

2019

The Chevronization of Auer

Kristin Hickman

University of Minnesota Law School, khickman@umn.edu

Mark R. Thomson

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles

Part of the [Law Commons](#)

Recommended Citation

103

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Essay

The *Chevronization* of *Auer*

Kristin E. Hickman[†] & Mark R. Thomson^{††}

Kisor v. Wilkie is pending before the Supreme Court as part of OT 2018.¹ The sole question in *Kisor* is whether the Court should jettison the deferential standard of judicial review known as *Auer* deference, which directs courts to defer to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the regulation.² The Court's decision to hear argument in *Kisor* makes this an opportune time to reassess *Auer*'s rationales.

When it first announced the *Auer* standard—in *Bowles v. Seminole Rock & Sand Co.*—the Supreme Court did not provide much explanation or justification for it.³ *Auer*'s supporters subsequently identified several. Broadly speaking, the rationales for *Auer* can be grouped into two categories: doctrinal and practical.

The overwhelming majority of scholarship and opinion regarding *Auer* deference focuses on its doctrinal underpinnings—*i.e.*, whether *Auer* is sound as a matter of legal theory.⁴ It is emphatically not this essay's purpose to join that debate. Instead,

[†] Distinguished McKnight University Professor & Harlan Albert Rogers Professor in Law, University of Minnesota Law School. Copyright © 2019 by Kristin E. Hickman.

^{††} Associate Attorney, Crowell & Moring LLP. The authors thank Nick Bednar and Aaron Nielson for helpful comments. Copyright © 2019 by Mark R. Thomson.

1. Order Granting Certiorari, *Kisor v. Wilkie*, No. 18-15, 139 S. Ct. 657, 2018 WL 6439837 (Dec. 10, 2018) (Mem.).

2. *See id.*; *see also* *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

3. *See Auer*, 519 U.S. at 461 (granting deference based on “our jurisprudence,” but without explaining the reasons underlying that jurisprudence); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (declaring, without explanation or citation, that “the ultimate criterion [in construing an ambiguous regulation] is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”).

4. *See, e.g.*, Cass R. Sunstein & Adrian Vemeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017); Matthew C. Stephenson & Miri

this essay focuses on the practical rationales for *Auer*, which have received much less scholarly attention.

What are those practical rationales? Although he ultimately called for the Court to repudiate the *Auer* standard,⁵ Justice Antonin Scalia neatly summarized them:

[*Auer* deference] makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency's view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process.⁶

Auer's defenders often echo those points, contending that *Auer* (1) simplifies the judicial task,⁷ (2) ensures that courts across the country give the same meaning to ambiguous regulations,⁸ and (3) allows regulated parties to more accurately forecast how courts will construe ambiguous regulations.⁹

These practical rationales have some outward appeal. Pinning down the precise meaning of a particular word or phrase can be tedious and difficult, for instance when the word or phrase is highly technical in scope or depends for its meaning on other parts of a convoluted regulatory scheme. When multiple courts undertake to interpret the same ambiguous regulatory language, the result is often multiple interpretations of that language, so that the regulation ends up meaning different things in different jurisdictions. Uncertainty about how a particular regulation applies can, in turn, make it difficult for regulated parties to conform their actions to the law. *Auer* promises to solve those problems with a simple and straightforward command: when the answer isn't obvious, the agency's interpretation controls.

Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449 (2011); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

5. *Decker v. Northwest Env'tl Def. Ctr.*, 568 U.S. 597, 616–21 (2013) (Scalia, J., concurring in part and dissenting in part).

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

7. See, e.g., Sunstein & Vermeule, *supra* note 4, at 298.

8. See, e.g., Matthew Mezger, *Using Interpretive Methodology to Get Out From Seminole Rock and a Hard Place*, 84 GEO. WASH. L. REV. 1335, 1358–59 (2016); Ben Snowden, *Has Auer's Hour Arrived?*, 28 NAT. RESOURCES & ENV'T 31, 34 (2014).

