The Final *Auer*: How Weakening the Deference Doctrine May Impact Environmental Law

by Erica J. Shell

Erica J. Shell is a 2015 graduate of Wayne State University Law School. While at Wayne State, she served as brief writer and oralist on the ABA National Appellate Advocacy team and the Jeffrey G. Miller Pace National Environmental Moot Court team. At Pace, the Wayne State team was awarded the David Sive Award for best overall brief. Ms. Shell also served as the Managing Editor of Wayne State's *Journal of Law in Society*. This Article won Honorable Mention in the 2014-2015 Beveridge & Diamond Constitutional Environmental Law Writing Competition.

Summary

Throughout the past decade, the United States Supreme Court has questioned the constitutionality of affording deference to a federal agency's interpretation of its own regulations. This level of deference originated with the Court's 1945 opinion in *Bowles v. Seminole Rock & Sand Co.*, and in 1997, the Court reinvigorated *Seminole Rock* in *Auer v. Robbins*. The impact of "*Auer* deference" has continued to grow with the expansion of the administrative state. But the intersection of a Supreme Court in flux with a presidential administration that has proposed major new environmental regulations may yet pose an opportunity for the Court to revisit this fundamental doctrine in administrative law.

I. Introduction

The status of judicial deference to an agency's interpretation of its own regulations has been in persistent flux since the U.S. Supreme Court's 1997 decision in *Auer v. Robbins*.[1] Discontent stems in large part from two primary constitutional defects in the deference doctrine: an absence of adequate notice to regulated parties; and the exercise of both legislative and judicial functions by administrative agencies. Several current members of the Court have expressed a desire to revisit *Auer* deference. The next decade could see a variety of political changes as well as changes in the Court's composition, which could present an opportunity to significantly upend the landscape of environmental law.

New environmental regulations could set the stage for a monumental change. The U.S. Environmental Protection Agency's (EPA's) current regulatory initiatives include greenhouse gas emissions from mobile and stationary sources, primarily under the Clean Air Act (CAA).[2] Without *Auer* deference, EPA would likely have to satisfy the more stringent requirements for *Skidmore*[3] or *Chevron*[4] deference. Five current Justices have expressed some desire to revisit *Auer* deference. Although the Court identifies three common justifications for *Auer* deference, those pragmatic justifications cannot overcome *Auer*'s inherent constitutional deficiencies.

Part II of this Article explores the origins of *Auer* deference in Supreme Court precedent predating the Administrative Procedure Act (APA),[5] principally *Bowles v. Seminole Rock & Sand Co.*,[6] as well as criticism of the doctrine that predates its expansion in *Auer*. It also introduces *Auer* and expands on contemporary criticisms of *Auer* by the Supreme Court. Part III examines the Court's most recent relevant decision, *Perez v. Mortgage Bankers Ass'n*,[7] where the Court addresses past criticism of deference doctrine. At the same time, the concurring Justices, Antonin Scalia and Clarence Thomas, continued to emphasize their desire to revisit *Auer* deference.[8] Part IV explores several implications for environmental litigation, EPA rulemaking, and the APA generally. Part V concludes by identifying considerations for future environmental regulation and summarizing potential outcomes.

1. 519 U.S. 452 (1997).
2. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618. *See* U.S. EPA, *Regulatory Initiatives*, http://www.epa.gov/climatechange/EPAactivities/regulatory-initiatives.html (last visited Mar. 25, 2015).
3. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
4. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
5. 5 U.S.C. §§500-559.
6. 325 U.S. 410 (1945).
7. 135 S. Ct. 1199, 1215, 45 ELR 20050 (2015).
8. *See* 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) and 1212 (Thomas, J., concurring in the judgment).

II. *Auer* Deference Generally

A. *Origins in* Seminole Rock

The foundation of *Auer* deference appeared without explanation in *Seminole Rock* in 1945.[9] At issue was an agency interpretation of a price control regulation announced during World War II.[10] The Court acknowledged that the regulation was ambiguous: "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."[11] In upholding the agency's interpretation, the Court considered that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[12]

The Court did not offer any elaboration as to how it arrived at this conclusion. Of particular note, *Seminole Rock* predates both the modern administrative state and the complex regulatory framework embodied in the APA.[13] The scope of agency action today, particularly with regard to environmental law, vastly exceeds its scope when *Seminole Rock* was decided.

B. *Early Critical Reception*

Although *Seminole Rock* went largely undisputed for most of the 20th century, Prof. John Manning identified a number of shortcomings even before its amplification in *Auer*.[14] The potential shortcomings of *Seminole Rock* include inadequate notice to regulated parties and improper extension of judicial power to administrative agencies.[15]

The justifications for *Seminole Rock* begin with the same concern for political accountability that, according to Professor Manning, later motivated *Chevron* deference.[16] Second, agencies admittedly have specialized expertise that informs their interpretations.[17] This second pragmatic explanation holds especially true for EPA, which has a wealth of scientific knowledge and expertise that courts lack. Finally, the agency that drafted a regulation presumably has "superior competence to understand and explain its own regulatory text."[18] This final point, although perhaps true for *Seminole Rock*, cannot explain the deference also extended when an agency interprets another agency's regulation.[19]

As early as 1996, a number of Justices had indicated their desire to revisit *Seminole Rock*.[20] The extension of *Seminole Rock* through *Auer*, however, neither added substantive support to the doctrine nor limited the impact of its defects on regulated parties. Regarding notice to regulated parties, the ability to receive judicial deference on interpretive rules "makes it much less likely that an agency will give clear notice of its policies either to those who participate in the rulemaking process prescribed by the Administrative Procedure Act (APA) or to the regulated public."[21] This is because if an agency can later receive binding deference for its interpretation of an ambiguous rule, less incentive exists to promulgate a clear, unambiguous rule in the first instance. Ambiguous regulations do not adequately inform the regulated public of the agency's stance: "legal rules must give persons of 'ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly.'"[22] An ambiguous regulation by definition is susceptible to more than one interpretation.[23] With more than one interpretation, it is unlikely that regulated parties will prospectively discern the interpretation that the agency will choose to adopt.

