ARTICLES

Agency Deference after *Kisor v. Wilkie*

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ABSTRACT

In Bowles v. Seminole Rock & Sand Co. *and* Auer v. Robbins *the Supreme Court directed federal courts to defer to an agency's interpretation of a vague or ambiguous rule. After two decades of criticism that those decisions effectively transferred law-interpreting power from Article III courts to agency officials, the Court granted review last term in* Kisor v. Wilkie *to decide whether to overturn those decisions. A badly fractured Court decided to completely rewrite rather than overturn them. In essence,* Kisor *turned* Seminole Rock *and* Auer *into* Chevron *deference. Yet, the Court did not decide whether the Administrative Procedure Act forbids giving an agency any deference when it construes a law. The result is that the Court has simply kicked the can down the road for perhaps a few more terms.*

This Article will summarize Kisor *and explain what it portends for administrative law. The Article will also discuss the answers to three questions that will arise in the near future in the application of* Kisor *and* Chevron. *First, what effect does a statute known as the Congressional Review Act have on the deference issue? Second, should an agency's interpretation of its organic statute and own rules receive deference, not in an administrative proceeding or a civil lawsuit, but in a criminal prosecution? Third, is there a basis for treating differently the interpretations adopted by so-called "executive" and "independent" agencies?* Kisor *turned out to be an inconclusive battle in the "Deference War." The fighting will shortly resume, most likely when the Court answers one of those three questions.*

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INTRODUCTION

The Constitution created a tripartite form of government, with separate legislative, executive, and judicial branches, each one possessing distinct powers.[1] Their mission was to work independently to achieve together the goals for which the union was created.[2] Government defense, regulatory, and welfare programs, however, do not implement themselves. Although the Constitution created the office of president, it would be "'impossibl[e],'" as George Washington recognized, "that one man could perform all the great business of the State.'"[3] After all, although the Constitution empowered Congress to "establish Post offices and post Roads,"[4] the Framers did not expect that the president would deliver the mail himself. Instead, the Constitution contemplated that Congress would create, and the president would staff, "executive Departments"[5] with "Officers of the United States"[6] to assist the elected officials serving the nation.[7]

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1. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id*. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id*. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

2. Namely, to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity" *Id*. pmbl.

3. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939)).

4. U.S. CONST. art. I, § 8, cl. 7.

5. *Id*. art. II, § 2, cl. 1 (authorizing the president to "require the Opinion, on writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

6. *Id*. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

7. U.S. CONST. art. I, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies"); *id*. art. I § 8, cl. 13 "The Congress shall have Power . . . To provide and maintain a Navy"); *id*. art. II, § 2, cl. 1 (The President shall be Commander in Chief of the Army and Navy of the United States"); *id*. art. VI, cl. 3 (stating that "all executive and judicial Officers, both of the United States and the several states, shall be bound by Oath or Affirmation, to support this Constitution"); *id*. art. III, § 3 ("[The President] shall take Care that the Laws be faithfully executed").

Reflecting that reality, the federal government has had civilian and military personnel since the nation's earliest days.[8] These officials are responsible for the day-to-day execution of whatever laws Congress has assigned to their department, and the successful completion of their daily tasks is critical to the effective operation of government. To complete their mission, federal officials must necessarily interpret and apply whatever statutes govern their actions. Nowadays, agency officials must also comply with whatever rules and other relevant documents their agencies generate to advise federal officials and the public how the federal bureaucracy will and should implement congressional programs.[9]

Disagreements between government officials and the public over the meaning of laws that agencies implement often lead to litigation in federal court.[10] When that happens, the courts have the responsibility to decide which party has the better of the argument and enter judgment in its favor.[11] When any federal regulatory program is involved, a recurring issue is how the agency officials responsible for implementing or administering the law have interpreted it. The agency might have drafted the legislation, or at least been consulted by Congress or the President during its nascent period, so agency personnel might know why the statute was necessary, or at least useful. The agency also has the chore of making the statute work, so the responsible officials might know better than anyone else whether the statute remedies whatever problem Congress and the President hoped to eliminate by passing it. Of course, Congress could have passed the statute long before anyone thought to ask the agency what it believed that the statutory terms mean or how it is working. The people who answer that question might also have an entirely different political agenda than the ones who actually implement that law. Nonetheless, what an agency thinks of the effectiveness of its organic statute

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8. *See*, *e.g.*, MATTHEW A. CRENSON, THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA (1975); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900 (1982). Even justices of the Supreme Court of the United States held multiple roles in the early days of the republic. John Jay was the first Chief Justice of the United States and the ambassador to England, and in that capacity he negotiated the treaty ending the Revolutionary War. John Marshall was simultaneously Chief Justice and Secretary of State, as well as a member of the Sinking Fund Commission, which had the responsibility for addressing the Revolutionary War debt. Act of Aug. 12, 1790, ch. 47, 1 Stat. 186; Mistretta v. United States, 488 U.S. 361, 398–99 (1989); Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123; Peter Alan Bell, Note, *Extrajudicial Activities of Supreme Court Justices*, 22 STAN. L. REV. 587 (1970).

9. The number of rules and documents is enormous and grows incessantly. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2446–47 (2019) (Gorsuch, J., concurring in the judgment) ("Now, in the 21st century, the administrative state wields vast power and touches almost every aspect of daily life. Among other things, it produces reams of regulations—so many that they dwarf the statutes enacted by Congress. As of 2018, the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long, almost quadruple the length of the most recent edition of the U. S. Code. And agencies add thousands more pages of regulations every year.") (footnotes and internal punctuation omitted).

10. It's the American way. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (Harvey Mansfield & Delba Winthrop trans. & eds., 2000) ("There is almost no political question in the United States that is not resolved sooner or later into a judicial question.").

11. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

is an important piece of information. Closely following that question is another one: Is that agency's interpretation of the law entitled to any special respect by the courts when they must construe it?

This issue is of considerable importance given the size and complexity of the administrative state, as well as the number of sub-statutory forms of law that agencies promulgate and use, such as legislative or interpretive rules.[12] The Supreme Court addressed the weight that a court should give to an agency's interpretation of a *statute* that Congress trusted it to administer in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.[13] *Chevron* and its successors make clear that an agency's construction is entitled to considerable weight if the court cannot itself decide what the statute means. In a different series of cases, the Court has addressed the deference that courts must show to an agency's construction of one of its own *rules*. The two principal decisions are *Bowles v. Seminole Rock & Sand Co*.[14] and *Auer v. Robbins*.[15] These cases required the courts to give extraordinary deference to an agency's interpretation of its own rules, even more deference than *Chevron* requires when an agency construes a statute. In effect, *Seminole Rock* and *Auer* allowed agencies to decide what their rules mean unless their interpretation was irreconcilable with the rule's text. The effect of those decisions was to hand off to agencies the interpretive task that the federal courts had always performed as part of the "judicial power" they possess under Article III of the Constitution.[16]

Last term, the Supreme Court granted review in *Kisor v. Wilkie* to decide whether to overturn its decisions in *Seminole Rock* and *Auer*.[17] *Kisor* did not finally resolve the controversy; it merely kicked the can down the road to another day.[18] In the short run however, the Court completely reworked its doctrine regarding the deference that an agency's construction of one of its rules should receive. The doctrine now is tantamount to the parallel one the Court created in 1984 in *Chevron*. It remains to be seen how the Court ultimately resolves this issue, just as it is also an open question whether the Court's *Chevron* decision will have a long or short remaining shelf life.

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12. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203–04, 1206 (2015) (defining "legislative" and "interpretive" rules); *infra* note 112 (defining "rules").

13. 467 U.S. 837 (1984).

14. 325 U.S. 410 (1945).

15. 519 U.S. 452 (1997).

16. U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.").

17. 139 S. Ct. 2400 (2019); *see* Petition for Writ of Certiorari at i, Kisor v. O'Rourke, (2018) (No. 18-15), 2018 WL 3239696 ("The questions presented are: 1. Whether the Court should overrule *Auer* and *Seminole Rock*."); Kisor v. Wilkie, 139 S. Ct. 657, 657 (2018) ("Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit granted limited to Question 1 presented by the petition.").

18. *See* Paul J. Larkin, Jr., *Baseball, Legal Doctrines, and Judicial Deference to an Agency's Interpretation of Rules*, CATO SUP. CT. REV., 2018-2019, at 69.

This Article will summarize the *Kisor* decision and then discuss three specific issues that will arise in the litigation and academic debate over its application. First, however, Section I of the Article will describe the background to the controversy addressed in that decision. Section II will summarize the multiple opinions in *Kisor* and explain what they mean and portend. Sections III–V shift the focus to three discrete problem areas that will arise as courts apply *Kisor* in new cases. Section III will discuss what effect a statute known as the Congressional Review Act has on the deference issue. Section IV will address the interpretive issue that arises when the government relies on an agency's construction of a rule, not in an administrative proceeding or a civil lawsuit, but in a criminal prosecution. Section V will ask whether there is any basis for treating differently the interpretations adopted by so-called "executive" and "independent" agencies.

I. THE DEVELOPMENT OF JUDICIAL DEFERENCE TO AN AGENCY'S INTERPRETATION OF ITS OWN RULES

It is reasonable to begin any analysis of how a congressional program works by learning how the people "on the ground" are implementing it—the civil servants and lower level political appointees who have the primary task of making sure congressional programs work. Laws are ultimately the embodiment of policies in words, and words can be difficult to understand or apply. Even when they have a readily understandable "core" meaning, words may be difficult to interpret as you move outward toward their periphery. There, their meaning can become fuzzy.[19] Terms used in technical or scientific fields can have a further complication in that only highly educated or trained experts can adequately determine their meaning. For example, in the statutory context, an expert is required to determine whether a particular substance is a "drug" and, if it is, whether that drug is "safe" and "effective."[20] In the case of a federal program, agency officials have the responsibility of deciding who should receive government benefits or what regulations should be promulgated to comply with a law to achieve its goals.[21] Their judgments, like the corresponding judgments of any other skilled professional, should be entitled to respect. That is the case even if the agency's interpretation is not dispositive as a legal matter. We can respect someone else's judgment as reasonable, perhaps even persuasive, while retaining the right to make a final decision on our own.

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19. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶¶ 68–75, at 32–35 (G.E.M. Anscombe trans., 3d ed. 1973) (describing the difficulties in defining the term "game").

20. Congress assigned those responsibilities to the Commissioner of Food and Drugs in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–392 (2018), and the Drug Efficacy Amendment, 21 U.S.C. ch. 9 § 301 (2018).

21. That is likely the rationale for the presumption that agency officials are presumed to have complied with the law. *See* United States v. Chem. Found., 272 U.S. U.S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties.").

Not surprisingly, the Supreme Court of the United States reached that eminently sensible conclusion more than a century ago in *United States v. Eaton*.[22] Before departing for the United States on a medical leave of absence, the Consul General of the United States to Siam, Sempronius Boyd, designated his assistant, Lewis Eaton, to be Vice Consul General and placed him in charge of the consulate. The Secretary of State and the Department of State later effectively ratified that designation by approving actions that Eaton had taken as Acting Consul General. A dispute later arose when Boyd's widow claimed she was entitled to Boyd's salary during Eaton's tenure as Acting Consul General, on the ground that Eaton had not been properly appointed in accordance with State Department rules.[23] In upholding a judgment in Eaton's favor, the Court rejected the argument that Boyd had appointed Eaton in violation of those regulations by relying on the actions by the Secretary and Department of State approving Eaton's actions. "The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the president, to amend them," the Court explained, "is entitled to the greatest weight, and we see no reason in this case to doubt its correctness."[24]

That accommodation between administrative expertise and judicial responsibility is a reasonable one. It respects whatever policy judgments Congress has allowed senior administrators to make, along with the practical experience that experts acquire making a program work. The Supreme Court has seen the wisdom in giving credit to administrators for making sure that a statute passed in Washington, D.C., can be made to work in Washington State by people who had no hand in its drafting. As the Court put it in *United States v. Midwest Oil Co.*, "government is a practical affair, intended for practical men."[25] On the other

22. 169 U.S. 331 (1898).

23. *Id.* at 331–35.

24. *Id.* at 343.

25. 236 U.S. 459, 472 (1915) ("It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."); *see also*, *e.g.*, Grisar v. McDowell, 73 U.S. (6 Wall) 363, 381 (1867) (noting that, since "an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses"); Edward's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."); *cf.* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("[P]ractice and acquiescence under [a statute] for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.").

hand, the *Eaton* rule gives effect to what the Court made clear in *Marbury v. Madison*—namely, that it is "emphatically the province and duty of the judicial department to say what the law is."[26] Administrative officials may be responsible for making the trains run on time, but the courts are responsible for keeping those trains on their tracks. The result was that, regardless of the deference due to an agency's interpretation and implementation of a law, courts have the ultimate responsibility to decide what a statute or rule means.[27] That is particularly important when a private party and the government are adversaries in court. A private party could be confident that a neutral arbiter would have the final say whether his or her interpretation was the correct one.

Half a century later, however, the Court carried that sensible proposition too far and made it into an unprincipled doctrine. The case was *Bowles v. Seminole Rock & Sand Co.*[28] Seminole Rock & Sand Co. had entered into a contract to deliver crushed stone for a railway bed at a certain price. Before it made delivery, the Office of Price Administration (OPA), a World War II-era agency created to set maximum prices to prevent inflation, capped the price of virtually every good sold in the nation, including the one that Seminole Rock made. The issue was which price mattered: the pre-delivery contract price or the OPA post-contract but pre-delivery ceiling price.[29] Even if the dollar effect of the Court's decision would have been considerable, the legal issue was rather ordinary. What made the decision stand out legally was the Court's rationale for its ruling. Without citing *Eaton*, or even its far more recent decision in *Skidmore v. Swift & Co.*,[30] which applied a rationale similar to *Eaton*'s,[31] the Court effectively turned over the job of interpreting the rule to the OPA. An agency's interpretation of its own rules is not entitled merely to "the greatest weight," as in *Eaton*, the Court wrote; it is dispositive. Without citing any authority, the Court wrote that "the ultimate criterion is the administrative interpretation, which becomes of controlling

26. 5 U.S. (1 Cranch) 137, 177 (1803).

