Essay

Using Interpretive Methodology to Get Out from *Seminole Rock* and a Hard Place

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Abstract

Though not directly at issue in Perez v. Mortgage Bankers Association*, several of the Supreme Court Justices felt compelled to question the legal validity of* Auer *deference. This rule granting agencies deference when interpreting their ambiguous regulations has been a longstanding precedent in administrative law, but several Justices of the Supreme Court and members of the academic community are signaling that the rule is ready to be changed. Recognizing that* Auer *is being called into question, an emerging field of scholarship has developed to assess what the new legal rule should be if and when* Auer *is overruled. This Essay takes part in that debate and proposes that the Supreme Court should impose a stare decisis methodology for interpreting regulations. While many members of the academic community assert that* Skidmore *deference, the deference granted to agencies if their interpretation is persuasive, is the preferred approach to this deference question, this Essay demonstrates that tackling the challenges of* Auer *deference through interpretive methodology offers the better approach.*

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INTRODUCTION

The Supreme Court's recent opinion in *Perez v. Mortgage Bankers Association*[1] is yet another indicator that the Supreme Court is likely to reconsider its longstanding holding that an agency's interpretation of its own ambiguous regulation is entitled to judicial deference.[2] For more than seventy years, beginning with the case of *Bowles v. Seminole Rock & Sand Co.*[3] and then in *Auer v. Robbins*,[4] the Su-

1 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

2 *See id.* at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213 (Scalia, J., concurring in the judgment); *id.* at 1220 (Thomas, J., concurring in the judgment). For examples of the debate taking place, see Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 112 (2000); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 516 (2011); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 412 (2012) [hereinafter Stack, *Interpreting Regulations*]; Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1466 (2011).

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

preme Court has held that agencies are entitled to deference when interpreting their own regulations. Notwithstanding the Supreme Court's established precedent, it appears that there is considerable willingness among some members of the Supreme Court to overturn *Seminole Rock*/*Auer*.[5] The question for the Supreme Court, if and when it does decide to overrule *Auer*,[6] is: what new approach should it adopt instead of granting agencies such strong levels of deference?

The issue of *Auer* deference, though once obscure, is now the subject of an emerging scholarship evaluating and examining the amount of deference an agency should be granted when interpreting its own ambiguous regulations.[7] Although some members of the academic community assert that *Auer* should remain the status quo,[8] the majority of scholars in the field contend that the level of deference established in *Skidmore v. Swift & Co.*[9] should replace *Auer* deference.[10] While a return to *Skidmore* deference would improve the shortcomings resulting from *Auer* deference, *Skidmore* deference falls

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4 Auer v. Robbins, 519 U.S. 452 (1997).

5 *See Perez*, 135 S. Ct. at 1210–11 (Alito, J., concurring in part and concurring in the judgment) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *id.* at 1225 (Thomas, J., concurring in the judgment) (stating "the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered"); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (noting "[i]t may be appropriate to reconsider" *Seminole Rock*/*Auer* at another time). It should be noted that at the time this Essay was originally drafted, Justice Scalia was still sitting on the Court and would have considered overruling *Auer*. *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (stating that "while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity"). With the event of Justice Scalia's untimely death on February 13, 2016, the fate of *Auer* is now slightly more indeterminate.

6 For purposes of this Essay, *Auer* and *Seminole Rock* will be referred to interchangeably as done in judicial practice. *See Talk Am., Inc.*, 564 U.S. at 67 (Scalia, J., concurring) (noting that *Seminole Rock* has been attributed to *Auer* even though the Court decided *Auer* after *Seminole Rock* and reaffirmed *Seminole Rock*'s doctrine).

7 *See* Stephenson & Pogoriler, *supra* note 2, at 1503–04 ("Federal judges and administrative law scholars continue to wrestle with the appropriate scope of *Chevron*'s domain. . . . It is therefore somewhat surprising that no comparable discussion has taken place about the appropriate domain of *Seminole Rock*, *Chevron*'s vitally important but sometimes neglected counterpart."); *see also* Derek A. Woodman, Essay, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721, 1723 n.5 (2014) (noting *Auer*'s historically obscure treatment, relative to *Chevron*).

8 *See, e.g.*, Jason Marisam, *Constitutional Self-Interpretation*, 75 OHIO ST. L.J. 293, 336 (2014).

9 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

10 *See, e.g.*, 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, 687 (2014) (arguing for the application of *Skidmore* deference to have more consistent interpretations).

short of remedying all of the problems that the *Auer* doctrine poses because it provides no clear standard for deciding what deference should be granted to agencies.[11] Recognizing that a simple return to *Skidmore* has its shortcomings, other scholars, such as Professor Stack, have turned their focus to the means and methodology by which courts should interpret regulations.[12]

Drawing from the previously proposed and emerging solutions to *Auer* deference, this Essay draws on the scholarship relating to the interpretation of regulations and how interpretive methodology[13] is a better approach to address concerns stemming from *Auer* deference. Courts have not developed a consistent method for approaching their interpretations of agency regulations.[14] Nor is there a consistent approach to applying *Skidmore* deference in ascertaining the amount of deference due to an agency's regulatory interpretation.[15] The application of *Skidmore* deference alone, consequently, is insufficient to remedy the problems resulting from *Auer* deference.

This Essay argues that in order to remedy the problems resulting from *Auer* deference and the shortcomings from replacing *Auer* with *Skidmore* deference, the Supreme Court should impose a stare decisis methodology for interpreting regulations. The proposed methodology would apply permanently to any lower court interpreting ambiguous

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11 *See infra* Part II.

12 *See* Stack, *Interpreting Regulations*, *supra* note 2, at 357, 410–12 ("While all agree that regulations are primary sources of law, strikingly little attention has been devoted to the method of their interpretation. Courts and scholars have labored over legal interpretation generally and the methodology for statutory interpretation in particular. But regulations . . . have been orphaned from those debates."). *See generally* Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 84–87 (2015); Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252 (2016) [hereinafter Stack, *Preambles as Guidance*]; Kevin M. Stack, *The Interpretative Dimension of* Seminole Rock, 22 GEO. MASON L. REV. 669 (2015).

13 This Essay defines interpretive methodology as the means of analysis that courts employ to give meaning to an ambiguous text. While granting agencies deference could be considered as a means to interpret ambiguous texts, this Essay does not interpret the Supreme Court's legal regime of deference to fit this definition.

14 *Compare* Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 207 (2011) (using the text to interpret the words of the regulation and concluding that the text alone does not resolve the ambiguity), *with* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 668–69 (2007) (applying surplusage canon to regulation's language to make its words operative), *and* Gardebring v. Jenkins, 485 U.S. 415, 428 n.14 (1988) (using regulation's promulgation history to interpret the language of the regulation). *See also* Stack, *Interpreting Regulations*, *supra* note 2, at 410–12.