9. See, e.g., Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L. J. 813, 816–17 (2015).

The practical argument for *Auer* deference only holds up, however, to the extent *Auer* actually is simple and straightforward to apply. As the *Auer* standard becomes more difficult to apply, the practical rationales that support it become less compelling.

This problem is not merely theoretical. For several years, courts have been carving qualifications and exceptions into *Auer* that have transformed a seemingly simple legal standard into a doctrine of uncertain scope and application. A list of those exceptions, and questions they raise, might include the following:

- *Auer* deference does not apply where a regulation is clear.¹⁰ But what qualifies a regulation as unclear? And what interpretive tools should courts apply before concluding that a regulation is unclear?
- *Auer* deference is unwarranted when an agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question," as when the interpretation conflicts with a prior one, or when it appears to be nothing more than a "convenient litigating position," or a "post hoc rationalization advanced by an agency seeking to defend past agency action against attack."¹¹ Courts have disagreed about how to apply each of those exceptions.¹²
- Some courts have held that some types of nonbinding agency pronouncements are not due *Auer* deference, notwithstanding that those same courts routinely defer to other nonbinding agency pronouncements.¹³ The basis for this disparate treatment is murky at best.

10. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

11. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

12. *See, e.g., Ohio Dept' of Medicaid v. Price*, 864 F.3d 469 (6th Cir. 2017) (Clay, J., dissenting) (criticizing majority for deferring to an interpretation that was "nothing more than a convenient litigating position") (quotation marks omitted); *Bible v. United Student Aid Funds*, 799 F.3d 633, 674 (7th Cir. 2015) (Manion, J., dissenting in part) (criticizing majority for deferring to an interpretation that was "entirely new and inconsistent with [the agency's] prior interpretations"); *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp.*, 768 F.3d 300, 316–17 (3d Cir. 2014) (Jordan, J., dissenting) (criticizing majority for deferring to agency's newly-announced interpretation that was adopted "in reaction to the District Court's decision in this case").

13. *See, e.g., Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1318 (Fed. Cir. 2017) (en banc) (declining to give *Auer* deference to an interpretation by the Patent and Trademark Office because the interpretation was announced in an "interpretive nonbinding discussion" that was later re-designated as a "representative non-binding discussion"); *Lezama-Garcia v. Holder*, 666 F.3d 518, 532 (9th Cir. 2011) (declining to defer to an interpretation announced in a single-member, nonprecedential decision of the Board of Immigration Appeals).

- *Auer* deference does not apply to interpretations of regulations that give rise to penalties.¹⁴ The origin of this exception lies in due process and the notion that a party should have adequate notice that its actions violate agency regulations before being subject to civil penalties.¹⁵ The distinction between penalties and mere adverse results is not always clear.¹⁶
- Relatedly, an interpretation is not due *Auer* deference if it would result in “unfair surprise” to regulated parties.¹⁷ What constitutes a surprise, and what differentiates a fair surprise from an unfair one, is anyone’s guess.
- *Auer* deference does not apply to interpretations of regulations that merely paraphrase or “parrot” statutory language.¹⁸ How much daylight must there be between a regulation and the statute for deference to apply?
- In at least some instances, when *Auer* does not apply, the multi-factor *Skidmore* standard replaces it.¹⁹ But when must a court move on to analyze an agency’s interpretation of a regulation using *Skidmore*, as opposed to merely invalidating the interpretation de novo, for example as contrary to the regulation?

14. *Christopher*, 567 U.S. at 154; see also KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.8.2 (6th ed. 2018) (observing that courts have been less inclined to defer to agency interpretations of ambiguous regulations when doing so would subject parties to civil penalties without prior notice that their conduct was unlawful).

15. HICKMAN & PIERCE, *supra* note 14, at § 3.8.2 (recognizing this line of cases).

16. See, e.g., *United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998) (analogizing a product recall order to the imposition of penalties for this purpose); *Upton v. Securities & Exchange Commission*, 75 F.3d 92 (2d Cir. 1996) (declining to defer in license suspension case); see also HICKMAN & PIERCE, *supra* note 14, at § 3.8.2 (“[C]ourts in some cases have applied this approach even when the ‘penalty’ takes the form of particularly onerous consequences, rather than a fine or more traditional form of punishment.”).