27. *See*, *e.g.*, NLRB v. Hearst Publ'ns, 322 U.S. 111, 130–31 (1944) ("Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.").

28. 325 U.S. 410 (1945).

29. *Id.* at 411–13.

30. 323 U.S. 134 (1944).

31. The issue in *Skidmore* was whether employees were entitled to overtime pay for the hours they spent in a state of readiness in case a fire broke out. The Fair Labor Standards Act of 1938 was the governing law, but it did not answer the question. The Administrator of Wages and Hours had issued a bulletin stating that a flexible approach was appropriate to determine whether time spent waiting for a fire should count as overtime. *Id.* at 136, 138. In an opinion by Justice Robert Jackson, the Court said that it was persuaded by the Administrator's approach. The Court explained as follows: "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

weight unless it is plainly erroneous or inconsistent with the regulation."[32] To be sure that no one missed the point, the Court limited the universe of pertinent interpretive factors to two: "Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator."[33] With only those tools in hand, the Court ruled against Seminole Rock.[34]

Perhaps the Court's statements in *Seminole Rock* were just an example of sloppy opinion writing.[35] Neither the Constitution nor any statute addressed this issue. History did not demand that result.[36] The Court's prior decisions construing agency rules[37] did not suggest that an agency's interpretation of a rule governing public conduct would be final.[38] The Court's decisions that followed closely on

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32. The relevant passage in *Seminole Rock* was the following: "The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator." *Seminole Rock*, 325 U.S. at 413–14.

33. *Id*. at 413–14.

34. *Id*. at 414–18.

35. It happens. *See*, *e.g*., Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991) ("We acknowledge that language in the later cases of *Cage v. Louisiana*, 498 U.S. 39 (1990), and *Yates v. Evatt*, 500 U.S. 391 (1991), might be read as endorsing a different standard of review for jury instructions. So that we may once again speak with one voice on this issue, we now disapprove the standard of review language in *Cage* and *Yates*, and reaffirm the standard set out in *Boyde* [*v. California*, 494 U.S. 370, 380 (1990)].") (citations omitted).

36. *See*, *e.g*., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2016); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 206 (1991) ("The de novo model in its various manifestations, which left the final say to the judiciary rather than the executive, was the predominant form of judicial review of executive action in the early Republic."). Some would disagree. *See*, *e.g*., Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011).

37. *See*, *e.g*., Addison v. Holly Hill Fruit Prods., 322 U.S. 607, 615–19 (1944); Bartchy v. United States, 319 U.S. 484, 489 (1943); Robinette v. Helvering, 318 U.S. 184, 187 (1943); Schafer v. Helvering, 299 U.S. 171 (1936); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 324–25 (1933) (ruling that the agency had clearly explained its inspection rules); Cosmos Exploration Co. v. Gray Eagle Co., 190 U.S. 301, 309 (1903) ("The rules and regulations promulgated by that department for the purpose of carrying out the provisions of the act of June 4, 1897, are found in 24 Land Dec. 589, 592, and we think the rules set forth below are reasonable and entitled to respect and obedience as valid rules and regulations.") (footnote omitted). Pre-*Seminole Rock* decisions sometimes gave an agency broad discretion to construe a statute or rule governing primary conduct, *see Addison*, 322 U.S. at 614 ("Congress left the boundary-making to the experienced and informed judgment of the Administrator."), but they did not hand the interpretive process over to an agency.

38. In *FCC v. Pottsville Broadcasting Co*., 309 U.S. 134 (1940), the Court wrote in a footnote that the FCC's interpretation of an internal agency rule governing the timing of hearings was "binding upon the courts," but the context does not suggest that the Court's statement had any application to a rule affective primary public conduct. *Id*. at 143 n.6 ("The Communications Commission's Rules of Practice,

the heels of *Seminole Rock* did not suggest that it had made a major change to the law.[39] Contemporaneous academic writing did not read *Seminole Rock* as having had that effect.[40] For the next two decades, that conclusion seemed to be the correct one.[41] It seemed that *Seminole Rock* was destined to become just a Supreme Court decision involving the proper interpretation of a peculiar agency rule that was a relic of a system of price caps imposed to prevent inflation during a war that ended long ago, and nothing more.

In 1965, in *Udall v. Tallman*, however, in the course of ruling in the government's favor, the Court expressly relied on the *Seminole Rock* statement that the administrative construction of a disputed rule is "controlling."[42] Having reawakened *Seminole Rock*, the Court expressly or impliedly relied on that decision for the next forty-plus years as having enunciated the standard of review for a federal court to apply when a case hinged on the proper interpretation of an unclear agency rule.[43] In fact, the Court expressly reaffirmed the *Seminole Rock* standard

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Rule 106.4, provided that 'the Commission will, so far as practicable, endeavor to fix the same date . . . for hearing on all applications which . . . present conflicting claims . . . excepting, however, applications filed after any such application has been designated for hearing.' Respondent contends, and the court below seemed to believe that this rule bound the Commission to give respondent a non-comparative consideration because its application had been set down for hearing before the later and rival applications were filed. The Commission interprets this rule simply as governing the order in which applications shall be heard, and not touching upon the order in which they shall be acted upon or the manner in which they shall be considered. That interpretation is binding upon the courts."). Plus, the lone case cited as authority in that footnote was *AT&T v. United States*, 299 U.S. 232 (1936). That case involved the proper accounting methodology for asset depreciation of AT&T's equipment. In rejecting a challenge to the "original cost provisions," the Court wrote that "[w]e accept this declaration as an administrative construction *binding on the Commission* in its future dealing with the Companies." *Id*. at 241 (emphasis added). Accordingly, the dictum in *Pottsville Broadcasting Co*. cannot be wrenched from its origin without being misleading.

39. *See*, *e.g*., United States v. Silk, 331 U.S. 704, 715 (1947); Walling v. Gen. Indus. Co, 330 U.S. 545 (1947); Levinson v. Spector Motor Serv., 330 U.S. 649, 672 (1947) ("As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration."); Gibson v. United States, 329 U.S. 338, 344 n.9 (1946) (noting that the Court had a duty to independently decide the relevant legal issue).

40. *See* Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 597 (1950) (characterizing *Seminole Rock's* discussion of the standard of review as "hardly more than dictum"); Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 936–39 & n.86 (1948); Frank C. Newman, *How Courts Interpret Regulations*, 35 CAL. L. REV. 509, 521 (1947) (citing *Seminole Rock* and two other decisions: "These few cases, however, seem to stand alone as authority for a rule of deference; and they have not inhibited the Court in other cases from doing what it thinks just, regardless of what the interpretations proved may have implied as to administrative intent.").

41. *See* Jonathan H. Adler, Auer *Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 7 (2018) (noting that "commentators largely ignored" *Seminole Rock* and that the Court did not rely on it "for another two decades").

42. Udall v. Tallman, 380 U.S. 1, 16–17 (1965).

43. *See, e.g*., Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 613 (2013); PLIVA, Inc. v. Mensing, 564 U.S. 604, 613 (2011); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 59–63 (2011); Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 208–11 (2011); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 284 (2009); Riegel v. Medtronic, Inc., 552 U.S. 312, 328 (2008); Long Island

in 1997 in *Auer v. Robbins*.[44] That is important. One stray remark, maybe even two or three, could be a mistake. More than two dozen repetitions, however, make a statement. Quantity, it has been said, has a quality all its own.

It took a while, but the academy responded. The last two decades have witnessed a renewed challenge to the legitimacy of the administrative state. This challenge has generated a considerable literature attacking, and defending, the post-New Deal federal architecture.[45] The most frequently voiced lament—sometimes advanced by scholars, but more frequently vented by members of the

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Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007); Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 387–88 (2003); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 94–95 (1995); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512–15 (1994); Stinson v. United States, 508 U.S. 36, 44–47 (1993); INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189–190 (1991); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 702 (1991); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 358–59 (1989); Gardebring v. Jenkins, 485 U.S. 415, 429–30 (1988); Mullins Coal Co. of Va. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 159 (1987); Lyng v. Payne, 476 U.S. 926, 939 (1986); Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 158 n.13 (1982); Blanding v. DuBose, 454 U.S. 393, 401 (1982); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980); United States v. Larionoff, 431 U.S. 864, 872–73 (1977); N. Ind. Pub. Serv. Co. v. Porter Cty. Chapter of the Izaak Walton League of Am., Inc., 423 U.S. 12, 15 (1975); Ehlert v. United States, 402 U.S. 99, 105 (1971); INS v. Stanisic, 395 U.S. 62, 72 (1969); Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 276 (1969).

44. 519 U.S. 452 (1997).

45. *See, e.g.*, JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); ADAM J. WHITE, OREN CASS & KEVIN R. KOSAR, 2 UNLEASHING OPPORTUNITY: POLICY REFORMS FOR AN ACCOUNTABLE ADMINISTRATIVE STATE 51, 51 (Yuval Levin & Emily MacLean eds., 2017); LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE (Dean Reuter & John Yoo eds., 2016); PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018); Charles J. Cooper, *Confronting the Administrative State*, 25 NAT'L AFF. 96 (2015); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475 (2016); John Tierney, *The Tyranny of the Administrative State*, WALL ST. J. (June 9, 2017), https://www.wsj.com/articles/the-tyranny-of-the-administrative-state-1497037492?mod=e2fb [https://perma.cc/J4PF-6EFW]. *Compare*, *e.g.*, Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017), *with*, *e.g.*, Aaron L. Nielson, *Confessions of an "Anti-administrativist"* 131 HARV. L. REV. F. 1 (2017), *and* Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13 (2017). The administrative state also has its defenders. *See, e.g.*, ADRIAN VERMEULE, LAW'S ABEGNATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE (2016); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 722–23 (2016) (reviewing DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014)); Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018). Ironically, defenders of the administrative state sometimes find themselves voicing one of the same criticisms advanced by opponents: it does not work for the public's benefit. *See, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 421–22 (1987) ("We are in the midst of a period of considerable dissatisfaction with the performance of the federal government. The post-New Deal increase in presidential power, and the creation of a massive bureaucracy concentrated in the executive branch, have augmented factional power and self-interested representation, often leading to regulation that fails to serve the interests of the public at large. In significant ways, the federal government both overregulates and underregulates. The failure of national institutions to intervene or to exercise restraint is not simply the product of the poor judgment of key government officials or the triumph of a particular political agenda. Much of the failure of public regulation over the past half-century reflects the inadequacy of important aspects of the constitutional vision embraced by the New Deal. Institutional reform is thus a major part of the agenda of modern public law."). Professor Sunstein wrote that passage 30 years ago, but it still resonates today.

public—has been that American life is governed, not by the federal officials we elect every two, four, or six years, but by the political appointees and career bureaucrats who staff a battalion of regulatory agencies, commissions, and offices.[46] As part of that assault, commentators challenged the principle that agencies should have the final word on a meaning of a rule.[47] Eventually, lower federal court judges[48] and Supreme Court justices[49] began to doubt that validity of the

46. *See, e.g.*, TIMOTHY SANDEFUR, THE PERMISSION SOCIETY: HOW THE RULING CLASS TURNS OUR FREEDOMS INTO PRIVILEGES AND WHAT WE CAN DO ABOUT IT 34 (2016) ("The agencies that oversee permit requirements form a branch of government not contemplated by the Constitution, run by officials who do not answer to voters. Americans spend much time and energy arguing over who should be elected to Congress or sent to the White House, but most of the laws that govern citizens' lives are written not by elected officials but by bureaucrats whose decisions are shielded against the democratic process.").

47. Then-Professor now Harvard Law School Dean John Manning was the first academic to challenge the Supreme Court's settled doctrine. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). Numerous other commentators have followed in his wake. *See*, *e.g.*, Jonathan H. Adler, Auer *Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 7 (2018); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L. J. 1, 4–12 (1996); Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. LEGAL ANALYSIS 47, 48–50 (2016); Kristin E. Hickman & Mark R. Thomson, *The* Chevron*ization of* Auer, 103 MINN. L. REV. HEADNOTES 103 (2019); Sanne H. Knudsen & Amy J. Widermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47 (2015); Sanne H. Knudsen & Amy J. Widermuth, *Lessons from the Lost History of* Seminole Rock, 22 GEO. MASON L. REV. 647 (2015); Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J. L. & PUB. POL'Y 625, 632–34 (2019); Kevin O. Leske, *Splits in the* Rock*: The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787 (2014); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 108–10 (2000); Aaron L. Nielson, Cf. Auer v. Robbins, 21 TEX. REV. L. & POL. 303, 305 (2016); Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J. L. & PUB. POL'Y 87, 100-02 (2018); Kevin M. Stack, *The Interpretive Dimension of* Seminole Rock, 22 GEO. MASON L. REV. 669 (2015); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1451–52 (2011); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1061-63, 1061 fig.11 (2015). *See generally* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018). Of course, there were also scholars who found *Seminole Rock* and *Auer* to be right on the money. *See, e.g.*, Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 OHIO ST. L. J. 813 (2015); Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633 (2014); Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297 (2017).

