

THE FUTURE OF DEFERENCE

Richard J. Pierce, Jr.¹

Abstract

In this essay, Professor Pierce describes the history of the deference doctrines the Supreme Court has announced and applied to agency interpretations of ambiguous statutes and rules over the last seventy years. He predicts that the Court will continue to reduce the scope and strength of those doctrines, in part because of increasing concern about the temporal inconsistencies created by those doctrines. In the current highly polarized political environment, deference doctrines create a legal environment in which the "law" applicable to many agency actions changes every time a President of one party replaces a President of the other party.

For over seventy years, the Supreme Court has applied a variety of deference doctrines when it reviews actions taken by agencies. This article will focus primarily on the origins, bases, effects, and likely future of three of those doctrines--the *Skidmore* doctrine, first announced and applied in 1944;² the *Chevron* doctrine, first announced and applied in 1984;³ and the *Seminole Rock* doctrine, first announced and applied in 1945⁴ and reaffirmed and renamed the *Auer* doctrine in 1997.⁵

Section I describes each of the doctrines, along with the purposes and effects of each. Section II describes the ways in which the Court has applied each of the doctrines over time, with particular emphasis on opinions it has issued over the last four years. Section II concludes that the Court is in the process of eliminating or weakening significantly two of the doctrines because the Court dislikes one of the effects of those doctrines--changes in law over time due to the differing political perspectives of

¹ Lyle T. Alverson Professor of Law, George Washington University. I am indebted to Marija Dordeska, Rob Glicksman, Emily Hammond, and Alexandra Klass for providing helpful comments on an earlier version of this essay.

² *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

³ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁴ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

⁵ *Auer v. Robbins*, 519 U.S. 452 (1997).

Presidential Administrations. Section III discusses the potential good and bad effects of the doctrinal changes predicted in section II. The article concludes by agreeing with Peter Strauss's opinion that the beneficial effects of the changes may be greater than the adverse effects when the Supreme Court reviews agency actions, but that the adverse effects of the changes exceed the beneficial effects when lower courts review agency actions.⁶ It ends with a question: Can or should the Supreme Court instruct lower courts to act in a manner inconsistent with the Supreme Court's actions?

I. The Doctrines, Their Purposes, and Their Effects

A. *Skidmore*

In its 1944 opinion in *Skidmore v. Swift and Co.* the Court announced that:

The weight [accorded to an agency judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier, and later, pronouncements, and all those factors that give it power to persuade, if lacking power to control.⁷

The test was based on the comparative advantage of specialized agencies over generalist courts because of agencies' greater subject matter expertise and greater experience in implementing a statutory regime. The results of applications of the test suggest that it is deferential to agency decisions. Depending on the time period studied, researchers have

⁶ Cf. Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093 (1987) (Strauss has expressed this particular opinion only in emails so far, but it follows logically from the points he makes in this article.) See discussion in text at notes 13-15, *infra*.

⁷ 323 U.S. at 140.

found that courts have upheld agency actions in 55% to 73% of cases.⁸ The *Skidmore* test has also produced inconsistent and unpredictable results, however.⁹

B. *Chevron*

In its 1984 opinion in *Chevron v. Natural Resources Defense Council*, the Court announced a new test that most people believed to be a replacement for the *Skidmore* test:

When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency's answer is based on a permissible construction of the statute.¹⁰

In other parts of the opinion, the court replaced "permissible" with "reasonable."¹¹ The second step of the *Chevron* test is a restatement of the test to determine whether an agency action is "reasonable" or arbitrary and capricious that the Court announced in its 1983 opinion in *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Automobile Insurance Co.*:

⁸ Richard Pierce, What Do the Studies of Judicial Review of Agency Actions Mean? 63 Ad. L. Rev. 77, 83-84 (2011).

⁹ Kristin Hickman & Matthew Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235 (2007).

¹⁰ 467 U.S. at 842-43.

¹¹ Id. at 844.