1. Exercise of Legislative Authority Through Interpretive Rules

Enabling an agency to receive binding deference for its own interpretation in essence gives binding legal effect to that interpretation, even though "it is emphatically the province and duty of the judicial department to say what the law is."[24] The U.S. Constitution expressly contemplated separation of powers between branches of government because "[b]y 1787, Americans widely understood that even representative government could result in tyranny if governmental power were concentrated and unchecked."[25]

9. *Seminole Rock*, 325 U.S. at 413-14.
10. *Id.* at 411.
11. *Id.* at 413-14.
12. *Id.* at 414.
13. *See* 60 Stat. 237 (1946).
14. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (Apr. 1996).
15. *Id.* at 617-18.
16. *Id.* at 629.
17. *Id.*; *see* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991).
18. Manning, *supra* note 14, at 630 (internal citation omitted).
19. *See, e.g.*, Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696-99 (1991).
20. Manning, *supra* note 14, at 615; see opinions by Justices Clarence Thomas, Sandra O'Connor, and Ruth Bader Ginsburg in *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting), and Justices O'Connor, Antonin Scalia, David Souter, and Thomas in *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 102 (1995) (O'Connor, J., dissenting).
21. Manning, *supra* note 14, at 617.
22. *Id.* at 669 (*citing* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).
23. *See* Merriam-Webster, *Ambiguous*, 1a. "doubtful or uncertain"; 2. "capable of being understood in two or more possible senses or ways," http://www.merriam-webster.com/dictionary/ambiguous (last visited Mar. 25, 2015).
24. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
25. Manning, *supra* note 14, at 641; *see* Thomas Jefferson, Notes on the State of Virginia 120 (William Peden ed., 1954) (1787):

> An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend

Early European political theorists including "Locke, Montesquieu, and Blackstone all emphasized that some separation of lawmaking from law-exposition promoted the rule of law and controlled arbitrary government."[26] The Constitution separates the exercise of government authority into three general categories: "legislating, enforcing, and determining the particular application of law," housed in the legislative, executive, and judicial branches, respectively.[27] The Constitution's drafters did not describe any role for administrative agencies.

Administrative agencies challenge traditional separation of powers in a number of ways, frequently encountered in the context of administrative adjudication.[28] Early critics of the APA also questioned whether the exercise of agency rulemaking validly qualified as an exercise of legislative authority under Article I.[29] The Constitution "leaves undiscussed what might be the necessary and permissible relationships of each of these three Constitutional bodies to the agency making the rule."[30] Without specific discussion of agency behavior within the Constitution, it falls on the Court and the U.S. Congress to delineate the boundaries of agency power. Even if the rigid separation of powers into the three traditional branches no longer suits American governance, modern practices should comport with the spirit behind separation of powers, creating a functional system of checks and balances and separating functions between different bodies.[31]

When an agency promulgates rules, it most closely falls within the boundaries of lawmaking. The APA contemplated that proper issuance of a binding legislative rule would comply with the formalities described by Congress.[32] When courts accord binding deference to agency interpretations, those interpretations transform into binding regulations as if by alchemy. Even before *Auer*, this phenomenon was observed in the early history of the National Environmental Policy Act (NEPA).[33] The Council for Environmental Quality (CEQ), originally designed to serve in an advisory capacity to the president of the United States, has in practice served as the administering agency for NEPA, with the result that "courts and most action agencies have regarded its rules as binding law."[34]

Prof. Jamison Colburn has commented that CEQ's interpretations lack the requisite "nexus between the [rule] and some delegation of the requisite legislative authority by Congress."[35] Although courts acknowledged that CEQ's guidance materials were not legally binding, they routinely accorded great weight to CEQ's interpretation of NEPA.[36] In *Andrus v. Sierra Club*, CEQ's "interpretation of NEPA [wa]s entitled to substantial deference" even though CEQ had reversed its interpretation.[37] The Supreme Court explained that the reversal came within the "detailed and comprehensive process, ordered by the president, of *transforming advisory guidelines into mandatory regulations* binding on all federal agencies."[38] The opinion contained no explanation of why CEQ was entitled to transform advisory guidelines into binding regulations, but permitted CEQ to do so without elaboration. Ten years later, in *Robertson v. Methow Valley Citizens Council*, the Court again extended deference to CEQ's interpretation of NEPA, even though CEQ's interpretation "had changed, seemingly as a result of shifting political winds."[39] In neither case did the Court explain why substantial deference was warranted.[40] In both cases, CEQ was allowed to exercise legislative authority.

These implications have become increasingly relevant as agencies take on more legislative responsibilities. A recent Brookings Institution report found that the 80th Congress, in session between 1947 and 1948, enacted 1,739 bills out of 7,611 total bills introduced.[41] By comparison, the 112th Congress, in session between 2011 and 2012, passed 561 bills out of 6,845 introduced.[42] Although the number of bills introduced in the 2011-2012 session measures 89.94% of the number introduced in the 80th Congress, the number of bills enacted dropped from just over 22% to around 8%. If the 112th Congress was less than one-half as productive as the 80th Congress, the 113th Congress was even less productive.

On October 1, 2013, the federal government experienced the "most significant" shutdown ever recorded, lasting 16 days.[43] Across the country, "[f]ederal government employees were furloughed for a combined total of 6.6 million days."[44] The shutdown has commonly been attributed to partisan disagreement over the Affordable Care Act.[45] During the 113th session, Congress passed only 231

their legal limits, without be effectually checked and restrained by the others.

26. Manning, *supra* note 14, at 646.
27. Peter L. Strauss, *The Place of Agency Rulemaking in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 577 (1984).
28. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
29. Strauss, *supra* note 27, at 576.
30. *Id.* at 577.
31. *Id.* at 578.
32. 5 U.S.C. §553 (2012).
33. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
34. Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ELR 10287 (Apr. 2015).
35. *Id.* (*citing* Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979)).
36. Colburn, *supra* note 34, at 10309. These considerations of CEQ guidance predate the *Auer* doctrine; some considerations also predate *Chevron*.
37. 442 U.S. 347, 357, 9 ELR 20390 (1979).
38. *Id.* at 358 (emphasis added).
39. 490 U.S. 332, 354-56, 19 ELR 20743 (1989); Colburn, *supra* note 34, at 10315.
40. Colburn, *supra* note 34, at 10317.
41. Brookings Inst., *Vital Statistics on Congress: Legislative Productivity in Congress and Workload*, http://www.brookings.edu/~/media/Research/Files/Reports/2013/07/vital-statistics-congress-mann-ornstein/Vital-Statistics-Chapter-6--Legislative-Productivity-in-Congress-and-Workload_UPDATE.pdf?la=en (last visited Apr. 30, 2015) (*see* tbl. 6-1).
42. *Id.*
43. Executive Office of President, *Impacts and Costs of the October 2013 Federal Government Shutdown* 2 (2013), https://www.whitehouse.gov/sites/default/files/omb/reports/impacts-and-costs-of-october-2013-federal-government-shutdown-report.pdf.
44. *Id.* at 4.
45. Karen Tumulty & Lori Montgomery, *Washington Braces for Prolonged Government Shutdown*, Wash. Post (Oct. 1, 2013), *available at* http://www.washingtonpost.com/politics/government-shutdown-begins-senate-expected-to-reject-latest-house-proposal/2013/10/01/ef464556-2a88-11e3-97a3-ff2758228523_story.html.

of 3,809 introduced bills.[46] Legislative inactivity reflected both the causes and the effects of the government shutdown. The number of introduced bills decreased by over 40%, and Congress passed only 6% of introduced bills.