17. *Christopher*, 567 U.S. at 154.

18. *Gonzales v. Oregon*, 546 U.S. 243, 256–57 (2006); Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 N.Y.U. J. L. & LIBERTY 290 (2011) (evaluating this *Auer* exception).

19. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (calling upon courts to give “weight” to an agency’s interpretation of a statute “depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”); *Christopher*, 567 U.S. at 159 (applying *Skidmore* in a case involving unfair surprise); *Gonzales*, 546 U.S. at 268–69 (applying *Skidmore* to an interpretation of a parroting regulation).

This list of *Auer* exceptions and issues is non-exhaustive, and it seems likely that courts will identify new exceptions to *Auer* going forward. A multi-step *Auer* doctrine is emerging,²⁰ one that mirrors the several steps and complexity of *Auer* deference's close cousin, *Chevron* deference.²¹ Indeed, using phraseology eerily reminiscent of *Chevron*'s two steps, the Solicitor General's brief in the *Kisor* case suggests that "[c]ourts should apply [*Auer*] deference only after exhausting all the traditional tools of interpretation and determining that the agency has reasonably interpreted any genuine ambiguity," and even then "only if the agency's interpretation represents its fair, considered, and consistent judgment."²² With each new exception or qualification, the *Auer* standard becomes harder to apply and less certain in its application—two criticisms long leveled at *Chevron* deference.

Like *Auer*, *Chevron* started simply: Courts should defer to agencies' reasonable interpretations of ambiguities in the statutes those agencies are tasked with administering.²³ For decades, however, courts have been piling caveats and qualifications atop *Chevron*'s basic premise. Courts and commentators have argued extensively over exactly how ambiguous a statute needs to be before deference becomes appropriate,²⁴ and which

20. See, e.g., *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 624 n.12 (9th Cir. 2018) (en banc) (describing "Auer's two-step analysis"); see also HICKMAN & PIERCE, *supra* note 14, at § 3.8.3 (describing how *Auer* "may be developing its own Step Zero, Step One, and Step Two to resemble the steps of *Mead* and *Chevron*").

21. The *Chevron* doctrine derives from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which instructed reviewing courts evaluating agency interpretations of statutes to consider first whether the meaning of the relevant statute is clear, and if it's not, then whether the agency's resolution of the statutory ambiguity is reasonable. *Id.* at 842–43. For just one of many, many scholarly discussions of *Chevron*'s complexity, see Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1418–41 (2017) (surveying *Chevron*'s many questions and resulting variations).

22. See Brief for Respondent at 28, 30, *Kisor v. Wilkie*, — S. Ct. — (No. 18-15), 2019 WL 929000, at *28, *30 (Feb. 25, 2019).

23. See *Meredith v. Time Ins. Co.*, 980 F.2d 352, 357 (5th Cir. 1993) ("*Chevron* purported to establish a simple and predictable method . . .").

24. See, e.g., *Scialabba v. Cuellar de Osorio*, 573 U.S. 41 (2014) (featuring concurring and dissenting opinions criticizing Justice Kagan's plurality opinion for rushing to find a statute ambiguous without making more of an effort to discern statutory meaning); *Coyomani-Cielo v. Holder*, 758 F.3d 908, 913 (7th Cir. 2014) (suggesting "a distinction between 'clear' meaning and a 'better' reading" in *Chevron* analysis); Bednar & Hickman, *supra* note 21, at 1419–27 (exploring the question and citing cases).

tools of statutory interpretation ought to be considered in evaluating statutory clarity.²⁵ And they have disagreed over whether certain categories of cases should fall outside of *Chevron*'s reach, and what those categories might be.²⁶