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹²

The Court based the *Chevron* test on constitutional and political grounds as well as on the basis of comparative expertise. The Court distinguished between issues of law that a Court can resolve by determining the intent of Congress and issues of policy that should be resolved by the politically accountable Executive Branch rather than the politically unaccountable Judicial Branch when Congress has declined to resolve the issue.¹³

The *Chevron* test has another beneficial effect in addition to the enhanced political accountability for policy decisions that it yields. By giving agencies the discretion to choose among several "reasonable" interpretations of an ambiguous statute, the *Chevron* test reduces geographic differences in the meaning given to national statutes by reducing the number of splits among the circuits that were produced by circuit court applications of the less deferential *Skidmore* test.¹⁴ At least for a time, *Chevron* had that effect as it was applied by circuit courts. A study of applications of *Chevron* by circuit courts the year after the court decided *Chevron* found that the rate at which courts upheld agency interpretations of statutes was 81%--a rate between 10% and 30% greater than the

¹² 463 U.S. 29,43 (1983). See also *Judalang v. Holder*, 132 S.Ct. 476, 483 n.7 (explicitly equating step two of *Chevron* with the *State Farm* test).

¹³ 467 U.S. at 865-66.

¹⁴ Strauss, *supra*. note 6.

rate at which courts upheld agency actions through application of the *Skidmore* test.¹⁵ Since there is only one agency and many circuit courts, that increased rate of upholding agency statutory interpretations necessarily produced increased geographic uniformity in interpretation of national statutes.

Chevron also had another effect that is more controversial. It created a legal regime in which a new Administration could change the interpretation of an ambiguous provision of a statute as long as it engaged in the process of reasoned decision-making required by *State Farm*. Indeed, that is what the agency did and the Court unanimously upheld in *Chevron*. The Court explicitly confirmed that effect in its 2005 opinion in *National Cable & Telecomm. Ass'n v. Brand X*.¹⁶ The Court held that a judicial decision that upholds an agency interpretation does not preclude an agency from changing its interpretation if it provides adequate reasons for doing so. *Brand X* made it clear that the only kind of judicial opinion involving interpretation of an agency-administered statute that precludes an agency from adopting a different interpretation is one in which the court concludes that there is one and only one permissible interpretation of the statute. Thus, *Chevron* increased temporal inconsistency in interpretation of national statutes at the same time that it decreased geographic inconsistency in interpretation of national statutes.

C. *Auer*

The Court first announced what is now called the *Auer* doctrine in its 1945 opinion in *Bowles v. Seminole Rock & Sand Co.*¹⁷ The Court inexplicably changed the

¹⁵ Peter Schuck & Donald Elliott, To the *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1038.

¹⁶ 545 U.S. 967 (2005). See also Richard Pierce, Reconciling *Chevron* and Stare Decisis, 85 Geo. L. J. 2225 (1997).

¹⁷ 325 U.S. 410 (1945).

name of the doctrine to the *Auer* doctrine in its 1997 opinion in *Auer v. Robbins*.¹⁸ The *Auer* doctrine is similar in its effects to the *Chevron* doctrine but it applies not to agency interpretations of agency-administered statutes but to agency interpretations of agency rules. In the process of reviewing agency interpretations of agency rules the Court instructed courts to give the agency interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."

The Court did not give reasons for the *Auer* test when it announced the test but many scholars have drawn the inference that the test was based primarily on comparative institutional expertise with respect to the field in which the rule was issued and the relationship of the rule to the statute the agency was implementing.¹⁹ The test has had effects similar to the effects of the *Chevron* test.

The *Auer* doctrine has produced a rate of judicial upholding of agency rules that is at least as high as the rate at which courts uphold agency interpretations of agency-administered statutes. A study of Supreme Court applications of *Auer* between 1989 and 2005 found that the Supreme Court upheld 90.9% of the interpretations it reviewed.²⁰ The sample size was small, however, so it is risky to attach much significance to that extraordinarily high rate of upholding. The Court reviewed only eleven agency interpretations of rules during that period. An empirical study of 219 applications of *Auer* by district courts and circuit courts during the periods 1999-2001 and 2005-2007 provides a more reliable indication of the effect of *Auer*.²¹ That study found that lower courts

¹⁸ 519 U.S. 452 (1997).

