Essay

Rethinking *Auer* Deference: Agency Regulations and Due Process Notice

*Derek A. Woodman**

Since 1945, the Supreme Court has struggled to determine the level of deference that is due to an agency's interpretation of regulations that the agency promulgates. For decades, and with little discussion, the Supreme Court has given an agency interpretation controlling weight. Concerned with the power of administrative agencies, the Supreme Court appears ready to re-examine its deference jurisprudence.

This Essay suggests that the Court has repeatedly focused throughout its opinions on the notice provided by an agency interpretation of a regulation. Relying in part on the recent resurgence of the due-process-notice doctrine, this Essay argues that courts should explicitly recognize the due-process-notice principles that underlie the Auer *deference analysis and incorporate those principles when considering whether an agency's regulatory interpretation receives controlling deference. These notice principles provide a coherent rationale and structure for the otherwise disjointed* Auer *deference doctrine. Furthermore, placing due-process-notice limits on* Auer *deference ensures that regulated parties are fully aware of the burdens that an agency imposes on them and prevents agencies from abusing their power to regulate.*

---

* J.D., 2014, The George Washington University Law School; B.A., 2009, The University of Michigan. I want to thank Professor Jonathan Siegel for his advice throughout the writing process and the editorial staff of *The George Washington Law Review* for their hard work. I also want to thank my parents Frank and Shelly, my sister Hillary, and Kara Paterson for their unwavering support.

TABLE OF CONTENTS

INTRODUCTION

For a long time, the degree of deference given to an agency's interpretation of the rules it promulgates received relatively sparse attention from the legal community.[1] This is surprising given the longstanding practice of courts deferring to an agency's interpretation of its regulations.[2] This practice was solidified in 1945 in *Bowles v. Seminole Rock & Sand Co.*[3] without much explanation or rationalization, thirty-nine years before the Court articulated the level of deference given to an agency's interpretation of the statutes it administers in *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*[4]

---

1 Relatively few articles have addressed *Auer* deference in detail, although the subject has received more attention in the last few years. *See, e.g.*, Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227 (2013); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449 (2011); Stephen M. DeGenaro, Note, *Why Should We Care About an Agency's Special Insight?*, 89 NOTRE DAME L. REV. 909 (2013); Aneil Kovvali, Note, Seminole Rock *and the Separation of Powers*, 36 HARV. J.L. & PUB. POL'Y 849 (2013). Professor Stephenson and Pogoriler note that what limited attention *Auer* deference does receive usually involves a wholesale critique or defense of the doctrine. *See* Stephenson & Pogoriler, *supra*, at 1451.

2 The practice dates back to the 1940s. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

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

4 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (holding that courts defer to agency interpretations of statutes "unless they are arbitrary, capricious, or manifestly contrary to the statute").

Although *Chevron* deference came to dominate administrative law scholarly writing, *Seminole Rock* received little fanfare.[5] In 1996, fifty years after the Court's articulation of *Seminole Rock* deference, Professor John Manning published an article critiquing the Court's practice, arguing that judicial deference to an agency's interpretation of its regulations violates fundamental separation of powers principles.[6] The Supreme Court, however, re-endorsed the *Seminole Rock* deference regime within a year of Manning's article being published.[7] In *Auer v. Robbins*,[8] the Supreme Court offered little support for its conclusion that an agency's interpretation of its regulations was entitled to controlling deference.[9]

Finally, over a half-century after *Seminole Rock*, it appears the Court is prepared to reconsider or limit the use of *Auer* deference.[10] Indeed, the Court has already begun to do so.[11] Three members of the Court have indicated they may be ready to reconsider and eliminate *Auer* deference.[12] With the Court focused on the appropriate level of deference to give an agency's interpretation of its own regulations,

---

5 There is a stark contrast between the attention paid to *Chevron* and *Seminole Rock*. Reviewing the number of citations for each opinion listed on Westlaw is telling. In the almost thirty years since *Chevron* was handed down, it has been cited over 68,000 times, compared to the nearly 4,200 citations to *Seminole Rock* in almost twice the amount of time. The academic community's focus on *Chevron* may in part be due to the frequency with which courts themselves cite *Chevron*. *Chevron* stands to become the most cited Supreme Court opinion in history if (or once) it surpasses *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399, 399 (Peter L. Strauss ed., 2006). To date, courts have cited to *Erie* approximately 17,000 times, while they have cited to *Chevron* over 13,500 times.

6 *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996).

7 *See* Auer v. Robbins, 519 U.S. 452, 461 (1997). Professor Manning's article was published in April of 1996. The Court's opinion in *Auer* was delivered on February 19, 1997.

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

9 *See id.* at 461 (citing the *Seminole Rock* standard and concluding "[t]hat deferential standard is easily met here").

10 Throughout this Essay, the deference given to an agency's interpretation of its own regulations will be referred to as *Auer* deference in keeping with the common practice of recent Supreme Court opinions. The terms *Seminole Rock* and *Auer* deference can be used interchangeably.

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

12 *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (indicating "[i]t may be appropriate to reconsider" *Seminole Rock* and *Auer* deference); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part) ("For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.'" (alteration in original) (quoting Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring))).

this Essay attempts to provide a middle ground between eliminating *Auer* deference altogether and almost always deferring as a matter of practice.[13] This Essay provides both a descriptive and prescriptive analysis and suggests an alternative rationale and methodology for *Auer* deference that focuses on whether litigants and regulated parties were given sufficient notice of the agency's regulatory interpretation. First, this Essay examines the evolution of the *Auer* doctrine, highlighting the focus on notice throughout its development. These notice limitations best align with the Supreme Court's rationales for granting *Auer* deference. This Essay then argues that, for the sake of clarity, consistency, and efficiency, and to align *Auer* deference with a coherent rationale, courts should explicitly recognize that the application of *Auer* deference is premised on whether a regulatory interpretation provides sufficient notice.

Part I of this Essay reviews the doctrine of *Auer* deference. The first section provides an overview of the spectrum of deference courts apply to administrative action. This Part then offers an analysis of how *Auer* deference evolved and where the doctrine currently stands. Part II offers a new focus for *Auer* deference, borrowing from the due process notice doctrine. Finally, Part III squares the proposed approach with current *Auer* deference applications and explains how the new approach can allay concerns of both scholars and the Supreme Court.

I. *AUER* DEFERENCE AND ITS RATIONALES

The Supreme Court has recognized a variety of circumstances under which it will defer to agency action. The Court first articulated a quasi-deferential standard towards an agency's statutory interpretations in *Skidmore v. Swift & Co.*[14] The Court later provided what

---

13 *Auer* deference has proven to be a much more powerful tool for litigants seeking to uphold agency interpretations than *Chevron* deference, which many view as outcome determinative. The Court has deferred to an agency's interpretation of its regulations ninety-one percent of the time, while only deferring to an agency under *Chevron* at a rate of seventy-six percent. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1100 (2008); *see also* Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515–16 (2011).