15 Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1291 (2007) ("Yet the confusion over the inquiry each factor represents in turn feeds the uncertainty over how the *Skidmore* standard should function. What the courts seem to be searching for, and what seems to be lacking in many cases, is an underlying guiding principle that links the various factors and explains why one informal, nonbinding agency action is superior to another.").

agency regulations. The methodology for interpreting an ambiguous regulation requires determining the "touchstone"[16] for the regulation's interpretation and the "tools"[17] that are permissible to use when making such an interpretation. While there is no consistent stare decisis methodology for interpreting statutes,[18] this Essay argues that because regulations are inherently different from statutes, they should be subject to a method of interpretation that has a stare decisis effect.

Part I of this Essay analyzes the *Auer* deference doctrine. This Part focuses on the modern developments of *Auer* deference and the noticeable impact that the doctrine has on agency rulemaking. This Part analyzes how the problems resulting from *Auer* deference should be framed in order to remedy them. Part II analyzes the drawbacks from trying to remedy the problems that *Auer* deference creates by applying *Skidmore* deference to an agency's interpretation of its vague regulations. Lastly, Part III applies the approach postulated by this Essay and demonstrates how it can ameliorate the concerns generated by *Auer* deference.

I. The Development of *Seminole Rock* and *Auer* Deference in Administrative Law

A. *The Historical Foundations and Doctrinal Overview of* Auer *Deference*

The Supreme Court announced what is known today as the doctrine of *Auer* deference in *Seminole Rock*.[19] *Seminole Rock* assessed price regulations promulgated under the authority of the Emergency Price Control Act of 1942.[20] The Administrator of the Office of Price Administration brought the action in order to enjoin a company from selling its product at prices that were in excess of the rates permissible

16 By "touchstone" this Essay refers to the "goal" of the interpretation. For example, touchstones could be the regulation's purpose (interpret the regulation to follow the reason why the enacting agency made the rule) or the intent of the regulator (interpret the regulation in a way that is consistent with the intent of the enacting agency).

17 By "tools" this Essay refers to what sources of information the interpreter can draw on to make his or her interpretation. For example, this could be the regulation's text, the regulation's promulgation history, etc.

18 *See* 4 Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1201–03 (tent. ed. 1958); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 8 (2012); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 Yale L.J. 1898, 1910–11 (2011).

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

20 *Id.* at 411.

under the agency's regulation.[21] The Court announced, "the ultimate criterion [for interpreting the agency regulation] is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[22] In interpreting any regulation of an agency, the Supreme Court noted that the "only tools . . . are the plain words of the regulation and any relevant interpretations of the Administrator."[23] Though criticized for not offering a clear rationale for the rule,[24] the Court reasoned that deference to the agency's interpretation of the rule was appropriate because "the Administrator has stated that this position has uniformly been taken by the Office of Price Administration in the countless explanations and interpretations given to inquirers affected by this type of . . . determination."[25]

The Supreme Court reannounced the *Seminole Rock* doctrine in *Auer*, notwithstanding the criticism that the doctrine generated.[26] The Court enunciated that "[b]ecause the [test at issue] is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"[27] The Court found that the agency "easily met" the deferential standard because the agency had consistently applied the challenged interpretation of its regulation.[28] Moreover, the Court held that the agency's action was not due deference to interpretations of its own regulation when the agency's interpretation is a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."[29]

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21 *Id.* at 412.

22 *Id.* at 414.

23 *Id.*

24 *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part) ("Our cases have not put forward a persuasive justification for *Auer* deference. The first case to apply it, *Seminole Rock*, offered no justification whatever—just the *ipse dixit* that 'the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" (quoting *Seminole Rock*, 325 U.S. at 414)).

25 *Seminole Rock*, 325 U.S. at 417–18.

26 *See* Auer v. Robbins, 519 U.S. 452, 461 (1997); *see also, e.g.*, Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 251–57 (2013) (identifying the confusion, problems, and irregularities in the Supreme Court's application of *Seminole Rock* from the time it was decided until *Auer* was decided).

27 *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

28 *See id.* at 461.

29 *Id.* at 462 (alteration in original) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).

The Court rested its theory of giving agencies deference to interpretations of their own regulations as a matter of functionalism: courts should defer to the agency in the interpretation of its own regulation because such an interpretation implicates the agency's legal expertise and the agency created the regulation at issue.[30] Furthermore, if a court defers to an agency's interpretation of its organic statute, which Congress enacted, then "giv[ing] an agency less control over the meaning of its own regulations than it has over the meaning of a congressionally enacted statute seems odd."[31]

B. The Supreme Court's Modern Developments to Auer *Deference*

For over half a century, the Supreme Court seemed committed to the *Auer* deference doctrine.[32] In recent years, however, it appears that its original commitment to *Auer* is wavering.[33] The jurisprudential shift that started shaking the foundations in *Auer* occurred when the Court announced in *United States v. Mead Corp.*[34] that the level of deference (either *Chevron* or *Skidmore*) the courts owed to an agency depended upon whether the agency exercised the rulemaking power that Congress gave to it.[35] Prior to the Court's decision in *Mead*, there were no significant restrictions on the application of *Chevron* deference to an agency's interpretation of its organic statute.[36] In several ways, the similarities between how the Court is currently restricting

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30 *See id.* at 461–63; Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part).

31 *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) ("Another conceivable justification for *Auer* deference, though not one that is to be found in our cases, is this: If it is reasonable to defer to agencies regarding the meaning of statutes that *Congress* enacted, as we do per *Chevron*, it is *a fortiori* reasonable to defer to them regarding the meaning of regulations *that they themselves crafted*."); *see also* Stephenson & Pogoriler, *supra* note 2, at 1457–58. Though he is not the author of the *Decker* opinion, Justice Scalia has an authoritative position on this point because he is the author of the *Auer* opinion. *See Auer*, 519 U.S. at 453.

32 *See* Healy, *supra* note 10, at 646–50, 657.

33 *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166–67 (2012).

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

35 *See id.* at 229.

36 *Cf.* Michael. P. Healy, *Reconciling* Chevron*,* Mead*, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 39–40 (2011) (*Mead* imposed restrictions on the analysis of an agency's interpretation of a legal issue "[a]fter the court has determined that the statute is ambiguous"). With the Court's decision in *Mead*, however, courts must first determine whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–27.

Auer and how the Court has already restricted *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[37] since *Mead* are striking.