As congressional activity has continued to decline, and political gridlock has apparently become the norm, agencies increasingly bear a proportionally higher "legislative" burden: "In recent years, federal agencies have published between 2,500 and 4,500 final rules annually, of which between 79 and 100 were classified as 'major' due to their impact on the economy."[47] In practice, if not in name, administrative rulemaking continues to supplant traditional lawmaking by virtue of its perceived flexibility. Heightened reliance on agencies in this regard imbues agencies with true legislative powers and correspondingly increases the risk that constitutional protections inherent in traditional lawmaking will not be replicated in the agency setting.

2. Separation-of-Powers Doctrine

Even assuming agency authority to promulgate what in effect becomes binding law, neither the APA nor constitutional principles support allowing an agency to also interpret the law it has created. Deference to an agency's interpretation impedes the judiciary's exercise of its own powers. In this way, unifying "lawmaking and law-exposition" within an agency violates the principle of separation of powers.[48] A constitutionally sensitive approach would house ultimate control over interpretation of the law with the judiciary. Although the Founders expressly limited Congress' ability to implement its own laws, they did not conceive of the vast administrative system that would exist today.[49]

Professor Manning suggests that the process set forth in *Skidmore* should apply to interpretive rules.[50] This would allow courts to benefit from agency knowledge and expertise, without binding them to the agency's approach. Keeping ultimate control within the judiciary protects the "meaningful separation of lawmaking from law-exposition" required by separation-of-powers doctrine.[51] The issuance of interpretive rules for the benefit of regulated parties does not force a court's hand in determining what the law means. "By shifting interpretive power over ambiguous legal texts to an institution independent of the lawmaking entity, the proposed change would bring the administrative regime into greater conformity with the assumptions of our constitutional system."[52] The framework of interpreting administrative material should mimic the structure designed to ensure proper allocation of judicial and legislative power.

3. Subverting the Role of Informal Rulemaking

Deference to agency interpretations also challenges the role of traditional notice-and-comment rulemaking by permitting an agency to promulgate binding interpretations without the formal protections prescribed by the APA.[53] If a regulation is ambiguous, such that *Seminole Rock* or *Auer* deference applies, "the efficacy of rulemaking as a political process is diminished as is notice of the public's legal obligations."[54] The primary benefit of formal rulemaking lies in the interaction between agency and public, an interaction that mirrors the political controls exercised by the public over Congress.

Deference affects the public's relationship to the regulatory state in two ways. First, commenters on formal rulemaking may "misapprehend the nature of the rule upon which they commented" if its import can subsequently change at the agency's sole discretion. Second, regulated parties will not foresee the agency's interpretation "until the agency gives its rule content in application."[55] Accordingly, regulated parties' ability to prospectively conform their behavior within the bounds of the rule will be limited.

The threats posed by constitutionally unsound reliance on agency interpretations have become increasingly severe in recent years because, "[f]or some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by agencies has far outnumbered the lawmaking engaged in by Congress."[56] Although there are a multitude of differences between modern government and the government envisioned by the Founders, Professor Manning posits that courts must attempt to accommodate the competing concerns of efficient governance and constitutional commands.[57] In a dissent in the 2015 decision *Perez*, Justice Thomas opined that "*Seminole Rock* was constitutionally suspect from the start, and this Court's repeated extensions of it have only magnified the effects and the attendant concerns."[58] Issues with the exercise of legislative power through interpretive rulemaking, violation of the separation-of-powers doctrine, and subversion of formal rulemaking became more widespread with the expansion of *Seminole Rock*.

46. Brookings Inst., *supra* note 41.
47. Andrew M. Grossman, *Examining the Proper Role of Judicial Review in the Regulatory Process* 2 n.3 (Apr. 28, 2015), *available at* http://www.hsgac.senate.gov/download/?id=00fd3227-284a-453d-9a0f-f7b9b660f7b0 (*citing* Maeve Carey, Cong. Research Serv., R43056, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register* 1, 8 (2014)).
48. Manning, *supra* note 14, at 631.
49. *Id.* at 641.
50. Skidmore v. Swift & Co., 323 U.S. 134 (1944). *See* Manning, *supra* note 14, at 618.
51. Manning, *supra* note 14, at 631.
52. *Id.* at 694.
53. *See* 5 U.S.C. §553.
54. Manning, *supra* note 14, at 654.
55. *Id.* at 662.
56. *Id.* at 614 (*citing* INS v. Chadha, 462 U.S. 919, 985-86, 13 ELR 20663 (1983) (White, J., dissenting)); *see also* City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting) (expressing concern about "the danger posed by the growing power of the administrative state" and emphasizing the Court's duty to "police the boundary between the legislature and the executive").
57. Manning, *supra* note 14, at 637.
58. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1215, 45 ELR 20050 (2015).

III. *Auer*

Largely without explanation, the Court expanded the scope of *Seminole Rock* deference throughout the 20th century as the administrative state grew. In *Udall v. Tallman*, Chief Justice Earl Warren "stated that deference to an agency interpretation of a regulation is even *more appropriate* than deference to an agency's interpretation of a statute."[59] Deference largely served pragmatic considerations grounded in the agency's perceived capacity to administer its area of expertise.

The gradual expansion of *Seminole Rock* deference came to a head with the Court's decision in *Auer*.[60] *Auer* involved an interpretation of the Fair Labor Standards Act (FLSA) overtime pay provision and associated exemption for "bona fide executive, administrative, or professional" employees.[61] The petitioners, who were sergeants and a lieutenant employed by the St. Louis Police Department, argued that they were entitled to overtime pay because they did not qualify as exempt employees under FLSA §213(a)(1).[62]

The Secretary of the U.S. Department of Labor (DOL) described exempt employees in part using a "salary-basis" test.[63] According to the test, if an employee was compensated weekly or biweekly a predetermined amount of her salary, "not subject to reduction because of variations in the quality or quantity of the work performed," she would qualify as an exempt employee and would not be entitled to overtime pay.[64] Hourly employees, on the other hand, were entitled to overtime pay. The salary-basis test was first adopted by DOL in 1940.[65] DOL also required the employee's duties to be consistent with the "executive, administrative, or professional" character of the exemption.[66]

The petitioners argued that their compensation did not satisfy the salary-basis test because they could be penalized by pay deduction for a variety of infractions.[67] According to DOL, "employees whose pay is adjusted for disciplinary reasons do not deserve exempt status because as a general matter true 'executive, administrative, or professional' employees are not 'disciplined' by piecemeal deductions from their pay."[68] Even though the employment manual expressly listed pay deduction for a number of infractions, that fact did not make the employees subject to deduction within the meaning of the salary-basis test.[69]

The Court looked to statements made by DOL in amicus briefs describing the import of disciplinary deductions on the salary-basis test.[70] Citing to *Seminole Rock*, the Court held that because DOL created the salary-basis test, DOL's "interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'"[71] The fact that the interpretation came to the Court by way of an amicus brief did not detract from the deference it received because it did not appear to be a post-hoc rationalization of agency behavior.[72] It followed that "there [wa]s simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question."[73] Assuming that DOL's brief represented a "fair and considered" interpretation of the regulation, that interpretation bound the Court.