14 Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944). The standard is quasi-deferential because the Court's standard for whether deference is due—"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," *id.*—is not deference insomuch as it is a determination of whether the Court agrees with the agency. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting).

would become the seminal articulation of judicial deference to an agency interpretation of a statute in *Chevron*.[15] *Chevron* provides that a court should defer to an agency's interpretation of the statute it administers so long as the interpretation is reasonable.[16] The Court refined its administrative deference jurisprudence in *United States v. Mead Corp*.,[17] by creating what is now known as *Chevron* step zero and holding that a court should only give an agency's statutory interpretation deference if it is the type of interpretation that deserves deference.[18] It is in this context that modern *Auer* deference developed.

A. The Evolution of Auer *Deference*

Although it is important to remember that *Auer* deference did not develop in a vacuum,[19] focusing squarely on *Auer* deference provides insight into what the doctrine could and should accomplish. The first observation is clear; generally, the Supreme Court provides little explanation for its application of *Auer* deference. A review of the Supreme Court's use of the doctrine reveals that it has inconsistently, and often without a clear rationale, deferred to an agency's interpretation of its regulations.[20] But more importantly, a review of the doctrine does reveal that the core concern surrounding deference to an agency's interpretation of its regulations is fair notice.

The first incantation of the principle that a court will defer to an agency's interpretation of the regulations it promulgates came in *Seminole Rock*.[21] *Seminole Rock* dealt with price regulations issued under the Emergency Price Control Act of 1942.[22] The Administrator of the Office of Price Administration brought the action to enjoin the defendant, a company that sold stone regulated under the Act, from selling

---

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

16 *See id.* at 843–44.

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

18 *See id.* at 231–34 (finding, among other things, that the classification rulings did not "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling").

19 For one perspective that the development of *Auer* deference tracks *Chevron* deference, see generally 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). Professor Healy tracks the progression of *Auer* deference with *Chevron* and, more instructively, *Mead* as points of reference. For an alternative (and lengthier) description of the development of the doctrine, see Leske, *supra* note 1, at 248–71.

20 *See generally* Healy, *supra* note 19; *see also* Robert A. Anthony & Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, ADMIN & REG. L. NEWS, Fall 2000, at 10, 10–11 (2000).

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

22 *See id.* at 411.

at prices that exceeded the rates allowed by the regulation.[23] The Supreme Court found that because the case "involve[d] 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."[24] The Court then mused that "[t]he intention of Congress or the principles of the Constitution in some situations may be relevant" if the meaning of the words used is in doubt.[25] Then, in what would become the most influential sentence of the opinion, the Court stated, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[26] The Court simply noted that where the only issue is the meaning of a regulation, the "only tools . . . are the plain words of the regulation and any relevant interpretations of the Administrator."[27]

It is often stated that the proposition that courts should defer to the agency's interpretation came without any explanation.[28] Although it is true that the Court cited to no prior cases and offered no rationale for why an agency's interpretation should be given controlling weight in almost all circumstances,[29] the Court did provide some explanation for its conclusion that deference was warranted. The Court cited the fact that "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 [regulatory] determination."[30] Thus, in the first articulation of *Auer* deference, the Court relied in part on the consistency of the agency interpretation and the reliance by regulated parties on that interpretation.

In later cases, the Supreme Court articulated other explanations of when and why it was appropriate to defer to an agency's interpreta-

---

23 *Id.* at 412.

24 *Id.* at 413–14.

25 *Id.* at 414.

26 *Id.*

27 *Id.*

28 *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)).

29 *See id.*

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

tion of its regulations. In *Udall v. Tallman*,[31] the Court was charged with determining whether the Secretary of the Interior's interpretation of public land orders used to deny oil and gas leases in the Kenai National Moose Range in Alaska were entitled to deference and therefore binding on the challenging party.[32] After reviewing the general principle that an agency interpretation of the statutes it is charged with administering is owed deference, the Court confirmed that deference to the administrative construction of the regulation is warranted if the meaning of the text of the regulation is in doubt.[33] According to the Court, an agency interpretation of a regulation deserves more deference than an agency construction of a statute.[34] That the parties had sufficient notice of the agency interpretation was an important consideration.[35] Because the "interpretation had, long prior to respondents' applications, been a matter of public record and discussion," there was reason to give the interpretation controlling deference.[36]

While coming short of demonstrating congressional acquiescence to the agency interpretation, an agreement worked out with the House Committee on Merchant Marine and Fisheries helped "demonstrate the notoriety of the Secretary's construction, and thereby defeat any possible claim of detrimental reliance upon another interpretation."[37] Instead, the reliance argument supported affording the agency's interpretation deference because "almost the entire area covered by the orders in issue has been developed, at very great expense, in reliance upon the Secretary's interpretation."[38] Agency consistency was another important feature, and the Court noted that the agency interpretation was "adopted . . . before the present controversy arose or was thought of, and, except for a departure soon reconsidered and corrected, they have adhered to and follow[ed] it ever since."[39] The Court went on to conclude that the agency's interpretation was a reasonable one and therefore was afforded deference.[40]

The Supreme Court has often returned to the principle of consistency when reviewing an agency's interpretation of its own regulation.

---

31 Udall v. Tallman, 380 U.S. 1 (1965).

32 *See id.* at 2–4.

33 *See id.* at 16–17 (quoting *Seminole Rock*, 325 U.S. at 413–14). The Court phrased the deference given to a statutory interpretation in language similar to *Chevron*. *See id.*

34 *See id.*

35 *See id.* at 17–18.

36 *Id.*

37 *Id.*

38 *Id.* at 18.

39 *Id.*

40 *See id.* at 20, 23.

Although it did not involve an interpretation of a regulation, one example of the Court's focus on consistency can be found in *Bowen v. Georgetown University Hospital*,[41] where the Court refused to give deference to an agency's novel statutory interpretation.[42] In the Court's view, deference was unjustified because the interpretation was contrary to the interpretation advocated in the past.[43] The Court had previously refused to give deference to an agency counsel's interpretation of a statute where the agency itself had not articulated a position on the question because Congress delegated responsibility for statutory interpretation to the agency and not the agency's counsel.[44] But the Court's underlying rationale accorded more with a concern for inconsistency.[45] Accordingly, the Court held that "[d]eference to what appears to be nothing more than an agency's convenient litigating position" was entirely inappropriate.[46] The Court incorporated these principles when evaluating an agency's interpretation of its regulations, and they now often comprise a significant portion of the Court's analysis.[47]

In *Pauley v BethEnergy Mines, Inc.*,[48] the Supreme Court articulated additional rationales for *Auer* deference: congressional delegation and agency expertise.[49] Using logic applied in *Chevron*, the Supreme Court reasoned that Congress intended to delegate to the Secretary of Labor broad policymaking authority under the Black Lung Benefits Reform Act of 1977.[50] The Court found that the Act at issue "produced a complex and highly technical regulatory program" and "courts appropriately defer to the agency entrusted by Congress

41 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

42 *See id.* at 212–13. While *Chevron* deference, afforded to an agency's interpretation of the statutes it administers, and *Auer* deference are distinct doctrines, the Supreme Court has incorporated the logic of *Bowen* in several cases. *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012); Auer v. Robbins, 519 U.S. 452, 462 (1997) (citing *Bowen* for the proposition that the Court will not uphold interpretations that are post hoc rationalizations seeking to defend past action).