Starting with the Court's opinion in *Gonzales v. Oregon*[38] and continuing through its decision in *Christopher v. SmithKline Beecham Corp.*,[39] the Court has been scaling back the application of *Auer* deference in the same way that *Mead* has impacted *Chevron*.[40] The Supreme Court has started to apply a similar kind of "source of law" analysis for its *Auer* deference cases in the same way that it applies to *Chevron* deference cases.[41] Like in *Mead*, the Supreme Court in recent years has begun to place limits on the blanket application of *Auer* deference.[42] In *Gonzales*, the Court held that when a regulation amounts to a "paraphrase" of the statutory language, the agency's claimed interpretation of a regulation paraphrasing the statute is not actually an interpretation of the regulation, but is rather an interpretation of the statute.[43] The agency, therefore, cannot be entitled to the substantial level of deference granted under the *Auer* regime because the source of law being interpreted was really the organic statute's language and not the language of the agency's regulation.[44]

Since the Court's decision in *Gonzales*, the Court has generally upheld the basic framework of the *Auer* deference regime;[45] however, in *SmithKline*, the Court delivered another limitation to the application of *Auer* deference: the prevention of an "unfair surprise" when agencies offer *post hoc* rationalizations for litigation.[46] The Court stressed once again that the doctrine of *Auer* deference has its limits and that it cannot be granted to agencies that offer *post hoc* rational-

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

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

39 Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012).

40 *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337–38 (2013) (noting agency not due deference when it creates *post hoc* interpretations of regulation for litigation); *SmithKline*, 132 S. Ct. at 2167 (holding agency's interpretation was not due deference because it would result in an "unfair surprise" in a manner that would lead to the "impos[ition] [of] potentially massive liability on respondent for conduct that occurred well before the interpretation was announced"); *Gonzales*, 546 U.S. at 257 (holding that *Auer* deference cannot apply when the agency is merely "parroting" the statute's language in the regulation it is interpreting).

41 *See* Healy, *supra* note 10, at 658.

42 *See, e.g.*, *Gonzales*, 546 U.S. at 257.

43 *Id.*

44 *Id.*

45 *See, e.g.*, Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 59 (2011); Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 210–11 (2011). By "basic framework of *Auer*," this Essay means that the Court will grant deference to an agency's interpretation of its own ambiguous regulation unless plainly inconsistent with the language of the regulation.

46 Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166–67 (2012).

izations in light of litigation because the parties subject to the regulation do not have an opportunity to be put on notice.[47] While the Court acknowledged agency interpretations "advanced in a legal brief" can be entitled to *Auer* deference, that deference cannot apply to situations that amount to an "unfair surprise."[48] In rejecting the application of *Auer* deference, the Court then applied *Skidmore* deference to the agency's interpretation.[49] The Court determined that once an agency acts outside of its permissible boundaries, the agency is at most entitled to *Skidmore* deference.[50] Once again, the Court carved out a notable exception to the application of *Auer* deference that not only limited the scope of the doctrine, but also aided in calling the rule of *Auer* deference into question.[51]

An agency is therefore entitled to *Auer* deference when (1) it interprets a regulation that contains an ambiguity;[52] (2) the regulation is not a rewording of the statutory language;[53] and (3) the interpretation is not a *post hoc* interpretation created in response to the pending litigation that amounts to an "unfair surprise."[54] Moreover, in these subsequent modern opinions that narrow the scope and application, the Supreme Court has increasingly called for the overruling and rethinking of *Auer* deference.[55] Before reviewing the alternatives to *Auer* deference, this Essay examines the rationale behind *Auer* deference and the criticisms that the doctrine has faced.

C. Rationale and Consequences of Auer *Deference*

Notwithstanding criticisms, including the criticism that the Court has never really offered a conclusive rationale for the doctrine,[56] there are pragmatic arguments that favor the *Auer* doctrine. Courts should avoid wading into highly complex and technical areas of law that are

47 *See id.* at 2166–67.

48 *See id.* at 2166–68 (citing *Chase Bank*, 562 U.S. at 208).

49 *See id.* at 2168–69.

50 *See id.*

51 *See* Healy, *supra* note 10, at 658–60, 670.

52 *See* Christensen v. Harris Cty., 529 U.S. 576, 588 (2000).

53 *See* Gonzales v. Oregon, 546 U.S. 243, 255–57 (2006).

54 *See SmithKline*, 132 S. Ct. at 2166–68.

55 *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment).

56 Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of* Seminole Rock, 22 GEO. MASON L. REV. 647, 665–67 (2015) (arguing that the Court's present understanding of *Seminole Rock* and deference doctrine is a vast departure from its historical origins and the Court has not offered justification or rationale for the departure).

within the domain of an agency's expertise.[57] Furthermore, the agency should have the flexibility to change the meaning of the rule without having to adopt a new rule through notice-and-comment rulemaking as these rulemaking procedures can be time consuming and require a cumbersome amount of the agency's resources.[58] Lastly, flexibility and vagueness in rules facilitates an efficient transition between political administrations because agency officials are often directly accountable to the executive branch and sometimes alter their positions and interpretations to reflect those of the current administration.[59]

By contrast, though, these pragmatic benefits come at the cost of what Professors Stephenson and Pogoriler have aptly termed "administrative authoritarianism."[60] Though the Supreme Court, at the time it decided *Auer*, did not enunciate a differentiation between agencies interpreting statutes and their regulations, there is a crucial difference.[61] Unlike in *Chevron* cases where the agency is interpreting a statute Congress created, in *Auer* cases, the agency is interpreting a regulation that it itself promulgated.[62] This poses a contentious constitutional question as to whether an agency can be vested with both lawmaking and law-interpreting powers.[63]

Under this scheme, the agency is able to create the regulation (the law) and have the ability to enforce its own interpretation of the regulation.[64] This is arguably an unconstitutional violation of the separation of powers doctrine.[65] Instead of interpreting their own regulations, agencies should have their regulations evaluated by the

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57 *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Amerada Hess Pipeline Corp. v. FERC, 117 F.3d 596, 604 (D.C. Cir. 1997).

58 *See* Stephenson & Pogoriler, *supra* note 2, at 1459; *see also* 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, 1317–18 (1992). New rules are difficult to promulgate because of the "front-end" requirements executive orders and statutes have put in place to regulate the content and impact of the rules. *See* Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179, 1182–83 (2004).

59 *See* Richard J. Pierce, Jr., *The Future of Deference*, 85 GEO. WASH. L. REV. 1293, 1303–05 (2016) [hereinafter Pierce, *The Future of Deference*]; *see also* Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 570–71 (2006).

60 *See* Stephenson & Pogoriler, *supra* note 2, at 1459–61.

61 *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1340–41 (2013) (Scalia, J., concurring in part and dissenting in part).

