 2020).

number of cases heard in federal courts.[3] The sprawl of the administrative state is potentially worrisome because federal agencies have wide latitude to interpret and enforce statutes and regulations with limited oversight from the judiciary.[4] Agencies can do this despite courts holding the power to "say what the law is."[5] Deference, however, is not a carte blanche for agencies to interpret any rule they please; courts still maintain reviewing power.[6] The Supreme Court has formally incorporated this power into three deference standards—derived from *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*[7] (*Chevron* deference), *Skidmore v. Swift & Co.*[8] (*Skidmore* deference), and *Auer v. Robbins*[9] (*Auer* deference)—applied to determine if deference is appropriate when agencies interpret statutes or regulations. *Auer* deference, in particular, has been the target of criticism arguing it violates both the Constitution and congressional statutes.[10] Despite questions about the validity of the doctrine,[11] in *Kisor v. Wilkie*,[12] the Supreme Court upheld *Auer* deference[13]—that agencies should receive deference for interpreting their own ambiguous regulations[14]—and also redefined the standards under which *Auer* deference would be granted.[15]

The new *Auer* test is a more discerning deference standard, which this Note describes as "strict deference." This standard is rigorous, designed to ensure that an agency receives deference only in instances where (1) the agency should qualify for it, (2) there are genuine ambiguities in the regulatory language, and (3) the agency presents adequate reasoning for its interpretation.[16] In building this new standard, the Court assembled the most demanding requirements of *Auer*, *Chevron*, and *Skidmore* together to create a strict deference doctrine.[17] The Court not only made it more difficult for agencies to receive deference but it also created a singular, unitary deference standard that could be deployed uniformly in all deference cases.[18] Given that *Chevron* has been criticized on terms similar to *Auer*[19] and the Court has

3. *See* Kevin M. Stack, *The Interpretive Dimension of* Seminole Rock, 22 GEO. MASON L. REV. 669, 673 (2015).
4. *See infra* Part II.
5. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
6. *See* 5 U.S.C. § 706 (2018) (providing that courts maintain the power to review agency decisions).
7. 467 U.S. 837 (1984).
8. 323 U.S. 134 (1944).
9. 519 U.S. 452 (1997).
10. *See generally* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).
11. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring).
12. 139 S. Ct. 2400 (2019).
13. *Id.* at 2408.
14. *See Auer*, 519 U.S. at 461.
15. *See id.*
16. *See infra* Part I.B.
17. *See infra* Part III.A.
18. *See infra* Part III.A.
19. *See infra* Part II.

expressed a willingness to reassess *Chevron*,[20] *Kisor* may have been the first domino to fall. Changes to *Chevron* could be coming next.[21]

This Note argues that the Court's new unitary, strict deference standard can be applied to *Chevron* cases and illustrates this possibility through a series of case studies. The case studies include two circuit court cases and one Supreme Court case. They demonstrate that the strict deference standard can protect against statutory and constitutional violations, while still allowing the legal system to reap the benefits agencies provide. Accordingly, the standard serves as a compromise between deference's advocates and critics.

This Note will proceed in three parts. Part I outlines the Court's traditional deference doctrines. It then explains how *Kisor* updated *Auer* and ushered in a new strict deference standard. Part II stakes out the debate over *Auer* deference. Analyzing whether *Auer* should have been upheld highlights the larger debate surrounding agency deference. Finally, Part III argues that, beyond the debate to keep or discard *Auer*, *Kisor* implicitly offers a third option by creating a unitary, strict deference standard that can be used in all deference situations. Part III applies strict deference in the *Chevron* context and argues that this standard takes advantage of the benefits agency deference brings while still mitigating against its risks.

I. THE DEFERENCE DOCTRINES

Part I reviews the various deference doctrines. Part I.A addresses the doctrines as they existed before *Kisor*. In particular, Part I.A.1 describes *Skidmore* deference and its derivative, the hard look doctrine; Part I.A.2 addresses *Chevron* deference; and Part I.A.3 explains *Auer* deference. Part I.B describes how *Kisor* amended the existing *Auer* test and created a new deference standard.

A. The Traditional Deference Doctrines

Traditionally, courts have extended three types of deference: *Skidmore* deference, *Chevron* deference, and *Auer* deference.[22] Courts apply one of these doctrines based on the type of agency interpretation. This section enumerates the test for each deference doctrine and explains when they are used.

1. *Skidmore* Deference and the Hard Look Doctrine

The least deferential of the deference doctrines is *Skidmore* deference.[23] Under *Skidmore*, a court will adopt an agency's interpretation of a statute or

20. *See infra* Part I.A.2.
21. *See infra* Part III.
22. *See infra* Parts I.A.1–3.
23. *See* Sierra Club v. U.S. Army Corps of Eng'rs, 508 F.3d 1332, 1334 n.1 (11th Cir. 2007) (describing *Skidmore* as the least deferential deference standard); Demahy v. Wyeth Inc., 586 F. Supp. 2d 642, 647 (E.D. La. 2008) (finding that *Skidmore* is less deferential than *Auer* and *Chevron*).

regulation if the court is "persuad[ed]" that the agency's interpretation is correct based on a review of factors the agency considered in reaching its decision.[24] Such factors include whether the agency: (1) reviewed relevant evidence thoroughly, (2) offered sound reasoning for its position, and (3) took a position consistent with its other pronouncements on the subject.[25] Courts are also entitled to consider other criteria, like congressional intent, when deciding whether to accept the agency's interpretation.[26] Because the standard imposes no obligation on a court to accept an agency's decision, *Skidmore* deference is "discretionary,"[27] only used when a court is persuaded by the agency's interpretation.[28]

Skidmore can also be used to assess whether an agency's policy decision is arbitrary and capricious.[29] In this context, *Skidmore* deference is referred to as the hard look doctrine.[30] Under this standard, an agency must consider relevant information and explain satisfactorily the connection between the facts in the case and the agency's policy choice.[31] While the Supreme Court has not articulated a bright-line rule for when an agency's choice can be deemed a "clear error of judgment,"[32] it has presented three instances where the agency's choice can be considered arbitrary and capricious: if the agency (1) relied on factors Congress did not intend the agency to consider; (2) failed to consider an entire important aspect of the issue for which it made a policy

24. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The Court reaffirmed *Skidmore* in United States v. Mead Corp., 533 U.S. 218, 234 (2001).

25. *See Skidmore*, 323 U.S. at 140. Under *Skidmore*, although a court may make a ruling consistent with the agency's interpretation, it has not granted the agency deference. Instead, the court makes a binding decision, which then becomes law unless a court overturns that decision. *See* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1156 (2012). For this reason, *Skidmore* may more appropriately be considered a pleading standard. *See* Transcript of Oral Argument at 15–16, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15). Some believe that *Skidmore* should apply in all cases because it allows judges to say what the law is. *See, e.g.*, *Kisor*, 139 S. Ct. at 2448–49 (Kavanaugh, J., concurring). This addresses one of the major concerns with agency deference generally: that it allows for judicial abdication in violation of both the Constitution and ratified congressional statutes. *See infra* Part II.

26. *See* Lawson v. FMR LLC, 134 S. Ct. 1158, 1188 (2014) (Sotomayor, J., dissenting) (viewing congressional intent as a factor to be considered when conducting a *Skidmore* review).

27. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1250 (2007).

28. *See* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1351–52 (2015) (citing *Skidmore*, 323 U.S. at 140).

29. *See* 5 U.S.C. § 706 (2018). A court reviewing an agency action must "hold unlawful and set aside agency action, findings, and conclusions" that are determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*; *see also* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46 (1983).

30. *See State Farm*, 463 U.S. at 46; *see also* Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 414 (1971).

31. *See State Farm*, 463 U.S. at 43.

32. *Id.* (citing Bowman Transp., Inc., v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1962)).

choice; or (3) offered an explanation for its decision that contradicts the facts available to the agency.[33]

2. *Chevron* Deference

Courts grant *Chevron* deference when an agency interprets an ambiguous congressional statute and acts reasonably.[34] In *Skidmore* cases, it is ultimately the court that decides the meaning of a statute or regulation.[35] However, sometimes Congress intends for the agency to be a law's authoritative interpreter.[36] To determine when it can defer to an agency's authoritative interpretive power, a court must first decide whether the case at issue is one where extending *Chevron* deference to an agency is appropriate.[37] To pass this threshold, also known as *Chevron* step zero,[38] the agency must show that Congress granted it binding rulemaking authority and that the agency exercised its rulemaking authority when it made its interpretation.[39] Once it determines that the agency acted pursuant to its rulemaking authority, a court moves to *Chevron* step one and asks whether the statute is ambiguous.[40] If the statute is clear, the court must enforce the statute as it is written and the agency receives no deference.[41] However, at *Chevron* step two, if a court finds that the statute is ambiguous, the agency's interpretation will be controlling so long as it is a "permissible construction of the statute."[42] Summarized, an agency will receive deference if the statute it interpreted is ambiguous and if its interpretation is reasonable.

Over time, courts have attempted to limit the scope of *Chevron*. One way they have done so is by granting deference only when the statute is genuinely ambiguous.[43] In a recent *Chevron* case, *Wisconsin Central Ltd. v. United States*,[44] where the Court addressed whether "money"[45] included stock options in a railroad pension plan statute, Justice Gorsuch established what one commentator defined as a "'clear enough' standard."[46] To determine

33. *Id.*

34. *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

35. *See supra* note 25 and accompanying text.

36. *See Chevron*, 467 U.S. at 843–44.

37. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001).

38. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 213–16 (2006).

39. *See Mead*, 533 U.S. at 226–27. The Court found that the delegation of force of law authority is demonstrated in various ways, such as an agency's ability to administer regulations through adjudications, notice and comment rulemaking, or by another vehicle of "comparable congressional intent." *Id.* at 227.

40. *See Chevron*, 467 U.S. at 842–43.

41. *See id.*

42. *See id.* at 843. If an agency does not receive *Chevron* deference, it can still receive *Skidmore* deference. *See Mead*, 533 U.S. at 234.

43. *See infra* Part I.B (describing how "genuinely ambiguous" is distinct from "ambiguous").

44. 138 S. Ct. 2067 (2018).

45. *Id.* at 2070.

46. Christopher J. Walker, *Gorsuch's "Clear Enough" & Kennedy's Anti–"Reflexive Deference": Two Potential Limits on Chevron Deference*, YALE J. ON REG.: NOTICE &

that "money" was an unambiguous term, Justice Gorsuch looked beyond the plain language of the provision at issue.[47] He considered the statutory language as a whole, as well as the structure and design of the statute.[48] Christopher Walker speculated that Justice Gorsuch's standard in *Wisconsin Central* would possibly lead lower courts to "interpret 'clear enough' as more searching than 'clear' or 'unambiguous,' thus narrowing the scope of *Chevron* deference in the circuit courts,"[49] because this review would require analyzing more than just the plain meaning of the statute.[50]

Another way the Court has limited *Chevron* is to question whether, in certain circumstances, Congress really intended for an agency to receive deference on a particular issue.[51] This inquiry arises when courts are faced with statutory ambiguity concerning major policy questions or issues of substantial political or economic significance.[52] For example, in *King v. Burwell*,[53] the Court found that the answer to whether the Affordable Care Act's tax credits were available on federal exchanges implicated policy to such a degree that "had Congress wished to assign that question to an agency, it surely would have done so expressly."[54] This approach could solve what Justice Anthony Kennedy has described as "reflexive deference": the risk that a court only conducts a cursory or perfunctory plain meaning analysis of the text before granting *Chevron* deference.[55] Even if it too quickly found the statute at issue to be ambiguous, the reviewing court would still have to determine contextual questions like congressional intent before granting deference.[56]

COMMENT (June 22, 2018), http://yalejreg.com/nc/gorsuchs-clear-enough-kennedys-anti-reflexive-deference-two-potential-limits-on-chevron-deference/ [https://perma.cc/H59V-9QLM]. *See also generally Wis. Cent.*, 138 S. Ct. at 2074.

47. *See Wis. Cent.*, 138 S. Ct. at 2070, 2073–74.