¹⁹ E.g., Richard Pierce & Joshua Weiss, An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Ad. L. Rev. 515, 517 (2011).

²⁰ William Eskridge & Lauren Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamden*, 96 Geo. L. J. 1083, 1142 (2008).

²¹ Pierce & Weiss, *supra*. note 19.

upheld 76% of agency interpretations of agency rules--a rate slightly higher than the rate at which courts upheld agency interpretations of statutes when they applied *Chevron*.²²

Auer also has the same effects as *Chevron* in the context of agency interpretations of agency rules. It reduces geographic differences in interpretation of rules that are supposed to have a uniform national meaning but it increases temporal differences in interpretation of rules.²³

II. Questions Raised by Judicial Applications of Deference Doctrines

A. *Chevron* and *Skidmore* Deference

This section will discuss judicial applications of both *Chevron* and *Skidmore* because the two doctrines became intertwined in 2000. Circuit courts immediately began to apply *Chevron* in 1984, with a resulting significant increase in the percentage of agency statutory interpretations that they upheld and a decrease in geographic differences in the meaning given to national statutes that were intended to have the same meaning throughout the country.²⁴ By contrast to the treatment of the *Chevron* doctrine by circuit courts, the Supreme Court has never consistently applied the *Chevron* doctrine.

The first indication that the Court did not fully embrace the *Chevron* doctrine came just three years after the Court decided *Chevron*, ironically in an opinion written by Justice Stevens, the author of the *Chevron* opinion. In *INS v. Cardoza-Fonseca*,²⁵ Justice Stevens authored a majority opinion that seemed to elevate a puzzling footnote in the *Chevron* opinion to a holding while it seemed to demote the test the Court announced in

²² Id. at 519.

²³ E.g. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (upholding agency interpretation of rule that was inconsistent with agency's prior interpretation).

²⁴ Text at notes 14-15, *supra*.

²⁵ 480 U.S. 421 (1987).

Chevron to the status of a footnote. The question before the Court was whether to uphold an agency interpretation of a statute to which *Chevron* deference obviously applied, but Justice Steven approached the question as if the agency interpretation did not exist. As Justice Stevens put it: "The question is a pure question of law for the courts to decide . . . [e]mploying traditional tools of statutory construction."²⁶ He had used similar words in a footnote to the test he announced on behalf of a unanimous Court in *Chevron*.²⁷ Justice Scalia wrote a concurring opinion in which he characterized the majority's approach as "an evisceration of *Chevron*."²⁸

The Court has been inconsistent in its treatment of *Chevron* in every Term since 1987.²⁹ Sometimes it applies a strong version of *Chevron*;³⁰ more often the Justices disagree about both the applicability and the effect of *Chevron*;³¹ and, in many cases the Court simply ignores *Chevron* completely in a situation in which it obviously applies.³²

In the period 2000 to 2002, the Court issued opinions that added a great deal of confusion to the interpretation, applicability, and scope of its deference doctrines. In *Christensen v. Harris County*,³³ a majority of Justices held that *Chevron* applies only to some agency statutory interpretations and that *Skidmore* applies to others.³⁴ Justice Scalia

²⁶ Id. at 446.

²⁷ 467 U.S. at 843, note 9.

²⁸ Id. at 454.

²⁹ For discussion of the Court's erratic treatment of *Chevron* in scores of cases, see Richard Pierce, I Administrative Law Treatise §§3.5 and 3.6 (5th ed. 2010); Kristin Hickman & Richard Pierce, 2015 Cumulative Supplement to Administrative Law Treatise §§3.5 and 3.6.

³⁰ E.g., *City of Arlington v. FCC*, 133 S.Ct.1863 (2013); *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011).