43 *See Bowen*, 488 U.S. at 212.

44 *See id.*

45 *See id.* at 213 ("Far from being a reasoned and consistent view of the scope of [the statutory provision], the Secretary's current interpretation . . . is contrary to the narrow view of that provision advocated in past cases . . . .").

46 *Id.*

47 *See infra* notes 62–68 and accompanying text.

48 Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991).

49 *See id.* at 697–98. Other opinions around this time also used this rationale. *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150–51 (1991) (finding that because of regulatory complexity, "we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers").

50 *See BethEnergy Mines*, 501 U.S. at 697.

to make such policy determinations."[51] The Court went on to extend that rationale to the Agency's interpretation of its own regulations, reasoning that the authority to promulgate regulations necessarily entails the authority to interpret regulations.[52] As the Court stated, "[f]rom this congressional delegation derives the Secretary's entitlement to judicial deference."[53] In addition, the Court acknowledged that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views," but rejected the argument that the interpretation at issue was not entitled to deference after finding that the interpretation was consistent.[54]

Building upon its logic in *BethEnergy Mines*, the Court later reiterated and solidified its deference rationale, stating that broad deference is warranted when "the regulation concerns a 'complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'"[55] In *Thomas Jefferson University v. Shalala*,[56] the Court analyzed and rejected a series of arguments on why deference was not warranted. First, the Court found that the interpretation was reasonable and not inconsistent with prior interpretations by the agency.[57] The Court then turned to the argument that the regulation's language was "precatory" and "aspirational" in nature.[58] The Court found that the regulation set forth specific limitations and was not written in vague generalities.[59] The negative inference that can be drawn from the Court's analysis is that when a regulation does speak in vague generalities rather than in precise terms, it may not be within the agency's

---

51 *Id.*

52 *See id.* at 698.

53 *Id.*

54 *Id.* at 698–99.

55 Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting *BethEnergy Mines*, 501 U.S. at 697); *see also* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 94–95 (1995). It is interesting to note that, as a precursor to the unanimous opinion in *Auer* itself, both the majority and the dissent agreed that courts generally should defer to an agency interpretation of its regulations. *Compare Guernsey Mem'l Hosp.*, 514 U.S. at 95, *with id.* at 108 (O'Connor, J., dissenting) ("I take seriously our obligation to defer to an agency's reasonable interpretation of its own regulations, particularly when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512) (internal quotation marks omitted)).

56 Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).

57 *See id.* at 514–17.

58 *See id.* at 517 (internal quotation marks omitted).

59 *See id.*

"discretion to interpret this language as imposing a substantive limitation . . . ."[60] This idea would be borne out in later cases.[61]

Finally, in the most cited articulation of the deference due to an agency interpretation of its regulations, the Court delivered its unanimous opinion in *Auer v. Robbins*.[62] In *Auer*, the Court expanded the doctrine by deferring to an agency interpretation that came before the Court in the form of an amicus brief.[63] The Court offered little explanation for its decision to defer to the agency interpretation. Instead, the Court simply found 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.'"[64] The Court concluded that the deferential standard was easily met because the regulatory phrase at issue comfortably bore the meaning the Secretary had assigned.[65] The only proposed limitation to the Court's deferring to the agency's interpretation was that the interpretation could not be a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."[66] The Court found that the interpretation was not "unworthy of deference" because it came in the form of a legal brief.[67] As examined earlier, the restriction on *post hoc* rationalizations and convenient litigating positions is largely based on the idea that courts should not defer to inconsistent agency interpretations.[68]

A recurring concern in the Court's deference jurisprudence leading up to *Auer* was apprehension of agency inconsistency when interpreting regulations. The Court cited this concern in *Auer*.[69] Although the Court articulated its concern in several ways, the key consideration was whether or not the interpretation could be contradicted by

---

60 *Id.*

61 *See infra* notes 77–80 and accompanying text.

62 Auer v. Robbins, 519 U.S. 452 (1997). It may come as a surprise to recent Supreme Court watchers that the Court's opinion in *Auer* was written by Justice Scalia, now the leading opponent of *Auer* deference. *See id.* at 454.

63 *See id.* at 461.

64 *Id.* (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))) (internal quotation marks omitted).

65 *See id.* (quoting AMERICAN HERITAGE DICTIONARY 1788 (3d ed. 1992); WEBSTER'S NEW INTERNATIONAL DICTIONARY 2509 (2d ed. 1950)).

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

67 *Id.*

68 *See supra* notes 41–46 and accompanying text.

69 *See Auer*, 519 U.S. at 461–63.

prior interpretations.[70] Accordingly, whether an interpretation was a *post hoc* rationalization or a convenient litigating position turned on the interpretation's consistency.[71] The Court also showed concern for vagueness in agency regulations and the problems associated with interpreting vague regulations.[72] These concerns are more directly addressed in more recent *Auer* deference applications.

B. Recent Auer *Deference Applications and Supreme Court Conflict*

Recent Supreme Court applications of *Auer* deference have often featured a divided Court, and in multiple instances the Court has placed additional limitations on the circumstances in which it would defer to an agency's interpretation. Although schisms in the Court's *Auer* jurisprudence were not uncommon prior to more recent cases, these splits often dealt largely with issues of textual interpretation.[73] Recent cases, in contrast, address the circumstances in which it is appropriate to defer to an agency's interpretation of its regulations. The Court is struggling to cope with the viewpoint, held by several justices, that shifts in administrative law generally have given agencies too much discretion and therefore too much power.[74] For the most part, the Court's attempts to address this concern have tracked the concerns that were voiced throughout the development of the doctrine.

First, the Court reaffirmed the first step of the *Auer* analysis: the regulation at issue must be ambiguous for the agency's interpretation to be afforded deference.[75] Without first requiring ambiguity in the regulatory text, *Auer* deference would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[76] The Court then determined that interpretations of regulations

---

70 *See, e.g.*, *id.*

71 *See, e.g.*, *id.* at 462–63 ("The Secretary's position is in no sense a *post hoc* rationalizatio[n] advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." (alteration in original) (internal quotation marks and citation omitted)).

72 *See, e.g.*, *id.* at 461.

73 *See, e.g.*, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 518 (1994) (Thomas, J., dissenting) ("When the case is properly viewed, I cannot avoid the conclusion that the Secretary's construction of [the statute] runs afoul of the plain meaning of the regulation and therefore is contrary to law . . . ."); Pauley v. BethEnergy Mines, 501 U.S. 680, 706 (1991) (Scalia, J., dissenting) ("The disputed regulatory language is complex, but it is not ambiguous . . . .").