62 *See* Manning, *supra* note 2, at 639.

63 *See id.*

64 *See id.*

65 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215–20 (2015) (Thomas, J., concurring in the judgment).

independent judgment from a separate entity. This independent review is necessary to restore a constitutional check on the agency's power.[66] As it currently stands, agencies' interpretations of their own ambiguous regulations (because of *Auer* deference) go unchecked.[67] Unlike the delegation of authority of Congress to a new entity, an agency's delegation of power goes to itself. Such power has already triggered the Supreme Court's concern that agencies do not give "fair warning of the conduct [a regulation] prohibits or requires."[68]

Specifically, *Auer* has the potential to deter and discourage agencies from creating clear rules, which poses a significant challenge for regulated parties.[69] Congress does not interpret its own statutes. *Chevron* consequently incentivizes Congress to write clearer statutes if it does not want an agency changing the purpose or meaning of the statute.[70] But, unlike Congress, because agencies are interpreting their own regulations, agencies do not have a strong incentive to promulgate clear regulations.[71]

Not only is there a lack of positive incentives for agencies to produce clear regulations, but, under *Auer*, agencies actually have perverse incentives to produce ambiguous regulations. In light of the fact that notice-and-comment rulemaking is increasingly arduous, expensive, and timely, agencies may prefer to adopt the vague rules.[72] The cost associated with developing clear and well-articulated rules increases in light of the time, money, and political capital invested to understand the impact of the pending regulation and engage with the participants (both the general public and the political administration) in the rulemaking process.[73] Because an agency's interpretation of its own ambiguous regulation has controlling deference, there is the heightened possibility that a regulated party might be caught in a regulatory interpretation that did not arrive until the start of litigation.[74]

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66 *See id.* at 1219–20.

67 *See* Manning, *supra* note 2, at 653–54.

68 Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012) (quoting Gates & Fox Co. v. Occupational Safety Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

69 Manning, *supra* note 2, at 647–60; *see* Anthony, *supra* note 58, at 1318.

70 *See* Manning, *supra* note 2, at 655–60; Stephenson & Pgoriler, *supra* note 2, at 1460–61.

71 *See* Stephenson & Pogoriler, *supra* note 2, at 1461.

72 *See* Manning, *supra* note 2, at 655.

73 *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983).

74 *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167–68 (2012).

This is especially true in light of the structure of the Administrative Procedure Act ("APA").[75] The APA authorizes agencies to issue "interpretative rules" that do not require the formal notice-and-comment rulemaking procedures that other rules would normally need to undergo.[76] These interpretative rules allow agencies to change their understanding of a regulation without making them binding law.[77] Although an agency is not authorized to issue interpretive statements that carry the force of binding law (for such statements would require notice-and-comment rulemaking procedures),[78] *Auer* deference effectively makes these interpretive guidance statements "law" as the courts are required to defer to an agency's interpretation of a regulation so long as it is not a "plainly erroneous" interpretation of the regulation's language.[79]

An agency's ability to circumvent notice-and-comment rulemaking is cause for further concern.[80] Notice-and-comment rulemaking procedures are necessary to ensure the "accuracy, efficiency, and [public] acceptability" of agency power.[81] Ensuring that rulemaking procedures are properly preserved "provides an ingenious substitute for the lack of electoral accountability of agency heads," as "people who care about legislative outcomes produced by agencies have a structured opportunity to provide input into the decisionmaking process."[82]

Furthermore, if the doctrine of *Auer* deference allows courts to defer to any interpretation the reading of a text allows, the text of the regulation cannot serve as notice to the public on the dividing line between lawful and unlawful conduct.[83] Parties are left in the lurch of

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75 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

76 5 U.S.C. § 553(b)(3)(A) (2012).

77 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000) ("One guidance document may yield another and then another . . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).

78 *See generally Am. Mining Cong.*, 995 F.2d at 1108–13 (explaining an agency's incentives and legal ramifications for promulgating a rule through notice-and-comment rulemaking and issuing interpretive guidance).

79 *See* Manning, *supra* note 2, at 656–57.

80 *See* Stephenson & Pogoriler, *supra* note 2, at 1464.

81 Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS., Winter 1994, at 127, 127–28.

82 *Id.* at 129.

83 *See* Manning, *supra* note 2, at 669–70; *see also* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012).

not knowing whether their conduct is permitted or not because an agency can issue interpretive guidance at any time.[84] As a result, what might be legal conduct on one day would become illegal conduct the next and, as a result, the regulated parties bear the burden of this legal uncertainty.[85]

In short, under *Auer*, agencies are circumventing both the procedural safeguards at the front-end (the APA's notice-and-comment procedural safeguards) and the back-end (judicial review under the APA's arbitrary and capricious standard) of the rulemaking process. Correcting this problem requires realigning agency incentives to promulgate clear rules.[86] Many scholars have argued for a return to *Skidmore* to accomplish this.[87] *Skidmore* will not fix these problems, but establishing a stare decisis methodology that asserts a binding method of interpreting regulations on all entities charged with the interpretation of regulations would realign these incentives by putting agencies on notice of how to achieve desired interpretations of their regulations and to allow regulated parties to know what is lawful and unlawful conduct under the regulations. Before turning to the stare decisis method this Essay proposes, however, it is necessary to discuss *Skidmore* in greater depth.

II. *Skidmore* Deference, Its Proposed Benefits, and Its Problems

In light of the growing debate and criticism encircling the *Auer* deference doctrine, many members of the academic community are calling for a return to *Skidmore* deference as a means to remedy the problems resulting from *Auer* deference.[88] This Part of the Essay examines how a pure return to *Skidmore* deference in instances where courts review an agency's interpretation of its own regulations would be insufficient to address the issues presented by *Auer* deference.

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84 *See* Manning, *supra* note 2, at 671 ("In a regime in which a regulation may be interpreted in several permissible ways, regulated parties may find it difficult, if not impossible, to plan their affairs with confidence until the regulation has been definitively interpreted by the agency.") (citing Henry J. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 20 (1962)); *see also* Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 808 (2001).

85 *See* Manning, *supra* note 2, at 669–70.

86 *See id.* at 668–69; *see also* 5 U.S.C. §§ 553, 706 (2012).

87 *See infra* Part II.

88 *See* Stephenson & Pogoriler, *supra* note 2, at 1465; *see also, e.g.*, Pierce, *The Future of Deference*, *supra* note 59 (manuscript at 22).