48. *See*, *e.g.*, Forrest Gen. Hosp. v. Azar , 926 F.3d 221, 229–30 (5th Cir. 2019); San Diego Gas & Elec. Co. v. FERC, 913 F. 3d 127, 145 n.4 (D.C. Cir 2019) (Randolph, J., dissenting); United States v. Havis, 907 F.3d 439, 450–452 (6th Cir. 2018) (Thapar, J., concurring), *on reh'g en banc*, 927 F.3d 382 (6th Cir. 2019); Marsh v. J. Alexander's LLC, 905 F.3d 610, 652–653 (9th Cir. 2018) (Ikuta, J., dissenting); Egan v. Delaware River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in judgment); Perez v. Loren Cook Co., 803 F.3d 935, 938 n.2 (8th Cir. 2015) (en banc); Johnson v. McDonald, 762 F.3d 1362, 1366–1368 (Fed. Cir. 2014) (O'Malley, J., concurring); Exelon Generation Co. v. Local 15, Int'l Brotherhood of Elec. Workers, AFL–CIO, 676 F.3d 566, 576 n.5 (7th Cir. 2012); *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134–44 (2016) (article by then-D.C. Circuit Court Judge Brett Kavanaugh).

49. *See, e.g.*, United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari) ("Any reader of this Court's opinions should think that the doctrine is on its last gasp."); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215–22 (2015) (Thomas, J.,

Seminole Rock and *Auer* propositions. What made the assault especially noteworthy was that even Justice Antonin Scalia, the author of *Auer v. Robbins*, came to believe that the opinion he wrote for the Court in that case was mistaken.[50]

After two decades of criticism of *Seminole Rock* and *Auer*, the Supreme Court decided to re-examine them. The case chosen for that vehicle was *Kisor v. Wilkie*.[51]

II. THE *KISOR* DECISION

Kisor v. Wilkie did not start out looking like a case that would make its way to the Supreme Court. It seemed more like a pedestrian squabble over social welfare benefits. A veteran of the Vietnam War, James Kisor sought disability benefits from the Department of Veterans Affairs ("DVA") due to Post-Traumatic Stress Disorder. The DVA at first denied his claim. After Kisor presented new evidence, the DVA granted his claim, but limited his payments to the date of his reapplication, rather than his initial filing. He challenged that ruling, but the United States Court of Appeals for the Federal Circuit upheld the DVA's decision, on the ground that the court had to defer to the agency because the relevant agency rule was ambiguous. The Supreme Court granted review limited to the question of whether it should overturn *Seminole Rock* and *Auer*. A badly fractured Court upheld those decisions, but only after completely rewriting them.

Justice Elena Kagan wrote the lead opinion for herself and Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor.[52] Most of her opinion represents the views of only those four justices. A few sections, however, garnered the vote of Chief Justice Roberts, making them the majority opinion.[53] Together, those five justices voted to vacate the court of appeals' judgment and to remand the case to that court for it to apply a new deference standard in the first instance. The Chief Justice also wrote a short opinion emphasizing the limits of the majority's ruling, as well as points of agreement between the separate opinions by Justices Kagan and Neil Gorsuch.[54] Justice Gorsuch, joined by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh, agreed that the court of appeals judgment should be set aside, but did so on the ground that the Court should

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concurring in the judgment); *id.* at 1210–11 (Alito, J., concurring in part and in the judgment); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring).

50. *See Decker*, 568 U.S. at 616–21 (Scalia, J., concurring in part and dissenting in part); Talk America Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring); *see also* Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1603 (2017) ("[A] few Terms ago, as we came off the bench after hearing arguments in a case involving judicial deference to agencies, Nino announced that *Auer v. Robbins* was one of the Court's 'worst decisions ever.' Although I gently reminded him that he had written *Auer*, that fact hardly lessened his criticism of the decision or diluted his resolve to see it overruled.").

51. *See supra* note 17 and accompanying text.

52. Kisor v. Wilkie, 139 S. Ct. 1, 2408–24 (2019) (lead opinion of Kagan, J.).

53. *Id.* at 2407 (noting that Sections I (the facts), II-B (the new *Kisor* deference analysis), III-B (the discussion of stare decisis), and IV (the remittal) are the opinion of the Court).

54. *Id.* at 2412 (Roberts, C.J. concurring in part).

overturn *Seminole Rock* and *Auer*.[55] Most of the Gorsuch opinion addresses why those decisions were wrong from the start and have not improved with age. Justice Brett Kavanaugh, joined by Justice Alito, also wrote a short separate opinion concurring in the judgment, in which he noted his agreement with the views expressed by the Chief Justice.[56]

The Kagan opinion begins with two propositions that are difficult to deny: (1) some agency rules are vague or ambiguous; and (2) someone has to interpret them, even just to know how they best apply to the numerous everyday scenarios that arise.[57] The Kagan opinion says that the Court has presumed that Congress wanted the relevant agency to have that responsibility because Congress created each agency to solve problems in its bailiwick.[58] If the construction of an agency rule is in dispute, she writes, the agency's interpretation is critical. Why? The agency drafted the rule, so like the author of any other document, the agency is best positioned to know what it means.[59] Looking to see how the agency interprets a rule, she adds, makes sense whenever the problem requires a policy-oriented judgment (such as one involving a tradeoff between employer profit and employee safety) or is highly technical (such as one involving a medical issue).[60] Finally, an

55. *Id*. at 2424–48 (Gorsuch, J., concurring in the judgment).

56. *Id*. at 2448–49 (Kavanaugh, J., concurring in the judgment).

57. *Id*. at 2411 (lead opinion of Kagan, J.) ("In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so?"); *see id*. at 2410–14 (lead opinion of Kagan, J.).

58. *Id*. at 2411–12 (lead opinion of Kagan, J.) ("In answering that question, we have often thought that a court should defer to the agency's construction of its own regulation. We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers. Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.") (citations omitted); *id*. at 2412–14 (lead opinion of Kagan, J.).

59. *Id*. at 2412 (lead opinion of Kagan, J.) ("In part, that is because the agency that promulgated a rule is in the better position to reconstruct its original meaning.").

60. *Id*. at 2412–13 (lead opinion of Kagan, J.) ("In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often entails the exercise of judgment grounded in policy concerns. And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have unique expertise, often of a scientific or technical nature, relevant to applying a regulation to complex or changing circumstances.") (citations and internal punctuation omitted).

agency can decide an issue for the nation, thereby providing a form of horizontal stability that geographically diverse federal courts cannot hope to achieve.[61]

Having set the stage, the Kagan opinion goes on to explain when an agency's interpretation of a rule is entitled to deference from a court.[62] Chief Justice Roberts joined that section of the Kagan opinion, making it the majority opinion for the Court.[63]

The Kagan opinion lowers the reader's expectation as to the amount of deference an agency's rule-interpretation should receive. Again, she starts with a proposition that no one would dispute. As desirable as it might be to give agencies complete freedom to read their rules however they may like, the Kagan opinion states, manipulation is not permissible. Courts must interpret unambiguous rules exactly as they are written.[64] Moreover, courts must read agency rules in the same way that they construe other legal instruments, particularly statutes. Just as *Chevron* directed the federal courts to use the traditional tools of statutory construction when construing an act of Congress, the Kagan opinion tells the courts that they must use the same tools when reading an agency rule.[65] The agency's reading becomes relevant only at the end of the process, not, as *Seminole Rock* and *Auer* had said, at the beginning. If the rule's text and the normal interpretive aids do not tell a court what the rule means, then the agency's reading becomes relevant.[66] Nonetheless, a court cannot automatically adopt the agency's

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61. *Id*. at 2413 (lead opinion of Kagan, J.) ("Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. We have noted Congress's frequent preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation.") (citations and internal punctuation omitted).

62. *Id*. at 2414–17.

63. *Id*. at 2424 (Roberts, C.J., concurring in part).

64. *Id*. at 2415 (lead opinion of Kagan, J.) ("First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. *Auer* does not, and indeed could not, go that far.") (citations and internal punctuation omitted); *see id*. at 2410-14 (lead opinion of Kagan, J.).

65. *Id*. at 2415 (lead opinion of Kagan, J.) ("And before concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction. . . . For again, only 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. That means a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read. Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved. A regulation is not ambiguous merely because discerning the only possible interpretation requires a taxing inquiry. To make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. . . . Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.") (citations and internal punctuation omitted).

66. *Id*. at 2414 (lead opinion of Kagan, J.) ("*Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. As we explain in this section, the possibility of deference can

interpretation, as *Seminole Rock* and *Auer* had directed. The court must find that the agency's construction is "reasonable."[67]

Yet, even a reasonable agency interpretation, the Kagan opinion notes, might not be dispositive. The opinion must be the agency's official position, and it must reflect the agency's particular expertise.[68] Presumably, that means the Department of Defense is an expert on preventing or winning wars; the Food and Drug Administration on approving pharmaceuticals as safe and effective; the Department of Housing and Urban Development on providing safe, affordable housing; and so on. Finally, the agency's opinion must reflect its "fair and considered judgment."[69] Interpretations first adopted by agency lawyers, views that come as a surprise, and convenient litigating positions are out.[70] The bottom line, then, is this: Under the Kagan opinion, an agency will receive deference for its interpretation of one of its own rules only if all the following stars align: (1) the rule must be unclear and (2) the agency's interpretation must be reasonable, foreseeable, official, and reflect its particular knowledge and skill-set.[71]

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arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable agency constructions of those truly ambiguous rules are entitled to deference.").

67. *Id*. at 2415–16 (lead opinion of Kagan, J.) ("If genuine ambiguity remains, moreover, the agency's reading must still be reasonable. In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.)") (citation and internal punctuation omitted).

68. *Id*. at 2416–17 (lead opinion of Kagan, J.) ("To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's authoritative or official position, rather than any more ad hoc statement not reflecting the agency's views. . . . Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to the agency. So the basis for deference ebbs when the subject matter of the dispute is distant from the agency's ordinary duties or falls within the scope of another agency's authority.") (citations and internal punctuation omitted).

69. *Id*. at 2417 (internal punctuation omitted).

70. *Id*. at 2417–18 (lead opinion of Kagan, J.) ("Finally, an agency's reading of a rule must reflect fair and considered judgment to receive *Auer* deference. . . . That means, we have stated, that a court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack. And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates unfair surprise to regulated parties. . . . That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction conflicting with a prior one. . . . Or the upending of reliance may happen without such an explicit interpretive change. This Court, for example, recently refused to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed. Here too the lack of fair warning outweighed the reasons to apply *Auer*.") (citations, footnote, and internal quotation marks omitted).

71. The Kagan opinion summarized the new analysis as follows: "The upshot of all this goes something as follows. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase 'when it applies' is important—because it often doesn't. As described above, this Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a

Next, the Kagan opinion goes on to decide whether those decisions conflict with the Administrative Procedure Act ("APA")[72] or separation of powers principles. She rejected both arguments. The former because the APA does not tell the federal courts *how* to review an agency decision.[73] The latter because the courts always have the final word as to the meaning of a rule.[74] Finally, the Kagan opinion asks whether overturning those decisions is consistent with *stare decisis* principles. She answers that question in the negative.[75] The Chief Justice joins that section of the Kagan opinion, making it an opinion for a majority of the Court.[76]

Justice Gorsuch wrote the other principal opinion in *Kisor*. He agrees with the Kagan opinion that a court should always consider the views of agency personnel who are experienced in making federal programs work, particularly if the subject is a highly technical one. He even goes so far as to favorably compare the views of agency experts on matters of statutory implementation to the opinions of well-known legal figures on evidence and contract law like John Henry Wigmore and Arthur Corbin, respectively.[77] Nonetheless, it is a court's responsibility to resolve any legal dispute in a case, he concludes.[78]

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deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear." *Id*. at 2418.

72. 5 U.S.C. § 500 *et seq*. (2018).

73. *Kisor*, 139 S. Ct. at 2419 (lead opinion of Kagan, J.) ("And even when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in determining the meaning of an ambiguous rule. One possibility, as Kisor says, is to review the issue *de novo*. But another is to review the agency's reading for reasonableness.") (citations and internal quotation marks omitted); *see id*. at 2418–21 (lead opinion of Kagan, J.).

74. *Id*. at 2421–22 (lead opinion of Kagan, J.) ("Finally, Kisor goes big, asserting (though fleetingly) that *Auer* deference violates separation-of-powers principles. In his view, those principles prohibit vesting in a single branch the law-making and law-interpreting functions. If that objection is to agencies' usurping the interpretive role of courts, this opinion has already met it head-on. Properly understood and applied, *Auer* does no such thing. In all the ways we have described, courts retain a firm grip on the interpretive function. If Kisor's objection is instead to the supposed commingling of functions (that is, the legislative and judicial) within an agency, this Court has answered it often before. That sort of mixing is endemic in agencies, and has been since the beginning of the Republic. It does not violate the separation of powers, we have explained, because even when agency activities take legislative and judicial forms, they continue to be exercises of the executive power—or otherwise said, ways of executing a statutory plan. . . . So Kisor's last argument to dispatch *Auer* deference fails as roundly as the rest.") (citations and internal punctuation omitted).

75. *Id*. at 2422–23.

76. *Id*. at 2424 (Roberts, C.J., concurring in part).

77. *Id*. at 2442 (Gorsuch, J., joined by Thomas & Kavanaugh, JJ., concurring) ("Pursuing a more modest tack, Justice Kagan next suggests that *Auer* is justified by the respect due agencies' technical expertise. . . . But no one doubts that courts should pay close attention to an expert agency's views on technical questions in its field. Just as a court would want to know what John Henry Wigmore said about an issue of evidence law or what Arthur Corbin thought about a matter of contract law, so too should courts carefully consider what the Food and Drug Administration thinks about how its prescription drug safety regulations operate.") (footnotes, citations, and internal punctuation omitted).