74 *See, e.g.*, *supra* note 12.

75 *See* Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

76 *Id.*

that simply recite statutory language do not deserve deference.[77] While reaffirming the general proposition that "[a]n administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation," the Court found that interpretations of regulations that do little more than restate the terms of the statute are not entitled to deference because the regulations "give[ ] little or no instruction on a central issue in th[e] case."[78] Explaining its rationale, the Court commented that "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."[79] Though grounded in the textual parroting of the statute, the underlying concern of the Court seemed to be excessive delegation to the agency.[80] In some sense, the Court adopted the negative inference from *Thomas Jefferson University*.[81] That is, when a regulation is too vague to actually be applying the statute, the agency's interpretation will not be given deference.[82]

Since 2011, the Court has decided four cases that have shed light on the meaning, application, and perhaps future of *Auer* deference.[83] First, in a succinct opinion by Justice Sotomayor in *Chase Bank USA, N.A. v. McCoy*,[84] a unanimous Court re-endorsed the traditional *Auer* deference analysis.[85] Then, in *Talk America, Inc. v. Michigan Bell*

---

77 *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (noting that agency paraphrasing of the statute amounts to an abdication of "its expertise and experience to formulate a regulation" and so does not deserve deference).

78 *Id.* at 255–57.

79 *Id.* at 257. This argument harkens back to the Court's earlier decision in *Thomas Jefferson University*. *See supra* notes 58–60 and accompanying text. Oddly, Justice Scalia dissented in *Gonzales*, preferring that the Court apply the traditional rule of *Auer* deference and defer to the agency interpretation at issue in the case. *See Gonzales*, 546 U.S. at 277 (Scalia, J., dissenting). Justice Scalia thought it "doubtful that any such exception to the *Auer* rule exists." *Id.* Indeed, Scalia articulates a strong interpretation of *Auer* deference, finding the "unanimous decision in *Auer* makes clear that broadly drawn regulations are entitled to no less respect than narrow ones." *Id.*

80 *See Gonzales*, 546 U.S. at 257 ("The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near equivalence of the statute and regulation belies the Government's argument for *Auer* deference.").

81 *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 517 (1994).

82 *See id.*

83 *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337–38 (2013); Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167–68 (2012); Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2260–61 (2011); Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 881–82 (2011).

84 Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871 (2011).

85 *See Chase Bank*, 131 S. Ct. at 881–82. The Court stated the agency interpretation was

Telephone Co.,[86] a divided Court reiterated its support for *Auer* deference while at the same time strengthening its application. The Court found that "novelty alone is not a reason to refuse deference," even in the case of a longstanding regulation.[87] In his concurrence, Justice Scalia began to explain his newfound doubts as to the appropriateness of *Auer* deference.[88] Explaining his reticence, Justice Scalia espoused the view, first articulated by Professor John Manning,[89] that *Auer* deference "seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."[90] The practice of deferring to an agency's interpretation of its ambiguous regulations "encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases," frustrating "the notice and predictability purposes of rulemaking . . . ."[91]

Continuing the debate in *Christopher v. SmithKline Beecham Corp.*,[92] the Court added an additional limitation on the application of *Auer* deference: unfair surprise. The Court found that, because the agency interpretation could impose potentially massive liability for conduct that occurred before the interpretation was announced, *Auer* deference was not appropriate.[93] Even though the Court refused to

---

neither a *post hoc* rationalization nor was there reason to believe it did not reflect the agency's fair and considered judgment. *Id.*

86 Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254 (2011).

87 *See id.* at 2263 (noting that the FCC conceded that it was advancing a novel interpretation of its longstanding regulation).

88 *See id.* at 2265 (Scalia, J., concurring).

89 *See generally* Manning, *supra* note 6.

90 *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). It is interesting that Scalia took several decades to reach this conclusion given the influential nature of Professor Manning's article, and the fact that Professor Manning clerked for Justice Scalia during the 1988 term. *See Faculty: John F. Manning*, HARV. L. SCHOOL, http://hls.harvard.edu/faculty/directory/10552/Manning/ (last visited Sept. 25, 2014).

91 *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring).

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

93 *See id.* at 2167–68. In *Christopher*, the petitioners sued alleging that their employers failed to pay them for overtime as required by the Fair Labor Standards Act ("FLSA") and relevant Department of Labor ("DOL") regulations. *See id.* at 2164. The DOL announced its interpretation of the over seventy-year-old regulation that pharmaceutical detailers were not exempt "outside salesmen" in a 2009 amicus brief. *See id.* at 2162, 2167. As such, the Court concluded that, until 2009, "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA." *Id.* at 2167. In other words, it is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

give the agency's interpretation deference, it did articulate an additional rationale for *Auer* deference generally. The Court referenced judicial efficiency, uniformity, and predictability as reasons supporting deference.[94] The Court went on to apply *Skidmore* deference and held that the agency interpretation was not persuasive and therefore could not be enforced.[95]

Finally, in *Decker v. Northwest Environmental Defense Center*,[96] the latest salvo over the propriety of *Auer* deference, Justice Scalia declared that "[e]nough is enough"; it was time to reconsider *Auer* deference.[97] Justices Roberts and Alito indicated in a separate opinion that they also were ready to reconsider the applicability of *Auer* deference.[98] The majority of the Court, applying *Auer*, focused primarily on the consistency of the agency's interpretation.[99]

This slew of recent opinions demonstrates the Court's struggle with applying the *Auer* doctrine. The Court alternates between applying the doctrine broadly and imposing new limitations on its application. An attempt at understanding and applying these decisions is expressed below.[100] But first, this Essay turns briefly to the rationales for *Auer* deference.

C. Auer *Deference Rationales*

Critics of *Auer* deference argue that the Supreme Court has not offered a rationale for *Auer* deference.[101] The Court, however, has referenced several rationales. As mentioned above, among the rationales referenced by the Court are congressional delegation and reliance on agency expertise.[102] Several commentators have analyzed and

---

94 *See id.* at 2168 n.17 (quoting *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring)).

95 *See id.* at 2168–69.

96 Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013).

97 *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

98 *See id.* at 1338 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer* deference] in an appropriate case.").

99 *See id.* at 1337–38 (majority opinion).

100 *See infra* Part II.

101 *See, e.g.*, *Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part) (arguing that the Court has been giving *Auer* deference "[f]or decades, and for no good reason").