A. Skidmore *Deference and Its Role in Administrative Law*

Prior to the *Chevron* deference regime, the Supreme Court applied *Skidmore* deference to an agency's interpretation of its organic statute.[89] Even after the Court decided *Chevron*, courts continued to apply *Skidmore* deference in limited circumstances.[90] In applying *Skidmore*, courts must assess a variety of factors and evaluate the agency's interpretation on a case-by-case basis in order to determine the degree of deference due to the agency in the particular case.[91] The weight a reviewing court gives to the agency's interpretation turns on "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."[92] Under the *Skidmore* deference regime, the agency's interpretation does not "control" a court's decision, but rather is assessed for whether it should have "weight" in the pending case.[93] *Skidmore* deference places the duty of interpreting statutes on the courts and merely uses the agency interpretation as an aid in the decision, while *Chevron* sees agencies as the main means of deciding legal interpretations.[94]

B. The Rationale for Replacing Auer *Deference with* Skidmore

Skidmore thus places the burden on the agency to persuade a court why the court should adopt the interpretation that it is advancing.[95] Because under *Skidmore* the agency has the burden to persuade the Supreme Court of its interpretation, scholars argue that agencies would have an incentive to promulgate clearer rules and would be prepared to offer sophisticated justifications for the interpretations they make.[96] If an agency decides to produce a vague rule, then it must face the consequences of trying to develop a thorough and well-articulated rationale for adopting a specific interpretation and defending it before a court.[97] Instead of creating rules and issuing interpretations for those rules that will be accepted unless the agency's position is not plainly erroneous under *Seminole Rock*, the agency is required

89 Hickman & Krueger, *supra* note 15, at 1236–37.

90 *See* Pierce, *The Future of Deference*, *supra* note 59 (manuscript at 8).

91 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

92 *Id.*

93 *See id.*

94 Hickman & Krueger, *supra* note 15, at 1249.

95 *See* Manning, *supra* note 2, at 687.

96 *Id.*

97 *See id.*

to explain itself and offer reasons for the interpretation that it is making.[98] Lastly, *Skidmore* deference still allows courts to respect the technical expertise of an agency and allows the agency to serve as an "expert" for statutory and regulatory provisions that are at issue.[99] The "expertise" factor reflects the idea that the agency is better suited than a court to interpret the technical aspects of the agency's rules and regulations.[100]

C. The Shortcomings with Skidmore *Replacing* Auer

A return to *Skidmore* deference indeed seems to be promising for the field of administrative law if the Supreme Court decides to overrule *Auer*. The problem is that *Skidmore* deference is not the "promised land" for the legal regime if *Auer* deference is overruled.[101] Some scholars argue that a return to *Skidmore* deference allows for consistency between all the courts in interpreting the statutes.[102] The problem with that assertion is that the *Skidmore* doctrine is not consistently applied throughout the lower courts—the main agents who will be deciding the weight due to agency regulatory interpretations.[103]

There is still confusion in the application of *Skidmore* deference by lower courts, and there is an indication that lower courts are applying *Skidmore* deference in divergent ways.[104] While the Supreme Court gave the lower courts a set of factors to follow in determining whether an agency's interpretation should receive "weight," these factors are applied in a variety of different manners and sometimes given different meanings.[105] For example, the most widely cited factor for granting deference, thoroughness of explanation (interestingly, a key factor for promoting the application of *Skidmore* as a solution to *Auer*), has two different conceptions in the lower courts.[106] Some courts view the thoroughness factor as assessing how comprehensive

98 *See id.* at 687–88.

99 *See id.* at 688–89.

100 *See id.*

101 *See generally Exodus* 33:3 (King James) (describing the promised land as "a land flowing with milk and honey").

102 Healy, *supra* note 10, at 687–89.

103 *See* Hickman & Krueger, *supra* note 15, at 1281–91 ("[T]he overarching impression that one receives from the *Skidmore* cases is a lack of uniformity in how courts apply the sliding-scale conception of *Skidmore*.").

104 *See id.*

105 *See, e.g.*, *id.* at 1281 (noting that when lower courts analyze an agency's thoroughness, "the courts' opinions reflected two different conceptions of what this factor entails").

106 *Id.* at 1281–82.

the explanation for the interpretation was.[107] Other courts examine thoroughness as a measure of how extensive the agency's procedures were in creating the interpretation at issue.[108] Furthermore, as Professors Eskridge and Baer found in their analysis of judicial deference, the determination of deference can also rest on the judges' own philosophies when it comes to interpreting statutes and regulations.[109] As such, there is a healthy amount of empirical evidence to support the conclusion that *Skidmore* is not as promising of a solution as it is claimed to be.[110]

With *Skidmore* deference already being applied in such a divergent manner across the lower courts, it cannot by itself achieve the desired consistency necessary to incentivize agencies to create clear rules.[111] Absent a consistent application of the doctrine, the likely effect of a *Skidmore* regime on an agency's rulemaking incentives would be *de minimus*.[112] Furthermore, *Skidmore* deference is still "highly differential—less so than *Chevron*, but still weighted heavily in favor of government agencies . . . ."[113] In a case study done by Professor Hickman and Mr. Krueger, agencies won the majority of cases in which courts applied *Skidmore* deference.[114] This case study and other studies' findings point to a conclusion that the application of *Skidmore* deference as *Auer*'s replacement still leads to agencies promulgating vague rules and subsequent guidance statements to interpret those rules.[115] These guidance statements will still be given

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107 *Id.* at 1281; *see also, e.g.*, OfficeMax, Inc. v. United States, 428 F.3d 583, 594 (6th Cir. 2005) (criticizing the agency's one-page justification as "not contain[ing] the traditional hallmarks for receiving deference").

108 *See, e.g.*, Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp., 374 F.3d 362, 370 (5th Cir. 2004); Heartland By-Products, Inc. v. United States, 264 F.3d 1126, 1135 (Fed. Cir. 2001) (holding "thorough consideration" was given by agency for interpretation at issue as it "was issued pursuant to a notice and comment process"); Hickman & Krueger, *supra* note 15, at 1281–82.

109 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1141–42 (2008); *cf.* Pierce & Weiss, *supra* note 2, at 520.

110 *See supra* notes 95–109.

111 *See* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1734 (2010) ("[T]he Court does not apply its announced deference regimes predictably and . . . those regimes do not operate as a formal constraint on the Justices.").

112 Hickman & Krueger, *supra* note 15, at 1281–91.

113 *Id.* at 1280.

114 *Id.* at 1276.