78. *Id*. at 2442–43 (Gorsuch, J., joined by Thomas & Kavanaugh, JJ., concurring) ("The fact remains, however, that even agency experts can be wrong; even Homer nodded. *Skidmore* and the traditional approach it embodied recognized both of these facts of life long ago, explaining that, while courts should of course afford respectful consideration to the expert agency's views, they must remain

The Gorsuch opinion, however, focuses less on when an agency's rule interpretation should receive any respect than on the wholesale demolition of the *Seminole Rock* and *Auer* decisions. The Gorsuch opinion starts by expressing the "what might have been" lament of a justice whose majority opinion was snatched away at the last minute by a switch in votes (probably the Chief Justice).[79] Instead of forthrightly admitting that *Seminole Rock* and *Auer* were poorly reasoned, he writes, the Court created an entirely new deference standard, one that is festooned with so many qualifications, restrictions, and limitations that it looks like a Christmas tree with something to make everyone happy.[80] From there, he goes on to explain in considerable detail that neither ruling has any basis in the Constitution, an act of Congress, or common law decision making.[81] What is more, the deference rule not only biases the decision-making process in the government's favor,[82] but also "sits uneasily" with the Article III delegation of judicial power to the federal courts.[83] Saying "goodbye" to *Seminole Rock* and *Auer* also should not have been painful he added, because the Court's decision in *Skidmore* would have carried forward whatever benefits *Seminole Rock* and *Auer*

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open to competing expert and other evidence supplied in an adversarial setting. Respect for an agency's technical expertise demands no more.") (footnotes and internal punctuation omitted).

79. *Id*. at 2425 (Gorsuch, J., joined by Thomas, Kavanaugh & Alito, JJ., concurring) ("It should have been easy for the Court to say goodbye to *Auer v. Robbins*. In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else. Nor is *Auer*'s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.") (footnotes and internal punctuation omitted).

80. *Id*. at 2426 (Gorsuch, J., joined by Thomas, Kavanaugh & Alito, JJ., concurring) ("The Court's failure to be done with *Auer*, and its decision to adorn *Auer* with so many new and ambiguous limitations, all but guarantees we will have to pass this way again. When that day comes, I hope this Court will find the nerve it lacks today and inter *Auer* at last. Until then, I hope that our judicial colleagues on other courts will take courage from today's ruling and realize that it has transformed *Auer* into a paper tiger."); *id*. at 2429–30 (Gorsuch, J., joined by Thomas, Kavanaugh & Alito, JJ., concurring) ("To be sure, Justice Kagan paints a very different picture of *Auer*, asking us to imagine it riding to the rescue only in cases where the scales of justice are evenly balanced between two equally persuasive readings. But that's a fantasy: If nature knows of such equipoise in legal arguments, the courts at least do not. In the real world the judge uses his traditional interpretive toolkit, full of canons and tiebreaking rules, to reach a decision about the best and fairest reading of the law. Of course, there are close cases and reasonable judges will sometimes disagree. But every day, in courts throughout this country, judges manage with these traditional tools to reach conclusions about the meaning of statutes, rules of procedure, contracts, and the Constitution. Yet when it comes to interpreting federal regulations, *Auer* displaces this process and requires judges instead to treat the agency's interpretation as controlling even when it is not . . . the best one.") (footnotes and internal punctuation omitted).

81. *Id*. at 2425–48 (Gorsuch, J., joined by Thomas and Kavanaugh, JJ., concurring).

82. *Id*. at 2425 (Gorsuch, J., joined by Thomas, Kavanaugh & Alito, JJ., concurring) ("This rule creates a 'systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.'") (quoting Larkin & Slattery, *supra* note 47, at 641).

83. *Id*. at 2437.

offered.[84] Ultimately, he concludes, the cobbling together of the view of the five justices in the majority only delays the day of reckoning. Eventually, the Court will need to reassess what it did in *Kisor* and, perhaps even more importantly, in *Chevron*. The fight over agency deference might have been temporarily halted, but it is not over.[85]

The Kagan and Gorsuch opinions are a remarkable contrast in their views of the administrative state. The Kagan opinion upholds a greatly modified version of *Seminole Rock* and *Auer* without once defending the rationale given in those decisions for the rule they endorsed, perhaps because neither opinion bothered to offer any rationale for their rule. The Kagan opinion goes out of its way to explain why the interpretive approach she adopts is a sensible one and, perhaps for that reason she implies, Congress would have wanted executive branch agencies to operate in the manner she describes. By contrast, the Gorsuch opinion delights in explaining in detail that the Court, not Congress, made up the *Seminole Rock-Auer* rule without giving any thought to what it meant, how it fit into the fabric of the law, or even whether it was constitutional. His opinion exudes schadenfreude at the problems besetting that rule and astonishment that the Court could ever have been so wrong.

The multiple opinions in *Kisor* are remarkable in a number of respects, but several are particularly important. The first one is that the Kagan opinion left *Seminole Rock* looking like Hiroshima after the *Enola Gay* had flown by. Gone is the proposition that the only two relevant interpretive tools are the text and the agency's interpretation of what that text means. Gone also is the proposition that the agency's construction of a rule is of "controlling weight" unless the agency

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84. *Id.* at 2447–48 (Gorsuch, J., joined by Thomas & Kavanaugh, JJ., concurring) ("Overruling *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. By contrast, the majority's attempt to remodel *Auer*'s rule into a multi-step, multi-factor inquiry guarantees more uncertainty and much litigation. Proceeding in this convoluted way burdens our colleagues on the lower courts, who will have to spend time debating deference that they could have spent interpreting disputed regulations. It also continues to deny the people who come before us the neutral forum for their disputes that they rightly expect and deserve. [¶] But this cloud may have a silver lining: The majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*. As reengineered, *Auer* requires courts to exhaust all the traditional tools of construction before they even consider deferring to an agency. . . . And those tools include all sorts of tie-breaking rules for resolving ambiguity even in the closest cases. Courts manage to make do with these tools in many other areas of the law, so one might hope they will hardly ever find them inadequate here. And if they do, they will now have to conduct a further inquiry that includes so few firm guides and so many cryptic markers that they will rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading.") (citations, footnote, and internal punctuation omitted).

85. *Id.* at 2448 (Gorsuch, J., joined by Thomas & Kavanaugh, JJ., concurring) ("But whatever happens, this case hardly promises to be this Court's last word on *Auer*. If today's opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it. Alternatively, if *Auer* proves more resilient, this Court should reassert its responsibility to say what the law is and afford the people the neutral forum for their disputes that they expect and deserve.").

cannot read what it wrote.[86] Those propositions were the heart of *Seminole Rock*, which *Auer* reaffirmed. Yet, the Kagan opinion is emphatic that *Marbury* is alive and well. "If [Kisor's] objection is to agencies' usurping the interpretive role of courts, this opinion has already met it head-on. Properly understood and applied, *Auer* does no such thing," she wrote.[87] "In all the ways we have described," Kagan wrote, "courts retain a firm grip on the interpretive function."[88] The Kagan opinion also went out of its way to emphasize that the new standard for court to use when reviewing a rule was *not* the same as the *Seminole Rock* "'plainly erroneous' formulation."[89] The revised *Kisor* standard has some bite to it. As if giving a call to arms during a presidential inaugural speech,[90] Justice Kagan said the following: "And let there be no mistake: that is a requirement an agency can fail."[91] By the time that she had finished her rewrite of *Seminole Rock* and *Auer*, they were unrecognizable. The Kagan opinion preferred using the label "*Auer* deference" to "*Seminole Rock* deference,"[92] but the correct term should be "*Kisor* deference" because *Kisor* completely replaced its predecessors.

The second notable feature is that the Kagan opinion completely rewrote the *Seminole Rock* and *Auer* rule without ever once saying that those decisions were mistaken, let alone admitting that they lacked any basis for holding that an agency should be able to say what one of its rules means. The effect was to overturn those cases without using the "o" word. Her discussion of *stare decisis* could have begun and ended with one sentence saying that there was no reason to consider overturning those cases because they no longer exist. Justice Gorsuch attempted to taunt the four justices in the lead opinion and the Chief Justice into admitting that fact, but they refused to do so.[93] Indeed, the Gorsuch opinion almost goes so

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86. Of course, sometimes no one might be able to read what the agency wrote, including people at the agency. Consider this example: "All commodities listed in Appendix A are those known to the trade as such excepting therefrom such thereof, if any, while subject to another regulation." Sales of Certain Seasonal Food Products at Wholesale, 8 Fed. Reg. 10,559 (July 29, 1943) (to be codified at 32 C.F.R. pt. 1351) (quoted at Newman, *supra* note 37, at 510). What is perhaps most remarkable (or most scary) about such a rule is that it was written by the OPA, whom the Supreme Court said in *Seminole Rock* possesses the "controlling" (maybe the only possible) interpretation of what its rules mean. *Seminole Rock*, 325 U.S. at 414.

87. *Kisor*, 139 S. Ct. at 2416 (lead opinion of Kagan, J.).

88. *Id.*

89. *Id.*

90. *See* John F. Kennedy Presidential Library and Museum, John Kennedy Inaugural Address (Jan. 20, 1961) ("Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and the success of liberty."), https://www.jfklibrary.org/learn/about-jfk/historic-speeches/inaugural-address [https://perma.cc/4UFH-RUQQ].

91. *Kisor*, 139 S. Ct. at 2416 (lead opinion of Kagan, J.).

92. *Id.* at 2408.

93. *Id.* at 2425 (Gorsuch, J., joined by Thomas, Kavanaugh & Alito, JJ., concurring) ("The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.").

far as to say, as the old Henny Youngman joke did, that not only is the *Seminole Rock-Auer* rule crazy, but it's ugly too.[94] Why the justices who joined the lead opinion found themselves unable to admit that their predecessors made a mistake is probably a question more fit for biographers or psychoanalysts than for lawyers. There is no doubt, however, that they recognized *Seminole Rock* and *Auer* could not survive as written. No one so utterly transforms a doctrine as Justice Kagan did the *Seminole Rock* and *Auer* rule if she believes it is correct.

The third important feature is that *Kisor* transplants the entire *Chevron* body of case law into the standard of review that *Seminole Rock* and *Auer* had adopted for a very different task. *Chevron* rests on the notion that Congress had impliedly delegated to an agency authority to interpret and apply statutes as necessary to carry out its assignment to make a statute work.[95] That rationale cannot work in this context, however, because agencies cannot delegate to themselves authority that Congress did not give them.[96] Of course, the rationale for *Chevron* is a fiction, as Justice Scalia once acknowledged in a candid moment.[97] But a fiction is something, and something is better than nothing. *Seminole Rock* had no rationale, and *Auer* did not supply one. To the extent that they have any rationale, *Seminole Rock* and *Auer* assume that a document's author knows better than anyone else what its words mean. Let's call that "The *Annie Hall* Principle."[98] Perhaps, that

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94. Henny Youngman used to tell a joke that went as follows: "A guy goes to a psychiatrist. The psychiatrist tells him, 'You're crazy.' The guy says, 'I want a second opinion.' The psychiatrist says, 'O.K., you're ugly, too.'" James Barron, *He's Crazy. A 2d Opinion? Funny, Too*, N.Y. TIMES, (Nov. 13, 1997), https://www.nytimes.com/1997/11/13/nyregion/he-s-crazy-a-2d-opinion-funny-too.html [https://perma.cc/SQ3B-NTQG].

95. *Chevron*, 467 U.S. at 843–44 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (citations, footnote, and internal punctuation omitted)

96. *See*, *e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

97. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (referring to *Chevron* as relying on "a fictional, presumed intent").

98. ANNIE HALL (Universal Pictures 1977). Alvy Singer (played by Woody Allen) is standing in line with Annie Hall (played by Diane Keaton) waiting to enter a movie theater and grows tired of a fellow behind him "pontificating" about Marshall McLuhan. At a certain point, Singer cannot take it anymore and strides toward the camera. The following exchange occurs.

> [*Singer, with exasperation*]: What do you do when you get stuck on a movie line with a guy like this behind you?
>
> [*Pontificating Moviegoer*]: Wait a minute. Why can't I give my opinion? It's a free country.
>
> [*Singer, with steam still building up*]: He can. [*Now, turning to the Pontificating Moviegoer*] You can. But do you have to give it so loud? I mean, aren't you ashamed to pontificate like that? And the funny part of it is . . . you don't know anything about Marshall McLuhan's work.

proposition makes sense for literary works like *The Inferno*, *Paradise Lost*, *Middlemarch*, or *The Winter of Our Discontent*. Justice Gorsuch, however, had the better of the exchange with Justice Kagan on that point. After all, agency rules are not "emails."[99] If a court gives them any legal weight, they are a "law," not literature, because they govern private conduct. If so, what matters is how a reasonable person would ordinarily construe their words, because the public cannot be tasked with the burden of reading an agency's official's mind to stay on the right side of the law.[100] The two inquiries—what did the agency intend by its words versus how would an average person understand those words—are materially different because the answers might be materially different and the consequences—receiving a "C" on an English paper versus being sanctioned by the government—are certainly quite different.

The fourth noteworthy point is that in place of the *Seminole Rock-Auer* rule we have the *Chevron* doctrine. A benefit of that result is a reduction in the number of different standards of review courts must know and use. At the same time, it is by no means certain that *Chevron* will endure. That doctrine has come under assault on numerous grounds.[101] Two serious challenges were before the Court in *Kisor*, but a majority of the Court did not resolve them. One is the argument that *Chevron* is inconsistent with the text and purposes of the APA. The other claim is that that any deference rule seriously biases decisionmaking in favor of one party, the federal government, which is certainly in a better position than any private party to persuade Congress to adopt favorable interpretive rules. Justice Gorsuch was correct to label the outcome in *Kisor* a reprieve rather than a pardon. There might be another day of reckoning for *Seminole Rock*, *Auer*, and *Kisor*, although *Chevron* will likely stand in the dock first. If *Chevron* falls, they will go down as well.

The last noteworthy feature of *Kisor* follows immediately from that one. Kisor argued that the *Seminole Rock-Auer* rule was inconsistent with the APA, which

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> [*Pontificating Moviegoer, said with condescension*]: Really, really. I happen to teach a class at Columbia [University] called "*TV, Media, and Culture*." So I think that my insights into Mr. McLuhan, well, have a great deal of validity.
>
> [*Singer, realizing that he's just been thrown a fastball down the middle of the plate*]: Oh, do you. That's funny, because I happen to have Mr. McLuhan right here, yeah, so, so, just let me, come over here a second.
>
> [*Marshall McLuhan enters from behind a movie sign, stage right*]: I heard what you were saying. You know nothing of my work. You mean my whole fallacy is wrong. How you ever got to teach a course in anything is totally amazing.
>
> [*Singer, turning back to the camera, beaming with satisfaction*]: Boy, if life were only like this.