48. *See id.* This type of analysis is in keeping with step two of strict deference. *See infra* Part I.B; *see also* SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1355 (2018) (considering congressional intent and other statutory provisions to determine whether the agency should receive deference).

49. *See* Walker, *supra* note 46 (quoting *Wis. Cent.*, 138 S. Ct. at 2074). If Justice Gorsuch meant "clear enough" to be a higher standard than unambiguous at *Chevron* step one, then his standard has similarities to the genuine ambiguity requirement found in strict deference's step two. Justice Gorsuch's analysis in *Wisconsin Central*, then, might suggest that the Court is linking deference regimes into a unified doctrine and is pushing a strict deference standard in situations beyond the *Auer* context. *See infra* Part III.A.

50. *See* Walker, *supra* note 46.

51. This limitation is otherwise known as the major questions doctrine. *See* Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 (2016).

52. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 159 (2000) ("In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."); *see also* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 720 (2014).

53. 135 S. Ct. 2480 (2015).

54. *See id.* at 2483; *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

55. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

56. *See* City of Arlington v. FCC, 569 U.S. 290, 322 (2013) (Roberts, C.J., dissenting) ("[W]e do not defer to an agency's interpretation of an ambiguous provision unless Congress

A third way to limit *Chevron* deference would be to incorporate the hard look doctrine into *Chevron* step two.[57] Under this framework, courts would only defer to the agency's interpretation if the agency could adequately demonstrate that it reasonably interpreted the statute.[58] This would raise the low bar that agencies have traditionally faced at *Chevron* step two.[59] Catherine Sharkey posits that the Court has already begun to implement a type of hard look review in some of its cases.[60] Additionally, circuit courts may have implicitly created a *Chevron* step three, in which the agency's interpretation is reviewed under the hard look doctrine.[61]

3. *Auer* Deference

Because *Chevron* applies when an agency interprets a statute,[62] the Court devised a separate deference doctrine to assess whether agencies should receive deference for interpreting their own regulations.[63] That deference is referred to as *Auer* deference.[64] Under this doctrine, an agency will receive

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wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide.").

57. *See* Catherine M. Sharkey, *Cutting In on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2385–89 (2018). Sharkey demonstrates how integrating the hard look doctrine into *Chevron* might look by reviewing a recent decision. *See id.* at 2369–77 (analyzing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F. Supp. 3d 500, 559 (S.D.N.Y. 2014)). In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, the district court applied the hard look doctrine at *Chevron* step two. 8 F. Supp. 3d 500, 559 (S.D.N.Y. 2014), *rev'd*, 846 F.3d 492 (2d Cir. 2017). On appeal, the Second Circuit found that satisfying the hard look doctrine is not required at *Chevron* step two. 846 F.3d 492, 523–24 (2d Cir. 2017). Applying hard look at *Chevron* step two is similar to the hard look–like review that strict deference has incorporated at its step one. *See supra* Part I.B.

58. *See* Sharkey, *supra* note 57, at 2385–89. This type of review is different than the D.C. Circuit's "*Chevron* step one-and-a-half," where an agency must recognize a statute's ambiguity. *See* Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760 (2017).

59. Indeed, because courts take such a capacious reading of reasonableness, agencies receive deference at *Chevron* step two 93.8 percent of the time. *See* Ken Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

60. *See* Sharkey, *supra* note 57, at 2412 (first citing Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016); then citing Michigan v. EPA, 135 S. Ct. 2699 (2015)); *see also* Catherine M. Sharkey, *The* Chevron–State Farm *Framework: A New Age for Hard Look Review at Step Two?*, HARV. L. REV. BLOG (Jan. 2, 2018), https://blog.harvardlawreview.org/the-chevron-state-farm-framework-a-new-age-for-hard-look-review-at-step-two/ [https://perma.cc/P4CH-MLAE] (citing Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016)).

61. *See* Arent v. Shalala, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995). In particular, *MetLife, Inc. v. Financial Stability Oversight Council*, 177 F. Supp. 3d 219 (D.D.C. 2016) exemplifies Sharkey's *Chevron–State Farm* model. *See* Sharkey, *supra* note 57, at 2433.

62. *See* Martin v. Occupational Safety & Health Comm'n, 499 U.S. 144, 157 (1991).

63. *See* Udall v. Tallman, 380 U.S. 1, 16–17 (1965).

64. *See* Auer v. Robbins, 519 U.S. 452 (1997). This deference standard is sometimes also referred to as *Seminole Rock* deference. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). Scholars often use *Auer* and *Seminole Rock* deference interchangeably. *See* Stack, *supra* note 3, at 669. This Note refers to this deference standard as *Auer* deference.

deference when interpreting its own regulations unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation."[65]

Like *Chevron*, the Court has placed additional limits on *Auer* deference through case law. First, the Court has found that an interpretation made as a "*post hoc* rationalizatio[n]"[66] to defend its past actions in a litigation should not receive deference because such an interpretation does not give sufficient notice to regulated parties.[67] Second, the Court requires that the regulation be ambiguous before deference can be extended.[68] Third, agencies cannot receive *Auer* deference for interpreting regulations that simply restate or are "near equivalen[t]" to a statute.[69] Finally, the Court cabined *Auer* by granting deference only when the agency's interpretation is based on its experience and expertise.[70]

B. Kisor *Establishes a New Strict Deference Standard*

In *Kisor*, the Court updated the traditional *Auer* standard. First, or at step one,[71] courts must look for markers to determine if *Auer* deference is applicable.[72] These markers include whether the agency's interpretation is authoritative,[73] implicates the agency's substantive expertise,[74] and reflects the agency's fair and considered judgment.[75] The Court was careful to note,

65. *Auer*, 519 U.S. at 461; *see also* Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 95–96 (2019).

66. *Auer*, 519 U.S. at 462 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).

67. *See id.*; *see also* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012) ("To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" (quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986))).

68. *See* Christensen v. Harris County, 529 U.S. 576, 588 (2000). An agency's ability to promulgate ambiguous regulations, which allows the agency to create de facto new regulations through the interpretation of a vague regulation, remains one of the principal issues with *Auer* deference. *See infra* Part II.B.

69. Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

70. *Id.* at 256 (citing *Auer*, 519 U.S. at 454–55).

71. WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1104 (6th ed. 2020) (classifying the prongs of the new *Auer* test as "steps," similar to the way scholars classify the prongs of the *Chevron* test).

72. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2416–18 (2019). The Court previously held that *Auer* does not apply in all regulatory contexts. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 n.4 (2015); *see also Christopher*, 567 U.S. at 159.

73. *See Kisor*, 139 S. Ct. at 2416 (citing United States v. Mead Corp., 553 U.S. 218, 257–59 (2001)).

74. *See id.* at 2417 (citing Martin v. Occupational Safety & Health Comm'n, 499 U.S. 144, 153 (1991) (finding that an agency's expertise puts the agency in a better position than judges to make an interpretive determination)); *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 167–68 (2007) (finding that agencies leverage expertise in conducting factual investigations); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991) (finding agencies are better situated than judges to fill regulatory gaps because agencies are politically accountable).

75. *See Kisor*, 139 S. Ct. at 2417–18 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) (finding that an agency will not receive deference if its interpretation is a

however, that these markers do not constitute an exhaustive list.[76] Rather, they are meant to help guide a lower court's inquiry into the "character and context" of the interpretation to determine if *Auer* deference is appropriate.[77]

Assessing whether the case at issue is the type of case where *Auer* could be applied is the same inquiry as is made at *Chevron* step zero.[78] This test asks whether: (1) Congress delegated force of law authority to the agency; and (2) the agency's interpretation was made in furtherance of that authority.[79] An agency must meet these requirements before even considering whether a statute is ambiguous and therefore ripe for agency interpretation.[80] While the context and character requirements outlined in *Kisor* are similar to *Chevron*'s threshold step zero, they are more rigorous. Beyond just assessing whether the interpretation is of the type that can receive deference, a court must also determine whether the agency adequately presented a basis and explanation for why *Auer* should apply.[81] This is similar to the type of justification required under *Skidmore* or the hard look doctrine.[82] Just as these doctrines are meant to ensure that agencies ground their policy choices in rational, factually supported decisions,[83] *Auer*'s character and context requirements ensure that only an agency's reasoned decision grounded in its expertise will qualify for deference.[84] Requiring such justification to determine simply if *Auer* deference can apply is a rigorous test that goes beyond the Court's other threshold test established by *Chevron*.[85]

If extending *Auer* deference is appropriate, courts move to step two: an inquiry into whether the regulation at issue is *genuinely* ambiguous.[86] To do this, a court must exhaust all tools of statutory interpretation, including analysis of the plain text, as well as the structure, history, and purpose of the regulation.[87] *Auer*'s new second step from *Kisor* requires a court to do more than "wave the ambiguity flag just because it found the regulation impenetrable on first read."[88] Courts must instead endeavor to find meaning

convenient litigation position or post hoc rationalization)); *see also* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1825 (2015) ("In principle, virtually everyone seems to agree that longstanding agency statutory interpretations should be entitled to extra weight upon judicial review.").

76. *See Kisor*, 139 S. Ct. at 2416.

77. *See id.*

78. *See supra* Part I.A.2.

79. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001).

80. *See id.* at 226–27.

81. *See supra* Part I.A.1.

82. *See supra* Part I.A.1.

83. *See supra* Part I.A.1.

84. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2416–18 (2019).

85. *See Mead*, 533 U.S. at 226–27.

86. *See Kisor*, 139 S. Ct. at 2415 (citing Christensen v. Harris County, 529 U.S. 576, 588 (2000) (allowing an agency to interpret a regulation when it is not ambiguous would be to allow the agency "to create *de facto* a new regulation")).

87. *See id.* ("[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991))).

88. *Id.*

because hard questions of interpretation emanating from dense regulations and statutes often can and should be resolved by judges.[89] Requiring that courts deploy *all* tools of statutory interpretation ensures that a regulation is not just possibly, but is actually, ambiguous.[90]

Finally, at step three, if ambiguity still remains, a court must assess whether the agency's interpretation is reasonable and falls within a "zone of ambiguity the court has identified after employing all its interpretive tools."[91] An agency will receive deference only if its interpretation of the regulation addresses the narrow ambiguity defined by the courts.[92] Accordingly, a reasonable interpretation within the bounds of an identified genuine ambiguity should receive *Auer* deference. Even at this final stage of the analysis, this reasonableness requirement is one the agency can fail to meet.[93]

This level of review is more intense than its corollary in *Chevron*. At step two of the *Chevron* analysis, agencies receive deference if the interpretation of the statute is permissible.[94] This is a low standard for an agency to meet and is closer to the "plainly erroneous" deference conception of reasonableness found in the previous *Auer* standard.[95] In comparison, the new reasonableness standard in *Auer* narrows the scope of deference to a subset of the regulation.[96] If the agency's interpretation exceeds the zone of ambiguity identified by the court in step two, the agency fails at step three and receives no deference at all.[97] As a result, what may be considered reasonable is more constrained if the court defines the scope of ambiguity than it would be if the court accepted the agency's interpretation of what the agency identified as the regulation's ambiguity.[98]

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89. *See id.*; *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (demonstrating the rigorous analysis the Court can engage in at *Chevron* step one); *cf.* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017) (stating that as of 2017, Judge Raymond Kethledge had never reached *Chevron* step two, always resolving the issue at step one).

90. Ensuring a regulation is genuinely ambiguous fulfills the presumption that Congress meant for the agency to have interpretive power when it purposefully speaks with ambiguity. *See supra* Part II.A.

91. *Kisor*, 139 S. Ct. at 2416.

92. *See id.*

93. *See id.* at 2415.

94. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

95. *Compare* Auer v. Robbins, 519 U.S. 452, 461 (1997) (articulating the plainly erroneous standard), *with* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 59 (2011) (finding the reasonableness standard is fulfilled if the interpretation was "sensible"), *and* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651 (1990) (finding the reasonableness standard is fulfilled if the interpretation does not "frustrate" the statute's objective). Appellate courts also interpret reasonableness to be a deferential standard. *See, e.g.*, Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492 (2d Cir. 2017); Cont'l Air Lines, Inc. v. Dep't of Transp., 843 F.2d 1444 (D.C. Cir. 1988).