Acknowledging that its decision removed the question from judicial consideration, the Court concluded that the general rule requiring FLSA exemptions to be construed against the employer did not apply.[74] That rule applied "only to judicial interpretation of statutes and regulations" and did not serve as "a limitation on the Secretary's power to resolve ambiguities in his own regulations."[75] In this way, the petitioners received different treatment than they would have received if the Court had considered the issues in a manner consistent with the separation-of-powers doctrine.

Prior to *Auer*, courts and scholars granted little consideration to the potential constitutional defects of *Seminole Rock* deference.[76] Although these issues also appeared in *Auer* itself, they would remain largely unresolved and unrecognized for at least another decade. The Court has acknowledged that *Auer* and *Chevron* place the same constraints on judicial consideration of agency interpretations.[77] The Court often attributed the deference afforded under *Auer* to congressional intent, despite the fact that agency rulemaking falls entirely outside the scope of legislative conduct contemplated by the Constitution.[78] "In this regard, the Court did not see any need to distinguish between the agency as lawmaker (in promulgating regulations) and as law executor (in applying the regulations in individual cases)."[79] As the administrative state grew, however, these defects would increasingly attract the Court's attention.

IV. Criticisms by the Supreme Court

As the Court continued to expand the scope of *Auer* deference, several of the Justices began to notice the ways

59. Michael P. Healy, *The Past, Present, and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 Kan. L. Rev. 633, 642 (2014) (*citing* Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (emphasis added by Healy)).
60. 519 U.S. 452 (1997).
61. *Auer*, 519 U.S. at 455 (*citing* 29 U.S.C. §213(a)(1)).
62. *Id.*
63. *Id.* (*citing* 29 C.F.R. §§541.1(f), 541.2(e) & 541.3(e) (1996)).
64. *Id.* (*citing* 29 C.F.R. §541.118(a)).
65. *Id.*at 457; *see* 29 U.S.C. §203(d) (1940 ed.), 5 Fed. Reg. 4077 (1940).
66. *Auer*, 519 U.S. at 452.
67. *Id.* at 455.
68. *Id.* at 456.
69. *Id.* at 462.
70. *Id.* at 461.
71. *Id.* (internal citation omitted).
72. *Id.* at 462 (*citing* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)).
73. *Id.*
74. *Id.* at 462.
75. *Id.* at 463.
76. Manning, *supra* note 14, at 614.
77. Healy, *supra* note 59, at 650. The Court has also applied *Chevron* deference to an agency interpretation of its own regulation on at least one occasion. *See* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 699-700 (1991).
78. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991).
79. Healy, *supra* note 59, at 656 n.128.

in which extending deference to agency interpretations impacted the rights afforded to parties in litigation. Five cases in the past 10 years have housed veiled criticism of *Auer* deference.[80] In three of these cases, the Court stepped outside the *Auer* framework to determine that the agency's interpretation should not receive binding deference. In those instances, the question was not whether the agency's interpretation was plainly erroneous or inconsistent with the regulation, but instead whether any other reason justified withholding deference.

First, in *Gonzales v. Oregon*, the Court relied on a source-of-law analysis to deny *Auer* deference to the agency's interpretation of its own regulation. Since the agency's regulation merely parroted the statutory language, the existence of a regulation could not "change the fact that the question here is not the meaning of the regulation but the meaning of the statute."[81] In question was U.S. Attorney General John Ashcroft's interpretation of a regulation based on the Controlled Substances Act (CSA), which allowed a doctor to prescribe a Schedule II controlled substance only for a "legitimate medical purpose."[82] A 1971 regulation reiterated that a valid prescription must "be issued for a legitimate medical purpose."[83] Detailed standards had not been set forth to describe what qualified as a "legitimate medical purpose."

In 1994, the state of Oregon legalized physician-assisted suicide through its Death With Dignity Act (DWDA).[84] The DWDA allowed doctors to prescribe, but not administer, a lethal dose of a Schedule II controlled substance in limited circumstances to terminally ill patients.[85] The DWDA relied on Oregon's understanding that physician-assisted suicide represented a legitimate medical purpose for which the drugs could legally be prescribed. In 2001, Ashcroft issued an interpretive statement that the use permitted under the DWDA did not qualify as a "legitimate medical purpose" as required by the CSA.[86] Although Ashcroft ostensibly relied on his authority to interpret 21 C.F.R. §1306.04, the fact that the regulation simply repeated ambiguous language from the statute defeated *Auer* deference.

Ashcroft's interpretation also did not qualify for *Chevron* deference because, although the phrase "legitimate medical purpose" was ambiguous, the Attorney General "is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."[87] Whether Ashcroft possessed the authority to make the rule represents a prerequisite question under *United States v. Mead Corp.*, which requires that the agency have authority to interpret the statutory ambiguity before its interpretation can receive *Chevron* deference.[88] Based on the plain text of the CSA, the Attorney General's statutory duties create authority only to "promulgate rules relating only to 'regulation' and 'control.'"[89]

Since Ashcroft's interpretation qualified for deference under neither *Auer* nor *Chevron*, the Court considered the interpretation's "power to persuade" under *Skidmore*.[90] In part due to Ashcroft's "lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment," the Court concluded that his interpretation was not persuasive.[91]

Three years later, the Court in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* analyzed an interpretation laid out in a 2004 memorandum prepared by EPA's Director of the Office of Wetlands, Oceans, and Watersheds.[92] There, the Court framed *Auer* deference as something less than *Chevron* deference, and concluded that *Chevron* deference did not apply because the memo was "not subject to sufficiently formal procedures."[93] Such a construction does not square with the commonly held opinion that *Chevron* and *Auer* deference are equally strong where they apply,[94] and suggests that the extension of binding *Auer* deference to other informal pronouncements by agencies may not be warranted due to the agency's failure to satisfy formal requirements in the first instance.