99. *Kisor*, 139 S. Ct. at 2412 (lead opinion of Kagan, J.).

100. *Id.* at 2441 (opinion of Gorsuch, J., joined by Thomas & Kavanaugh, JJ., concurring) (citing Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1899)).

101. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016); Cory R. Liu, Chevron*'s Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391 (2016).

requires court to set aside erroneous agency decisions. Perhaps the most interesting feature of the *Kisor* decision is that the Court did not resolve that issue. The four justices in the Kagan opinion rejected Kisor's argument, the four justices in the Gorsuch opinion accepted it, and the Chief Justice did not vote one way or the other. He did not say why he declined to cast a vote, but it is possible that he wanted to wait for a case raising it in the context of *Chevron*. He wrote that the issues in *Kisor* and *Chevron* were distinct from each other.[102] That is true, but, for this point, it is irrelevant. The APA argument that Kisor advanced would apply equally in both settings. The APA focuses on "agency action" and does not distinguish between action based on the interpretation of a rule or a statute.[103] If *Seminole Rock* and *Auer* conflict with the APA, then *Chevron* does too. Accordingly, it is possible that the Chief Justice, realizing that the Court was unanimous that the circuit court's analysis was mistaken, decided to give the APA issue more time to percolate in the lower courts before resolving it. Time will tell.

Over the next few years, the lower federal courts will apply the new *Kisor* deference standard as another addition to their interpretive toolbox.[104] If those courts conclude that the *Kisor* rule is just the *Chevron* standard applied to agency rules—which, in my opinion, is likely—the lower courts will enlarge the already sizeable body of decisions applying that ruling.[105] But there are three discrete subjects that are also likely to arise that do not involve run-of-the-mill applications of the *Kisor* or *Chevron* deference doctrine. The next sections discuss them.

III. *KISOR* AND THE CONGRESSIONAL REVIEW ACT

One subject of debate between the Kagan and Gorsuch opinions involved the relevance of the APA to the proper analysis of the deference issue.[106] Their debate was over the question whether *Seminole Rock-Auer* rule violated the APA for two separate reasons: the decisions did not require courts to perform the *de*

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102. *See Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part) ("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. *See Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I do not regard the Court's decision today to touch upon the latter question.").

103. *See* 5 U.S.C. § 706 (2018) (directing courts to "decide all relevant questions of law" and to "set aside agency action . . . found to be . . . not in accordance with law").

104. For authorities explaining how courts should undertake legal interpretation of contracts, statutes, rules, and so forth, see ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Holmes, *supra* note 100; James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

105. A Westlaw search revealed that, as of August 6, 2019, approximately 16,462 judicial opinions and 20,150 secondary sources have cited *Chevron*.

106. *See Kisor*, 139 S. Ct. at 2418–20 (lead opinion of Kagan, J.); *id*. at 2432–37 (Gorsuch, J., joined by Thomas, Kavanaugh & Alito, JJ., concurring).

novo review that the APA seemed to demand, and they gave potentially controlling weight to an agency rule that had not passed through the APA notice-and-comment process. Justice Kagan answered that question, No; Justice Gorsuch, Yes. Notably, Chief Justice Roberts did not join Justice Kagan's treatment of the relevance of the APA to the validity of *Seminole Rock* and *Auer*, so there was no majority opinion for the Court on that subject.

There is another statute, however, that is highly relevant to this issue: the Congressional Review Act (CRA).[107] None of the opinions in *Kisor* discussed that statute, for several reasons.[108] The circuit court decision under review did not discuss it. The question the Court decided to review did not mention it. The two decade-long debate conducted by members of the judiciary and academy that criticized the *Seminole Rock-Auer* rule also did not discuss its relevance. And the Court had not previously analyzed it. It therefore would have been a bold move for any of the Justices to consider the effect of the CRA on the *Seminole Rock-Auer* rule without having any prior experience with, or adversarial education about, that law and its effect on the agency deference doctrine. That will change now, however, because the statute has the effect of nullifying the legal effect of a great many agency guidance documents that would otherwise receive deference under the new *Kisor* rule.

The CRA empowers Congress and the President to repeal an agency rule without the delay occasioned by the administrative or legislative process.[109] The Act benefits both branches of government. The law enables a president to revoke certain agency rules expeditiously without undergoing the often-lengthy notice-and-comment process that agencies must generally pursue to rescind an agency rule.[110] The Act also allows Congress to consider a rule and quickly decide whether to invalidate it without fear of a Senate filibuster. Given the hostile and

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107. 5 U.S.C. §§ 801–08 (2018). Congress enacted the CRA as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104–121, 110 Stat. 871 (1996). For discussions of the provenance, text, and operation of the CRA, see Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL'Y 187 (2018) [hereinafter Larkin, *The CRA*]; Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J. L. & PUB. POL'Y 505 (2018) [hereinafter Larkin, *Trump and the CRA*].

108. The Pacific Legal Foundation discussed the CRA in its *Kisor* amicus brief. Brief of Pac. Legal Found. et. al. as Amici Curiae Supporting Petitioner 11-19, *Kisor v. Wilkie*, 139 S. Ct. 1 (2019). None of the justices, however, mentioned the statute in any of the opinions.

109. "The CRA empowers Congress and the President to use a fast-track process to pass legislation repealing an agency rule. The Act benefits both branches of government. The law enables a president to revoke certain agency rules expeditiously without undergoing the often-lengthy notice-and-comment process that agencies must generally pursue to rescind an agency rule. The Act also allows Congress to consider a rule and quickly decide whether to invalidate it without fear of a Senate filibuster. In a time of always polarized and often poisonous relationships between the parties, the ability to accomplish results expeditiously is a godsend." Larkin, *Trump and the CRA*, *supra* note 107, at 508; *see also* Larkin, *The CRA*, *supra* note 108, at 197–204.

110. *See* Motor Vehicle Mfrs. of Am. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983) (ruling that an agency must undergo the same notice-and-comment process to repeal a regulation that is required to adopt one by the Administrative Procedure Act (APA), 5 U.S.C. § 701 (2012)).

warring relationship between the branches and political parties, the ability to accomplish results expeditiously is a blessing.

The CRA works as follows: every federal agency, whether executive or independent,[111] must submit to Congress and the Comptroller General a copy of a new "rule" before it can take effect.[112] For purposes of the CRA, the term "rule" has an exceptionally broad reach, effectively reaching any regulation, legal opinion, guidance document, manual, or other document that establishes rights or responsibilities or offers an agency's interpretation of the law.[113] Submission sets in motion an expedited process by which Congress can nullify the rule quickly by passing a joint resolution of disapproval that Congress then sends to the President for his signature or veto. If the President signs the resolution or Congress overrides his veto, the CRA nullifies the rule, and the agency cannot re-adopt it or a "substantially similar" one unless Congress passes new authorizing legislation.[114]

How many rules are invalid because agencies have failed to submit them to Congress, as the CRA requires? Who knows. Agencies acting in good faith might not have a complete list of guidance documents.[115] It also should come as no surprise to learn that agencies do not generally tally up the number of instances in which they have violated an act of Congress. No agency keeps an up-to-date list of the instances in which it has willfully flouted federal statutory law. Other parties, including the House Oversight and Government Reform Committee, have tried to determine that number, but they could not come up with a precise figure. A common estimate, however, is that agencies did not forward thousands of post-

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111. The CRA applies to agencies under the direct supervision of the President and to so-called "independent agencies." Larkin, *The CRA*, *supra* note 107, at 214 & n.85.

112. With a few exceptions, the CRA incorporates the definition of "rule" adopted by the APA. *See* 5 U.S.C. § 801 (2012) (incorporating § 551(4)): "'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . ."); *see* Larkin, *The CRA*, *supra* note 107, at 204.

113. Larkin, *The CRA*, *supra* note 108, at 204–14. Submission also triggers a requirement for the Comptroller General to review, and issue a special report on, major rules for Congress. *Id*. at 197–217; *see also* Russell T. Vought, Acting Dir., Off. of Mgmt. & Budget, Memorandum for the Heads of Executive Departments and Agencies re: Guidance on Complying with the Congressional Review Act 2-3, Apr. 11, 2019, https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf [https://perma.cc/SRL3-9EVT]; Paul J. Larkin, Jr., *OMB's New Approach to Agency Guidance Documents*, REG'Y REV., June 10, 2019, https://www.theregreview.org/2019/06/10/larkin-omb-new-approach-agency-guidance-documents/ [https://perma.cc/W8B2-DPVM].

114. *Id*. at 198–204. President Trump and Congress took advantage of the CRA in 2017. Together, they quickly erased more than a dozen rules promulgated during President Obama's last year in office and one adopted in 2018 by the Consumer Financial Protection Bureau.

115. *See* HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, SHINING LIGHT ON REGULATORY DARK MATTER, STAFF REPORT, 115th Cong. 4 (Mar. 2018) ("The Committee found agencies generally do not maintain a complete inventory of guidance documents.") [hereinafter HOUSE GOVERNMENT REFORM STAFF REPORT].

1996 agency rules to Congress, which means that they are not "in effect."[116] Whether accidental, negligent, or willful, that is law-breaking on a massive scale.

Why does that matter? There might be thousands of guidance documents that are "rules" for purposes of the Congressional Review Act that are not "in effect" because the executive branch never submitted them to Congress. Nonetheless, agencies might seek to use them in formal or informal adjudication, negotiation, or jawboning with private parties. In other words, agencies might attempt to make use of whatever legal force those guidance documents would receive under *Kisor* to regulate private conduct notwithstanding their invalidity under the Congressional Review Act. That is tantamount to claiming that a "Bill" passed by only one House of Congress (or both, but not signed by the president) is a "Law" that can legally order private parties to undertake or refrain from otherwise lawful conduct.[117] In order for the Congressional Review Act to play the role that Congress intended, agencies cannot receive *any* type or degree of deference for rules that Congressional Review Act deems not in effect.

Of course, the federal government might seek to avoid that result as follows. It would argue that an agency's noncompliance with the Congressional Review Act should not disable the Justice Department from arguing in a legal brief that whatever interpretation the agency took in its rule is a correct reading of whatever statute or regulation is involved in a lawsuit. Congress authorized the United States Attorney General to manage or supervise the conduct of all litigation in which the federal government has an interest[118] and deciding how to construe statutes, regulations, and rules is an integral part of representing federal agencies and the public.[119] Reading the Congressional Review Act to prevent the government from arguing that an agency correctly interpreted a federal statute would hamper the agency's ability to satisfy its constitutionally assigned responsibilities and injure the public to boot.

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116. *See*, *e.g.*, *id.* at 4 ("Of the more than 13,000 guidance documents identified for the Committee, only 189 were submitted to Congress and the Government Accountability Office (GAO) in accordance with the CRA."); CURTIS W. COPELAND, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS, REPORT SUBMITTED TO THE ADMIN. CONF. OF THE UNITED STATES (July 15, 2014) (noting that from 1997-2011 agencies submitted to Congress approximately 88 percent of the final rules published in the Federal Register, but that percentage dipped to 77 percent of the final rules published in the Federal Register once the Government Accountability Office in November 2011 stopped notifying the Office of Management and Budget about missing rules); Clyde Wayne Crews, *Most Federal Agency Regulatory Guidance May Be Invalid, So Now What?*, FORBES, Nov. 6, 2017, https://www.forbes.com/sites/waynecrews/2017/11/06/most-federal-agency-regulatory-guidance-may-be-invalid-so-now-what/#1e9e507d5fd4 [https://perma.cc/CJH2-Q2TG].

117. *See* INS v. Chadha, 462 U.S. 919, 944-59 (1983) (ruling that a "Bill" must satisfy the Article I Bicameralism and Presentment requirements to become a "Law").

118. *See* 28 U.S.C. §§ 503, 509 (2019).

119. *See* 28 U.S.C. § 505 (2019) (authorizing the president to appoint a Solicitor General to assist the Attorney General); 28 C.F.R. § 0.20 (2019) (identifying "matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned").

There are two flaws in that argument. The first one is obvious: leaving unremedied an agency's noncompliance with the Congressional Review Act will only encourage agencies to continue to defy it.[120] Statutes without consequences for noncompliance are not "Laws"; they are just advice, which anyone can take or leave.[121] Yet, we know that Congress intended that agencies would comply with the Congressional Review Act because Congress passed it as a "Law," not just a resolution stating the "sense of the Congress." Affording *Kisor* deference to any agency rule that is not yet "in effect" gives that rule some "effect" and therefore is absurd.

The second flaw is that the argument assumes that the only effective remedy is one that goes overboard: silencing the Justice Department. The appropriate remedy for noncompliance is not preventing the Justice Department from representing its client agency and offering a reasonable interpretation of the law. Instead, it is depriving an agency rule not yet "in effect" of whatever deference it would otherwise receive under *Kisor*. If the Justice Department can offer a persuasive argument in defense of the agency's position, the court should accept it. That, however, is not an application of the new *Kisor* deference doctrine (or the old *Seminole Rock-Auer* deference doctrine). It is an application of the principle the Court stated in *Skidmore v. Swift & Co.*,[122] a decision predating *Seminole Rock* that also addressed this subject. The issue in *Skidmore* was whether fire fighters should receive overtime pay for the time they spent at or near their jobs in case a fire broke out.[123] The Administrator of Wages and Hours concluded that a flexible approach was the optimal way to answer that question, and the Supreme Court agreed. As Justice Jackson explained for the Court, courts should consider the soundness and consistency of the agency's position in deciding whether it is persuasive.[124] *Skidmore* did not place a thumb on the scale in the government's favor. It simply stated the unremarkable conclusion that courts should be receptive to a convincing agency interpretation of the law. The Justice Department can always take advantage of the *Skidmore* approach even when an agency violates the Congressional Review Act.