96. *See Kisor*, 139 S. Ct. at 2416.

97. Like under *Chevron*, if an agency fails at step one or two, the agency's position could still be granted deference under *Skidmore*. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012).

98. *See, e.g.*, Glob. Tel*Link v. FCC, 859 F.3d 39, 60 (D.C. Cir. 2017) (Silberman, J., concurring). Judge Laurence Silberman provided an example of how the zone of ambiguity

In sum, *Kisor* ushered in a new strict standard for when agencies seek deference for their interpretations of seemingly ambiguous regulations. Now, courts must determine whether the agency has taken appropriate steps to qualify for *Auer* deference, whether the regulation is genuinely ambiguous, and whether the agency has attempted to interpret the regulation beyond the zones of ambiguity defined by the courts. However, as will be discussed more extensively in Part III, the strict deference standard outlined in *Kisor* is more than an update or a replacement for *Auer* deference. By crafting a new standard that includes aspects of *Skidmore* and *Chevron*, *Kisor*'s strict deference is a unitary deference doctrine that can be applied in any deference context[99] and one that makes it more difficult for agencies to receive deference.[100] Accordingly, strict deference may address the criticisms levied at *Auer* and deference to agencies in general.[101]

II. THE *KISOR* DEBATE OVER *AUER* AND DEFERENCE

Although ultimately deciding to preserve the doctrine, the Court in *Kisor* vigorously debated the viability of *Auer* and, by extension, deference as a whole.[102] In forceful opposition, Justice Gorsuch argued that Justice Kagan engaged in judicial gymnastics to skirt the fact that *Auer*, even after being updated in *Kisor*, still violated the Administrative Procedure Act[103] (APA) and constitutional separation of powers, as well as failed to address an agency's perverse incentives to promulgate vague regulations.[104] Justice Gorsuch contended that *Kisor* now requires courts to conduct three complicated, inexact levels of analysis to determine whether an agency's interpretation of a regulation is persuasive.[105] At best, Justice Gorsuch opined that this new framework was a reformulation of *Skidmore*.[106]

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limits the amount of deference an agency could receive. He noted that the issue in *Chevron* was the Environmental Protection Agency's definition of stationary sources of pollution, which could reasonably mean a whole factory or a single smokestack emitting pollution. *See id.* Ruling that "stationary sources" is generally ambiguous, without limiting the ambiguity in any way, would mean that the agency could receive deference for defining stationary sources as a whole city, an apartment building, or something else so long as it was not inconsistent with the statute. *See id.* Finding a narrow zone of ambiguity, after conducting a rigorous statutory analysis at step one, would preclude definitions like "whole city," which are not inconsistent with the statute but are not really what the statute is meant to regulate.

99. *See infra* Part III.A.

100. *Kisor*, 139 S. Ct. at 2418 (finding that based on the standard in *Kisor*, deference to agencies "often doesn't" apply).

101. *See infra* Part II (explaining the benefits and shortcomings of granting deference to agencies); *see also infra* Part III.C (explaining how strict deference can address criticisms of deference).

102. *Compare Kisor*, 139 S. Ct. at 2408–24 (plurality opinion), *with id.* at 2425–28 (Gorsuch, J., concurring).

103. Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The APA regulates both the procedures that agencies must follow when promulgating rules and the scope of judicial oversight to review agency decisions. *See id.*

104. *See Kisor*, 139 S. Ct. at 2425–48 (Gorsuch, J., concurring).

105. *See id.* at 2447.

106. *See id.*

This Part explains the debate between the pro-*Auer* and anti-*Auer* deference positions. Part II.A outlines the pro-*Auer* position. Specifically, Part II.A.1 explains that Congress intends for agencies to receive deference because they maintain particular expertise that places them in the best position to make an interpretive determination related to administering their regulatory schemes. Part II.A.2 illustrates how this delegation of interpretive authority to agencies is consonant with constitutional principles and existing congressional statutes. Part II.B describes the anti-*Auer* position. Part II.B.1 addresses concerns that *Auer* deference violates the APA. Further, Part II.B.2 explains why *Auer* may violate fundamental separation of powers principles, and Part II.B.3 challenges the presumption held by the pro-*Auer* position that agencies are in a better position than courts to decide interpretive questions. Through drawing the distinctions between these two positions, this Part also highlights issues related to the larger deference debate. These issues include whether Congress actually intends for agencies to make interpretive decisions, whether agencies are best positioned to make interpretive decisions, and whether deference allows the judiciary to retain its adjudicatory functions.

A. For Deference: Kisor*'s Pro-*Auer *Position*

The pro-*Auer* position posits that the *Auer* doctrine "retains an important role in construing agency regulations."[107] The doctrine allows Congress to delegate interpretive authority to an agency, which may be more knowledgeable and experienced than either Congress or the courts on a particular issue, putting the agency in the best position to interpret a rule.[108] This position also argues that such delegation is consistent with constitutional principles and does not result in a violation of the APA.[109]

1. Delegating Interpretive Authority to Agencies

Often, regulations are ambiguous.[110] However, Congress, despite knowing about these ambiguities, rarely explicitly assigns interpretive authority to either an agency or a court.[111] Deferring to an agency's interpretation of a regulation is one way to address these ambiguities and is based on a presumption that Congress generally intends for an agency to be the primary interpreter of ambiguous regulations.[112] The presumption favors agencies, instead of courts, as interpreters for three reasons.

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107. *Id.* at 2408 (plurality opinion).
108. *See infra* Part II.A.1.
109. *See infra* Part II.A.2.
110. *See Kisor*, 139 S. Ct. at 2410.
111. *See id.* at 2412.
112. *See id.* (citing Martin v. Occupational Safety & Health Comm'n, 499 U.S. 144, 151–53 (1991)). Under *Chevron*, the presumption is that when Congress leaves an ambiguity in a statute, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute." Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). If the statute is unambiguous, it is left to the courts to interpret the statute's meaning. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 621 (2013) (Scalia, J., concurring

First, agencies, as the original authors of regulations, are in the best position to determine the regulations' original meaning.[113] This is because the agency will have "direct insight" into what the rule should mean.[114] Even when faced with an issue it failed to consider during the rulemaking process, the agency is at least in the best position to explain the regulation's original purpose and how that purpose covers the unanticipated issue.[115] As Matthew Stephenson and Miri Pogoriler explained, "the agency's current view is likely to accurately capture the agency's original intent or understanding of the regulation's text at the moment of enactment."[116]

Second, courts presume that Congress intends to extend deference to agencies because interpreting ambiguous regulations often implicates policy, an issue the executive branch traditionally handles.[117] Ambiguous regulations and statutes hold multiple reasonable meanings and choosing among those meanings is a policy choice.[118] For example, Transportation Security Administration (TSA) regulations prohibit carrying water in a container larger than 3.4 ounces through airport security,[119] but it is not clear that the prohibition of liquids extends to items like yogurt or tapenade.[120] Effectively resolving this policy question requires intimate familiarity with and expertise on the issue of liquids in the aviation security context.[121] Agencies like the TSA are designed specifically to address these types of problems.[122] Justice Kagan argued that Congress is aware that an agency's

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in part and dissenting in part). Depending on the specificity with which it writes laws, Congress can constrict or enlarge agency discretion as it deems necessary. *See* City of Arlington v. FCC, 569 U.S. 290, 296 (2013); *see also* Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 536–37 (2014) (stating that Congress intends for agencies to fill gaps in statutory schemes).

113. *See Kisor*, 139 S. Ct. at 2412. Justice Kagan analogized this assumption to an attempt to determine the original meaning of an email. *See id.* Whether looking for the original meaning of an email or a regulation, Justice Kagan posited one should ask its author. *See id*. Justice Gorsuch, however, found this analogy unpersuasive. *See id.* at 2441 (Gorsuch, J., concurring). He argued that agency personnel change or an agency's policy priorities may shift over time, which means the agency may not know what the original meaning of the regulation was. *See id.* This presumption requires the current owner of an email account to know what a previous owner meant, even when the email was sent decades ago. *See id.*

114. *Id.* at 2412 (plurality opinion) (citing Mullins Coal Co. of Va. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 159 (1987)).

115. *See id.*

116. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1454 (2011).

117. *See Kisor*, 139 S. Ct. at 2413; *see also* Manning, *supra* note 10, at 626.

118. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018).

119. *See Liquids Rule*, TRANSP. SECURITY ADMIN., https://www.tsa.gov/travel/security-screening/liquids-rule [https://perma.cc/DQ58-XGUD] (last visited Apr. 12, 2020).

120. *See Kisor*, 139 S. Ct. at 2413.

121. *See id.* at 2410 (stating that determining the definition of line of sight at a sporting event, whether x-ray results are diagnoses, and what an active moiety is are other examples of policy decisions best left to agencies).

122. *See* SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1364 (2018) (Breyer, J., dissenting) (citing Barnhart v. Walton, 535 U.S. 212, 225 (2002) (finding that in the *Chevron* context agencies have the expertise and experience to administer detailed, complex statutory schemes)).

expertise gives it a comparative advantage over a court.[123] Congress delegates power to the agency, then, so it can use this skill set to complete the regulatory or statutory scheme as it deems necessary to address new circumstances implicating the regulation.[124]

Third, having agencies interpret their own ambiguous regulations promotes uniformity in the enforcement of the regulation.[125] Congress has a "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation."[126] An agency is able to offer one interpretation, uniformly applied to all regulated parties.[127] By contrast, a judicial interpretation applies only to those regulated parties located in the court's jurisdiction.[128] This can lead to disagreements among circuits as to how a regulation should be enforced.[129] The uniformity principle encompasses simple schemes as well. Even seemingly accessible regulatory language may have multiple reasonable interpretations.[130] Accordingly, delegating interpretive authority to the agency helps avoid conflicting interpretations.[131]

2. Compliance with the APA

The pro-*Auer* position also argues that the doctrine does not violate any ratified congressional statute. Specifically, *Auer* is consistent with requirements found in sections 553 and 706 of the APA.[132] Section 706 provides that it is the courts, not the agency, which "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[133] However, section 706 does not enumerate how a court must find the meaning

123. *See id.* at 1358 (majority opinion) (finding that policy arguments are not best decided by the Court).

124. *See Kisor*, 139 S. Ct. at 2413.

125. *See* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117–29 (1987). *Chevron* can also offer interpretive uniformity. As Justice Antonin Scalia noted, the presumptions supporting *Chevron* create a "stable background . . . against which Congress can legislate." City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

126. *See Kisor*, 139 S. Ct. at 2413 (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980)).

127. *See id.* at 2414.

128. *Compare* Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995) (finding salaried workers exempt under the Fair Labor Standards Act (FLSA) so long as they experience no deduction from their compensation), *with* Yourman v. Dinkins, 84 F.3d 655 (2d Cir. 1996) (per curiam) (finding salaried workers protected by the FLSA so long as their compensation is subject to deduction).

129. *Compare Auer*, 65 F.3d at 710–11, *with Yourman*, 84 F.3d at 656.

130. *See Kisor*, 139 S. Ct. at 2414.

131. *See id.*; *see also* Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1204 (1995).

132. *See* Brief of Administrative Law Scholars as Amici Curiae in Support of Affirmance at 9–31, *Kisor*, 139 S. Ct. 2400 (No. 18-15) [hereinafter Brief of Administrative Law Scholars].