Talk America, Inc. v. Michigan Bell Telephone. Co. also dealt with an informal interpretation, advanced in an amicus brief.[95] The Federal Communications Commission (FCC) interpreted its regulations to require incumbent local telephone service providers to "make certain transmission facilities available to competitors at cost-based rates."[96] FCC interpretation relied on the Telecommunications Act of 1996,[97] designed to facilitate market competition.[98] Even though FCC's interpretation first appeared in an amicus brief, the Court concluded that it was entitled to *Auer* deference.[99] The Court did not agree with AT&T's assertion that "deferring to the (FCC) would effectively 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'"[100] Although "the FCC concedes that it is advancing a novel interpretation of its longstanding interconnection regulations, nov-

80. *Id.* at 657; *see* Gonzales v. Oregon, 546 U.S. 243 (2006); Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261, 39 ELR 20133 (2009); Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254 (2011); Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012); and Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326, 43 ELR 20062 (2013).
81. *Gonzales*, 546 U.S. at 257.
82. *Id.*
83. 21 C.F.R. §1306.04(a) (2005).
84. *Gonzales*, 546 U.S. at 249.
85. *Id.*
86. *Id.*
87. *Id.* at 258.
88. *Id.* at 255-56 (*citing* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).
89. *Id.* at 259.
90. *Id.* at 268.
91. *Id.* at 269.
92. 557 U.S. 261, 283, 39 ELR 20133 (2009).
93. *Id.* at 283-84.
94. Healy, *supra* note 59, at 634.
95. 131 S. Ct. 2254, 2260-61 (2011).
96. *Id.* at 2257.
97. Telecommunications Act of 1996, 110 Stat. 56.
98. *Talk America*, 131 S. Ct. at 2257 (2011).
99. *Id.* at 2261.
100. *Id.* at 2263 (*citing* Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000)).

elty alone is not a reason to refuse deference."[101] Extending deference to a novel interpretation, however, exacerbates the potential notice issues that result from enforcing an agency statement not promulgated through notice-and-comment rulemaking.

Justice Scalia's concurrence did not rely on extending deference to FCC's interpretation. Instead, Justice Scalia felt that the proposed interpretation was the most reasonable one.[102] Justice Scalia went on to question the practice of extending deference to agency interpretations of their own regulations because, "though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law."[103] Based on the binding effect of an agency rule, allowing the agency to also interpret that rule "seems contrary to fundamental principles of separation of powers,"[104] Justice Scalia wrote. As described by Professor Manning, the numerous defects inherent in *Auer* deference, in Justice Scalia's view, called the Court to revisit the doctrine on appropriate invitation.

Christopher v. SmithKline Beecham Corp. dealt with the outside salesman exemption to the overtime pay requirements under the FLSA.[105] DOL had explained the meaning of "outside salesman" in several regulations.[106] Although the Court did not expressly state that the agency's regulations were ambiguous, an "inference of regulatory ambiguity" was warranted "because the Court felt it necessary to address the question 'whether the DOL's interpretation of the regulations [was] owed deference under *Auer*.'"[107] At issue was whether the outside salesman exemption applied to pharmaceutical sales representatives.[108] The district court held that the petitioners qualified as outside salesmen; the petitioners argued that this interpretation contradicted an interpretation "which the DOL had announced in an *amicus* brief filed in a similar action" in another circuit.[109]

Attempting to rationalize the constitutional issues inherent in *Auer* deference, the Court noted that deference would be "undoubtedly inappropriate . . . when the agency's interpretation is plainly erroneous or inconsistent with the regulation."[110] In the instant case, deference was not appropriate due to the fact that the agency had modified its position, resulting in unfair surprise to the regulated party.[111] The liability would attach to "conduct that occurred well before that interpretation was announced."[112] Further, DOL had not initiated any enforcement action based on the practice of treating pharmaceutical representatives as outside salesmen.[113] Instead, the Court's analysis relied on *Mead* and considered DOL's interpretation "proportional to its power to persuade."[114] Importantly, the potential harm identified in *SmithKline* stems not from any unique feature of DOL's conduct in that instance, but instead from the general practice of affording binding deference to interpretive rules—even those set forth in litigation.

Finally, in *Decker v. Northwest Environmental Defense Center*, the Court considered whether national pollution discharge elimination system (NPDES) permits would be required for discharge of "channeled stormwater runoff from logging roads."[115] The Clean Water Act (CWA)[116] exempted "discharges composed entirely of stormwater" unless those discharges were "associated with industrial activity."[117] In its amicus brief, EPA advanced an interpretation excluding logging road discharges from the category of industrial runoff requiring an NPDES permit.[118] Applying *Auer*, the Court stated that "an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail."[119] So long as the agency's interpretation was not erroneous or inconsistent, the Court felt bound to agree. As a result of *Auer* deference, "the Court never actually had to resolve which was the best or fairest reading of the regulation."[120]

Concurring in part and dissenting in part, Justice Scalia saw *Decker* as illuminating the constitutional flaws within *Auer* deference "in a particularly vivid way."[121] The rationales put forth in support of *Auer* did not serve to correct these flaws. As to the most common rationale, that the agency has special insight into its own regulations, Justice Scalia noted that regulated parties "are bound *by what [the rules] say*, not by the unexpressed intention of those who made them."[122] In *Decker*, EPA's application of the Industrial Stormwater Rule to logging operations, which was binding on both the judiciary and regulated parties, came by way of "an amicus brief drafted nearly two decades after it promulgated the rule."[123]

Further, although the Agency may in fact have expertise in administering "complex and highly technical regulatory" programs, that expertise did not explain why "the power to write a law and the power to interpret it" should "rest in the same hands,"[124] Justice Scalia wrote. The increasingly technical nature of environmental policymaking may suggest that environmental regulations especially should receive some consideration by courts, due to an agency's unique ability to engage in extensive fact-finding and consult scientific authorities. Trial courts, on the other hand, generally suffer a diminished capacity to engage in

101. *Id.*
102. *Id.* at 2266 (Scalia, J., concurring).
103. *Id.*
104. *Id.*
105. 132 S. Ct. 2156, 2158 (2012) (*citing* 29 U.S.C. §§207(a), 213(a)(1)).
106. *See* 29 C.F.R. §§541.500, 541.500(a)(1)-(2), 541.501(b) & 541.503(a).
107. Healy, *supra* note 59, at 667 (*citing SmithKline*, 132 S. Ct. at 2165).
108. *SmithKline*, 132 S. Ct. at 2158.
109. *Id.* at 2159.
110. *Id.* at 2166 (internal citation omitted).
111. *Id.* at 2167.
112. *Id.*
113. *Id.* at 2159-60.
114. *Id.* at 2160 (*citing* United States v. Mead Corp., 533 U.S. 218, 228 (2001)).
115. 133 S. Ct. 1326, 1330, 43 ELR 20062 (2013).
116. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
117. *Decker*, 133 S. Ct. at 1330 (*citing* 33 U.S.C. §§1342(p)(1), 1342(p)(2)(B)).
118. *Id.* at 1331.
119. *Id.* at 1337.
120. Daniel Mensher, *With Friends Like These: The Trouble With* Auer *Deference*, 43 Envtl. L. Rev, 849, 862 (2013).
121. *Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part).
122. *Id.* at 1340 (Scalia, J., concurring in part and dissenting in part).
123. Mensher, *supra* note 120, at 862 (*citing Decker*, 133 S. Ct. at 1337).
124. *Decker*, 133 S. Ct. at 1340-41 (Scalia, J., concurring in part and dissenting in part).

detailed scientific fact-finding as a result of their general nature and heavy caseloads.