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120. That is the principal rationale offered in defense of the Fourth Amendment Exclusionary Rule. *See* Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016) ("The exclusionary rule exists to deter police misconduct."); Davis v. United States, 564 U.S. 229, 236–37 (2011) ("The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations."). That rationale makes sense here too.

121. *See* THOMAS HOBBES, LEVIATHAN 223 (1609) ("Covenants without the Sword, are but Words, and of no strength to secure a man at all.").

122. Skidmore v. Swift & Co., 323 U.S. 134 (1940).

123. *Id.* at 134–35.

124. *Id.* at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

IV. *KISOR* AND FEDERAL CRIMINAL LAW

The dispute that led to the Supreme Court's decision in *Kisor* began when James Kisor sought an increase in disability benefits from the DVA on the ground that he had discovered new proof that he suffered from service-related post-traumatic stress disorder. Given the number of benefit programs available under federal law today, there are certain to be thousands more cases like his. The legal question decided in *Kisor*, however, also arises in every case in which the federal government uses its regulatory power to define primary conduct and uses the criminal law to enforce those rules.

The problem arises because of the combination of factors. The first one is that Congress often delegates to agencies the authority to define terms in a statute by promulgating regulations. Congress might use a term with a broad reach (for example, "solid waste") in a law (for example, the Resource Conservation and Recovery Act) that empowers an agency (for example, the EPA) the power to flesh out the term's meaning by issuing regulations that elaborate or refine its term (for example, "hazardous waste"). Aggravating the problem is the common agency practice of using documents—often known as "guidance documents," but also bearing a host of different labels[125]—that explain how the agency reads a statute or regulation. Another factor is that Congress often makes it a crime to violate regulatory laws.[126] We do not know how many cases involving an alleged rule-violation can be prosecuted through the criminal law—the number of federal offenses is so great that no one knows exactly what it is[127]—but in some fields, such as environmental regulation, there could be a goodly number of cases.[128] Those factors pose an important question: Is an agency's interpretation of its rules and regulations entitled to deference in the context of a criminal prosecution?

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125. *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like— Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1320 (1992) (noting that the term "rules" includes "legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidance, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others").

126. *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 728-29 (2013) [hereinafter Larkin, *Overcriminalization*]).

127. *See* Gamble v. United States, 139 S. Ct. 1960, 2008 n.98 (2019) (Gorsuch, J., dissenting) ("'There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes.'") (quoting Larkin, *Overcriminalization*, *supra* note 126, at 726); *see also* WALLISON, *supra* note 45, at xxi ("According to Clyde Wayne Crews of the Competitive Enterprise Institute, . . . the agencies of the administrative state have issued 101,380 rules since 1993, and never less than 3,000 in any one year.").

128. *See, e.g.*, Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. OF CRIM. L. & CRIMINOLOGY 725, 736 (2012) ("the environmental laws offer a full-service panoply of rules of conduct enforceable in a criminal prosecution"); *see generally id.* at 736 & nn.59–60 (collecting statutes).

The argument for granting federal agencies deference under *Kisor* in the interpretation of agency rules would be parallel to the argument that courts should defer under *Chevron* to an agency's reasonable interpretation of a regulatory statute.[129] In each case, there is a presumption that Congress wants the agency it designated to implement a regulatory scheme to have the authority to fill in any gaps in the laws of those regulatory programs. Agencies have the necessary expertise to decide how best to carry out their responsibilities, and they should be free to satisfy that task by rulemaking or by adjudication, which includes the informal process by which agencies construe their own rules. In fact, today, when governments find themselves in "the age of statutes,"[130] administrative agencies have become the new common-law courts, authorized to engage in the same "molar to molecular" lawmaking that the pre-New Deal courts had long performed.[131] The role for the federal courts is now the subsidiary one of making sure that an agency remains within the bounds of reason. Besides, someone must resolve ambiguity in an agency rule; the only question is *who*—the agency or the courts. When a statute or regulation creates an ambiguity in a technical field, or one in which a policy judgment is necessary for a congressional program to work, the argument goes, the sensible approach is to have the best-qualified party clarify its meaning.

A reflexive response to that problem would be to try to side step it or find a so-called "third way" to accommodate the relevant interests. For example, one possible solution would be to adopt the principle that courts should defer to an agency's interpretation of its own rules in administrative or civil enforcement proceedings, but not in criminal prosecutions; there, it should be up to the courts to decide what a rule means. That approach, the argument goes, accommodates the interests of the three relevant parties. Agencies could then use their expertise to make a regulatory program work, engaging in a trial-and-error process if need be, without the fear that non-expert generalist judges would force them to stick with their original plan. Courts could permit agencies to experiment with different law-interpreting approaches without fear that revisions in the government's interpretation of statutes and rules would create the type of legal uncertainty the

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129. Several commentators have debated this issue in the context of *Chevron* deference. *Compare* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (hereinafter Kahan, *Chevron*); and Sanford N. Greenberg, *Who Says It's A Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996) (both arguing in favor of applying *Chevron* deference in criminal cases) *with* Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612 (1992); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757 (1991); Paul J. Larkin, Jr., Chevron *and Federal Criminal Law*, 32 J. L. & POL. 211 (2017) [hereinafter Larkin, Chevron *and Federal Criminal Law*]; and Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2115–16 (1990) (all taking the opposite position).

130. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31 (1982).

131. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

criminal law abhors.[132] Regulated parties would know that they might have to adapt to a new regulatory regime, but they would also be confident that they could not wind up in the hoosegow for complying with old rules that are no longer in effect.[133]

That solution, however, suffers from several flaws. To start, it would sacrifice legitimacy for expediency. Federal courts would use their law-interpreting power to delegate to agencies the authority to create a common law body of federal crimes as a subset of the broader congressional delegation of authority from Congress to implement a regulatory scheme. Yet, federal courts have no authority to create a penal code by themselves, as the Supreme Court held two centuries ago in *United States v. Hudson*.[134] If so, federal courts cannot delegate to agencies authority they do not possess. Only Congress can give agencies authority to create separate bodies of law for criminal and administrative or civil purposes, and Congress has not done so in any across-the-board manner.

Atop that, this "third way" proposal would raise questions that have no clear objective solution. Why only two categories of agency-created bodies of law: criminal vs. administrative or civil? Why not one for each of the three? Why not more? Why not different categories for different types of criminal prosecutions—one category for cases with people as defendants and another one for cases with artificial persons, like corporations? Why not different categories for different types of penalties—imprisonment, fine, forfeiture, collateral consequences? I

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132. Under the Void-for-Vagueness Doctrine, statues that do not clearly define a crime cannot be criminally enforced, regardless of whether the vagueness is due to sloppy legislative drafting or incoherent (or unforeseeable) judicial decision-making. Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 68 (1960); Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 307–08 (2016) [hereinafter Larkin, *Lost Doctrines*]; *see, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2323 (2019) ("In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements."); Bouie v. City of Columbia, 378 U.S. 347, 352 (1964) ("[A] deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.").

133. Under a modern-day form of the common law "estoppel" doctrine, the government cannot prosecute someone for following an official government directive identifying permissible conduct. Larkin, *Lost Doctrines*, *supra* note 132, at 309 ("The estoppel doctrine prevents the government from convicting someone for conduct that the government had previously and expressly told an individual or the public was lawful . . . a paradigm case of a bait-and-switch."); *see, e.g.*, United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 673–74 (1973); Cox v. Louisiana, 379 U.S. 559, 571 (1965); Raley v. Ohio, 360 U.S. 423, 438 (1959).

134. 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt – imprison for contumacy – enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others, and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.").

could go on, but you get the point. There is no objective answer to any of those questions.

A third flaw stems from the realities of governance. The Kagan opinion says (in at least at one place, but not everywhere) that only senior agency officials should receive deference for interpreting rules, because only they are politically accountable to the president for their actions, the same rationale that *Chevron* gave to justify giving agency officials deference for reading statutes. That rationale assumes that political accountability counts for more than agency expertise. That assumption is likely correct insofar as it describes how presidents chose their lieutenants. Senior agency officials can wind up in their positions because of their political connections or campaign work rather than because they were experts in the subject matter Congress assigned to their agency. But if only political appointees receive *Chevron*, and now *Kisor*, deference, there is no justification for deferring to the expertise of agency officials as to meaning of agency rules.

Whatever might be the merits of that debate as a policy matter, the Supreme Court has foreclosed that escape route. The Court has made it clear in several cases that the courts must construe a statute with civil and criminal applications as if it would only be applied in criminal cases.[135] As Justice Scalia once put it, "the lowest common denominator, as it were, must govern."[136] We therefore cannot escape answering the question whether the government should receive *Chevron* and *Kisor* deference for its interpretation of a criminal statute or implementing agency rule. It turns out, however, that three Supreme Court decisions tell us that the answer is: No.

In the first one, *Crandon v. United States*, the government brought a civil suit for the alleged violation of a criminal statute.[137] The Boeing Company gave a severance package to several executives who resigned or took early retirement to work for the federal government, actions that would cost them a considerable loss of income, stock options, and retirement benefits. The question was whether the payments violated a provision in the federal criminal code, Section 209(a) of Title 18, prohibiting private parties from supplementing the income of government employees. Relying on the text and history of the law, the Court held that the payments were lawful because the Boeing executives were not government employees when they received them.[138] Justice Antonin Scalia disagreed with the Court's interpretation of the statute, but not with the result, so he wrote a separate opinion concurring in the judgment, joined by Justices Sandra Day O'Connor and Anthony Kennedy.[139] What is particularly noteworthy about his separate opinion

135. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 380–81 (2005); Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2008); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–18 (1992) (all ruling that a statute with alternative criminal and civil remedies must be construed as a criminal law would be interpreted).

136. *Clark*, 543 U.S. at 380.

137. 494 U.S. 152, 158–68 (1990).

138. *Id.* at 158–68.

139. *See generally id.* at 168–84 (Scalia, J., concurring in the judgment).

is his unmistakable rejection of the notion that the federal government's administrative interpretation of a criminal statute is entitled to *Chevron* deference.[140] The courts are responsible for administering the criminal law, he wrote, not agencies. Of course, executive branch officials must construe the criminal laws to ensure that their own actions remain on the lawful side of the dividing line. The Justice Department, in particular, must interpret the criminal code, because it is responsible for deciding whether to prosecute someone for a crime. That said, he concluded, "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."[141] The reason is that the Justice Department does not implement the federal penal code; that is the courts' job.[142]

Justice Scalia wrote only for himself and two other justices in *Crandon*, but in the two cases that followed *Crandon—United States v. Apel*[143] and *Abramski v. United States*[144]—the majority refused to afford *Chevron* deference to the government's interpretation of a criminal statute. The issue in *Apel* was whether the defendant had unlawfully re-entered a military installation after an officer ordered him not to do so. Apel argued that the area he re-entered was not part of the installation because it was not subject to the military's *exclusive* control. To support his argument, Apel pointed to several documents construing the relevant statute as requiring exclusive federal possession of the area in dispute.[145] In an opinion by Chief Justice Roberts, the Court rejected Apel's exclusivity argument, concluding that neither the text of the relevant law nor the nation's historical practice imposed his sought-after limitation.[146] In so ruling, the Court gave the back of its hand to Apel's reliance on internal government documents supporting Apel's interpretations of the unlawful re-entry statute. Those views "may reflect overly cautious legal advice based on division in the lower courts," the Chief Justice explained, or "they may reflect legal error."[147] "Either way," he concluded, "we have never held that the Government's reading of a criminal statute is entitled to

140. *See id.* at 177.

141. *Id.*

142. As Justice Scalia put it: "The law in question, a criminal statute, is not administered by any agency but by the courts. It is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding its interpretation; and in a general way all agencies of the Government must interpret it in order to assure that the behavior of their employees is lawful—just as they must interpret innumerable other civil and criminal provisions in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron*. The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Id.*

143. 571 U.S. 359, 369 (2014).

144. 573 U.S. 169, 191 (2014).

145. *Apel*, 571 U.S. at 368–69.

146. *See id.* at 367–72.