115 *Id.* at 1281–91.

deference and followed by the courts because of *Skidmore* deference.[116]

Indeed, it is true that the application of *Skidmore* deference, instead of *Auer*, would constrict the level of deference agencies receive.[117] But as evidenced by the empirical data on how *Skidmore* is applied to statutory interpretation cases,[118] *Skidmore* alone is not the answer to the problems presented by *Auer* deference. Indeed, as Professor Stack has articulated, if the Supreme Court is not going to place more "*Mead*-like" restrictions on *Auer* deference,[119] then the next avenue for reform should come from reexamining the interpretive methodology for administrative regulations.[120]

III. Building upon the Shortcomings of *Skidmore* Deference: The Need for a Stare Decisis Methodology to Replace *Auer* Deference

If a less deferential standard (*Skidmore*) fails to properly remedy the malaise caused by the *Auer* doctrine, what is then the proper approach to incentivizing agencies to produce clear rules and prevent inconsistencies? The answer, as this Essay proposes, can be found in the development of a consistent method for interpreting agency regulations in the courts.[121] If created by the Supreme Court, this methodology for interpreting ambiguous agency regulations would have a binding stare decisis effect on all lower courts. Because this solution would give the federal courts *de novo* review of the agency's regulation, it would bring an end to deferential review of an agency's interpretation of its regulations. In doing so, the *de novo* review of the regulation's ambiguous text would ensure that the law-interpreting power is removed from the lawmaker: in this case the agency. Moreover, the proposed stare decisis methodology would not disturb the *Chevron* deference framework that is currently in place.

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116 *Cf. id.* at 1276–81.

117 *See* Manning, *supra* note 2, at 686–88.

118 *See* Eskridge & Baer, *supra* note 109, at 1141–42.

119 Such *Mead*-like restrictions of *Auer* deference would take the form of limiting *Auer* deference to instances where Congress granted agencies rulemaking authority, as Congress would have implicitly given them the power of interpreting those regulations. *See* Stephenson & Pogoriler, *supra* note 2, at 1484. The current caselaw does not suggest that the Supreme Court has placed or is going to place such a limitation on *Auer* deference. *See id.* What the Supreme Court has been willing to do by way of implementing a *Mead*-like restriction is to deny *Auer* deference to *post hoc* interpretations made in response to litigation. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167–69 (2012).

120 *See* Stack, *supra* note 2, at 410–14.

121 *See generally id.* (discussing a purposive approach for interpreting regulations).

Professor Stack has proposed that courts adopt a purposivist approach to interpreting regulations—specifically, looking at a regulation's preamble language when fashioning its interpretation.[122] Unlike Professor Stack's thesis, which does not argue for the replacement of *Auer* deference,[123] this Essay recognizes that such interpretive methodologies as Professor Stack's should replace *Auer* deference in its entirety if and when the Supreme Court overrules its precedents *and* adopts a new rule carrying stare decisis effect.

Under an interpretive approach, an agency will likely behave differently if it knows how its regulations are going to be interpreted by a court.[124] This is true for Congress, as it creates statutes.[125] If Congress knows that courts will consistently rely on the statute's text, it will likely write clearer statutes in order to effectuate its desired purpose.[126] Conversely, Congress will write more ambiguities into a statute and spend more time developing the legislative history through reports, debates, statements, etc., if it knows that courts will rely on such materials.[127] It should follow that agencies would act in a similar fashion in drafting their regulations based on the manner in which reviewing courts interpret their regulations and the level of deference that they grant them—this would be true if agencies did not want to have the purpose of their regulation thwarted by the reviewing court.[128] The potential problem here is that if courts do not employ a consistent methodology for interpreting statutes, lawmakers will not know what to emphasize in drafting statutes.[129] The same principle can apply to agencies as they promulgate rules and issue interpretive guidance statements.[130] Absent clear and consistent methodologies

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122 *See* Stack, *Preambles as Guidance*, *supra* note 12 (manuscript at 32–34).

123 *See id.*

124 *See, e.g.*, Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) (discussing how agency actions change when agencies know they will be subject to formal notice-and-comment rulemaking).

125 *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 92–93 (1991).

126 *See id.*

127 *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1887 (2008); *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142 (2002).

128 *Cf.* Foster, *supra* note 127, at 1887. *See generally* Pierce, *supra* note 124; Stack, *supra* note 2.

129 *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 683–84 (1990); *see also* Finley v. United States, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

130 *See, e.g.*, Pierce, *supra* note 124, at 65 (noting that the structure of judicial review when

employed by courts for interpreting regulations, it will be difficult to shift the incentive mechanism needed to change agencies' rule promulgation practices.[131]

A. The Stare Decisis Method

This Essay calls for the Supreme Court to implement a stare decisis methodology[132] for interpreting regulations in the event that it overrules *Auer* using the authority granted to it in § 706 of the APA.[133] This methodology would apply to all lower courts and to the Supreme Court each time that the court is called upon to interpret an agency regulation. In essence, the methodology of the interpretation would carry a stare decisis effect. Under this solution, the lower courts would be bound to the interpretive methodology that the Supreme Court announces. Additionally, the Supreme Court would also be bound to follow it, unless there is a "special justification" for departing from the precedent.[134] Like federal courts have already done in the context of contract law, the Supreme Court can feasibly fashion a rule of interpretation here.[135] The difficulty in this solution, though, lies in the divergent theories of interpretation and the tensions that exist among them.[136] Notwithstanding this tension, there are many interpretive tools and techniques that are capable of converging into a single methodology.[137] Indeed, many state supreme courts have started to develop a precedential methodology when interpreting their state statutes.[138]

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reviewing regulations has changed the ways in which agencies make rules in the notice-and-comment process of rulemaking); *see also* Stack, *supra* note 2, at 358–59.

131 *See supra* notes 111–130 and accompanying text.

132 *Cf.* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

133 *See* 5 U.S.C. § 706 (2012) ("[T]he *reviewing court* shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.") (emphasis added); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment).

134 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000).

135 *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1757–59 (2010).

136 *See id.* at 1757.

137 *See id.*

138 *See id.* at 1757–58. While this Essay argues that the Supreme Court should adopt a stare decisis method for interpreting regulations, it is equally feasible for Congress to create a statutory method of interpreting regulations. *See generally* Rosenkranz, *supra* note 127 (arguing that Congress should and is constitutionally empowered to create a binding set of statutory interpretation rules for the federal courts to follow).