Justice Scalia saw the benefits of *Auer* deference as largely pragmatic. First and foremost, where the agency's interpretation binds the judiciary, the "country need not endure the uncertainty produced by divergent views of numerous district courts."[125] In an environmental context, national stability may prevent widely disparate environmental outcomes in different regions of the United States. Stability could also theoretically prevent regulated parties from manipulating EPA's standards by simply moving to a different state. Even without *Auer*, however, an agency's power to amend its own regulations could prevent district courts from applying widely disparate versions of EPA rules.[126] The danger of widely disparate outcomes could also be prevented with the issuance of unambiguous rules through notice-and-comment rulemaking.

V. *Perez*

On March 9, 2015, Justices Thomas, Samuel Alito, and Scalia again expressed a strong desire to revisit *Auer* in their concurrences in *Perez*. In that case, the Court revisited the applicability of an exemption to the FLSA overtime pay provision as applied to a specific category of employees,[127] focusing on the applicability of a DOL regulatory exemption for executive or administrative employees to mortgage-loan officers.[128] If the administrative exemption applied, employers would not have to satisfy overtime pay requirements for mortgage-loan officers.[129] In 1999 and 2001, DOL "issued letters opining that mortgage-loan officers *do not* qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act of 1938."[130] DOL modified the underlying regulation in 2004 and announced a new interpretation in 2006, stating that mortgage-loan officers *did* qualify for the administrative exemption.[131]

The Mortgage Bankers Association argued that DOL's reversal of its stance regarding the administrative exemption violated the D.C. Circuit's doctrine, announced in *Paralyzed Veterans of America v. D.C. Arena, L.P.*, that required an agency to follow notice-and-comment rulemaking "when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation."[132] The *Paralyzed Veterans* doctrine theoretically corrected for the risk of unfair surprise that explained the denial of *Auer* deference in *SmithKline*.[133] Prior to *Perez*, the *Paralyzed Veterans* doctrine applied even when the first interpretation was not issued through notice-and-comment rulemaking.[134]

Reversing the D.C. Circuit's reliance on *Paralyzed Veterans*, a majority of the Court held that *Paralyzed Veterans* contradicted the APA's distinction between formal and informal rulemaking.[135] Further, the APA expressly "requires agencies to use the same procedures when they amend or repeal a rule as they used to issue the rule."[136] Allowing the D.C. Circuit to attempt to regulate the use of interpretive rulemaking in this way violated the plain text of the APA, despite its pragmatic rationality.

The Court relied in part on the concept of *Auer* deference, wherein the agency's interpretation of its own regulation received deference from the Court even though that interpretation was inconsistent with a past interpretation.[137] The majority acknowledged, however, that the *Paralyzed Veterans* doctrine "creates a judge-made procedural right that is inconsistent with Congress' standards."[138] This same reasoning readily explains withholding binding deference from interpretive rules, since they are "issued . . . to advise the public of the agency's construction of the statutes and rules which it administers," are not subject to notice and comment, and "do not have the force and effect of law."[139] While interpretive rules "do not have the force of law," allowing them to bind courts vests binding rules with the cloak of agency interpretation.

In his concurrence, Justice Scalia commented that the APA itself "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."[140] As one scholar puts it, when courts have the power to resolve regulatory ambiguities, administrative agencies are foreclosed "from being able to make law (divide the cake) in a way that the agency itself can later apply unfairly (distributing the pieces)."[141] Further, Justice Scalia revisited his past statements that *Auer* deference may violate separation of powers: "an agency may not use interpretive rules to *bind* the public by making law, because it remains the responsibility of the court to decide whether the law means what the agency says it means."[142] If an agency has both the power to promulgate regulations and to define their meaning, interpretive rules not only become imbued with the full force of law, but also subsume the role of the judiciary. Although the *Perez* majority acknowledges that this procedural convenience "comes at a price," *Auer* deference subsidizes those costs.

Key to Justice Scalia's concerns was the fact that these "judge-made doctrines of deference" have "revolutionized

125. *Id.* at 1341.
126. *Id.* at 1341-42.
127. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1201, 45 ELR 20050 (2015).
128. *Id.*
129. *Id.*
130. *Id.* (emphasis added).
131. *Id.*
132. *Id.*; *see* Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579 (D.C. Cir. 1997).
133. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).
134. *Id.* at 1201
135. *Id.* at 1203.
136. *Id.* at 1201 (*citing* 5 U.S.C. §551(5)).
137. *Id.* at 1208 n.4.
138. *Id.* at 1202.
139. *Id.* at 1201 (*citing* Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 99 (1995).
140. *Id.* at 1211 (Scalia, J., concurring in the judgment).
141. Healy, *supra* note 59, at 681 (*citing* James Harrington, The Commonwealth of Oceana (1656), *reprinted in* Cambridge Texts in the History of Political Thought 22, 24 (James G. Pocock ed., 1992)).
142. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1211, 45 ELR 20050 (2015) (Scalia, J., concurring in the judgment).

the import of interpretive rules' exemption from notice-and-comment rulemaking."[143] Agency statements promulgated through notice-and-comment rulemaking, although legally binding, do not present the same notice problems as interpretive rules enforced through binding deference.

Justice Thomas, writing separately, noted that the *Seminole Rock* family of cases requires courts "to defer to agency interpretations of regulations, thus, as happened in these cases, giving legal effect to the interpretations rather than the regulations themselves."[144] In a previous dissent, Justice Thomas had opined that "agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law."[145] The dissenting Justices have repeatedly indicated a desire to revisit the extension of deference to an agency's interpretation of its own regulations. Even the majority opinions over the past decade have demonstrated that the Court has been withholding deference in situations not contemplated by the test set forth in *Auer* itself.

VI. Implications for Environmental Law

Within the next five years, the possibility exists for simultaneous changes in EPA administration, control of the White House, issuance of new regulations on greenhouse gas emissions, and potentially a change in composition of the Supreme Court. A change in the Court's composition could redistribute its votes in such a way as to transform consistent dissenting opinions into the majority. The convergence of these factors represents a unique opportunity to reground environmental law in constitutionally sound practices while simultaneously preparing the field for the modern era.

Upcoming environmental regulations could answer a call by various, largely conservative, members of the Court for a fully briefed discussion of *Auer* deference.[146] Not only does EPA extensively regulate a wide variety of parties through its regulations, but environmental law is also intrinsically linked to complex economic and scientific questions that courts cannot readily resolve. Greenhouse gas regulations represent a new regulatory framework, based on complex science, with as-yet undetermined effects on regulated parties. Greenhouse gas regulations will certainly face major challenges on statutory interpretation grounds, but they will also demand a high volume of interpretive issuances from EPA should they survive preliminary interpretive challenges. Even if the Court does not revisit *Auer* in an environmental context, a lower deference standard will come to bear on the relationship among citizens, regulated parties, and EPA in the coming years.

The precarious status of *Auer* deference could impact environmental law in the following ways. First, reduced deference to agency interpretations could facilitate suits by citizen groups as well as regulated parties; relatedly, this would also require EPA to provide more vigorous support for its positions. Second, EPA's promulgation of interpretive rules would likely change if the Agency had to satisfy a *Skidmore*-type test to receive judicial weight. Finally, the situation between EPA and regulated parties demonstrates that the APA may be out of step with its original scope, which could potentially result in future modification of the APA to better address the modern administrative state.