The Supreme Court has led the way. In *Christensen v. Harris County*, the Court announced that only certain types of agency pronouncements qualify for *Chevron* deference.²⁷ In *United States v. Mead Corp.*,²⁸ the Court introduced "*Chevron* Step Zero," holding that *Chevron* deference is only appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority,"²⁹ but equivocated about exactly how to identify those conditions.³⁰ In *Barnhart v. Walton*, the Court further obscured *Chevron*'s scope by suggesting that certain informal agency pronouncements might be due *Chevron* deference depending on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."³¹ Just a few terms ago, in *King v. Burwell*, the Court applied a separate "extraordinary cases" or "major questions" limitation on *Chevron*'s scope, whereby deference is not due to agencies' interpretations of statutory provisions that carry special economic or political significance.³²

25. See, e.g., Robert A. Katzmann, *Judging Statutes* 47 (2014); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153–54 (2016); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

26. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 848–52 (2001) (recognizing fourteen different disagreements about *Chevron*'s scope that emerged in the doctrine's first fifteen years).

27. 529 U.S. 576 (2000).

28. 533 U.S. 218 (2001).

29. *Id.* at 226–27; see Merrill & Hickman, *supra* note 26, at 873 (coining the "Step Zero" term).

30. *Mead*, 533 U.S. at 229–31 (identifying "express congressional authorizations to engage in the process of rulemaking or adjudication" as "a very good indicator of delegation meriting *Chevron* treatment," but noting that "the want of that procedure . . . does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded").

31. 535 U.S. 212, 222 (2002).

32. See 135 S. Ct. 2480, 2488–89 (2015).

Circuit courts have added their own wrinkles. In the D.C. Circuit, for example, there is now a “*Chevron* Step One-and-a-Half,” requiring courts to withhold *Chevron* deference unless the interpreting agency recognized that the statutory provision at issue is susceptible of multiple interpretations.³³ The Fourth Circuit has suggested that deference is not warranted when the interpretation at issue “is not based on [the agency’s] expertise in the particular field.”³⁴ Some circuits have embraced the notion that an agency might be able to waive *Chevron* deference, even though standards of review normally are for courts rather than litigants to determine.³⁵ And the list goes on. Justice Scalia complained in 2012 about “the ugly and improbable structure that our law of administrative review has become,”³⁶ and the complexity has only grown since then.

Indeed, Justice Scalia (among others) frequently bemoaned the many exceptions and caveats that the Court had built into *Chevron* precisely because they made *Chevron* hard to apply and robbed it of much of its practical value—not just in terms of simplifying the judicial task, but also in terms of providing easy-to-understand guidance for regulated parties.³⁷ Even justices and scholars who have advocated for the aforementioned exceptions

33. Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017) (describing the “*Chevron* Step One-and-a-Half” doctrine announced in *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985)); see *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1353–54 (D.C. Cir. 2006).

34. *W. Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245 (4th Cir. 2003) (quoting *Burgin v. Office of Pers. Mgmt.*, 120 F.3d 494, 497 (4th Cir. 1997)).

35. See, e.g., *Martin v. Soc. Sec. Admin.*, 903 F.3d 1154, 1161 (11th Cir. 2018) (per curiam) (describing a circuit split over the issue). For more discussion on *Chevron* waiver, see James Durling & E. Garrett West, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183 (2019); Jeremy Rozansky, *Waiving Chevron*, 85 U. CHI. L. REV. 1927 (2008).

36. *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 494 (2012) (Scalia, J., concurring).