³¹ E.g., *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014); *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014); *United States v. Home Concrete & Supply*, 132 S.Ct. 1836 (2012).

³² E.g., *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. ____ (2015); *United States v. Apel*, 134 S. Ct. 1144 (2014); *Carachuri-Rosendo v. Holder*, 560 U.S. 63 (2010).

³³ 529 U.S. 576 (2000).

³⁴ Id. at 586-87.

wrote a dissenting opinion in which he criticized the majority for resurrecting the "anachronistic" *Skidmore* doctrine that he believed the Court had replaced with the *Chevron* doctrine in 1984.³⁵ The Justices then divided three ways in expressing widely differing opinions about the appropriate scope and effect of deference doctrines.³⁶

A year later, in *United States v. Mead Corp.*,³⁷ a majority again held that *Skidmore* rather than *Chevron* applies to some agency statutory interpretations. The majority noted that "[t]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication," but it acknowledged that "we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."³⁸

Justice Scalia dissented again. He criticized the majority for making "an avulsive change in judicial review of federal administrative action,"³⁹ by replacing *Chevron* "with that test most beloved by a court unwilling to be held to rules . . . th' ol' totality of the circumstances test."⁴⁰ He characterized the *Skidmore* test as "an empty truism and a trifling statement of the obvious," and criticized the majority for announcing criteria to determine whether *Chevron* or *Skidmore* apply that are "confusing" and "utterly flabb[y]."⁴¹

³⁵ Id. at 588.

³⁶ Id. at 588-97.

³⁷ 533 U.S. 218 (2001).

³⁸ Id. at 230-32.

³⁹ Id. at 239.

⁴⁰ Id. at 241.

⁴¹ Id. at 245, 250.

A year after the Court issued its opinion in *Mead*, a majority seemed to merge and to blend the *Chevron* and *Skidmore* doctrines in *Barnhart v. Walton*.⁴² The majority concluded that an agency's "longstanding" statutory interpretation was entitled to *Chevron* deference even though it was not announced in a rulemaking or in a formal adjudication because of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to 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 . . ."43

In a concurring opinion, Justice Scalia agreed that the interpretation at issue was due *Chevron* deference, but he criticized the majority's reference to "anachronis[ti]c" factors like whether the agency interpretation is "longstanding," as "a relic of the pre-*Chevron* days when there was thought to be only one 'correct' interpretation of a statutory text."⁴⁴ He noted that the interpretation the Court upheld in the *Chevron* case itself was a recent change from a prior interpretation.⁴⁵

In the meantime, the circuit courts were doing their best to comply with the Supreme Court's constantly changing approach to deference. They began by applying *Chevron* consistently, with a resulting large increase in the proportion of agency statutory interpretations they upheld.⁴⁶ As they began to observe the inconsistency in the Supreme Court's approach to *Chevron*, however, they followed the Court's lead and became less

⁴² 535 U.S. 212 (2002).

⁴³ *Id.* at 221.

⁴⁴ *Id.* at 226.

⁴⁵ *Id.* at 226.

⁴⁶ Schuck & Elliott, *supra*. note 15, at 1038 (81% in 1985).

consistent in their applications of *Chevron*, with a resulting reduction in the proportion of agency statutory interpretations they upheld.⁴⁷

After the Supreme Court issued its trilogy of opinions in *Christensen*, *Mead*, and *Barnhart*, the prior clarity and consistency in circuit courts' approach to judicial review of agency statutory interpretations declined significantly.⁴⁸ Circuit courts began to write opinions that blended *Chevron* and *Skidmore* in a variety of ways. They also began to write opinions in which they hedged their bets by making statements like "even if we were to apply the stronger version of deference announced in *Chevron* we would reject the agency's interpretation;" or "even if we were to apply the weaker version of deference announced in *Skidmore*, we would uphold the agency interpretation."⁴⁹