147. *Id.* at 369.

any deference."[148] To support that proposition, the Chief Justice cited Justice Scalia's separate opinion in *Crandon*.[149]

The Court's decision only four months later in *Abramski* made the same point. *Abramski* involved the federal statute outlawing the "straw purchase" of firearms—*viz*., the second-party purchase of a firearm for someone who could not buy one himself. Abramski argued that, even if he falsely reported that he purchased the gun for his own use when he bought it, the ultimate recipient could have bought the firearm himself. As support, Abramski cited pre-1995 opinions by the Bureau of Alcohol, Tobacco, and Firearms (ATF) stating that "a straw purchaser's misrepresentation counted as material only if the true buyer could not legally possess a gun."[150] Again, the Court made swift work of that argument. Citing *Apel*, the Court said (after noting that ATF had since changed its mind) that "[t]he critical point is that criminal laws are for courts, not for the Government, to construe."[151] Congress was "the entity whose voice *does* matter," and it did not limit the straw purchaser statute as Abramski argued.[152] "Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to in construing [the relevant law]), a court has the obligation to correct its error."[153] The "ATF's old position" was "no more relevant than its current one," the Court noted, "which is to say, not relevant at all."[154] In sum, *Abramski*, like *Apel* and Justice Scalia's separate opinion in *Crandon*, makes it clear that the government cannot receive *Chevron* deference for its interpretation of a criminal statute.[155]

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148. *Id*.
149. *Id*. (citing *Crandon*, 494 U.S. at 177 (Scalia, J., concurring in the judgment)).
150. *Abramski*, 573 U.S. at 191.
151. *Id*.
152. *Id*. (emphasis in original).
153. *Id*.
154. *Id*.
155. *See also* Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Statement of Scalia, J., joined by Thomas, J., respecting the denial of certiorari) ("I doubt the Government's pretensions to deference. They collide with the norm that legislatures, not executive officers, define crimes. When King James I tried to create new crimes by royal command, the judges responded that 'the King cannot create any offence by his prohibition or proclamation, which was not an offence before.' *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K.B. 1611). James I, however, did not have the benefit of *Chevron* deference. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain. Undoubtedly Congress may make it a crime to violate a regulation, *see* United States v. Grimaud, 220 U.S. 506, 519 (1911), but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation, *see* Carter v. Welles–Bowen Realty, Inc., 736 F.3d 722, 733 (C.A.6 2013) (Sutton, J., concurring). [¶] The Government's theory that was accepted here would, in addition, upend ordinary principles of interpretation. The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants. Deferring to the prosecuting branch's expansive views of these statutes 'would turn [their] normal construction . . . upside-down, replacing the doctrine of lenity with a doctrine of severity.' Crandon v. United States, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in judgment) . . . Whitman does not seek review on the issue of deference, and the procedural

There is more. As a matter of history, the job of interpreting criminal laws has always belonged to the courts, not the executive.[156] The concept that King John should have the power to adjudicate the limits of his own authority would have astounded the barons that forced him to agree to Magna Carta, given that the purpose of that document was to force him to bend his will to the common law applied by the courts.[157] As a matter of constitutional law, the Supreme Court has consistently held that the government cannot prosecute civilians in non-Article III courts.[158] The Court has also gone out of its way to limit the role that non-Article III magistrate judges can play in resolving any issue necessary for entry of a final judgment of conviction.[159] As a matter of administrative policy, the *raison d'être* for *Chevron* deference is to empower agencies to implement regulatory schemes. There is no such program for the government to implement in criminal cases.

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history of the case in any event makes it a poor setting in which to reach the question. So I agree with the Court that we should deny the petition. But when a petition properly presenting the question comes before us, I will be receptive to granting it.").

156. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) ("The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a "Judicial Power" is one to render dispositive judgments.'") (quoting Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)) (emphasis added in *Plaut*).

157. Chapter 39 of the Magna Carta provided that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go send against him, except by the lawful judgement of his peers or by the law of the land," J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992), which Coke construed to refer to "'the Common Law, Statute Law, or Custome of England.'" Ellis Sandoz, THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF THE RULE OF LAW 16–17 (Ellis Sandoz ed., 1993). Coke thought that the terms "due process of law" and "the law of the land" were interchangeable. *See* 2 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 50 (E. & R. Brooke 1797) (1642). Over time, the phrase "law of the land" became "due process of law," but the meaning did not change. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) ("Fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament."). For discussions of the provenance, meaning, and effect of Magna Carta, see generally DAVID CARPENTER, MAGNA CARTA (2015); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968); Larkin, *Lost Doctrines*, *supra* note 132, at 327 – 350.

158. *See*, *e.g.*, Kinsella v. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955). *Toth* set forth the rationale for that principle. 350 U.S. at 15–16 ("Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government. It is the primary, indeed the sole business of these courts to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases. These courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government.").

159. *See*, *e.g.*, Peretz v. United States, 501 U.S. 923 (1991) (ruling that a federal magistrate may not select the jury in a felony trial without the defendant's consent); United States v. Raddatz, 447 U.S. 667 (1980) (ruling that Congress may delegate to a federal magistrate the authority to prepare for an Article III district court judge an advisory opinion on the resolution of a suppression motion).

The Supreme Court's decision in *United States v. Mead Corp*. illustrates the importance of that conclusion.[160] Mead involved the issue of whether tariff classification decisions by the United States Customs Service deserved judicial deference under *Chevron*. The Customs Service was responsible for deciding how to characterize imported goods for tariff purposes at all of the forty-six ports of entry into the United States. Mead Corporation imported "'day planners,' three-ring binders with pages having room for notes of daily schedules and phone numbers and addresses, together with a calendar and such."[161] The issue was whether they were subject to a tariff because they were "notebooks and address books" or were exempt because they were "[o]ther" items.[162] The Court concluded that the Customs Service was not entitled to *Chevron* deference for its tariff classification decisions because Congress did not intend that courts would defer to those judgments.[163] As the Court held, "administrative implementation of a particular statutory provision" can qualify for *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming deference was promulgated in the exercise of that authority."[164] For several reasons, the Court concluded, Congress had no such intent.[165]

Those reasons have strong parallels in the case of criminal prosecutions. There, as in *Mead*, the Department of Justice does not have statutory authority to engage in rulemaking or adjudication. There, as in *Mead*, the Justice Department does not engage in notice-and-comment rulemaking when it adopts its interpretations of federal criminal laws. There, as in *Mead*, decision-making is not centralized in Washington, D.C. The Attorney General has the authority to manage all federal criminal prosecutions, but the 93 U.S. Attorneys manage all but the most important criminal cases.[166] *Mead* strongly militates against affording the Justice Department Chevron deference for its reading of federal criminal laws.

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160. 533 U.S. 218 (2001).

161. *Id*. at 224.

162. *Id*. (citations omitted).

163. *Id*. at 226–38.

164. *Id*. at 226–27.

165. *Mead* noted that "a very good indicator of delegation meeting *Chevron* treatment" was "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id*. at 229. The tariff statute at issue there did authorize the Customs Service to issue "binding rulings," *id*. at 232 (quoting 19 U.S.C. § 1502(a) (2019)), but not to "more than the parties to the ruling," *id*., particularly since the service's rulings were subject to de novo review in the Court of International Trade. *Id*. The Customs Service also did not engage in notice-and-comment rulemaking when it issued its classifications. *Id*. at 233. The practicalities of the tariff classification process also militated against giving Customs Service decisions deference under *Chevron*. "Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's scattered offices is simply self-refuting." *Id*. Classification decisions were better viewed as "interpretations contained in policy statements, agency manuals, and enforcement guidelines," which "are beyond the *Chevron* pale." *Id*. at 234 (citations and internal punctuation omitted).

166. *See* 28 U.S.C. §§ 501, 503, 506–507A (2019); Larkin, *Overcriminalization*, *supra* note 126, at 775 ("The Attorney General has the legal authority to supervise criminal litigation in the federal courts, but, even aided by his lieutenants at the department, he cannot oversee every criminal prosecution that

To be sure, the Court finessed its resolution of that question in *Crandall*, *Apel*, and *Abramski*, and not everyone has noticed the Court's "Inside Baseball" subtlety. The United States Court of Appeals for the District of Columbia Circuit recently faced the issue in *Guedes v. BATFE*, and it whiffed.[167] The issue in *Guedes* was whether the Bureau of Alcohol, Tobacco, Firearms, and Explosives had the statutory authority to adopt its new Bump-Stock Rule, which prohibited the use of a rifle stock that harnesses recoil energy in a manner that effectively allows a rifle to fire continuously.[168] In upholding the BATFE's statutory authority to promulgate the rule, the *Guedes* majority rejected the proposition that *Chevron* does not apply to an agency's interpretation of a statute, the violation of which could serve as the basis for a criminal prosecution.[169] *Apel* and *Abramski*, the majority reasoned, only "signaled some wariness about deferring to the government's interpretations of criminal statutes," nothing more.[170] Additionally, the *Guedes* majority said that refusing to apply *Chevron* to statutes that could be criminally enforced would keep *Chevron* from applying to cases involving the securities or environmental laws, even though *Chevron* itself involved an environmental law that could be the subject of a criminal prosecution.[171] Besides, the majority concluded,[172] the Supreme Court applied *Chevron* in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*[173] when it considered the government's construction of the Endangered Species Act,[174] which can be criminally enforced.

The D.C. Circuit's *Guedes* opinion brings two aphorisms to mind. One is that, when you hear a song, you should listen to the music as well as the lyrics; they tell the story together. In his *Crandon* concurring opinion, Justice Scalia emphatically rejected the notion that the government can receive *Chevron* deference when it construes a criminal law; *Apel* made the same point, even citing Justice Scalia's *Crandon* concurrence as authority; and *Abramski* reiterated that point yet again and cited *Apel*. To say that the Supreme Court has done nothing more than express "some wariness" about applying *Chevron* in criminal prosecutions is not an honest reading of the Court's decisions. The other aphorism is used to criticize what courts do when they rely on the legislative history of a statute to discern its

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the department brings. It is inevitable that some U.S. Attorneys or Justice Department Divisions will pursue a case that the Attorney General never would prosecute. Some targets will prove just too tempting for a prosecutor to pass up.").

167. 920 F.3d 1 (D.C. Cir. 2019).

168. *See id*. at 7; Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018).

169. *See* 920 F.3d at 17–27.

170. *Id*. at 25 (citing *Abramski*, 573 U.S. at 191, and *Apel*, 571 U.S. at 369).

171. *Id*. at 24–25.

172. *Id*.

173. 515 U.S. 687 (1995).

174. 16 U.S.C. § 1531 (2019).

meaning. It has been said that a court citing legislative history to justify its interpretation of a statute resembles someone looking out over a crowd and picking out his friends.[175] The D.C. Circuit majority in *Guedes* followed the same approach, the only difference being that it looked for helpful passages in Supreme Court decisions. *Guedes* did not place those statements in context or give them the weight they deserve.[176]

Now that *Kisor* has refashioned *Seminole Rock* and *Auer* into rule-based versions of *Chevron* deference, the Court has heightened the importance of clarifying how *Chevron* applies to an agency's interpretation of a statute when that becomes relevant in a criminal prosecution. The issue will certainly arise in environmental prosecutions and in cases like *Guedes*, and perhaps even *Guedes* itself, where an agency adopts a rule to address a problem that it cannot persuade Congress to resolve by statute. Those cases will wend their way to the Supreme Court for correction over the next term or two. They might become the first opportunity the Court has to reiterate—or, technically speaking, re-reiterate—what it thought that it had already twice made clear.

V. *KISOR* AND INDEPENDENT AGENCIES

A president's ultimate weapon over the work of the regulatory state is the authority to remove officials who do not satisfactorily implement his chosen policies. Presidents have used that power since the Decision of 1789 by the First Congress, which recognized that the "executive Power" granted to the President by Article II[177] gives him the authority both to oversee and to remove federal

175. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

176. Consider the D.C. Circuit's treatment of the Supreme Court's decision in *Babbitt*. Babbitt was a pre-enforcement facial challenge to a Department of the Interior regulation interpreting a provision in the ESA making it unlawful for anyone to "take" an endangered or threatened species. The regulation defined a "taking" to include "significant habitat modification or degradation where it actually kills or injures wildlife." 515 U.S. at 690. *Babbitt* upheld the regulation as consistent with the text of the ESA. The ESA could hardly be read otherwise. It is murder to strangle a victim or to remove all oxygen from his room; the difference between the two forms of homicide is immaterial. The same rationale applied in *Babbitt*. In a two-sentence paragraph at the end of that section of the Court's opinion, the Court cited *Chevron* (and a law review article by Justice Breyer) to say that the statutory text "did not unambiguously manifest its intent" to adopt the challenger's reading of the ESA and that the government's reading was reasonable. *Id*. at 703–04. In an accompanying footnote, the Court added that the Rule of Lenity did not require a different result. *Id*. at 704 n.18. *Guedes* read a *throwaway* paragraph and a *two-sentence discussion* in a *footnote* of what was an *ancillary* issue (*viz*., the Rule of Lenity) in an opinion handed down *19 years prior* to *Apel* and *Abramski* as rejecting what the Court expressly ruled in those two cases. The Court has told us that it does not resolve major issues in footnotes. *See* Wainwright v. Witt, 469 U.S. 412, 418–22 (1985). The Supreme Court might have to grant review to again make its position clear.

177. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

executive officials.[178] The Supreme Court gave its blessing to that decision in *Myers v. United States*.[179] The Court held that the president has the Article II authority to remove a federal officer without establishing a justification for doing so and without obtaining the Senate's prior approval in a manner comparable to the "advice and consent" that the Senate must supply for the officer's initial appointment.[180] Later, however, the Supreme Court twice upheld restraints on the president's removal power, holding in *Humphrey's Executor v. United States*[181] and *Wiener v. United States*[182] that Congress may impose "for-cause" restraints on the president's authority.[183] More recently, the Supreme Court has shown greater respect for *Myers*, rejecting limitations on the removal power in cases such as *Bowsher v. Synar*[184] and *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[185] The upshot is that, as Professor Cass Sunstein recently put it, "[o]ne of the great unresolved questions in American law" is the issue whether the president can control the regulatory policy agenda of so-called independent agencies, such as the Federal Reserve Board and the Federal Trade Commission.[186]

That controversy is relevant to the deference issue in *Chevron* and *Kisor*. One reason the Court gave in *Chevron* for its deference standard was that Congress intended executive branch officials to be able to make policy judgments when implementing broadly phrased statutory programs because they are responsible to the president, who is accountable to the public.[187] Kagan's opinion in *Kisor*

178. *See Free Enterprise Fund*, 561 U.S. at 492 ("The Constitution provides that '[t]he executive Power shall be vested in a President of the United States of America.' Art. II, §1, cl. 1. As Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.' 1 Annals of Cong. 463 (1789). [¶] The removal of executive officers was discussed extensively in Congress when the first executive departments were created. The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not 'expressly taken away, it remained with the President.' Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). 'This Decision of 1789 provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument.' Bowsher v. Synar, 478 U. S. 714, 723–724 (1986) (internal quotation marks omitted). And it soon became the 'settled and well understood construction of the Constitution.'").

179. 272 U.S. 52 (1926).

180. U.S. CONST. art. II, § 2, cl. 2 ("[The President] . . . shall have Power, by and with the Advice and Consent of the Senate . . . to . . . appoint . . . all other Officers of the United States").