37. See *id.*; *United States v. Mead Corp.*, 533 U.S. 218, 245 (2001) (Scalia, J., dissenting) (assailing the majority’s application of *Chevron* as “confusing,” full of “utter flabbiness,” and “virtually open-ended”); *id.* at 257 (Scalia, J., dissenting) (criticizing the majority opinion for replacing the simplicity of *Chevron*’s “across-the-board presumption” with “the indeterminacy of *Skidmore* deference”); see also Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2602 (2006) (“[*Mead*] has produced a great deal of confusion and complexity, disappointing those who hoped that *Chevron* would simplify the law.”).

and caveats recognized that they were doing so at the cost of simplicity and predictability.³⁸

The result of *Chevron*'s evolution is a doctrine that many now lament is so full of holes as to be troublesome in its application.³⁹ Some scholars question whether there remains much practical benefit in applying *Chevron* rather than a less deferential but more flexible and open-ended standard like *Skidmore*.⁴⁰

This same question is increasingly pertinent for courts charged with applying *Auer*. Exceptions and caveats—whether characterized as recent innovations or simply features of the original rule that were not expressly recognized until more recently—have profoundly transformed *Auer* deference. What was formerly hailed as a simple, straightforward shortcut for quickly and predictably resolving potentially thorny cases is more and more a straitjacket that forces courts to resolve a different but equally thorny (or sometimes thornier) set of questions.

Dueling Federal Circuit opinions in the *Kisor* case illustrate the point. The dispute underlying *Kisor* is whether the claimant, a veteran, is entitled to certain benefits for post-traumatic stress disorder. The Department of Veterans Affairs denied the claimant's request for those benefits. Its decision rested on the meaning of the word "relevant" in a regulation governing the reopening of veterans' claims. A panel of the Federal Circuit held that, as used in the regulation, "relevant" is ambiguous.⁴¹ Deferring under *Auer*, the panel gave the term the meaning given it by Board of Veterans Appeals, with the result that the claimant was denied the benefits he sought.⁴²

The Federal Circuit denied the claimant's request for *en banc* rehearing, but three judges dissented from that decision.⁴³ They argued that "granting *Auer* deference to the [Department

38. See, e.g., *Mead Corp.*, 533 U.S. at 235–37 (majority opinion) ("Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety.")

39. See *In re Mersmann*, 505 F.3d 1033, 1051 (10th Cir. 2007) ("Since *Chevron*, the Court's standard has evolved in many ways, leaving in its wake a confusing path for courts to navigate."); *Cal. Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 848 (9th Cir. 2003) ("Analyses by scholars and jurists alike have emphasized that [*Mead* and *Barnhart*] have further obscured the already murky administrative law surrounding *Chevron*.")

40. See, e.g., Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075 (2016).

41. *Kisor v. Shulkin*, 869 F.3d 1360, 1367–68 (Fed. Cir. 2017).

42. *Id.* at 1368.

43. *Kisor v. Shulkin*, 880 F.3d 1378 (Fed. Cir. 2018) (en banc order).

of Veterans Affairs] interpretation of its own ambiguous regulations flies in the face of . . . the longstanding canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."⁴⁴ According to the dissenters, there was no reason to apply *Auer* because applying the veteran-friendly Armed Services canon should have resolved any doubts about the meaning of "relevant" in that case.⁴⁵

At the circuit level, then, *Kisor* boiled down to a disagreement about the proper order in which to apply conflicting principles of interpretation (including deference doctrines). That happens to be an especially knotty area of the law, with courts and scholars having already staked out a range of conflicting positions.⁴⁶ And, as noted above, such "order of operations" questions are just a few of the many that courts must now consider before applying *Auer*.

The multifarious exceptions and qualifications courts have attached to *Auer*, and the disagreements and uncertainties they generate, invite the question: Does *Auer* still serve the practical purposes its defenders have touted it as serving? There is a good argument to be made that it does not. Whatever *Auer*'s practical value was once understood to be, today's legal landscape largely gives the lie to any claims that *Auer* appreciably simplifies things for courts, or that it improves consistency and predictability for regulated parties.

Consider the glut of recent cases in which members of the same court are openly divided on the proper application of *Auer*.⁴⁷ The opinions in those cases evince "widespread confusion

44. *Id.* at 1380 (quotation marks omitted).