133. 5 U.S.C. § 706 (2018).

of a rule.[134] By conducting an *Auer* review, the court either finds and then enforces the statute or regulation's particular meaning or finds that the meaning of the regulation is ambiguous.[135] In both cases, the court determines the meaning of the statute or regulation.[136] The pro-*Auer* position argues this is perfectly consistent with the text of the APA.[137]

Further, the pro-*Auer* position contends that the doctrine does not violate the APA's required processes for promulgating new rules. The procedures and requirements imposed on agencies when they engage in rulemaking are codified in sections 551 through 559 of the APA.[138] Section 553 requires agencies to undergo notice and comment procedures when promulgating rules with the force of law[139] through informal rulemaking.[140] To comply, an agency must present the public with information regarding the proposed rule, allow the public to comment on the proposed rule, and eventually provide an explanation for the agency's decision to adopt or reject the proposed rule.[141] Agencies also have the ability to promulgate rules, albeit without the force of law, through other methods like issuing an interpretive rule.[142] *Auer* applies equally to rules with or without the force of law, which the anti-*Auer* position argues ostensibly makes non–force of law rules into force of law rules.[143] However, a rule that receives deference is not conferred with the force of law.[144] Agencies then have no incentive to attempt to evade rulemaking.[145] Accordingly, Justice Kagan argues *Auer* is consistent with the rulemaking requirements prescribed by the APA.[146]

In sum, the pro-*Auer* position advocates for *Auer* deference based on the presumption that Congress intends for agencies to have the authority to interpret their own ambiguous regulations. As agencies write regulations, they are in the best position to know what the regulations mean. Agencies also hold the necessary technical and scientific knowledge to interpret complex regulatory schemes and address the associated policy issues. Delegating interpretive power to agencies promotes the uniform application

134. *See Kisor*, 139 S. Ct. at 2419.

135. *See id.* (citing Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 308 (2017)).

136. *See id.*

137. *But see infra* Part II.B.1 (explaining the counterargument that finding a regulation to be ambiguous is not the same as determining the statute's meaning).

138. *See* 5 U.S.C. §§ 551–559.

139. A rule has the force of law "only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule." Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).

140. 5 U.S.C. § 553; *see also* United States v. N.S. Food Prods. Corp., 568 F.2d 240, 249–52 (2d Cir. 1977).

141. *See* 5 U.S.C. § 553.

142. Interpretive rules are pronouncements that inform the public how an agency will construe and administer a particular statute or regulation. *See* Azar v. Allina Health Servs., 139 S Ct. 1804, 1811 (2019). Interpretive rules do not have the force of law. *See id.*

143. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2420 (2019); *see also infra* Part II.B.1.

144. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 & n.4 (2015).

145. *But see infra* Parts II.B.1–2.

146. *See Kisor*, 139 S. Ct. at 2418–22.

of regulations and statutes. Further, the pro-*Auer* position argues that the doctrine complies with requirements enumerated in the APA. Meeting the requirements in section 706, courts granting *Auer* deference are endeavoring to find the meaning of a rule. If that meaning is unambiguous, the courts will decide the ultimate outcome, but if it is ambiguous, the ultimate outcome will be left to the agency for the policy reasons discussed above.[147] Finally, *Auer* does not circumvent the APA's rulemaking requirements because it does not give agencies a method to promulgate force of law rules without the agency conducting a notice and comment period.

B. Against Deference: Kisor*'s Anti-*Auer *Position*

By contrast, the anti-*Auer* position contends that the doctrine allows agencies to effectively promulgate force of law regulations without adhering to the requirements in section 553 and forces judges to abdicate their responsibilities in violation of section 706.[148] Further, the anti-*Auer* position argues that *Auer* violates separation of powers principles because it allows agencies to have control over all portions of the lawmaking process.[149] Accordingly, the anti-*Auer* position argues that the doctrine should have been overturned.[150]

1. Violating the APA

Critics of *Auer* contend that it violates section 706. Justice Gorsuch argues that the provision "requires" a court to determine "for itself" the proper meaning of an agency regulation.[151] This is an "unqualified command" from Congress that courts, not agencies, have interpretive authority.[152] When a court finds a regulation is ambiguous, it is not "'decid[ing]' the relevant 'questio[n] of law'"; it is transferring its judicial functions to the agency in violation of section 706.[153] This position stands in stark contrast to *Auer*'s proposition that it is the agency, not the courts, that has the nearly controlling power to interpret agency regulations so long as that interpretation is not plainly erroneous.[154]

Likewise, *Auer* presents problems given an agency's obligations under section 553. The anti-*Auer* position asserts that, regardless of whether the

147. *See supra* Part II.A.1.
148. *See infra* Part II.B.1.
149. *See infra* Part II.B.2.
150. *See Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring).
151. *Id.* at 2432.
152. *Id.* (alteration in original) (quoting 38 U.S.C. § 7292(d)(1) (2018)).
153. *Id.* A similar argument about judicial abdication can be made about the role of the judiciary at *Chevron* step two. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–52 (10th Cir. 2016) (Gorsuch, J., concurring) ("[R]ather than completing the task expressly assigned to [judges], . . . declaring what the law is, and overturning inconsistent agency action, *Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision.").
154. Brief for Professor Thomas Merrill as Amicus Curiae Supporting Reversal at 3, *Kisor*, 139 S. Ct. 2400 (No. 18-15) [hereinafter Brief for Professor Thomas Merrill].

rule was promulgated through notice and comment, an agency can present an interpretation of a preexisting vague regulation that "for all practical purpose" will have binding legal force.[155] Because courts can grant deference for any type of agency rule, *Auer* disincentivizes agencies to promulgate rules through notice and comment.[156] In Justice Gorsuch's opinion, "*Auer* thus obliterates a distinction Congress thought vital" between rules carrying the force of law and those not "and supplies agencies with a shortcut around the APA's required procedures for issuing and amending substantive rules that bind the public with the full force and effect of law."[157]

2. Violating Separation of Powers

The principle of separation of powers ensures that rule writing, rule interpretation, and rule enforcement are housed in separate branches of government so each branch can serve as a check on one another.[158] In the *Auer* context, the agency has promulgated a rule—a legislative function—and later, for the same rule, can authoritatively interpret or enforce it—a judicial function.[159] According to the anti-*Auer* position, unifying these distinct functions together in one agency "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[160] Because agencies have the ability to both pass rules and later interpret them, agencies are incentivized to strategically promulgate vague and broad regulations.[161] If the regulation is vague, an agency can change the meaning of the regulation whenever it pleases for whatever reason it wants by issuing a new interpretation of the regulation.[162] Because the agency's interpretation will only be overturned under *Auer* if it is plainly

155. *See Kisor*, 139 S. Ct. at 2434 (Thomas, J., concurring) (citing Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1221 (2015)).

156. *See* Hanah Metchis Volokh, *The Anti-parroting Canon*, 6 N.Y.U. J.L. & LIBERTY 290, 308–09 (2011).

157. *See Kisor*, 139 S. Ct. at 2434 (Gorsuch, J., concurring).

158. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); INS v. Chadha, 462 U.S. 919 (1984).

159. *See* Manning, *supra* note 10, at 631.

160. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part). This separation of powers concern also exists for *Chevron* deference. *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–52 (10th Cir. 2016) (Gorsuch, J., concurring).

161. *See* Manning, *supra* note 10, at 618.

162. *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring). Supporters of *Auer* note that agencies have incentives to promulgate clear rules. *See Kisor*, 139 S. Ct. at 2421; *see also* Brief of Administrative Law Scholars, *supra* note 132, at 3–4. Clear rules can lower enforcement costs, ensure better compliance by regulated parties, and bind subsequent administrations. *See* Manning, *supra* note 10, at 655–56. Further, there is no evidence that agencies take strategic steps to promulgate vague regulations. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 308 (2017). In response, the anti-*Auer* position argues that regardless of whether agencies strategically promulgate vague regulations, giving them the opportunity to do so by combining rule writing and interpretation authority in one body necessarily contravenes the Constitution. *See Kisor*, 139 S. Ct. at 2440–41 (Gorsuch, J., concurring).

erroneous, there is very little risk of the judiciary denying deference and interpreting an agency's regulation in a way that conflicts with the agency's preference for future interpretation.[163]

Moreover, allowing an agency "to do what it pleases,"[164] or change the meaning of a regulation, can adversely impact regulated communities. Without the regulator clearly outlining its rules and expectations, regulated parties are less likely to understand or realize when they have violated a regulation.[165] This can lead to issues of notice and may ultimately implicate due process concerns.[166]

Finally, *Auer* allows agencies to avoid the costs associated with promulgating a new regulation. Generally, agencies face a "pay me now or pay me later" incentive structure.[167] When promulgating a rule with the force of law, the agency incurs upfront costs for going through the notice and comment period.[168] When the agency uses an interpretive rule, which requires no notice and comment period and therefore incurs no costs ex ante, the agency risks paying costs later when a regulated entity challenges the rule and a court reviews it under *Skidmore*.[169] *Auer*, by contrast, offers agencies a third, low-cost option; instead of formally amending or overturning existing rules, agencies can simply say the preexisting regulation means something totally new.[170]

3. Rejecting Policy Arguments

In addition to statutory and constitutional concerns, the anti-*Auer* position does not subscribe to the presumption that Congress intends for agencies to have interpretive power. First, the anti-*Auer* position argues that Congress, through section 706, chose courts over agencies to determine the meaning of a regulation.[171] To find that the presumption favors agencies, in Justice Gorsuch's opinion, would be to believe that "Congress really, secretly, wanted courts to treat agency interpretations as binding" despite the "plainly expressed statutory directives" in the APA.[172]

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163. *See* Manning, *supra* note 10, at 655.

164. *Talk Am.*, 564 U.S. at 69.

165. *See* Manning, *supra* note 10, at 655.

166. *See* Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 559–60 (2019).

167. *See* Stephenson & Pogoriler, *supra* note 116, at 1464.

168. *See id.*

169. *See id.*

170. Professor Thomas Merrill describes this option as the "pay me never" option. Brief for Professor Thomas Merrill, *supra* note 154, at 19; *see also* Stephenson & Pogoriler, *supra* note 116, at 1468–69. This problem is particularly important as agencies can choose the way in which they promulgate rules. *See* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947). With this shortcut present, there is nothing binding the agency to a notice and comment process. *See* Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 948 (2017) (arguing that *Auer* and *Chenery* are substitutes for each other and used by agencies interested in retaining future flexibility).

171. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2432 (2019) (Gorsuch, J., concurring).

172. *See id.* at 2435. It is also not clear Congress is even secretly delegating authority to the agencies. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the*

Further, the anti-*Auer* position rejects the presumption that an agency is in the best position to discern the meaning of a regulation because it is the original author.[173] Agency personnel change over time.[174] With such turnover, the anti-*Auer* position argues that the agency often cannot know a regulation's original meaning.[175] Even allowing for institutional knowledge, an agency's priorities change as presidential administrations change.[176] *Auer* allows agencies to modify their interpretations to match an incumbent president's position.[177] Deferring to an agency's interpretation, therefore, cannot guarantee a regulation's initial meaning will be enforced.

Finally, the anti-*Auer* position contends that an agency should not receive deference for being an expert on a particular issue. Expertise can be afforded "respect" and is often useful to a reviewing court when it makes a decision.[178] However, the anti-*Auer* position argues that expertise does not place agencies in a position so favorable that they should be granted interpretive power over courts.[179] Instead, agencies should use their expertise as one factor among many to persuade a court to adopt the agency's interpretation.[180]

Justice Gorsuch argued in *Kisor* that "[o]verruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and 'follow [the] agency's [view] only to the extent it is persuasive.'"[181] This would have done principally two things. First, courts would retain the power to be the ultimate arbiters of the meanings of ambiguous regulations, consistent with the language in section 706.[182] Second, were the interpretive function moved primarily back to the courts, agencies would be concerned with only the executive functions of rulemaking, removing incentives to promulgate vague regulations and avoid notice and comment.[183] Such a divide would be more consistent with

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Inside—an Empirical Study of Congressional Drafting, Delegations, and the Canons (pt. 1), 65 STAN. L. REV. 901, 906–07 (2013). Gluck and Bressman found that drafters of legislation may be aware of some interpretive tools like *Chevron* and some textual canons like noscitur a sociis, although the canons are not always applied by drafters as courts expect. *See id.* However, there are "a host of canons" and doctrines of which drafters are unaware or that they ignore. *Id.* at 907. Similarly, Judge Raymond Kethledge stated that the Office of Legislative Counsel, the congressional body responsible for writing laws, chooses words "based upon the sole criterion of clarity." Kethledge, *supra* note 89, at 320. If this is true, Judge Kethledge's contention supports the anti-*Auer* position that section 706 clearly assigns interpretive functions to the judiciary. *See supra* note 153 and accompanying text.