The opinions issued by the Supreme Court in two major cases decided during the 2015 Term provide evidence of where the Court is going and why. In *King v. Burwell*,⁵⁰ a six-Justice majority refused to apply *Chevron* in the process of adopting as its own an interpretation of a provision of the Affordable Care Act (ACA) that was the same as the interpretation announced by IRS, the agency that is responsible for implementing that provision. IRS had interpreted the tax credit provision of the ACA to allow citizens of all states to be eligible for the credit, rather than the interpretation urged by the petitioners which would have rendered citizens of 36 states ineligible for the credits. The majority concluded that the tax provision was ambiguous but that *Chevron* did not apply because:

⁴⁷ Pierce, supra. note 8, at 84 (64% to 73% from 1991 to 2006).

⁴⁸ Lisa Bressman, How *Mead* Has Muddled Judicial Review of Agency Action," 58 Vanderbilt L. Rev. 1443 (2005).

⁴⁹ E.g., *Fournier v. Sebelius*, 718 F.3d 1110 (9th cir. 2013); *Hagens v. Commissioner of Social Security*, 694 F.3d 287 (3d Cir. 2012); *Shipbuilders Council of America v. Coast Guard*, 578 F.3d 234 (4th Cir. 2009).

⁵⁰ 135 S. Ct. -----(2015).

The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep economic political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.

This is not a case for the IRS.⁵¹

The dissenting Justices disagreed with the majority's interpretation of the statute, but they did not disagree with the majority's conclusion that *Chevron* did not apply and that the Court should instead resolve the question of the proper interpretation of the ACA without conferring any deference on the agency's interpretation.⁵²

In *Michigan v. EPA*,⁵³ the question was whether to uphold EPA's interpretation of the statutory decisional standard "necessary and appropriate" to allow it to take a regulatory action without considering cost. The majority applied a new version of *Chevron*. It skipped step one entirely and applied a strong version of step two. It held that the agency's interpretation of the standard to allow it to make a decision without considering cost was unreasonable because:

Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." [] Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative

⁵¹ Id. at ----

⁵² Id. at ----

⁵³ 135 S. Ct. at ----

agency to determine whether “regulation is appropriate and necessary” as an invitation to ignore cost. ...⁵⁴

The dissenting Justices made no reference to *Chevron*, but they agreed with the majority's conclusion that EPA's interpretation of the statute to allow it to make regulatory decisions without considering cost was unreasonable:

I agree with the majority – let there be no doubt about this – that EPA's power plant regulation would be unreasonable if “[t]he Agency gave cost no thought *at all*.” [] But that is just not what happened here.⁵⁵

The dissenting Justices went on to explain why they believed that EPA had considered cost at an appropriate stage in the decision making process.⁵⁶ Thus, all nine Justices applied step two of *Chevron* in a way that eliminates any discretion for the agency to adopt an interpretation of the statute that differs from the only interpretation the Court found to be reasonable.

After the Court qualified *Chevron* in ways that make it difficult to distinguish from *Skidmore* in *Christensen*, *Mead*, and *Barnhart*, it is hard to tell whether or to what extent *Chevron* exists as an independent deference doctrine.⁵⁷ In any event, after *King* and *Michigan*, the Court now has five ways of conferring neither *Chevron* deference nor *Skidmore* deference on agency actions. It can simply ignore both doctrines and resolve an issue of statutory interpretation without conferring any deference on the agency interpretation;⁵⁸ it can use all of the “tools of statutory construction” to resolve an issue of statutory interpretation

⁵⁴ Id. at ----

⁵⁵ Id. at ----

⁵⁶ Id. at ----

⁵⁷ Text, *supra.*, at notes 33-49.