181. 295 U.S. 602 (1935).

182. 357 U.S. 349 (1958).

183. *Cf.* Morrison v. Olson, 487 U.S. 654 (1988) (upholding a facial challenge to a limitation on the U.S. Attorney General's authority to remove the Independent Counsel).

184. 478 U.S. 714 (1986).

185. 561 U.S. 477 (2010).

186. Cass R. Sunstein, *Trump White House Seeks New Power Over Agencies*, BLOOMBERG (Apr. 23, 2019), https://www.bloomberg.com/opinion/articles/2019-04-23/trump-seeks-more-control-of-fed-sec-and-other-agencies [https://perma.cc/7QKB-HS9F].

187. *Chevron*, 467 U.S. 865–66 ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests,

made the same point, saying that Congress "is attuned to the comparative advantages of agencies over courts in making such policy judgments," one of which is that "agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public."[188] Like *Chevron*, *Kisor* justified the legitimacy of a deference rule on the ground that the president can ultimately control whatever policy judgments executive branch officials make when implementing the vague administrative rules that inevitably result from such broad delegations.

But what if the president cannot exercise the same type and degree of control over independent agency officials that the president could exercise over the head of the Environmental Protection Agency (EPA), the agency at issue in *Chevron*? The EPA is headed by an administrator, appointed by the president with the advice and consent of the Senate, but whom the president can remove without satisfying the type of "for cause" standard discussed in *Humphrey's Executor* and *Wiener*.[189] If agency deference is justified, even only partially, because the president can manage the policy judgments of his lieutenants, it would seem to follow that *Chevron* should not apply when an independent agency construes a statute. Moreover, insofar as *Kisor* relied on a presidential-supervision rationale to sustain *Seminole Rock-Auer* deference,[190] there is far less justification for applying its deference doctrine to an independent agency's construction of its own rules. At a minimum, there is a strong argument that an independent agency should not receive the same type or amount of deference that *Chevron* and *Kisor*

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but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

188. *Kisor*, 139 S. Ct. at 2413 (lead opinion of Kagan, J.).

189. Reorganization Plan No. 3 of 1970, Pub. L. No. 98-80, 97 Stat. 485 (1970), *reprinted in* 5 U.S.C. app 1 (2019).

190. *See Kisor*, 139 S. Ct. at 2416–17 (lead opinion of Kagan, J.) ("To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views. . . . Next, the agency's interpretation must in some way implicate its substantive expertise. Administrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to the agency. So the basis for deference ebbs when the subject matter of the dispute is distant from the agency's ordinary duties or falls within the scope of another agency's authority.") (citations and internal punctuation omitted).

contemplate.[191] At a maximum, justifying deference on the ground that the president can hold agency officials politically accountable is tantamount to a David Copperfield magic trick—when you look for the president's removal authority, there is nothing there.

The Supreme Court has assumed that there is no difference between executive and independent agencies for purposes of *Chevron*. The Court's 2005 decision in *National Cable and Telecommunications Ass'n v. Brand X Internet Services*[192] illustrates that point.[193] *Brand X* involved the Federal Communication Commission's interpretation of the term "telecommunications service" in the Communications Act of 1934.[194] The "first" issue that the Court considered was "whether we should apply *Chevron*'s framework to the Commission's interpretation" of that term.[195] The Court concluded that "[t]he *Chevron* framework governs our review of the Commission's construction" because "Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act" and, if necessary to do so, "to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the [Communications] Act."[196] Those provisions, the Court reasoned, "give the Commission the authority to promulgate binding legal rules."[197] The Court went on to consider, and reject, the argument that the FCC should not receive *Chevron* deference because its position in the *Brand X* case was inconsistent with earlier interpretations that the FCC had adopted. The Court apparently did not see any problem with granting the FCC *Chevron* deference because it was an independent agency. *Brand X* certainly suggests that *Chevron* applies to executive and independent agencies alike, even if it did not expressly so hold. The clear implication at least is that the status of an agency does not matter for *Chevron* purposes.

That said, in the past the Court has been willing to reconsider decisions that rested on an undiscussed assumption, like this one.[198] Perhaps, the Court will do so again. If the Court is willing to address that specific issue, however, any

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191. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376–77 (2001) (arguing that *Chevron* deference is appropriate only when "presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes"); Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429 (2006); *see also* David M. Gossett, Chevron*, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 689 n.40 (1997) (noting the argument).

192. 545 U.S. 967 (2005).

193. *See also* Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power, 534 U.S. 327, 333–39 (2002); Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 501–20 (2002) (both applying *Chevron* deference).

194. 47 U.S.C. §§ 151–63 (2019).

195. *Brand X*, 545 U.S. at 980.

196. *Id.* (quoting 47 U.S.C. §§ 151, 201(b) (2019)).

197. *Id.*

198. *See*, *e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 631 (1993); Stone v. Powell, 428 U.S. 465, 480–82 (1976); Edelman v. Jordan, 415 U.S. 651, 670–71 (1974).

attempt to distinguish independent from executive agencies for *Kisor* and *Chevron* purposes will have some steep hurdles to overcome.

The first one is that the term "independent agency" has different connotations.[199] Some people use it to describe agencies, like the Federal Trade Commission (FTC), headed by officials whom the president cannot remove except for "cause."[200] Others use that term far more broadly, to reach a host of organizations, such as the Central Intelligence Agency, that are not cabinet agencies but are headed by officials whom the president can remove for whatever reason he deems sufficient.[201] That difference could be significant under *Chevron* and *Kisor*. The label used to describe an agency is irrelevant, the argument goes; only the president's ability freely to remove an agency head should matter. If so, this interpretive issue is relevant only for that limited number of agencies, like the FTC, that Congress believed must be treated differently from executive agencies because they perform adjudicative (or "quasi"-adjudicative) functions, where the need for apolitical decision-making is at its apogee.

Then, there is the second hurdle: Executive and independent agencies alike might possess the technical expertise necessary to implement an assigned regulatory scheme. The Kagan opinion repeatedly mentions the specialized nature of some agency decisions. She began her analysis of the deference issue by identifying examples of the technical or scientific judgments that agencies must make, such as whether a truffle pâté is a liquid, gel, or aerosol; whether chest x-rays can form a "diagnosis" of a medical condition; and whether a drug contains an "active

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199. *See* DAVID E. LEWIS & JENNIFER L. SELIN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 48–49 (1st ed. Dec. 2012) ("To ask this begs the question of what defines agency independence. There is no general, widely accepted definition of an independent agency, but this label or definition is consequential for both law and politics. For some scholars, any agency created outside the [Executive Office of the President] or executive departments is an independent agency. For other scholars, however, independence is defined not by location inside or outside an executive department but by structural features, particularly for cause removal protections (i.e., political appointees cannot be removed except 'for cause,' 'inefficiency, neglect of duty, or malfeasance in office,' or similar language) for agency leaders. Independence in this context means independence from political interference, particularly removal by the President.") (footnotes omitted).

200. *See* 44 U.S.C. § 3502(5) (2019) ("the term 'independent regulatory agency' means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission[.]").

201. *See* MARSHALL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE AND POLITICS 6 (2015); Jacob E. Gerson, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne J. O'Connell eds., 2010); *Branches of the U.S. Government*, USA.gov, https://www.usa.gov/branches-of-government#item-214500 [https://perma.cc/QHL2-RRKN] (follow "Independent Agencies" hyperlink under "Executive Branch Agencies, Commissions, and Committees" heading) (last updated Oct. 18, 2019).

moiety" found in an already approved drug.[202] It is reasonable to assume—and "assume" is the correct term, because the Kagan opinion identified no evidence that Congress made the judgment she attributed to it—that Congress would want physicians to decide medical issues.

Of course, there could often be considerable tension between the relevance or importance of the "political accountability" and "technical expertise" factors mentioned in *Chevron* and *Kisor*. An axiom of the Progressive Movement was that properly educated, trained, and experienced government officials could solve technical societal problems if they were protected from political influence.[203] One way to keep politics from interfering with sound public policy decision-making, the argument went, was to make agencies independent from presidential supervision by limiting his removal authority to settings where there was good "cause" to fire someone. The classic example is what Congress did when it created the FTC and limited the president's power to remove commissioners, essentially, to malfeasance or misfeasance.[204]

Today, we do not share the Progressive Era's belief in apolitical government decision-making or its trust in the ability of career government bureaucrats to remain politically neutral.[205] There is a reason why Professor Rosemary O'Leary subtitled her book on the ethics of dissent by government officials *Managing Guerilla Government*.[206] We also have learned that presidents do not necessarily select competent technicians for senior policymaking positions. The people with skills and expertise—physicians, biochemists, geologists, engineers, and the like—might not be the upper level officials who make policy choices. For every Nobel laureate or former Cal Tech president heading an agency,[207] there are scores of people chosen for partisan political reasons.[208]

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202. *Kisor*, 139 S. Ct. at 2410 (lead opinion of Kagan, J.).

203. *See* WALLISON, *supra* note 45, at xii–xiii; Larkin & Slattery, *supra* note 47, at 636, 636 n.64 (collecting authorities); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 46–47, 99–100 (1994); May, *supra* note 191, at 445.

204. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935).

205. *See* Synar v. United States, 626 F. Supp. 1374, 1398 (D.C.C. 1986) (per curiam opinion by a three-judge court) ("It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence on the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that is even theoretically desirable to insulate them from the democratic process."), *aff'd sub nom*. Bowsher v. Synar, 478 U.S. 714 (1986).

206. *See* ROSEMARY O'LEARY, THE ETHICS OF DISSENT: MANAGING GUERILLA GOVERNMENT (2d ed. 2014).

207. *See* Larkin & Slattery, *supra* note 47, at 640 (referring to former Secretary of Defense Harold Brown and former Secretary of Energy Steven Chu).

208. *See* Susan Milligan, *The Lessons of Isaac and Katrina*, U.S. NEWS & WORLD REP. (Aug. 28, 2012), https://www.usnews.com/opinion/blogs/susan-milligan/2012/08/28/the-lessons-of-isaac-and-katrina [https://perma.cc/68UR-E3U5] ("Katrina has become short-hand for government ineptitude. The Bush administration was slow to respond, and the recovery was also plagued with problems and inefficiencies. The memory of George W. Bush telling his FEMA chairman that 'you're doing a great job, Brownie,' even as people were dying in the water and enduring unimaginable conditions at a sports stadium used for flood victims still evokes a chill."). At the same time, perhaps we should be thankful

Chevron reflected a changed mindset from the days of Progressivism. Policy-oriented decision-making by political appointees is legitimate, *Chevron* assumed. The Court went out of its way to justify deference to agencies on the ground that they can and should make policy-oriented judgments when Congress does not or cannot do so. The reason is that agencies are accountable to the president, who, in turn, is accountable to the public.[209] The Kagan opinion in *Kisor* relied on *Chevron* by accepting the legitimacy of an agency's policy-oriented interpretation of an ambiguous rule.[210] That opinion also tried to limit the ability of lower-level government officials to speak for the agency by effectively requiring a senior agency political appointee to be responsible for whatever position the agency claims is entitled to deference.[211] The Kagan opinion in *Kisor*, however, does not demand that the same person have both policy-making authority and scientific expertise. That reluctance is sensible, even if only as a concession to the reality of staffing an administration. Yet, it does leave us with this result: bureaucrats with the technical expertise that might justify deference under one rationale generally lack the authority to make policy judgments for an agency, while the officials authorized to make those policy calls often lack the knowledge to do so correctly, which is necessary under a different theory of administrative legitimacy. Which theory of administrative legitimacy (if either) should be controlling in general or in any particular case is anyone's guess. *Kisor*, like *Chevron*, does not say. Insofar as policy-making authority is the rationale for deference, however, there is no justification for granting deference to agencies over which the president lacks an unfettered ability to remove its officials when he disagrees with their judgments.

CONCLUSION

The Supreme Court granted review in *Kisor v. Wilkie* to decide whether to kill off the *Seminole Rock-Auer* rule. As it turns out, the Court did bring that rule to an end, but did so without driving a stake into its heart. Fearful of admitting that

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that political appointees can run the show in agencies because they will change with each new administration. Career government officials can work for far longer terms, and many of them have nothing but contempt for the people they supposedly serve. *See* JENNIFER BACHNER & BENJAMIN GINSBERG, WHAT WASHINGTON GETS WRONG 10 (2016) ("We found that much of official and quasi-official Washington is content to think that ordinary Americans, and the politicians whom they send to Congress, are uninformed and misguided and that policy makers generally should ignore them. This is more or less what they do."); *id*. at 102–03 ("America's rulers regard members of the public as generally incompetent and uninformed on most policy questions."); *id*. at 108 ("The fact that many officials seem unfamiliar with or even contemptuous of public opinion may already lead us to doubt their commitment to heeding the will of the people."); *id*. at 153 ("[T]he rulemaking agenda more closely reflects the preferences of America's unelected government and, perhaps, the constellation of 'usual suspects' who influence rulemaking, than it mirrors the wishes of Congress, the president, or the American people.").

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

210. *See Kisor*, 139 S. Ct. at 2413 (lead opinion of Kagan, J.) ("resolving genuine regulatory ambiguities often entails the exercise of judgment grounded in policy concerns") (citation and internal punctuation omitted).

211. *Id*. at 2416 (lead opinion of Kagan, J.).

it made a mistake in those cases, yet equally afraid to lose whatever benefits result from that rule, the Court decided to completely rewrite *Seminole Rock* and *Auer* by transforming them into applications of the *Chevron* doctrine, now involving the construction of rules instead of statutes. Critics of *Seminole Rock* and *Auer* will doubtless be disappointed at the Court's failure to overturn those cases, but they will almost certainly get another chance to see that happen. The Court left open enough important questions, such as whether *Kisor* and *Chevron* are consistent with the APA, that we have not seen the end of the "Deference War." For now, there is a break in the fighting. But it will resume shortly.