173. *See supra* note 113 and accompanying text.
174. *Kisor*, 139 S. Ct. at 2441 (Gorsuch, J., concurring).
175. *See id.*
176. *See id.*
177. *See id.* at 2443.
178. *See id.*
179. *See* Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB POL'Y 625, 646–48 (2019).
180. *See Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., concurring).
181. *See id.* (quoting Gonzales v. Oregon, 546 U.S. 243, 269 (2006)).
182. *See supra* Part II.B.1.
183. *See supra* Part II.B.2.

foundational principles of separation of powers.[184] Accordingly, the anti-*Auer* position advocated for *Auer* to be overturned.[185]

III. A UNITARY THEORY OF DEFERENCE

Kisor could be viewed as an isolated debate over a particular, narrow issue: whether to maintain *Auer* or overturn it altogether.[186] *Kisor*, however, does more than juxtapose these two arguments in a conversation about which of these positions is more tenable.[187] It implicitly offers a third position with broader implications. *Kisor* represents a change from independent deference doctrines to a singular, unitary deference regime. This new approach to deference is rigorous, making it more difficult for agencies to receive any type of deference.[188] In effect, the Court has moved from traditional deference—deferring to an agency when a statute or regulation is textually ambiguous—to a strict deference standard, which requires courts to consider more than just the plain words of the statute.[189] The test in *Kisor* is the Court's first illustration of this new strict deference standard and, given the links between the deference doctrines, could signal that soon the Court will apply the *Kisor* test in other deference situations, including those scenarios traditionally analyzed under *Chevron*.[190] No longer would there be *Auer* deference or *Chevron* deference. Instead, there would be one unitary deference standard: strict deference.

Part III.A explains how in *Kisor* the Court combined *Chevron*, *Skidmore*, and *Auer* into a unitary deference doctrine, which this Note calls strict deference.[191] Next, Part III.B applies strict deference to three *Chevron* cases decided by circuit courts and the Supreme Court. The case studies explain each court's original analysis under the traditional *Chevron* framework and then demonstrate how the analysis would change if strict deference had been applied. Finally, Part III.C argues that strict deference ameliorates some of the concerns expressed by the antideference position outlined in Part II.B, while still preserving the benefits outlined in Part II.A. It then argues that strict deference can work as a unitary deference doctrine.

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184. *See* Manning, *supra* note 10, at 631.
185. *See Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring).
186. *See supra* Part II.
187. *But see* Corbin K. Barthold & Cory L. Andrews, *Symposium: A Small Win for James Kisor; a Big Loss for the Constitution*, SCOTUSBLOG (June 27, 2019, 2:19 PM), https://www.scotusblog.com/2019/06/symposium-a-small-win-for-james-kisor-a-big-loss-for-the-constitution/ [https://perma.cc/9QUT-VBJ8] (positing that the fight about *Auer* is over).
188. *See supra* Part I.B.
189. *See supra* Part I.A.2.
190. *See supra* Part I.A.2.
191. *See supra* Part II.B.

A. Strict Deference as a Unitary Standard

Instead of viewing each of its deference doctrines in silos,[192] to be deployed independently, *Kisor* suggests that the Court is moving towards a unified doctrine of deference in which *Chevron*, *Auer*, and *Skidmore* are inextricably linked.[193] Indeed, in his *Kisor* concurrence, Chief Justice Roberts noted that "cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation," a *Skidmore* principle.[194] Courts have also acknowledged the links between *Chevron* and *Auer*. In *Auer* itself, Justice Antonin Scalia cited *Chevron* for the proposition that the secretary of labor's interpretation of "salaried" deserved deference.[195] He later wrote that "[in] practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes"[196] and that "[*Auer*] seems to be a natural corollary—indeed, an *a fortiori* application—of [*Chevron*'s] rule that we will defer to an agency's interpretation of the statute it is charged with implementing."[197] Similarly, Justice Kennedy cited *Auer* directly together with *United States v. Mead Corp.*[198] in assessing an Environmental Protection Agency decision regarding discharge fill material standards.[199] Kristin Hickman and Mark Thomson also recognized the similarities at play, referring to *Chevron* as *Auer*'s "close cousin."[200]

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192. This siloed approach, applied only to the *Chevron* context, has been referred to as the decision tree model. *See* Hickman, *supra* note 112, at 537–41.

193. *Compare* United States v. Mead Corp., 533 U.S. 218, 234 (2001) (linking *Chevron* and *Skidmore* by finding that an agency decision denied deference under *Chevron* could still be upheld under *Skidmore*), *and* Hickman, *supra* note 112, at 544 (writing that the Court has employed a "blended approach" to some *Chevron* cases), *with* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) (linking *Auer* with *Skidmore* and finding that an agency decision denied deference under *Auer* could still be upheld under *Skidmore*). Aditya Bamzai believes *Auer* and *Skidmore* are virtually identical and questions whether employing different types of deference makes sense. Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 192 (2019). At least in the context of *Auer* and *Skidmore*, Bamzai writes, "it might make sense to have a single approach with a single label." *Id.*

194. *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring).

195. *See* Auer v. Robbins, 519 U.S. 452, 457 (1997). Lower courts have also acknowledged that a "similar standard [to *Chevron*] is applied in judicial review of an agency's interpretation of its own regulations." Indep. Petroleum Ass'n of Am. v. Babbitt, 92 F.3d 1248, 1256 (D.C. Cir. 1996); *see also* Forrest Gen. Hosp. v. Azar, 926 F.3d 221, 230 (5th Cir. 2019) (finding that "[i]n practice, *Auer* deference mirrors *Chevron* deference").

196. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part).

197. Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring). Despite pointing out the similarities, Justice Scalia used his concurrences in *Talk America* and *Northwest Environmental* to harshly criticize *Auer* for shortcomings discussed in Part II.B. *See id.* at 68–69; *Nw. Envtl.*, 568 U.S. at 616–21 (Scalia, J., concurring).

198. 533 U.S. 218 (2001).

199. *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 277–78 (2009) (first citing *Mead*, 533 U.S. at 234–38; then citing *Auer*, 519 U.S. at 461).

200. Kristin E. Hickman & Mark. R. Thomson, *The* Chevron*ization of* Auer, 103 MINN. L. REV. HEADNOTES 103, 107 (2019).

This larger unitary deference regime looks like a double helix of DNA. *Auer* and *Chevron* serve as the rails of the helix, while *Skidmore*, like the proteins in DNA, binds the doctrines together. And just as the rails of DNA are comprised of the same chemical compounds, *Chevron* and *Auer* can also be viewed as comprising the same analytical elements.[201] More importantly, a unified strict deference standard makes it possible for the Court to apply this standard in contexts beyond *Auer*. Limiting application of the standard to the *Auer* context would accentuate a contradiction. A stricter test resulting in less deference would be applied when an agency interprets regulations it promulgated, but a more relaxed test would be applied when an agency interprets statutes passed by Congress.[202] Therefore, strict deference is unlikely to remain an *Auer*-specific test. The logical next step, especially given how the Court has already linked together the deference standards into a unitary regime, would be to apply the same strict deference standard to *Chevron*.[203] Indeed, the Court's attention has turned in that direction. Justice Kennedy wrote that, "[g]iven the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[204]

B. Case Studies

This section applies the strict deference standard to three cases, two decided at the circuit court level and one decided at the Supreme Court, which analyzed deference under a *Chevron* framework. Part III.B.1 applies strict deference to a case where the Ninth Circuit granted reflexive deference, choosing only to look at the plain meaning of the text. Part III.B.2 illustrates

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201. *See supra* Parts I.A.2, I.B (showing that both doctrines include a threshold requirement, a statutory interpretation requirement, and a reasonableness requirement). Some courts have applied all three doctrines in a single case to determine if an agency should receive deference. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 255–75 (2006); Belt v. P.F. Chang's China Bistro, Inc., 401 F. Supp. 3d 512, 528–30 (E.D. Pa. 2019).

202. *See Nw. Envtl.*, 568 U.S. at 617–18 (Scalia, J., concurring in part and dissenting in part).

203. *See supra* Part I.A.2 (explaining limits being placed on *Chevron*).

204. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (internal citations omitted); *see also supra* Part I.A.2. Even in agency cases that do not involve deference, the Court is conducting discerning interpretive reviews of statutes. *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (confirming that delegation to the agency to enforce sex offender laws did not violate constitutional principles of nondelegation); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (calling for reconsideration of when Congress can delegate interpretive authority to agencies). *Kisor* also contains clues that the Court may be turning its attention to *Chevron*. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring) ("Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. I do not regard the Court's decision today to touch upon the latter question." (citations omitted)); *see also* Brief of Professors of Administrative Law and Federal Regulation as Amici Curiae in Support of Neither Party at 3, *Kisor*, 139 S. Ct. 2400 (No. 18-15) (arguing that regardless of whether *Auer* and *Seminole Rock* are overturned or narrowed, *Chevron* is and should remain good law).

how, even when a court conducts a more robust *Chevron* analysis, strict deference can favor courts' retention of interpretive authority. Part III.B.3 tracks a *Chevron* analysis at the Supreme Court and shows how deference is still available to agencies even when they are subjected to a strict deference review.

1. *Baldwin v. United States*

In 2007, Howard and Karen Baldwin believed that a $2.5 million net operating loss from their movie production business could be used to offset tax liability for the 2005 tax year.[205] Based on that offset, the Baldwins filed for a tax refund of approximately $167,000.[206] To be considered for the refund, Internal Revenue Service (IRS) regulations required them to file by October 15, 2011.[207] The Baldwins claimed that they sent the form to the IRS in June 2011; however, the IRS allegedly never received it.[208] By the time the Baldwins re-sent the filing and confirmed the agency received it, the statutory deadline had passed and the IRS denied the Baldwins' claim as untimely.[209]

The Baldwins then brought suit in federal court. Taxpayers can bring a civil action to recover any IRS tax that has been "erroneously or illegally assessed or collected"[210] but only after they properly file for a refund or credit with the IRS.[211] A properly filed refund or credit is one that is filed within the statutory limits articulated by law—here, by October 15, 2011.[212]

Before 1954, a document was filed properly if it was physically delivered to the IRS.[213] To protect taxpayers from mistakes made by the United States Postal Service (USPS) when delivering these documents, some jurisdictions applied the common-law mailbox rule.[214] This rule allowed an individual to present evidence showing that the mailing was physically delivered in a reasonable amount of time.[215] The Baldwins relied on the mailbox rule in bringing their case.[216]

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205. *See* Baldwin v. United States, 921 F.3d 836, 839 (9th Cir. 2019).
206. *Id.*
207. *Id.* (citing 26 U.S.C. § 6511(b)(1), (d)(2)(A)).
208. *Id.*
209. *Id.*
210. 28 U.S.C. § 1346(a)(1) (2018).
211. *See Baldwin*, 921 F.3d at 839 (citing 26 U.S.C. § 7422(a)).
212. *See id.* (citing Yuen v. United States, 825 F.2d 244, 245 (9th Cir. 1987)).
213. *Id.* at 839–40.
214. *Id.* at 840. The mailbox rule states that "proof of proper mailing—including by testimonial or circumstantial evidence—gives rise to the rebuttable presumption that the document was physically delivered to the addressee in the time such a mailing would ordinarily take to arrive." Phila. Marine Trade Ass'n v. Comm'r, 523 F.3d 140, 147 (3d Cir. 2008).
215. *See Baldwin*, 921 F.3d at 840 (first citing Detroit Auto. Prods. Corp. v. Comm'r, 203 F.2d 785, 785–86 (6th Cir. 1953) (per curiam); then citing Ark. Motor Coaches, Ltd v. Comm'r, 198 F.2d 189, 191 (8th Cir. 1952)).
216. *See id.* at 842.