While this Essay does not argue for any particular method, the adopted methodology should at least make clear the "touchstone" (the goal of the interpretation) for the courts' interpretation and the "tools" (the sources of information available) that courts are allowed to employ when making these interpretations. The methodology should also incorporate some of the procedural requirements that agencies must follow in order to have their rules withstand "arbitrary" and "capricious" review under the APA.[139]

There is considerable need for the selection of a clearly defined touchstone because courts interpreting regulations have multiple options to choose from that could lead to very disparaging results from one judge to the next. For example, the interpreting court could consider the agency's purpose or textualism as the objects of their interpretation. Without a clearly defined touchstone for the lower courts to follow, the goal of achieving a consistent approach to interpreting regulations will not come into existence in a regime without *Auer* deference. If the application of diverse touchstones to interpretations of statutes and the varying results it creates is any indication of how it would apply to regulatory interpretation, the need for a single touchstone is evident to create consistency throughout the courts.[140]

Equally important as the selection of an interpretive touchstone is the selection of which tools judges can use to make their interpretations. Such tools could include, but are not limited to, interpretive canons, promulgation histories, texts of other regulations, and agency statements. Presently courts are applying interpretive tools in varying and inconsistent manners.[141] In order to build consistency and uniformity of regulatory interpretation in a legal regime without *Auer* deference, the Supreme Court needs to do more than select the tools that are permissible to use in crafting a regulatory interpretation. The Court should take extra care to instruct how courts should be employing the tools for interpretation. Without addressing the methodology for applying those tools, the notion of developing a consistent interpretation could be destroyed.[142] For example, it is not enough for the

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139 5 U.S.C. §§ 553(c), 706(2)(A) (2012); Stack, *Preambles as Guidance*, *supra* note 12 (manuscript at 6–8).

140 *See generally* SCALIA & GARNER, *supra* note 18, at 15–28 (discussing the application of different statutory touchstones and the results that they create when used by different judges across the lower courts).

141 *See supra* note 14 and accompanying text.

142 *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (noting how there are "two opposing canons on almost every point").

Court to identify which statutory canons the lower courts can use; rather the Court should also identify the circumstances in which it is appropriate for the lower courts to invoke those canons in the first place. Absent such an instruction, one court might misuse a canon to create an ambiguity in the text where there is none, while another court may employ a canon to help resolve the ambiguity.[143]

As iterated, this Essay does not favor any particular approach over another. An illustration of an interpretive method, however, might be helpful to the reader. For example, in its newly minted interpretive methodology, the Supreme Court could select textualism as its touchstone.[144] This means that the Court would look to interpret words in a regulation according to their ordinary meaning.[145] The Court can then specify a manner in which it desires to assess what is the ordinary meaning of the words.[146] The meaning can be supplied by a section in the regulation or can be supplied by how the word is used in everyday parlance at the time of its promulgation. If the Court finds that the word or phrase in question is not susceptible to multiple ordinary meanings, then its interpretive analysis would cease.[147]

In the event that the word or phrase has multiple meanings, the Court can determine what "tools" it wishes to employ in order to clarify the ambiguity. For example, it can use interpretive canons to give further meaning to the ambiguity that it uncovered.[148] The Court might also choose to look at the promulgation history to determine if that offers any insight into the meaning of the ambiguous words or phrases in the regulation. Alternatively, the Court might consider looking to text of similar regulations promulgated by the agency that use similar language to the regulation being interpreted. There are, of course, diverse options for the Court to choose from, and this is just one example of what the methodology for interpreting ambiguous regulations might look like.

As an illustration, it is helpful to revisit one of the Supreme Court's previous decisions interpreting a regulation to assess how dif-

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143 *See id.*; *see also, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2497–99 (2015) (Scalia, J., dissenting).

144 *See* SCALIA & GARNER, *supra* note 18, at 15–18.

145 *See id.*

146 *See, e.g.*, Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 212–17 (1998).

147 *See id.*

148 For an illustrative list of statutory canons, see generally SCALIA & GARNER, *supra* note 18, at 15–28.

ferent interpretive touchstones and tools can alter the outcome, and why it is important to clearly define what tools would be available for courts to use in their interpretations. In *Chase Bank USA, N.A. v. McCoy*,[149] the question presented was whether a change in the interest rate constituted a change in a "term required to be disclosed."[150] There is a textual argument that an "increase in [the] interest rate constitutes a change to a 'term required to be disclosed . . . .'"[151] The "periodic rate" is a term that the regulation requires to be disclosed if it is changed.[152] The interest rate is used in the periodic rate and, therefore, changes to the interest rate change the periodic rate.[153] Alternatively, the text can also be read to support an interpretation that an increase in the interest rate is not a change for purposes of § 226.9(c)(1).[154] The agreement between the parties "discloses both the initial rate (preferred rate) and the maximum rate to be imposed in the event of default (nonpreferred rate)."[155] Chase Bank imple-

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149 Chase Bank, USA, N.A. v. McCoy, 562 U.S. 195 (2011).

150 *See id.* at 204. The relevant regulatory language is:

> The creditor shall disclose to the consumer, in terminology consistent with that to be used on the periodic statement, each of the following items, to the extent applicable:
>
> (a) *Finance charge*. The circumstances under which a finance charge will be imposed and an explanation of how it will be determined, as follows:
>
> (2) A disclosure of each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate. When different periodic rates apply to different types of transactions, the types of transactions to which the periodic rates apply shall also be disclosed.

12 C.F.R. § 226.6(a)(2) (2010).

> (c) *Change in terms*—(1) *Rules affecting home-equity plans . . .*—(i) *Written notice required*. Whenever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.
>
> (ii) *Notice not required*. [N]o notice under this section is required when the change . . . results from . . . the consumer's default or delinquency (other than an increase in the periodic rate or other finance charge).

12 C.F.R. § 226.9(c)(1) (2010).

151 *Chase Bank*, 562 U.S. at 205–06 (quoting 12 C.F.R. § 226.9(c)(1)(i) (2010)).

152 *See Chase Bank*, 562 U.S. at 205.

153 *See id.*

154 *See id.* at 206.

155 *Id.*

mented the nonpreferred rate when Mr. McCoy defaulted.[156] If "change" therefore means only rate increases beyond those listed in the agreement, then this interest rate change was not a "change" that needed to be disclosed per § 226.9(c)(1).[157] These two different results were obtained by looking at the plain meaning of these words. Sometimes the textual inquiry might end with one result because the regulation might not be ambiguous. Here, however, the regulation is susceptible to two equally plausible readings and, accordingly, it is ambiguous.[158] Consequently, looking to the text alone is not enough to answer the question and, thus, additional "tools" are needed to flesh out the meaning of the statute.

Before turning to the discussion of tools, it is helpful to examine how the analysis might be different if another touchstone were employed as the basis for the interpretation. For example, if the Court looked to the purpose of the regulation, the Court might find that it was designed to further Congress's goal of giving customers "informed use of credit."[159] If the Court was less textually oriented and favored the purpose of the regulation to facilitate Congress's goal, the Court might instead rule in favor of a reading that requires disclosure of the interest rate information and find that the regulation is not ambiguous at all. The only question that would remain under this form of analysis is: what kinds of tools the Court would be willing to use in order to ascertain the purpose of the regulation?