A. *Facilitating Citizen Suits by Weakening Deference*

In several instances, *Auer* deference has impeded the ability of both citizen groups and regulated parties to challenge agency interpretations. Knowledge that the agency's interpretation will receive deference may also have a chilling effect on citizen suits, including those that could have successfully demonstrated that deference was not warranted. If EPA's interpretation did not receive strong deference, or had to satisfy conditions before receiving deference, citizen groups could present competing interpretations to the courts for consideration. Citizen groups would also have lower entry barriers to challenging interpretations that either do not best fit or plainly follow from the plain language of the regulation at issue. Returning ultimate control to the court engages the courts in the administrative process, increases administrative accountability, and provides important clarity and guidance to regulated parties.

1. *Auer* Deference Prevents Citizen Groups From Challenging Agency Interpretations

In *Biodiversity Conservation Alliance v. Jiron*, a citizen group attempted to challenge the U.S. Forest Service's interpretation of a regulation promulgated pursuant to the National Forest Management Act (NFMA).[147] The NFMA states that the Forest Service must develop and implement a land and resource management plan (forest plan).[148] In 1982, a rule was issued requiring the Forest Service to "promote the diversity of species by maintaining 'viable populations of existing and desired' plants and animals."[149] The rule was amended in 2005; however, the 2005 rule allowed the Forest Service to continue using the 1982 forest plans so long as they "consider[ed] data and analysis relating to habitat unless the plan specifically require[d] population monitoring or population surveys for the species."[150] At issue was whether either of these provisions "imposed a duty on the Forest Service to collect or consider population data or create population objectives to ensure the viabil-

143. *Id.*
144. *Id.* at 1213 (Thomas, J., concurring in the judgment).
145. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).
146. Other areas of environmental law, such as NEPA, also represent fertile ground for a discussion and delineation of the boundary between agency guidance and regulations, as well as the deference accorded to each. *See* Colburn, *supra* note 34.
147. 762 F.3d 1036 (10th Cir. 2014). The NFMA is codified at 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16.
148. *Jiron*, 762 F.3d at 1049 (*citing* 16 U.S.C. §1604(a) & (i)).
149. *Id.* at 1049 (*citing* 36 C.F.R. §219.19 (1982)).
150. *Id.* at 1050 (*citing* 36 C.F.R. §219.14(f) (2005)).

ity of species," as argued by the Biodiversity Conservation Alliance (BCA).[151]

Auer deference defeated the citizen suit despite the fact that the interpretation argued by the BCA represented the most intuitive reading of the regulation's language.[152] The regulation repeatedly relied on terms such as "minimum number" and "estimated number."[153] Because the regulation did not "plainly direct the Forest Service to collect or consider population data or create population objectives," it did not matter that the "language may reasonably be read as having imposed a population data requirement."[154] The BCA could not prevail because it did not attempt to show "that the Forest Service's interpretation is unreasonable or plainly erroneous,"[155] the U.S. Court of Appeals for the Tenth Circuit held. Even though *Chevron* deference would also have defeated the suit, the parties have numerous other avenues to take a role in the formal rulemaking process and to challenge the agency's compliance with the procedures required by the APA. Cases like *Jiron*, where more than one reasonable interpretation of a regulation's language exists, represent the broadest category of cases where citizen groups could benefit from reversal of *Auer*.

2. A *Skidmore* Approach Facilitates Suits and Corrects Constitutional Defects

Without *Auer*, a citizen group would not have to establish that the agency's interpretation was "plainly erroneous or inconsistent with the regulation" in order to challenge the agency's interpretation.[156] This would open a broader category of interpretations to judicial considerations. Similarly, linking the level of deference to the actions taken by the agency would create a deference spectrum. On one end, the outcomes would mirror those under *Auer*; however, regulated parties and citizen groups would be provided with additional explanatory material from the agencies.

On the other end, where the agency's interpretation does not warrant judicial weight, citizens could put forth an equally reasonable or more reasonable alternative for consideration by the court. At present, "an interpretation offered in a statement to a congressional committee or in an amicus brief carries the same weight as a regulatory preamble published at the same time an agency issues a new rule."[157] While this may not seem patently unconstitutional, a vast difference exists in terms of the notice provided to regulated parties.

Adopting the most reasonable reading of the regulatory language serves the important constitutional function of aligning the regulation with what a regulated party would reasonably expect upon reading its language. Where the agency's interpretation does not align with the most reasonable interpretation of the language, it is unlikely that regulated parties had sufficient notice of what they would have to do to comply with the regulation. Improving the alignment between regulatory language and application will assist regulated parties in conforming their behavior to the regulatory landscape they occupy.

Even if a *Skidmore*-type analysis would result in the same outcome as the Court's current equivocal application of *Auer*, regulated parties and citizen groups would still benefit from the increased clarity of administrative behavior. Providing insight into EPA's reasoning would allow parties to predict related applications of the interpretation and engage on a more meaningful level with the scientific and economic supports for EPA's interpretation. *Auer* deference, on the other hand, increases agency decisionmaking opacity to the detriment of regulated parties.

B. Future Interpretive Rules

Without the ability to receive binding deference for interpretive rules, EPA may choose to rely less on interpretive rulemaking and more on notice-and-comment rulemaking. Following notice-and-comment procedures would still allow the Agency to obtain strong deference for its rule, but only by complying with the procedures laid out in the APA. Doing so could also protect EPA against the uncertain impact that regime changes could have if interpretive rules no longer receive binding deference. On one hand, *Auer* deference can enable a past regime to continue to control the outcome through an interpretive statement. Interpretations issued by one regime cannot be easily reversed based on the threat of unfair surprise discussed in *Smith-Kline*. On the other hand, with less deference, agencies may be more prone to promulgating binding statements through notice-and-comment procedures to ensure that a new regime cannot reverse its interpretations. When using interpretive rulemaking, EPA should prepare to satisfy conditions, possibly shaped by *Skidmore*, that could afford judicial weight in the event that the Court overrules *Auer*.

Even if the Court determines that the *Auer* doctrine should be overruled, it may still provide some limited judicial weight to interpretive rules. For interpretive rules, one popular alternative suggested by Daniel Mensher, involves considering a combination of deference factors similar to those applied in a *Skidmore* analysis.[158] Relevant factors could include both the participation of regulated parties and the level of guidance provided to those parties during the interpretive rulemaking process.[159] This option returns ultimate authority to the courts and supports increased involvement by regulated parties and interested citizens.[160] An opportunity for interaction between regulated parties and agencies represents a key benefit of notice-and-comment rulemaking. Under *Auer*, as one scholar puts it, "the agency is able to avoid the notice and comment rule mak-

151. *Id.* at 1063.
152. *Id.*
153. *Id.* (internal citation omitted).
154. *Id.*
155. *Id.* at 1067.
156. Auer v. Robbins, 519 U.S. 452, 461 (1997).
157. Mensher, *supra* note 120, at 863.
158. *Id.* at 869.
159. *Id.*
160. Healy, *supra* note 59, at 679.

ing process and the interaction with regulated parties."[161] Mensher's alternative framework protects the primary values encompassed by formal rulemaking while preserving administrative flexibility.