45. *See id.*

46. *See Note, Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594, 600–01 (2010) (summarizing some of the approaches advocated by prominent scholars); Patricia G. Chapman, *Has the Chevron Doctrine Run Out of Gas?*, 19 MISS. C. L. REV. 115, 164 n.303 (1998) (same). *Compare, e.g.*, *United States v. Phifer*, 909 F.3d 372, 384–85 (11th Cir. 2018) (concluding that the rule of lenity supersedes *Auer* deference in criminal cases), and *Maniilaq Ass'n v. Burwell*, 170 F. Supp. 3d 243, 247–48 (D.D.C. 2016) (citing *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008), and holding that the pro-Indian canon trumps *Auer* deference), with *Oppedisano v. Holder*, 769 F.3d 147, 153 (2d Cir. 2014) (holding that *Chevron* deference supersedes the rule of lenity), and *Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989) (holding that *Chevron* deference trumps the pro-Indian canon).

47. *See, e.g.*, *Kisor*, 880 F.3d 1378; *United States v. Havis*, 907 F.3d 439 (6th Cir. 2018); *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (en banc); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725 (9th Cir. 2017); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human*

[] on many aspects of *Auer* deference, including its scope, applicability, and the relevant factors to be weighed when applying the doctrine.”⁴⁸ Growing uncertainty about when and how to apply *Auer* is also consistent with data showing a downward trend in the percentage of cases in which courts invoke *Auer* to affirm an agency’s interpretation of a regulation.⁴⁹ Perhaps the benefits of applying *Auer* just aren’t worth the trouble.

The Sixth Circuit’s decision in *Woudenberg v. Department of Agriculture*⁵⁰ illustrates this latter point. In considering the meaning of highly esoteric regulations promulgated by the Department of Agriculture, the court undertook an exhaustive analysis that delved deep into the regulations’ text, structure, purpose, and history (going so far as to review individual comments submitted prior to the agency’s amendment of the regulations in question).⁵¹ Only *after* affirming the agency’s interpretation on that basis did the court mention *Auer* deference, and then only in the final two sentences of the opinion.⁵² The *Woudenberg* court’s back-of-the-hand treatment of *Auer*—almost as an aside—bespeaks a reluctance to lean on the doctrine, even in cases where the doctrine seems to offer a straightforward answer, and even when the alternative is several pages of painstaking analysis.

To be sure, *Auer*’s increasing complexity is not the only reason courts might hesitate or disagree about how to apply it.⁵³ But if some courts are so reluctant or uncertain in applying *Auer* deference, that fact itself weighs against ascribing too much practical value to the standard because spotty application undermines the principles of consistency and predictability *Auer* is supposed to advance.⁵⁴

None of what we have written here is to argue unequivocally that *Auer* deference should be abandoned, whether in *Kisor* or

Serfs., 867 F.3d 338 (3d Cir. 2017); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (*vacated sub nom* 137 S. Ct. 1239).

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

49. Barmore, *supra* note 9, at 815–16.

50. 794 F.3d 595 (6th Cir. 2015).

51. *Id.* at 597, 599–601.

52. *Id.* at 601.

53. Uncertainty about the doctrine’s future might be another factor prompting courts to rest their decisions on non-*Auer* grounds.

54. See Recent Case, *Bible v. United Student Aid Funds, Inc.*, 129 HARV. L. REV. 2281, 2286 (2016).

some future case. Nor do we assert that there are no longer *any* practical benefits to *Auer*.⁵⁵ It seems inarguable to us, though, that most of the pragmatic reasons for retaining *Auer* have been substantially weakened by developments in the doctrine. If *Auer* survives *Kisor*, it should not be because *Auer* deference makes things significantly easier or more consistent and predictable for courts or regulated parties. It doesn't.

55. For example, some scholars contend one of the “pragmatic arguments” for *Auer* is that it gives expert agencies (rather than inexpert judges) the primary role in applying often-technical regulations to complex changing circumstances. See Stephenson & Pogoriler, *supra* note 4, at 1460. That argument is largely unaffected by the growing list of exceptions and qualifications to *Auer*, except perhaps insofar as the exceptions and qualifications—by significantly reducing the number of cases in which courts ultimately defer to agencies’ expert interpretations—diminish the agencies’ role.