102 *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

provided additional rationales for *Auer* deference.[103]

Some have suggested that there are two "originalist" rationales.[104] First, the agency, as the original drafter, may be in a better position to understand what the agency meant when it initially promulgated the rule.[105] This rationale rests on the assumption that the agency's current view is likely to accurately capture the agency's original intent or understanding of the regulation's text at the moment of enactment, and that the original intent or understanding should control the regulation's interpretation.[106] This justification appears weak because it will often be the case that the interpretation will be announced long after the rule was issued, and it does not account for changes in interpretation.[107] There is also reason to question whether the Supreme Court has actually relied on this rationale. Although the Court has given an agency's view of the original intent or understanding of the regulation some lip service, it has often come in the context of discussing agency expertise and congressional delegation.[108]

A second set of rationales rests on pragmatic considerations. One such rationale is that an agency's interpretation should be given deference because the agency has considerable expertise in regulating the subject matter.[109] This can be broken down into two subcomponents: technical expertise and policy expertise. The technical expertise rationale suggests that an agency's interpretation should receive deference because the agency is better able to understand the subject matter that it is regulating, and is therefore in a better position to interpret its regulations relating to that subject matter.[110] The policy expertise rationale contends that an agency is in a better position than the courts to interpret a rule to further the policy objectives left to the agency by the statutes it administers.[111] This rationale is closely linked with the congressional delegation rationale, which provides that an agency may interpret its regulations because, by delegating the authority to make the regulations in the first instance, Congress also im-

---

103 *See, e.g.*, Stephenson & Pogoriler, *supra* note 1, at 1454–59; Pierce & Weiss, *supra* note 13, at 516–17.

104 *See* Stephenson & Pogoriler, *supra* note 1, at 1454.

105 *See id.* (citing *Martin*, 499 U.S. at 153, for that proposition); Pierce & Weiss, *supra* note 13, at 516.

106 *See* Pierce & Weiss, *supra* note 13, at 516.

107 *See id.* at 516–17.

108 *See Martin*, 499 U.S. at 153.

109 *See* Stephenson & Pogoriler, *supra* note 1, at 1456–57.

110 *See id.*

111 *See* Pierce & Weiss, *supra* note 13, at 517.

plicitly delegated to the agency the authority to clarify its regulations.[112]

An additional rationale is that giving an agency's interpretation of its regulations controlling weight is more likely to lead to national consistency when compared with the disuniformity that could result if courts were to substitute the agency's interpretation of the regulation with their own.[113] Deferring to an agency's interpretation would also allow for agency flexibility and efficient use of administrative resources.[114] If an agency were allowed to interpret its regulations without interference from courts, the agency could avoid the time-consuming process of amending those regulations through either informal or formal rulemaking procedures.[115]

The pragmatic rationales for *Auer* deference can be criticized for not providing sufficient guidance for the application of *Auer* deference.[116] But the rationale that has received considerably less attention from commentators is the rationale that the Court has referenced most often: a desire for consistent agency interpretations and the stability that results from reliance on agency interpretations.[117] Reviewing the Supreme Court's *Auer* deference decisions reveals that the primary concerns underlying the proper application of *Auer* deference are analogous to due process notice concerns.[118] The focus on consistency over time and reliance throughout the doctrine's development provides strong support for giving those rationales considerable weight in determining the proper scope of *Auer* deference. The following section provides a methodology for reviewing an agency's interpretation of its regulations based on those concerns.

II. CLARIFYING *AUER* DEFERENCE: DUE PROCESS NOTICE

A doctrine's supporting rationale will often determine that doctrine's application. The examination of *Auer* deference applications and their rationales has provided a framework for applying *Auer* deference moving forward, with an emphasis on notice. Due process notice, which shares many of the problems and concerns the Court has focused on when applying *Auer*, is thus an instructive body of law for

112 *See* Stephenson & Pogoriler, *supra* note 1, at 1457.

113 *See* Pierce & Weiss, *supra* note 13, at 517.

114 *See* Stephenson & Pogoriler, *supra* note 1, at 1459–60.

115 *See* Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 564–65 (2006).

116 *See* Stephenson & Pogoriler, *supra* note 1, at 1458.

117 *See, e.g.*, *supra* note 93 and accompanying text.

118 *See e.g.*, Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2261–64 (2011).

focusing *Auer* deference. The Court's recent focus on due process notice provides additional support for placing greater emphasis on the notice rationale in the context of *Auer* deference.[119] An overview of due process notice and how it can inform courts' *Auer* deference analyses follows.

A. Analogies to Due Process Notice

Due process notice has a long history,[120] and the Supreme Court recently reiterated its commitment to the constitutional principle. The Supreme Court has repeatedly held, most recently in *FCC v. Fox Television Stations, Inc.*,[121] that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[122] The Court seems broadly concerned with requiring sufficient notice because, as Justice Kennedy posited, the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment."[123] Courts have utilized due process in a variety of ways over the last several decades,[124] and the Supreme Court seems poised to place renewed emphasis on the doctrine.[125] Historically, due process notice has encompassed the concepts of vagueness, the rule of lenity, and retroactivity.[126] Those doctrines are briefly summarized and then compared to their *Auer* deference analogues below.

1. Vagueness Doctrine

"[T]he vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

---

119 *See* FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307, 2317 (2012).

120 *See generally* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169 (2013).

121 *Fox II*, 132 S. Ct. 2307.

122 *Id.* at 2317. The Supreme Court cited and relied on a series of previous opinions for this proposition. *See id.* (citing Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

123 *Fox II*, 132 S. Ct. at 2317 (citing United States v. Williams, 553 U.S. 285, 304 (2008)).

124 Most recently, the principle of due process notice has been used in the context of vagueness challenges, *see* Skilling v. United States, 561 U.S. 358, 402–403 (2010), in immigration cases, *see* Vartelas v. Holder, 132 S. Ct. 1479, 1486–87, 1491 (2012), and in relation to the First Amendment, *see Fox II*, 132 S. Ct. at 2317.

125 The Court has revitalized the due process notice analysis in several contexts. For an overview of the Supreme Court's recent foray into using due process notice as a check on statutory and regulatory enactments, see Sohoni, *supra* note 120, at 1217–24.

126 *See id.* at 1176–77.

differ as to its application.'"[127] The Court has found that a law can be impermissibly vague for two reasons. The first reason tracks the general articulation of the vagueness standard. "[V]ague laws are hard to follow and threaten to trap the innocent . . . ."[128] The second reason is an extension of that reasoning viewed from the standpoint of the enforcer. Vague standards allow arbitrary and discriminatory enforcement.[129] "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[130]

Though the vagueness doctrine is grounded in these fundamental policy concerns, its application is not uniform.[131] Rather, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."[132]

2. Rule of Lenity

The rule of lenity is an interpretive rule providing "that penal statutes should be strictly construed against the government."[133] This rule is meant to protect criminal defendants' right to receive sufficient notice that their conduct is outlawed, and that they are subject to penalty, by requiring precision in the drafting of criminal statutes.[134] The doctrine is said to have lost its bite beginning in the 1940s.[135] In what is now the dominant doctrinal formulation, a court will find a statute "ambiguous for purposes of lenity only after seizing every thing from which aid can be derived, including the language and structure, legislative history, and motivating policies of the statute."[136]

---

127 United States v. Lanier, 520 U.S. 259, 266 (1997) (quoting *Gen. Constr. Co.*, 269 U.S. at 391); *see also Williams*, 553 U.S. at 304.

128 Sohoni, *supra* note 120, at 1175.

129 *See* Hill v. Colorado, 530 U.S. 703, 732 (2000); *see also* Sohoni, *supra* note 120, at 1176.