Applying this schema to *Decker* demonstrates how the outcome could differ under this metric. In *Decker*, neither the Northwest Environmental Defense Center nor the regulated parties had any notice prior to the filing of the complaint that "EPA would construe the definition of 'industrial activity' to exclude logging."[162] Since the interpretation arose in a brief drafted by EPA's attorneys, the public played no part in arriving at this interpretation.[163] Regulated parties received no guidance from this interpretation because it arose only after the regulated parties had already acted. Under Mensher's framework, EPA's interpretation would likely receive little, if any, weight in the proceedings.

Requiring some process before extending deference again supports the ability of citizen groups to challenge EPA's rules. In the same way that a *Skidmore* analysis would extend judicial deference only to the extent that the agency provides evidence to support its opinion and engages regulated parties, increased reliance on notice-and-comment rulemaking will increase the opportunities for citizen groups and regulated parties to challenge EPA procedures that do not satisfy the APA's requirements. Under the *Auer* framework, no procedural formality protects the regulated party's right to challenge EPA.

C. Impact on the APA

The difficulties caused by the conflict between *Auer* deference and heavy reliance on interpretive rulemaking to satisfy increased demand on agencies illuminates the divide between modern agencies and the role of agencies contemplated by the APA. The APA's drafters intended interpretive statements not to have the full "force and effect of law," but simply to provide guidance to regulated parties in their compliance with legislative rules.[164] This likely explains the exception to notice-and-comment procedures provided for informal or interpretive rules.[165]

Assuming, arguendo, that the modern role filled by agencies far exceeds the scope of that role contemplated by the APA, two primary options exist. One option is that the Court could require agencies to comply with formal notice-and-comment rulemaking in order to secure deference. This option is unlikely to be adopted because of the time and expense involved in drafting a formal rule. If the Court were to require a return to notice-and-comment rulemaking instead of allowing an agency to promulgate informal rules, agencies would either have to increase staff or suffer dramatically longer time lines. Increasing staff necessarily entails increasing funding for all federal agencies, while enduring delays in rulemaking threatens to prejudice regulated parties and hinder the ability of agencies to keep up with contemporary concerns.

The second option is for Congress to modify the text of the APA to account for agencies' need for interpretive rulemaking. On April 28, 2015, the Senate Subcommittee on Regulatory Affairs and Federal Management heard testimony from Prof. Ronald Levin and Andrew Grossman, who shared opposing perspectives regarding the role of administrative deference in the contemporary administrative state.[166] While Grossman expressed concern about the scope and weight of deference accorded under *Auer* and *Seminole Rock*, Levin argued that *Auer*'s critics overstate its constitutional risks and, regardless, that Congress should leave any modification to the Court as described above. Committee members acknowledged the dissenting opinions (discussed above), but questioned the Court's capacity to resolve the issue, due in part to the multiplicity of viewpoints taken by the Court in recent years. As of August 2015, the Committee has taken no further action toward a legislative solution to these issues.

In the event that the Court or Congress does elect to modify the deference framework, interpretive rulemaking could entail some requirements, perhaps modeled on a *Skidmore* metric as described above. Compliance with these requirements would allow the agency to receive limited deference to its interpretation. Failure to comply with requirements would not invalidate the agency's interpretation entirely, but would allow a citizen or regulated party to present alternatives to a court for consideration. Optional conditions would create a textual distinction between the varying purposes served by interpretive rules. If the agency intends to fill a gap in a legislative rule with binding effect, the agency could satisfy the optional conditions. If the agency intended simply to advise a regulated party on the application of a legislative rule, the agency would not necessarily need to satisfy those conditions. Although this still allows the agency to control, at least in part, the level of deference afforded to its own interpretation, an improvement over the present system exists in the fact that regulated parties and citizens would be able to determine at the outset what level of deference could be expected should they choose to challenge the interpretation.

VII. Conclusion

Opinions by concurring Justices in *Perez* and the death of the *Paralyzed Veterans* doctrine have created a vacuum in

161. *Id*. at 675; *see* 5 U.S.C. §553 (2012) (detailing process for informal rulemaking).
162. Mensher, *supra* note 120, at 870. *See* Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326, 43 ELR 20062 (2013).
163. Mensher, *supra* note 120, at 870.
164. *See* Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 99 (1995).
165. 5 U.S.C. §553(b).
166. *Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs & Federal Mgmt. of the S. Comm. on Homeland Security & Governmental Affairs*, 114th Cong. 1 (2015) (statements of Ronald Levin and Andrew Grossman), *available at* http://www.hsgac.senate.gov/hearings/examining-the-proper-role-of-judicial-review-in-the-federal-regulatory-process. Written testimony from Professor Levin and Grossman can be accessed online at http://www.hsgac.senate.gov/download/?id=bf37fcca-9672-4c1c-9cdc-fde2309b1eb6, and http://www.hsgac.senate.gov/download/?id=00fd3227-284a-453d-9a0f-f7b9b660f7b0, respectively.

which attempts to correct the constitutional deficiencies of *Auer* deference can no longer continue. The precarious position held by *Auer* offers an opportunity to revisit the role of administrative agencies in lawmaking, a call that may be answered by an environmental case.

A number of implications arise for both citizens and EPA. First, without *Auer* deference, citizen groups and regulated parties may have increased opportunities to challenge agency interpretations. Second, EPA should prepare for a potential doctrinal change by relying on notice-and-comment rulemaking and fully supporting its interpretive rules. Although the loss of *Auer* deference could result in a temporary de-unification of environmental law by circuit, EPA could correct for inconsistent applications through notice-and-comment rulemaking. Finally, returning decisionmaking power over interpretations of agency regulations to the courts and requiring that agencies more fully support their interpretations would enable citizens and regulated parties to play a more decisive role in interpretive rulemaking.

The Court's recent decisions have inconsistently denied or altered *Auer* deference for pragmatic reasons, despite the fact that, if *Auer* applies, the agency's interpretation should not be overturned unless "plainly erroneous or inconsistent with the regulation."[167] Although the Court has in practice modified *Auer* to sidestep its constitutional deficiencies, recent opinions offer little clarity for regulated parties. A modification or reversal of *Auer* would better inform regulated parties as to where they stand vis-à-vis interpretive rulemaking. Even if the Court simply announces a guiding principle behind its recent decisions, the notice provided to regulated parties would represent a vast improvement to the *Auer* doctrine.

167. Auer v. Robbins, 519 U.S. 452, 461 (1997).