In 1954, Congress codified exceptions to the physical delivery rule, satisfied when the IRS actually receives the filing on time, by promulgating Internal Revenue Code (IRC) section 7502.[217] Pursuant to the statute, a document is considered filed if the IRS actually received it *and* it was postmarked before the deadline date.[218] A filing sent by certified mail automatically met these two requirements.[219] In 1992, the Ninth Circuit found that, despite codifying the certified mail exception, section 7502 did not replace the common-law mailbox rule but instead supplemented it.[220] Other circuits, however, found that section 7502 replaced the mailbox rule completely.[221]

In 2011, the Treasury Department attempted to resolve this disagreement among the courts by amending 26 C.F.R. § 301.7502-1(e).[222] The regulation stated that the exception in section 7502 replaced the mailbox rule.[223] The district court rejected the Treasury Department's argument that the new amended regulation could bar the application of the mailbox rule.[224] On appeal, the Ninth Circuit asked whether the district court was correct in rejecting the government's argument.[225]

a. Applying Chevron

The court reviewed section 7502 under *Chevron* to determine whether the statute barred the application of the mailbox rule.[226] At step one, the court found that section 7502 was "silent" as to whether the statute replaced the common-law rule.[227] The court noted that section 7502 explicitly provides exceptions, including for certified mail and electronic filings, but does not provide an exception for regular mail.[228] At step two, the court found that the agency's interpretation of the statute was permissible.[229] The court opined that the statute presented two reasonable constructions of section 7502, including the agency's interpretation that the statute precluded the mailbox rule.[230] The court presumed that "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative

217. *See id.* at 840.
218. *See id.*
219. *See id.* at 840–41 (citing 26 U.S.C. § 7502(c)(1)).
220. Anderson v. United States, 966 F.2d 487, 492 (9th Cir. 1992).
221. *See Baldwin*, 921 F.3d at 841 (first citing Miller v. United States, 784 F.2d 728, 730–31 (6th Cir. 1986); then citing Deutsch v. Comm'r, 599 F.2d 44, 46 (2d Cir. 1979)).
222. *See id.*
223. *Id.* at 841–42.
224. *See id.* at 842.
225. *Id.*
226. *See id.*
227. *Id.*
228. *See id.*
229. *Id.* at 843.
230. *See id.*

intent."[231] As the statute enumerates an exception for certified mail only, but does not speak with such clarity regarding the mailbox rule, the court found the Treasury Department's interpretation reasonable.[232] Accordingly, the court granted deference.[233]

b. Applying Strict Deference

In granting deference, the Ninth Circuit conducted the type of basic *Chevron* analysis that has led commentators to question whether the doctrine needs updating.[234] Had the court applied the more rigorous strict deference standard, however, the agency may not have received *Chevron* deference.

i. Character and Context Requirements

Step one of the strict deference standard requires a court to assess whether deference is appropriate.[235] The Treasury Department's interpretation raises two issues. First, strict deference requires a court to consider whether an agency used its experience and knowledge to make its interpretation.[236] In this case, the Treasury Department may not have leveraged its substantive expertise as the chief revenue agency when interpreting section 7502. This provision provides a remedy to taxpayers when the IRS receives their filings late or not at all due to a mistake by the USPS.[237] Arguably, the Treasury Department's substantive knowledge about revenue is not necessary to interpret section 7502's provisions about the mail system. Accordingly, the court may be as qualified as the Treasury Department to determine the meaning of the statute.

Second, the agency's interpretation gives rise to notice issues, suggesting that the Treasury Department did not use fair and reasoned judgment in making its interpretation.[238] The Baldwins could not have known that the mailbox rule would be inapplicable; they attempted to secure a refund from the IRS as early as June 2011, two months before the Treasury Department promulgated its amended regulation barring the mailbox rule.[239] The court found notice not to be at issue.[240] It noted that the regulation is explicitly written to be backward-looking, covering all documents mailed after September 21, 2004.[241] This retroactive provision is in compliance with IRC

231. *Id.* (quoting Hillman v. Maretta, 569 U.S. 483, 496 (2013)). *But see infra* Part III.B.1.b.ii. (explaining that Senate and House committee reports may demonstrate legislative intent contrary to the explicit enumerated exceptions in the statute).
232. *See Baldwin*, 921 F.3d at 843.
233. *Id.* at 844.
234. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring); Walker, *supra* note 46.
235. *See supra* Part I.B.
236. *See supra* Part I.B.
237. *See Baldwin*, 921 F.3d at 839–40.
238. *See supra* note 75 and accompanying text.
239. *See Baldwin*, 921 F.3d at 839.
240. *Id.* at 844.
241. *Id.*

section 7805(b), which "authorizes the Treasury Secretary to make regulations retroactively applicable as far back as the date of their proposal."[242] While the regulation may have been legally in accordance with the IRC, the regulation is still backward-looking. Under strict deference, agencies should not receive deference for this type of retroactive interpretation.[243]

ii. The Interpretive Tool Kit

At *Chevron* step one, the court found that section 7502 was "silent"[244] on whether the statute incorporated the mailbox rule.[245] However, in primarily relying on the plain text, the court did not fully utilize all its tools of statutory interpretation, including a review of the statute's legislative history.[246] Senate and House committee reports for a 1966 amendment to section 7502 suggest that Congress intended to include the mailbox rule in the statute.[247] The reports state that the statute's purpose was to provide that "where a claim, statement, or other document, which is required to be filed by a specific date is properly mailed, the postmarked date is to be considered as the date on which it was filed."[248] Before promulgating the amended regulation, the IRS acted in compliance with this purpose, considering filings and returns timely if they were mailed before the due date, regardless of whether the mail was certified.[249] The reports state that the certified mail exception is a "special provision" to the statute's general purpose and provides taxpayers with a guaranteed way of establishing delivery.[250]

Based on a fair interpretation of the legislative record, section 7502 offers individuals two ways to prove delivery. An individual could take advantage of the special certified mail provision, guaranteeing she establishes her prima facie case. Alternatively, the statute allows for the common-law mailbox rule; the individual could present evidence, without any guarantees of meeting her burden, that the mail was sent before the due date.[251] While they did not present evidence sufficient to establish a prima facie case, the Baldwins presented testimony from two of their employees that the returns were mailed before the statutory deadline.[252] Under this interpretation, the testimony could fulfill the general requirements of section 7502.

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242. *Id.* (citing I.R.C. § 7805(b)(1)(B)).
243. *See supra* note 67 and accompanying text.
244. *Baldwin*, 921 F.3d at 842.
245. *Id.*
246. The court does explain the history of the mailbox rule and the statute but does not address specifically section 7502's history and purpose. This would be a relevant inquiry as the statute was meant to address maladies with the physical delivery rule, something the mailbox rule could fix. *See id.* at 840.
247. *See generally* S. REP. NO. 89-1625 (1966); H.R. REP. NO. 89-1915 (1966).
248. S. REP. NO. 89-1625, at 8; H.R. REP. NO. 89-1915, at 8.
249. *See supra* note 248.
250. *Supra* note 248.
251. *See* S. REP. NO. 89-1625, at 9; H.R. REP. NO. 89-1915, at 9.
252. Baldwin v. United States, 921 F.3d 836, 842 (9th Cir. 2019).

Had the court deployed more interpretive tools, it may have found that the statute was not in fact genuinely ambiguous. The legislative history demonstrates that the statute was not "silent"[253] on the mailbox rule and suggests that the court could have found a meaning with a more searching review.[254] Without the genuine ambiguity, the agency would not be entitled to deference under strict deference and it would be up to the court to determine the statute's meaning.[255]

iii. Reasonableness

Step three under strict deference flows naturally from the analysis done at step two. An interpretation is reasonable if it addresses the zone of ambiguity identified by the court at step two and nothing more. In *Baldwin v. United States*,[256] the court not did identify such a zone. Instead, the court found that the entire statute was "silent" on the mailbox rule question.[257] The zone of ambiguity, therefore, was the whole statute. Had the court narrowed the inquiry to a smaller subsection of the statute at step two, the agency's interpretation may have exceeded the zone of ambiguity and deference would not have been extended. Instead, the court conducted a more traditional *Chevron* step two analysis, asking if the interpretation was permissible.[258]

In sum, the Ninth Circuit conducted a traditional *Chevron* review that was highly deferential to the agency. It did not fully consider notice or whether substantive expertise was used in making its interpretation. Further, the court did not fully consider legislative history that may have suggested that Congress did intend for section 7502 to include the mailbox rule. Had the court analyzed these factors pursuant to strict deference, it is likely that the court would have denied deference in this case. In any event, subjecting the agency to a rigorous strict deference analysis would have ameliorated concerns that this case represented another example of reflexive deference.[259]

2. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*

In response to mass shootings in 2017 and 2018,[260] the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) promulgated a rule classifying bump stocks as machine guns pursuant to the National Firearms Act[261] (the

253. *Id.*
254. *See* Walker, *supra* note 46. *See generally* Kethledge, *supra* at note 89.
255. *See supra* Part I.A.1.
256. 921 F.2d 836 (9th Cir. 2019).
257. *See id.* at 842.
258. *See id.* at 843; *see also supra* Part I.A.2.
259. Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring); Walker, *supra* note 46.
260. *See* Charlie Savage, *Trump Administration Imposes Ban on Bump Stocks*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/politics/trump-bump-stocks-ban.html [https://perma.cc/2SGR-G6SY].
261. Pub. L. No. 90-618, tit. II, 82 Stat. 1227 (1954) (codified as amended in scattered sections of 18 and 26 U.S.C.).

"Firearms Act").[262] Machine guns are regulated under the Firearms Act[263] and are defined as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[264] The Firearms Act also regulates parts or components intended to convert a firearm into a machine gun.[265]

ATF argued that a bump stock fits the statutory requirements enumerated in section 5845(b) of the Firearms Act.[266] To do so, ATF conducted a two-step analysis. First, the agency defined "automatically" as "the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger."[267] Second, the agency defined a "single function of a trigger" as "a single pull of the trigger and analogous motions."[268] Accordingly, ATF concluded that machine gun, as defined in the Firearms Act, included bump stocks because the device allowed a semiautomatic weapon to discharge more than one cartridge with a single pull of the trigger.[269] By contrast, the plaintiffs argued that the statutory definition of machine gun does not include a bump stock.[270]

a. Applying Chevron

After conducting a *Chevron* review, the court granted deference to ATF.[271] At step one, the court focused its analysis on the language of the statute: "single function of the trigger" and "automatically."[272] It identified two interpretations for "single function of the trigger." This phrase could mean either that the singular mechanical act of pulling the trigger results in the discharge of only one bullet or the singular mechanical act of pulling the trigger results in the discharge of multiple bullets because of the bump stock.[273] The court found nothing to preclude either of these interpretations.[274] Accordingly, the court found that there was a statutory gap for which ATF could offer an interpretation.[275]

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262. *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 6 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020).
263. *Id.* (citing 26 U.S.C. § 5845(a)).
264. *Id.* (citing 26 U.S.C. § 5845(b)).
265. *Id.* at 7.
266. *Id.*
267. *Id.* at 8 (citing 27 C.F.R. §§ 447.11, 478.11, 479.11).
268. *Id.*
269. *Id.*
270. *Id.* at 6.
271. *Id.* at 32.
272. *See id.* at 29.
273. *See id.*
274. *See id.* The court considered dictionary definitions of "function" as well as the plain meaning of the statute in attempting to resolve the possible ambiguities. *See id.* The court conducted a similar analysis for "automatically" by considering its dictionary definition and plain meaning. *See id.* at 30.
275. *Id.* at 29.