130 Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

131 *See* Sohoni, *supra* note 120, at 1176.

132 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

133 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59:3, at 125 (6th ed. 2001).

134 *See* McBoyle v. United States, 283 U.S. 25, 27 (1931).

135 *See* Sohoni, *supra* note 120, at 1204–05.

136 Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 386 (internal quotation marks and alterations omitted).

3. Retroactivity in the Law

The Supreme Court has recognized a strong presumption against the retroactive application of laws.[137] "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[138] Although the Supreme Court has not prohibited retroactive application of statutes as a constitutional rule, the presumption against retroactivity is a factor to consider in the context of due process challenges.[139] In addition, the Court's concern for fairness and notice has created a clear-statement rule requiring Congress to state unambiguously when it wishes to "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[140]

B. Notice-Based Auer *Deference*

It is important to note at the outset that the Due Process Clauses of the Fifth and Fourteenth Amendments are not always applicable to agency regulations or their interpretations.[141] The character of agency interpretations of its own regulations and the principles underlying the Court's due process review, however, strongly support borrowing from the Court's due process jurisprudence. The rationales supporting *Auer* deference are, in many ways, the same rationales that underlie due process concerns. For those reasons, it is helpful to consider the two doctrines together.

The Supreme Court has already begun to inject the aforementioned due process notice principles into its *Auer* deference analysis. As noted above, the Court has begun to incorporate the doctrine of vagueness into its *Auer* deference analysis—citing vagueness as a factor relevant to the determination of whether deference is appropri-

---

137 *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265–66 (1994).

138 *Id.* at 265.

139 *See* Sohoni, *supra* note 120, at 1200–01.

140 *Landgraf*, 511 U.S. at 280; *see also* Sohoni, *supra* note 120, at 1178.

141 *Compare* Londoner v. City & Cnty. of Denver, 210 U.S. 373, 386 (1908), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. . . . The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee.'" (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part))).

ate.[142] Similarly, the Court has relied on the anti-parroting exception to refuse to defer to an agency interpretation.[143] The Court, in *Gonzales,* found that the agency regulation was too vague to allow a subsequent interpretation to receive deference, because the regulation merely restated the text of the statute.[144] Although whether an agency rule is too vague to be a valid interpretation of a statutory standard is sometimes difficult to determine, it is an important line to draw.[145]

More dramatically, in *Christopher v. SmithKline Beecham Corp.*,[146] the Supreme Court refused to defer to a Department of Labor ("DOL") interpretation of the regulations implementing the Fair Labor Standards Act. As in *Auer*, the DOL interpretation was announced through an amicus brief.[147] In *Christopher*, however, the argument was first addressed by the district court after an amicus brief was filed in a similar action pending in the Second Circuit.[148] The Second Circuit ultimately held that the DOL interpretation should receive deference because the interpretations were not "plainly erroneous or inconsistent with the regulation."[149] The Ninth Circuit, in contrast, held that the DOL interpretations did not receive controlling deference because the regulation merely restated the statute and did not provide enough new language to qualify as an interpretation.[150] The Supreme Court affirmed the Ninth Circuit's determination on different grounds, refusing to allow the interpretation of the ambiguous regulation "to impose potentially massive liability on [the regulated party] for conduct that occurred well before that interpretation was announced."[151] The Court reasoned that, "[t]o defer to the

142 *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 461 (1997); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 517 (1994) (noting that the regulation does not speak in vague generalities).

143 *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006). For a brief discussion of the problems presented by vague regulations and how parroting amplifies those problems, see Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 N.Y.U. J. L. & LIBERTY 290, 308–09 (2011).

144 *See supra* notes 77–79 and accompanying text.

145 *See* Pierce, *supra* note 115, at 605–06 (arguing that it is important to distinguish between cases where a regulation is simply ambiguous and cases where the interpretation "adds so little to a vague provision of a statute that a court should not confer deference on an agency interpretation of the rule").

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

147 *See id.*

148 *See id.* at 2165. The DOL filed a similar amicus brief in the Ninth Circuit once the case was appealed. *See id.* at 2165 n.10.

149 *In re* Novartis Wage & Hour Litig., 611 F.3d 141, 153 (2d Cir. 2010) (internal quotation marks omitted).

150 *See* Christopher v. SmithKline Beecham Corp., 635 F.3d 383, 395 (9th Cir. 2011).

151 *Christopher*, 132 S. Ct. at 2167.

agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[152] The Court went on to explain that it would result in "precisely the kind of 'unfair surprise' against which our cases have long warned."[153]

The doctrine of unfair surprise fits nicely with the Supreme Court's prior case law in determining whether or not an agency's interpretation receives deference. *Christopher* was the first time, however, that the Court relied on that justification for denying an agency's interpretation deference. As articulated above, the Court should embrace the unfair surprise analysis and make it the cornerstone of *Auer* deference. Unfair surprise relates to two principles of due process notice: ambiguity and the rule of lenity.[154] An agency interpretation that might lead to unfair surprise is hard to follow and may trap the innocent, or allow for arbitrary and discriminatory enforcement.[155] The Supreme Court has explicitly offered the latter as a rationale in support of its prior *Auer* deference opinions.[156] Unfair surprise is a corollary to the rule of lenity; they both seek to avoid punishing parties for actions they did not and could not know were punishable.[157]

Based on these due-process-notice principles, *Auer* deference should be applied as a four-part sequence. First, as is current practice, *Auer* deference will only apply when the agency regulation is ambiguous.[158] If the regulation is not ambiguous, courts should adhere to the plain language of the regulation. Accordingly, courts should refuse to adopt the agency's interpretation of the regulation if it conflicts with the plain meaning of the text of the regulation. Second, if the regulation is ambiguous, courts should defer to the agency's interpretation of its regulations when the agency interpretation has been made available to regulated entities, either through published guidance or

---

152 *Id.* at 2167 (alteration in original) (quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

153 *Christopher*, 132 S. Ct. at 2167.

154 *See supra* Part II.A.

155 *See supra* notes 128–29 and accompanying text.

156 *See, e.g.*, Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("[The power to interpret vague regulations] frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."), *quoted by Christopher*, 132 S. Ct. at 2168.

157 *See* Sohoni, *supra* note 120, at 1176–77.

158 This is the current state of *Auer* deference, and maintaining this principle accords with administrative deference more generally. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (noting that the Court only looks to the agency's interpretation if the statute is ambiguous).

through prior litigation. This second step involves determining whether the *interpretation* is sufficiently clear to provide the necessary notice, not whether the regulation itself is sufficiently clear. The only limitation imposed on a regulation is that it must actually interpret the statute. The agency cannot avoid formal rulemaking procedures by adopting a regulation that simply restates the statute.