Returning to the "textualism analysis" discussed previously, the interpreter faced the issue of determining how to resolve the statutory ambiguity. The resolution will likely have to come from extrinsic sources—i.e., sources that are not in the text of the statute. The question for the interpreter and the creator of the stare decisis methodology is: which extrinsic tools will they use to determine the meaning of "changed term"? For example, the interpreter could use dictionaries, textual canons, or administrative material to give meaning to the ambiguous term. The use of different tools, even as applied to this particular example, can change the way in which the interpretation is shaped.

This example assumes that the stare decisis methodology allows for the use of all dictionaries, all notable canons, and promulgation/agency material (i.e., "regulation history"). Here, there is a clash be-

156 *See id.* at 202.
157 *See id.* at 206.
158 *See id.* at 207.
159 *See id.* at 198.

tween results obtained if the court employs a canon (the canon of consistent usage) and the regulation history. If the court were to employ the canon of consistent usage (words used in similar context have the same meaning), then "changed term" would include any type of credit term and not just those outside the parties' agreement terms.[160] Because the consistent usage of the word "term" indicates that it is referring to credit terms, then, as applied to this particular case, the interpretation would lean in favor of disclosure.[161] Alternatively though, if the Court looked to the promulgation history, it would find that the agency issued documents that show it understands the regulation to mean that disclosure is not required.[162]

As evidenced by the application of these two sets of tools, different tools can allow for very different "answers" when determining the meaning of ambiguous language. The choices that the Court makes for its interpretive method would have outcome-determinative effects. As seen in the above example alone, the choice of the tools used to interpret the regulation shift the result of the interpretation. Therefore, the choice of a touchstone, the selection of appropriate tools, and instructions for how and when to deploy the tools are critical parts of an effective interpretive methodology.

B. Applying the Stare Decisis Methodology to an Agency's Ambiguous Rules

The methodology that carries for all lower courts to follow should ideally be well defined. The Supreme Court should be wary that as more discretion is granted to lower court judges, there is greater room for disparate results among the lower courts.[163]

The goal of replacing *Auer* goes beyond making sure that agencies develop clearer rules and putting the citizenry on notice for what amounts to lawful and unlawful conduct.[164] It also encompasses consistency because there is a risk that judicial interpretation of a regulation will be different from one geographic circuit to the next.[165] Part of the pragmatic reason for allowing *Auer* deference was that the agency's interpretation, if deferred to by the courts, could then be ap-

160 Brief for Respondent at 18–19, Chase Bank, USA, N.A. v. McCoy, 562 U.S. 195 (2011) (No. 09-329).

161 *See id.*

162 *See Chase Bank*, 562 U.S. at 207–10.

163 *See* Gluck, *supra* note 135, at 1757–59.

164 *See* Pierce, *The Future of Deference*, *supra* note 59 (manuscript at 18).

165 *See id.* (manuscript at 2–6) (noting geographical consistency as a concern for interpreting agency regulations).

plied uniformly on a nationwide basis.[166] But inconsistent judicial interpretation of an agency regulation can best be avoided if the courts apply a consistent method for interpreting agency regulations.

Applying a doctrine of interpretive methodology through stare decisis has some additional, incalculable gains for a legal regime without *Auer* deference. The more predictable the interpretive methodology becomes, the less costly and more efficient the process of enforcement and compliance with agency regulations becomes (both for the agency and the regulated party).[167] A stare decisis methodology also provides the necessary certainty for those who want to challenge or defend an agency's interpretation of its own ambiguous regulations.[168] Regulated parties would not have to wait for agencies to issue interpretive guidance on a particular subject matter to understand the meaning of an ambiguous regulation.[169]

Unlike the statutory interpretation context, there are no concerns in the regulation interpretation context about frustrating Congress's intent to delegate "lawmaking" authority to another agency.[170] If anything, Congress delegates to agencies the power to resolve statutory "gaps" and ambiguities for the purpose of creating greater clarity, not for the purpose of creating additional ambiguities in their regulations.[171] It is inconsistent with the logic of *Chevron* and the delegation doctrine for the courts to allow agencies to receive deference for the interpretation of their regulations when they are the same entity that is going to administer the guidance statements of the regulations that they created.[172] *Auer* deference could be justified if agencies delegated the authority to issue guidance statements for their regulations to an entirely separate entity from the original agency, to keep the law-maker and law-interpreter distinct entities and to remain consistent with the logical underpinnings of the *Chevron* doctrine.

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166 *See id.* (manuscript at 6); Ben Snowden, *Has* Auer*'s Hour Arrived?*, NAT. RESOURCES & ENV'T, Spring 2014, at 31, 31.

167 *See* Foster, *supra* note 127, at 1887–88; Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. REV. 1389, 1420 (2005). This would also likely serve as an effective trade-off for the costs incurred to make clear rules. *See supra* Part I.C.

168 *See* Tyler, *supra* note 167, at 1420.

169 *See id.*

170 *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 640, 681 (2002); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 440–41 (1989).

171 *See* Healy, *supra* note 10, at 680–85; *see also* Manning, *supra* note 2, at 684–85.

172 *See* Manning, *supra* note 2, at 684–85; *see also* Healy, *supra* note 10, at 684–85.

Objecting to a stare decisis methodology because it was the intent of the agency to leave something unclear in order for the agency to resolve it at a later time is not persuasive because it is not a constitutionally sound principle to leave the law interpretation to the lawmaker.[173] Implementing a stare decisis method for interpreting statutes would have the added benefit of rectifying this separation of powers problem that *Auer* deference creates[174] because courts would become the chief interpreter of regulations, and agencies would not receive such a high degree of deference for any interpretation that is not plainly erroneous.

Conclusion

Auer deference has created a regime in which regulated parties are subject to vague regulations and sometimes are in a position where they are subject to different interpretations of the regulation at varying times. While the Supreme Court might have tried to stem some of these concerns by limiting the scope of *Auer* deference, these problems and concerns still persist. A strict return to *Skidmore* deference might have some benefits in promoting clearer rules for the public, addressing constitutional concerns, and helping give certainty to the regulated parties, but it does not achieve them in full. *Skidmore* deference is applied inconsistently and still favors the agency.

Therefore, to adequately address these issues, the focus should be on the courts' interpretive methodology for approaching vague regulations for which agencies want to offer interpretations. To achieve the needed consistency, mesh with the law's preexisting rulemaking requirements, and develop the necessary incentives to promote clearer regulations, the Supreme Court should develop a stare decisis methodology for interpreting regulations that would apply to every court encountering a vague regulation.

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173 *See* Healy, *supra* note 10, at 684–85

174 *Cf. id.* at 681–82.