Similarly, the court found "automatically" to be ambiguous.[276] A function can be automatic even if there is some limited level of human involvement in the process.[277] The court, however, noted that it is not clear how much human involvement would push a process from automatic to manual.[278] It is also not clear if a single action, like a single trigger pull, is enough to start an automatic process.[279] Without answers to these questions, the court determined that there was another statutory gap for ATF to fill.[280]

At step two, the court found the agency's interpretations of both "single function of the trigger" and "automatically" permissible.[281] First, the court found that the agency's expertise on the mechanics of firearms placed it in a better position to define "single function of the trigger" than a court.[282] Second, the court found that other jurisdictions read the statute consistently with the agency's interpretation.[283] Third, the court found that an interpretation of "automatically," which included some limited amount of human intervention comported, with an "everyday understanding of the word 'automatic.'"[284] Fourth, the court noted that the statute itself allows for some human intervention.[285] Therefore, the court found ATF's interpretation permissible, and it received deference under *Chevron*.[286]

b. Applying Strict Deference

The D.C. Circuit conducted a rigorous *Chevron* analysis that largely comports with the requirements of strict deference. However, based on the record, a strict deference review would have leaned toward placing interpretive authority with the court and counseled against extending deference.

i. Character and Context Requirements

In line with step one, the court initially addressed whether *Chevron* was even applicable.[287] The court found that 18 U.S.C. § 926(a) and 26 U.S.C. § 7805(a) both expressly delegated rulemaking authority carrying the force of law to ATF by way of the Department of Justice.[288] The court also found

276. *Id.* at 30.
277. *See id.*
278. *See id.*
279. *See id.*
280. *Id.* at 31.
281. *Id.*
282. *See id.*
283. *See id.*
284. *Id.*
285. *See id.* at 31–32.
286. *Id.* at 32. *But see* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789 (2020) (denying petition for a writ of certiorari). The third question presented to the Court was "[w]hether, if *Chevron* deference applies and cannot be waived, *Chevron* should be overruled?" Petition for Writ of Certiorari at i, *Guedes*, 140 S. Ct. 789 (No. 19-296).
287. *See Guedes*, 920 F.3d at 19.
288. *See id.*

that the bump stock rule was in furtherance of this authority.[289] As the agency met both prongs of the *Mead* test, ATF's interpretation qualified for deference.[290]

However, to fulfill the character and context requirements, an agency must show it does more than just meet the basic threshold question.[291] Like in *Baldwin*, at issue in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*[292] was whether the agency exercised its fair and reasoned judgment in making its interpretation.[293] To consider this question, the court framed its analysis as an arbitrary and capricious review under the hard look doctrine.[294] In doing its hard look analysis, the court addressed at least five reasons for why the agency's interpretation could not be considered arbitrary and capricious.[295] The court found that the agency engaged in a cost-benefit analysis to address reliance concerns and additionally identified no deficiencies in the notice and comment process that would have led the agency to reach a decision contrary to the presented evidence.[296] Further, the agency addressed concerns of post hoc rationalization, litigation strategy, and notice by delaying the start of enforcement ninety days from when the ATF promulgated the regulation.[297] Therefore, the agency's interpretation withstood the court's hard look review.

This analysis suggests that the court fulfilled the character and context requirements of strict deference. Judge Karen Henderson, in concurrence, however, pointed out two potential flaws in the majority's analysis. First, ATF's interpretation implicates concerns regarding notice.[298] When ATF originally classified bump stocks, the agency did not classify them as machine guns.[299] In 2006, ATF changed its position, classifying a particular type of bump stock, an Akins stock, as a machine gun,[300] following the agency's shift in its interpretation of "single function of the trigger" in section 5845(b) from "single movement of the trigger" to "single pull of the

289. *See id.*
290. *Id.* at 20.
291. *See supra* Part I.B.
292. 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020).
293. *See supra* Part III.C.1.b.i. Here, by stating that the agency used its expertise, the court implicitly considered other factors of the character and context analysis. *See Guedes*, 920 F.3d at 31.
294. *See Guedes*, 920 F.3d at 32 (citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).
295. *See id.* at 33–34.
296. *See id.* at 34.
297. *See id.* at 35.
298. *See id.* at 37 (Henderson, J., concurring in part); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (finding that the Court has "rarely given *Auer* deference to an agency construction 'conflict[ing] with a prior one'" (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994))).
299. *See Guedes*, 920 F.3d at 37 (Henderson, J., concurring in part) (citing Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,517 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, and 479)).
300. *Id.*

trigger."[301] Despite this interpretation, ATF continued to use the "single movement of the trigger" definition when classifying all other non-Akins bump stocks. Indeed, between 2008 and 2017, ATF issued ten rulings in which it found that various bump stocks did not qualify as machine guns.[302] ATF changed its position again in *Guedes*, interpreting non-Akins bump stocks to be machine guns.

This muddied history of defining bump stocks suggests that the agency's interpretation in *Guedes* actually may violate the character and context requirements of strict deference. Defining non-Akins bump stocks as machine guns contradicts almost ten years of stable agency decision-making. Further, given that this rule was promulgated in reaction to horrific mass shootings,[303] it is not unreasonable to wonder if the agency took into account the regulation's potential impact on litigation. Under a strict deference analysis, these factors would counsel against granting an agency deference, despite the agency's interpretation withstanding the court's hard look analysis.

Second, Judge Henderson argued that courts should not extend *Chevron* deference when an agency seeks to interpret a criminal statute.[304] If *Chevron* does not apply to criminal statutes, it cannot apply to statutes, like the Firearms Act, which include both civil and criminal liability.[305] If Congress intended for an agency to have such authority, it would make a clear statement expressly enumerating the delegation, and the regulation would have to include fair warning to avoid lenity issues.[306] Judge Henderson noted that neither of these requirements were met and, accordingly, the court should not have granted deference.[307]

In contrast, the majority distinguished between interpretations of rules carrying the force of law, which could qualify for *Chevron* deference, and interpretations of rules without the force of the law, which could not.[308] The majority found that an agency could not receive deference for interpretations of criminal statutes made without the force of law, but an agency could receive deference for interpreting rules that had the force of law, regardless of whether those rules implicated criminal liability.[309] This dispute about whether *Chevron* applies in a criminal context goes to the heart of strict

301. *See id.* This interpretation was upheld in *Akins v. United States*, 312 F. App'x 197, 201 (11th Cir. 2009).

302. *See Guedes*, 920 F.3d at 37 (Henderson, J., concurring in part) (citing Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,517 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, and 479)).

303. *See* Michael D. Shear, *Trump Moves to Regulate "Bump Stock" Devices*, N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/us/politics/trump-bump-stocks.html [https://perma.cc/TX6M-QLP4].

304. *See Guedes*, 920 F.3d at 39–40 (Henderson, J., concurring in part) (citing Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring)).

305. *See id.* at 41.

306. *See id.* at 41–42.

307. *See id.* at 42.

308. *See id*. at 24–25 (majority opinion).

309. *See id.* at 25.

deference's first step. The standard ensures that deference is only granted when it is truly appropriate.[310] The fact that there is disagreement over whether it is appropriate to extend *Chevron* in this case because of possible criminal liability, coupled with the notice issues, suggests that in this case deference may not have been warranted.

ii. The Interpretive Tool Kit

To find that "single function of the trigger" and "automatically" were ambiguous, the court conducted a textualist analysis of the statute.[311] Leveraging both dictionary definitions and the ordinary meanings of the words, the court found that "single function of the trigger" had two distinct definitions and "automatically" could hold a number of interpretations.[312] The multitude of interpretations for each of the two phrases at issue led the court to determine that there was sufficient ambiguity for the agency to interpret the statute.[313]

At step two, a court must conduct more than just a textual analysis. In this case, the majority did not consider legislative history,[314] the statute's original purpose, or the statutes beyond sections 5845(a) and 5845(b). Taking a purposive approach[315] would have led the court to consider the agency's previous interpretations that a bump stock did not constitute a machine gun. It also could have helped the court determine whether one of the definitions for either "single function of the trigger" or "automatically" was ambiguous given the entirety of the statute and purpose behind it. Under a strict deference analysis, finding two possible interpretations is not enough to decide whether a statute or regulation is *genuinely* ambiguous.[316] It is only after deploying all interpretive tools that such a determination can be made. While the majority conducted a careful textualist analysis, it is possible that applying the strict deference standard would have resulted in the court finding that the statute was in fact not ambiguous. If so, the court would not have granted deference.

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310. *See supra* Part I.B.

311. *See Guedes*, 920 F.3d at 29–31.

312. *Id.*

313. *See supra* note 274 and accompanying text; Taniguchi v. Kan Pac. Saipan, Ltd. 566 U.S. 560, 566–69 (2012) (demonstrating that dictionary definitions are a key part of a court's statutory analysis). *See also generally* Lawrence Baum & James J. Brudney, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013) (examining how Supreme Court justices use dictionaries in statutory decisions).

314. The court noted that the agency reviewed congressional reports, but the record does not suggest that the court itself engaged in a legislative history analysis. To the extent that it did engage with the legislative history, it was to assess reasonableness, not to assess whether the statutory language was genuinely ambiguous. *See Guedes*, 920 F.3d at 31.

315. *See* ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014).

316. *See supra* Part I.B.

iii. Reasonableness

Assuming that the statute was ambiguous, the court properly conducted a strict deference analysis at step three. Central to this review is determining whether the agency's interpretation falls within the zone of ambiguity identified by the court.[317] Here, the majority identified two narrow ambiguities—in the language of "single function of the trigger" and "automatically."[318] The agency's interpretation only addressed these ambiguities.[319] While it would have been possible for the agency to fail at this late step had its interpretation exceeded the narrow zone of ambiguity identified by the court, the agency tailored its interpretation to the small gap in the statute. Accordingly, the agency satisfied strict deference at step three.

In sum, *Guedes* is a close case. At step one, the agency's interpretation survived a multifactor hard look analysis. However, the majority failed to address the inconsistent interpretive positions the agency has taken in defining bump stocks, and the issue of applying *Chevron* to criminal statutes remains murky. Similarly, the court conducted a careful textual analysis to determine if the statute was ambiguous but chose not to deploy all the interpretive tools at its disposal. While the analysis comes close to fulfilling strict deference, the outstanding concerns would caution against extending deference in this case if strict deference had been applied.[320]

3. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*

The Communications Act of 1934[321] regulates two types of bodies: telecommunications carriers and information service providers.[322] Telecommunications carriers provide "telecommunications services," which involve the transmission "between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[323] The Act requires that providers of such services comply with mandatory common carrier regulations.[324] By contrast, information service providers offer the "capability [of] generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[325] In a March 2002 declaratory ruling, the Federal Communications Commission (FCC) concluded that broadband internet service provided by cable companies was

317. *See supra* Part I.B.
318. *Guedes*, 920 F.3d at 31.
319. *See id.*
320. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (observing that conflicting agency interpretations and questions implicating notice provide reasons to not extend *Auer* deference); *id.* at 2447 (Gorsuch, J., concurring) (same).
321. 47 U.S.C. §§ 151–624 (2018).
322. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005) (citing 47 U.S.C. § 153(44)).
323. *Id.* at 977 (quoting 47 U.S.C. § 153(43)).
324. *See id.*
325. *Id.* (quoting 47 U.S.C. § 153(20)).

not a "telecommunications service" subjected to common carrier regulations because the companies did not "offer" information transmission services.[326] The Ninth Circuit found the FCC's ruling impermissible[327] and, subsequently, the Supreme Court granted certiorari.[328]

a. Applying Chevron

Writing for the majority in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[329] Justice Thomas stated that the issue facing the FCC was whether a cable company offered customers a telecommunications service and an information service bundled together or whether the cable company provided the services separately.[330] If the company provided services separately, the common carrier regulations would apply to cable companies.[331] The FCC argued that while cable companies do provide a telecommunications service, the companies' primary purpose is to provide information services.[332] Therefore, telecommunications services provided to consumers as a by-product of providing information services were not regulated by the Act.[333]

Justice Thomas found that at *Chevron* step one, the statute was ambiguous. Beginning with an ordinary meaning analysis, Justice Thomas observed that the statute had two reasonable constructions.[334] The plain meaning of the statute states that a cable company offers information services and, separately, in order to deliver those services, offers a data transmission service.[335] However, the statute could also mean that cable companies provide only information services and that data transmission services are nothing more than a by-product.[336] Given that the offer could reasonably be the integrated final product or the discrete components, Justice Thomas found the statute to be ambiguous.[337]

To reach this second meaning and confirm the ambiguity of the statute, Justice Thomas turned to the regulatory history surrounding the Communications Act. First, he noted that the FCC has defined terms based

326. *Id.* at 977–78.

327. *See* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003), *rev'd sub nom.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

328. *Brand X*, 545 U.S. at 979–80.

329. 545 U.S. 967 (2005).

330. *Id.* at 976–77.

331. *See id.* at 990. Justice Thomas offers examples—consumers understand car dealerships sell cars. But as a by-product of selling the cars, dealerships also sell car engines. Similarly, a pet store can sell dogs, and it also sells leashes. The difference between the hypotheticals is how integrated the products—cars and engines or dogs and leashes—are. *See id.* at 990–91.

332. *See id.* at 988.

333. *See id.*

334. *Id.* at 989.