Third, if an agency interpretation of a regulation is espoused for the first time during litigation, courts should subject the agency interpretation to greater scrutiny and closely examine the text of the regulation. In those circumstances, courts must determine whether the language of the regulation provided sufficient notice to parties that their conduct would subject them to agency action. As part of this analysis, courts must examine the clarity of the regulation and the liability sought to be imposed. The greater the liability, the closer a textual link there must be between the regulation and the agency interpretation of that regulation. This analysis mirrors that of *Skidmore* deference, where the agency interpretation is evaluated for its persuasiveness.[159]

Fourth, if an agency changes its interpretation of its regulation, the subsequent interpretation should be afforded deference so long as it does not apply to conduct retroactively. If the conduct occurs after the agency has issued its new interpretation, courts should defer to that interpretation as if it were the original interpretation. If the new interpretation is adopted during adjudication, however, the new interpretation should not be applied to the conduct at issue but only to future conduct.

Just as significant as what should be analyzed when considering whether to provide *Auer* deference to an agency interpretation is what should be dropped from the analysis. In the current application of *Auer* deference, it is not clear why courts evaluate whether the interpretation is "the agency's fair and considered judgment on the matter in question."[160] Although the Supreme Court has used "fair and considered judgment" in the context of notice,[161] lower courts have understood that phrase as an instruction to delve into the decisionmaking process of the agency.[162] Lower courts' decisions to evaluate the consideration given to an agency interpretation seem to stem from two concerns. First, the interpretation put forward in litigation "may not

159 *See supra* note 95 and accompanying text.

160 Auer v. Robbins, 519 U.S. 452, 462 (1997).

161 *See supra* notes 66–68 and accompanying text.

162 *See, e.g.*, Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997).

reflect the views of the agency itself."[163] "Second, it is likely that 'a position established only in litigation may have been developed hastily, or under special pressure,' and is not the result of the agency's deliberative processes."[164]

The Supreme Court has never required an agency's decision to meet a deliberative threshold. Such an analysis makes little sense in the context of agency interpretations of regulations. It should not matter how much time was spent deciding what interpretation should be controlling. Instead, the determinative factor should be whether the interpretation is reasonable in light of the text of the regulation. Requiring an agency to follow certain internal procedures confuses the role of the courts in reviewing agency interpretation of its regulations.[165] Allowing courts to police agency interpretations confuses substance for procedure, and it is the substance of the agency interpretation and not the procedure that should dictate its validity.

Some argue, however, that courts should consider whether an agency has carefully considered an interpretation because "[a]gency supervision of agency lawyers is highly uneven."[166] As Professor Richard Pierce has noted, sometimes an agency's litigation position has been discussed and approved at the highest levels, while other times "no policy-making official has even considered, much less approved, the position the lawyer is taking in litigation."[167] But similar results can be reached without looking into whether the agency involved high level officials and whether they sufficiently deliberated the appropriate interpretation. Instead, a court could look to whether there was sufficient notice for the regulatory interpretation.

For example, in the context of the Environmental Protection Agency's interpretation of the regulations promulgated under the Clean Air Act discussed by Professor Pierce, a court would have little difficulty concluding that the interpretation is not the agency's "fair and considered judgment" because "policymaking officials in the agency . . . announced policies in 2003 and 2005 that are the opposite of the positions the agency's lawyers have taken in the enforcement

---

163 *Id.*

164 *Id.* (quoting FLRA v. U.S. Dep't of Treasury, 884 F.2d 1446, 1455 (D.C. Cir. 1989)).

165 *See generally* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543–45 (1978).

166 *See* Pierce, *supra* note 115, at 606–07. Professor Pierce's discussion focuses on the context of the EPA policy officials' roles in interpreting the Clean Air Act's modification of coal-fired power plants.

167 *Id.* at 607.

proceedings during the same time period."[168] By looking to whether or not the agency interpretation is consistent with the previously announced interpretation, the Court can ensure the agency's deliberative process is sufficient by focusing on the substance of the regulation and whether it conflicted with an existing interpretation. Because the change in interpretation was articulated for the first time during litigation, the interpretation should only be applied prospectively. And that interpretation will remain controlling unless the agency provides notice of a different interpretation. Accordingly, the problem of the agency lawyer's having a "frolic of their own" could be addressed through the principles adopted from due process notice review.[169]

While vagueness and rule of lenity principles help inform the courts' analysis in the first instance, the presumption against retroactivity aids in the application of regulatory interpretations after they have been announced in formal adjudication. From a doctrinal perspective, an agency interpretation that is expressed during formal adjudication and provides notice as to the agency's interpretation of a regulation for future applications is no longer barred from receiving *Auer* deference.[170] Once an agency's reasonable interpretation is publicly known, there is no reason to think it will result in unfair surprise. The agency's interpretation of the regulation should therefore be given effect in future actions.

Courts should abandon the current process of administrative review whereby they move from one level of deference to another. As it stands, courts proceed to apply *Skidmore* deference after they find that an agency's interpretation of its regulation is not due *Auer* deference because it is too vague or would result in unfair surprise.[171] This makes little doctrinal sense. Once a court determines that the regulation was too ambiguous to support the agency's interpretation, the court should not allow that interpretation to control. But courts, in applying *Skidmore* deference, imply that an agency interpretation—even when impermissibly vague or inconsistent—may still receive def-

168 *Id.*

169 *See id.*

170 Previously, a court would itself provide an interpretation of a regulation after holding the agency's interpretation did not warrant *Auer* or *Skidmore* deference. *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2169–70 (2012). Under an application of notice-based *Auer* deference, the agency's interpretation would receive deference in subsequent cases because it would not provide unforeseen liability. *See id.* at 2167 (explaining the danger of unfair surprise and collecting cases).

171 *See, e.g.*, *Christopher*, 132 S. Ct. at 2168–69.

erence because of the agency interpretation's power to persuade.[172] If this were a practical reality, the court's analysis of whether the regulation was vague or provided sufficient notice would have no effect. Accordingly, as a practical matter, the procession to *Skidmore* deference will almost always result in a court refusing to grant the interpretation *Skidmore* deference.[173] Instead of advancing to *Skidmore* deference, a reviewing court should allow the agency interpretation to control from then on. This serves at least two purposes. First, it saves judicial resources by ending what is often a complicated and unclear review process. Second, it avoids a logical inconsistency between the levels of deference. As mentioned above, it makes little sense that an agency interpretation can be so flawed that it does not have controlling weight, yet remain persuasive.[174]

In this context, retroactivity adds an important feature to *Auer* deference analysis. Because an agency interpretation that conflicts with an earlier interpretation is not solidified until after adjudication, the interpretation should not be applied retroactively. The implication of applying retroactivity principles to agency interpretations of regulations is shown in *Christopher*.[175] There, the Supreme Court noted that the "pharmaceutical industry had little reason to suspect that [the industry's] longstanding practice" of treating it as exempt from the regulatory regime would change.[176] The interpretation would make them liable for conduct that "occurred well before that interpretation was announced."[177] This analysis emphasizes the importance of reliance and consistency in agency interpretations. If an agency is consistent, courts will generally defer to the agency's interpretations so long as they provide sufficient notice.[178] If an agency changes its interpretation of its regulations, however, it will not be given retroactive effect. Similarly, if an agency has interpreted a regulation as excluding a group from coverage, a change in that interpretation will only allow prospective application. This implicates the Supreme Court's oft-recognized consistency concerns.[179]

That is not to say that an agency may only change its interpretation of its regulations through formal adjudication. An agency may

---

172 *See id.*

173 *See, e.g.*, *id.*

174 *See supra* Part II.B.