335. *See id.*

336. *See id.*

337. *Id.* ("[W]here a statute's plain terms admit of two or more reasonable ordinary usages, the Commission's choice of one of them is entitled to deference." (quoting Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 498 (2002))).

on how consumers interact with information.[338] Because consumers use information services as an integrated offering, it is reasonable to assume that "telecommunications services" refers to a "pure" or disintegrated offering.[339] Otherwise, all information services could be a telecommunications service regulated by common carriers rules, rendering the distinction meaningless. Second, the FCC had "long held" that not all providers of transmission services, which could include cable companies, are common carriers.[340] Congress was aware of this regulatory history when it amended the Communications Act in 1996, and, therefore, it is reasonable to assume that Congress incorporated these positions into the terms of the statute.[341]

At step two, Justice Thomas found that the FCC offered a "reasoned explanation" for not subjecting cable companies to common carrier regulations because the agency relied on its technical expertise regarding how the internet functions.[342] In arriving at its interpretation, the FCC consulted the agency's commission report, which found that broadband companies integrated telecommunications and information services.[343] This led the FCC to decide that these cable companies were not offering a discrete telecommunications service.[344] The FCC also concluded that based on market conditions, broadband cable companies should compete with minimal regulatory oversight to promote investment and innovation.[345] Labeling these companies as common carriers would frustrate that goal.[346] Ultimately, the majority believed this "technical and complex"[347] choice to be the type of policy decision "*Chevron* leaves to the [agency] to resolve."[348] Accordingly, the Court granted the FCC deference.[349]

b. Applying Strict Deference

The analysis done to determine whether the FCC would receive deference is illustrative of how strict deference would be applied in the *Chevron* context. It also demonstrates that an agency can receive deference, even under this rigorous standard, if it offers a well-reasoned and narrow interpretation of a genuinely ambiguous statute.

338. *See id.* at 993.
339. *Id.*
340. *Id.*
341. *See id.* at 992–93 (citing Comm'r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 159 (1993)).
342. *Id.* at 1000.
343. *See id.* at 978.
344. *See id.*
345. *See id.* at 1001.
346. *See id.* at 1001–02.
347. *Id.* at 992.
348. *Id.* at 991.
349. *See id.* at 986.

i. Character and Context Requirements

The majority's analysis largely addresses the main components of the character and context requirements. First, because Congress delegated authority to the FCC to "execute and enforce" the Communications Act, which included promulgating rules and regulations, the FCC could be entitled to receive deference.[350] The majority found that the interpretation regarding telecommunications services was formed pursuant to the FCC's expertise on the "technical and complex" telecommunication policy addressed by the statute.[351] Further, the agency used its expertise to determine that, because of the market, broadband companies should not be subject to common carrier regulations.[352] This analysis cuts in favor of the agency qualifying for deference under step one.

Second, the Court found that the respondents' argument that the agency's interpretation was inconsistent with its past actions regarding common carriers was not "a basis for declining to analyze the agency's interpretation under the *Chevron* framework."[353] So long as the agency explained its reasoning, a change in policy would not preclude deference because *Chevron* is designed to leave agencies discretion to modify a position, even if that modification conflicts with a previous interpretation.[354] Under strict deference, such flip-flopping could be a basis for declining to extend deference.[355] However, the standard does not make this factor dispositive. Instead, it requires courts to consider inconsistent positions and to do so rigorously. Here, the Court did. It addressed why this factor did not counsel against extending deference because the agency reasonably explained how it reached its decision.[356]

Finally, the Court engaged in one other analysis to determine if deference could be extended in this case. In the case below, the Ninth Circuit did not grant deference to the FCC because the court believed that the agency's interpretation violated Ninth Circuit precedent.[357] The Court found that to be incorrect.[358] A prior judicial construction of a statute supersedes an agency's construction "otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[359] Stated otherwise, a court's interpretation must completely close the statutory gap

350. *Id.* at 980 (quoting 47 U.S.C. § 151).
351. *Id.* at 992.
352. *See id.* at 977.
353. *Id.* at 981.
354. *See* Rust v. Sullivan, 500 U.S. 173, 186 (1991) (rejecting the argument that, under *Chevron*, an agency cannot receive deference if its interpretation is inconsistent with previous interpretations).
355. *See supra* Part II.B.
356. *See Brand X*, 545 U.S. at 997–1000.
357. *See* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1131–32 (9th Cir. 2003) (citing AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000)).
358. *See Brand X*, 545 U.S. at 980.
359. *Id.* at 982.

for the agency to be precluded from receiving deference. In dissent, Justice Scalia wrote that this holding would allow an agency to ignore judicial precedent, making judicial opinions "subject to reversal by executive officers."[360] This question regarding competing interpretations between courts and agencies is not an enumerated factor under strict deference. Nevertheless, this debate between Justices Thomas and Scalia is the type of thorough review that should occur at strict deference's step one. Accordingly, the review here is commensurate with a strict deference analysis.

ii. The Interpretive Tool Kit

In determining whether the statute was ambiguous, the majority brought multiple tools of statutory interpretation to bear. Justice Thomas considered the entire Communications Act, searching for defined terms and applying the definitions to the language at issue.[361] He then analyzed the statute's ordinary meaning to determine that a reasonable reader could interpret the statute in multiple plausible ways.[362] His analysis did not stop at this first sign of ambiguity, however. Justice Thomas consulted the telecommunications industry's regulatory history and determined that the terms at issue were genuinely ambiguous.[363] Further, he noted that Congress was aware of this ambiguity and adopted it into the act when it was ratified.[364] Overall, Justice Thomas conducted a textual analysis by considering the language at issue and the entirety of the statute to identify whether any ambiguity existed. Once he determined ambiguity was present, he confirmed that ambiguity by looking to regulatory history and congressional intent. This analysis illustrates the Court's use of its interpretive tool kit and is consistent with strict deference's step two.

iii. Reasonableness

The Court's analysis is also consistent with step three. The majority narrowed the ambiguity at issue to whether information and telecommunications services were sufficiently integrated such that they could not be regulated by common carrier requirements or whether the two services were discrete, making them subject to common carrier regulation.[365] By deciding that the services were sufficiently integrated, as the FCC did, the agency limited its interpretive authority to the zone of ambiguity identified by the Court. Taken together, this review contrasts with the cursory analysis

360. *Id.* at 1016 (Scalia, J., dissenting).
361. *See id.* at 989–91 (majority opinion).
362. *See id.*
363. *See id.* at 992–93.
364. *See id.* at 993.
365. *See id.* at 986.

so often performed at *Chevron* step two[366] and rises to the level of strict deference.

C. The Compromise

These case studies demonstrate that strict deference is a rigorous standard that would limit the frequency with which deference is awarded to agencies.[367] Although the result in *Brand X* likely would be the same, the case studies show that had a court analyzed the agencies' decisions in *Baldwin* and *Guedes* through strict deference, deference likely would not have been awarded.[368] This focus on the outcome, however, does not directly address the issues debated by the justices in *Kisor* concerning *Auer* and deference in general.[369] Deference—particularly in the *Auer* and *Chevron* contexts—is criticized for the way in which interpretive authority is granted to an agency.[370] The question is whether this process, or the means, is constitutionally permissible and can function without violating ratified congressional statutes.[371] While it can impact the ends, a unitary strict deference standard can more importantly impact the means for cases implicating *Auer* and cases in any other deference situation.

Strict deference ensures that judges cannot "abdicate"[372] their responsibility to authoritatively "say what the law is."[373] Under strict deference, judges must assess whether deference is appropriate; whether there is a true ambiguity in the statute or regulation; and whether the agency's interpretation narrowly addresses that ambiguity.[374] Strict deference requires judges to conduct an analysis to find meaning—to say what the law is—like they do in cases outside the deference context.[375] Strict deference pushes judges to conduct their own independent analysis as opposed to relying on an analysis done by the agency. This standard, then, changes the presumption that agencies should receive deference unless proven otherwise to the position that courts should retain interpretive power unless an agency can demonstrate it made a reasoned, narrowly tailored interpretation of a genuinely ambiguous statute.[376]

The shift towards the judiciary can ameliorate the concerns of the antideference position.[377] Because strict deference requires far more judicial

366. *See, e.g.*, Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1227–28 (11th Cir. 2009); Ciba-Geigy Corp. v. Sidamon-Eristoff, 3 F.3d 40, 49 (2d Cir. 1993).
367. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019); *id*. at 2447 (Gorsuch, J., concurring).
368. *See supra* Part III.B.
369. *See supra* Part II.
370. *See supra* Part II.B.
371. *See supra* Part II.
372. *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring).
373. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
374. *See supra* Part I.B.
375. *See, e.g.*, Yates v. United States, 135 S. Ct. 1074 (2015) (determining the meaning of "tangible object" in 18 U.S.C. § 1519).
376. *See Kisor*, 139 S. Ct. at 2419.
377. *See supra* Part II.B.

oversight than the traditional deference standards, courts will find the meanings of statutes and regulations commensurate with the requirements in section 706. Bringing a full arsenal of interpretive tools to bear will reveal that many seemingly ambiguous rules are in fact not ambiguous.[378] Therefore, the risk of violating separation of powers principles is diminished;[379] it is less likely that the governing body writing rules is also interpreting them. Further, without *Auer*'s plainly erroneous standard, it is more likely that agencies will pay the price for promulgating vague rules.[380] Vague rules will be challenged, and because strict deference makes it less likely that agencies will receive interpretive authority, the agency risks a court making an unfavorable, binding interpretation of the rule. It would behoove agencies to pursue notice and comment rules pursuant to section 553 and refrain from flip-flopping interpretations to avoid judicial interference with their administrative mandates.

Despite its stringent requirements, strict deference can also appeal to the prodeference position.[381] The standard still offers the possibility that an agency can receive deference if it makes an interpretation that is well reasoned and narrowly tailored to a genuinely ambiguous rule. This possibility means that if circumstances warrant it, the system can take advantage of the agency's technical expertise and experience in administering complex schemes.[382] Further, it continues to give Congress the option to delegate interpretive authority to agencies when the legislature believes that it is the agency, not the courts, that should be making interpretive decisions.[383]

Finally, the case studies demonstrate that strict deference can apply in cases beyond the *Auer* context. First, they illustrate that factors present in *Chevron* analyses are directly addressed by the strict deference factors, making strict deference a relevant test for *Chevron* cases.[384] Second, the case studies show that strict deference can resolve some of the deference issues implicated by *Chevron*.[385] Notably, strict deference can protect against the reflexive deference exhibited in *Baldwin* by forcing courts to look beyond the plain language of a statute.[386] Further, by requiring genuine ambiguity, strict deference incorporates the muscular type of *Chevron* review that can protect against current concerns of judicial abdication.[387] Strict deference also formally incorporates limitations to *Chevron* like the major questions doctrine, ensuring that agencies will only receive deference if Congress really intended to delegate such authority. Finally, it incorporates the hard

378. *See Kisor*, 139 S. Ct. at 2415.
379. *See supra* Part II.B.
380. *See supra* Part II.B.
381. *See supra* Part II.A.
382. *See supra* Part II.A.
383. *See supra* Part II.A.
384. *See supra* Part I.A.2.
385. *See supra* Part I.A.2.
386. *See supra* Part III.B.1.
387. *See supra* note 153 and accompanying text.

look doctrine, proposed as a way to solve *Chevron*'s permissive step two.[388] Accordingly, strict deference represents a compromise between Justices Kagan and Gorsuch and their associated positions. The standard makes it less likely, in all contexts, that deference will violate constitutional or statutory provisions, while still making it possible to take advantage of the benefits agencies offer.

CONCLUSION

Strict deference is a workable test to address the problems with deferring to an agency's interpretation of a statute or regulation. The test is a middle ground, protecting against violations to constitutional and statutory principles, while still making it possible to reap the benefits agencies can provide. *Kisor* illustrates that the debate surrounding deference will not stop at *Auer* and other deference contexts like *Chevron* could soon be reviewed as well. Strict deference is a unitary deference standard that is not limited in its application to *Auer*. Accordingly, strict deference offers a new way forward for the Court, a framework through which it can address its outstanding deference questions.

388. *See supra* Part I.A.2.