175 *See Christopher*, 132 S. Ct. at 2166–68.

176 *Id.* at 2167.

177 *Id.*

178 *See, e.g.*, *id.*

179 *See supra* notes 36–46 and accompanying text.

always go through formal or informal rulemaking procedures to alter the meaning of its regulations. If the agency attempts to interpret its regulations in a manner inconsistent with past pronouncements, however, it can do so only prospectively after the agency provides sufficient notice.

III. THE BENEFITS OF REFORMULATING *AUER* DEFERENCE

The use of due process notice has broad appeal across ideological spectrums.[180] Viewing the proposed doctrine broadly, utilizing due process notice allows for a more searching inquiry into administrative regulations without the invasiveness that would follow from removing *Auer* deference altogether. This analysis creates a middle ground between *Skidmore* deference, which is not deference at all, and *Auer* deference, which results in an agency's interpretation being upheld in almost every instance.[181] This middle ground would help to rein in the administrative state, which many perceive to be oversized and overcomplicated.[182] It would not, however, require judicial review of every agency regulation. The direct benefits of using *Auer* deference colored by due process notice principles are threefold: clarity, finality, and efficiency.

The application of the proposed analysis is clearer than the traditional *Auer* deference analysis as interpreted by lower courts. It avoids problems such as the Ninth Circuit's strained decision in *Christopher*, which attempted to rely on the anti-parroting canon announced in *Gonzales* to find the agency interpretation did not deserve deference.[183] The Supreme Court appropriately reached the best result by applying many of the principles articulated above.[184]

In addition to clarity in application, the due process notice regime also provides clarity in a regulation's meaning by allowing the agency's interpretation to remain final. By allowing for a regulation to be interpreted by the agency unless it violates one of the notice principles, regulated individuals can rely on that interpretation. If *Auer* deference were to be removed altogether, no regulation would have final meaning until a court provided its own interpretation. Allowing the agency's interpretation to control allows for finality and

---

180 *See* Sohoni, *supra* note 120, at 1221–23.

181 *See supra* note 13.

182 *See* Sohoni, *supra* note 120, at 1171; *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that the modern administrative estate is unconstitutional).

183 *See* Christopher v. SmithKline Beecham Corp., 635 F.3d 383, 392–94 (9th Cir. 2011).

184 *See supra* notes 172–74 and accompanying text.

uniformity. It is better to allow an agency to control the meaning of its regulations than to allow multiple courts to simultaneously apply their own disparate meanings.

The finality of the interpretation of the regulation also helps improve agency efficiency. Efficiency has always been a concern with agency action, and it stands to reason that procedural constraints will decrease administrative efficiency. The law already imposes limitations on an agency's ability to promulgate rules, and courts impose additional limitations on an agency's ability to apply those rules once announced. Adopting a due-process-notice regime for the review of administrative interpretation of regulations balances the need for sufficient process and administrative efficiency. It provides an agency with enough flexibility to administer the programs under its control while ensuring that the agency does not impose unfair burdens on regulated entities.

For example, when an agency interpretation is found to provide insufficient notice because it was inconsistent with a prior interpretation, the adjudicatory process can provide the notice sufficient for the interpretation to apply in the future. This permits the interpretation to stand, and the agency can avoid another round of either formal or informal rulemaking aimed at clarifying the regulation and giving it the interpretation it desires. These changes would result in a more responsive administrative state.

Some argue that deference only provides a thumb on the scale, and that the level of deference ultimately does not matter. Even if that proposition were accepted as true, if *Auer* deference were removed, the debate over whether an interpretation was merely a "*post hoc* rationalization"[185] would be replaced by competing canons of statutory (or regulatory) interpretation. These canons have been shown to be just as malleable as the varying degrees of deference.[186]

In addition, notice-based *Auer* deference would discourage an agency from adopting vague regulations through the more formal processes of the Administrative Procedure Act[187] and then interpreting the regulations using an informal process. While it is true that the agency will be permitted to interpret an ambiguous regulation, the regulation must provide sufficient notice of its coverage before it can

185 Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 881–82 (2011).

186 *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6–7 (2005) (summarizing findings that canons of constructions are used to reach justices' preferred results).

187 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

be enforced. In those circumstances where an ambiguous regulation is interpreted for the first time during adjudication, the court will undertake a more searching analysis of the regulatory text and will be less likely to defer to the interpretation. By continuing to defer to an agency interpretation when the agency has articulated its interpretation of the regulation prior to the regulated conduct, courts will ensure that the agency is not hamstrung by the burdensome administrative rulemaking process.

Limiting deference to interpretations of regulations that provide substance beyond the statutory text, however, will ensure that the agency does not avoid those formal rulemaking processes altogether. Invariably, situations will arise that were not anticipated during rulemaking, or some ambiguity will be found in a regulation that was previously thought to be unambiguous. Alternatively, an agency may wish to change course, and both the prior and new interpretations fit comfortably within the text of the regulation. In those circumstances, the agency should be allowed to use its discretionary authority so long as regulated parties are aware of any changes. It is important to remember that *Auer* deference is only implicated in those circumstances where the regulation has passed judicial scrutiny, i.e., *Chevron*, and the regulation itself is ambiguous.

It must be conceded that this approach will not satisfy those scholars or jurists who believe that *Auer* deference poses a structural constitutional threat. Those concerns have been addressed elsewhere, and are beyond the scope of this Essay, except to say that there are alternative ways to limit the power of the administrative state. Once an agency has been delegated the power to publish rules, agency personnel will inevitably need to interpret those rules. We should allow them to do so for the reasons mentioned. To the extent that critiques of *Auer* deference focus on the practical implications of deferring to an agency's interpretation of an ambiguous regulation, those concerns can be minimized under the proposed *Auer* deference methodology.

Conclusion

It is not the courts' job to ensure that the best policy is implemented, but rather to ensure that a clear policy is implemented. In most instances, an agency has broad discretion over how to promulgate regulations. Although it is not appropriate to allow an agency to rewrite regulations through its interpretation of those regulations, giving an agency's interpretation deference allows for more efficient administrative action. Focusing *Auer* deference on due-process-notice

principles prevents an agency from exercising too much power and allows for the flexibility that the agency and the executive branch often require. The evolution of the Supreme Court's *Auer* deference analysis supports focusing on due process notice. Recognizing that due-process-notice principles underlie the Court's *Auer* deference jurisprudence provides structure to an otherwise inconsistent doctrine. Applying notice-based *Auer* deference would bring the doctrine's policy rationales, application, and common sense into accord.