⁵⁸ See cases cited in note 32, *supra.*

at the time it applies step one of *Chevron*;⁵⁹ it can decline to apply any deference doctrine because the interpretative issue is important;⁶⁰ it can decline to apply any deference doctrine to an agency interpretation because the agency lacks sufficient expertise in the field that is affected by the rule to justify deference;⁶¹ or it can apply a version of step two of *Chevron* that is functionally indistinguishable from an independent judicial resolution of the statutory interpretation issue.⁶² The Court has used each of these methods of avoiding deferring to agency statutory interpretations, and it will have many more opportunities to use each in the future.⁶³

B. *Auer* Deference

As it was initially stated, the *Auer* doctrine seemed to be unusually deferential to agency interpretations of rules: the agency interpretation is "of controlling weight unless

⁵⁹ E.g. *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987). See also cases discussed in Richard Pierce, *The Supreme Court's New Hypertextualism: A Prescription for Incoherence and Cacophony in the Administrative State*, 95 *Colum. L. Rev.* 749 (1995).

⁶⁰ *King v. Burwell*, 135 S.Ct. ____, ____. .

⁶¹ *Id.* at ____.

⁶² *Michigan v. EPA*, 135 S.Ct. ____.

⁶³ The importance of the interpretative issue criterion is highly elastic. The Court could easily have applied it to the question of whether Congress intended to require EPA to regulate carbon dioxide emissions by automobiles that the Court addressed in *Massachusetts v. EPA*, 549 U.S. 497 ((2007), or even to the EPA decision to adopt the "bubble" concept in *Chevron* itself. Both required some institution to resolve a major interpretative issue in a context in which many billions of dollars were at stake. The inadequate expertise method is likely to arise with great frequency in the future. Over half of the rules that IRS issues are arguably outside its area of expertise. Kristin Hickman, *Administering the Tax System We Have*, 63 *Duke L.J.* 1717, 1747-1753 (2014). The number of IRS interpretations of statutes that are unrelated to collecting taxes that are reviewed by courts will increase as a result of the four holdings in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012). The Court held that a key provision of the ACA was not within the scope of Congress's power under the Commerce Clause, *id.* at 2593, and it imposed an unprecedented limit on Congress's power under the Spending Clause. *Id.* at 2603-04. It held that the provision was within Congress's power to tax. *Id.* at 2597. That combination of holdings will encourage Congress to use the power to tax implemented by IRS as the basis for other regulatory statutes. The *Sebelius* Court also adopted unusually narrow interpretations of the Tax Injunction Act and the tax exemption from the Declaratory Judgment Act. *Id.* at 2582-84. Those interpretations inevitably will require courts to engage in pre-enforcement review of virtually all of the many rules that IRS issues that are arguably outside its expertise as a tax collecting agency.

it is plainly erroneous or inconsistent with the regulation."⁶⁴ As applied, the doctrine never had as powerful an effect as the initial characterization of the test by the Court implied.⁶⁵ In recent years, the Court has qualified the doctrine in many ways.⁶⁶ Many of the qualifications were based on an article in which John Manning made a strong argument that *Auer* deference was not sensible even if *Chevron* deference was.⁶⁷ Manning argued that *Auer* deference gave agencies an unhealthy incentive to issue rules that are vague and ambiguous.

As modified over the last decade, the *Auer* doctrine does not apply when an agency adopts a new interpretation of an ambiguous rule in the process of imposing a penalty in an enforcement proceeding.⁶⁸ It does not apply when an agency relies on a new interpretation of an ambiguous rule as the basis to require a regulated firm to make large payments to third parties.⁶⁹ It does not apply when an agency has not interpreted the rule to apply in a situation for a long period of time.⁷⁰ It does not apply when the interpretation "lacks the hallmarks of thorough consideration."⁷¹ It does not apply if it is arbitrary and capricious.⁷² It does not apply when the rule the agency is interpreting is as broad as the statute the agency is implementing.⁷³ More recently, some Justices have urged the Court to overrule *Auer*,⁷⁴ and others have suggested that they would seriously

⁶⁴ *Auer v. Robbins*, 519 U. S. 452, 461.

⁶⁵ *Pierce & Weiss*, supra. note 19, at 519.

⁶⁶ For detailed discussion of the cases, see *Pierce*, supra. note 29 at §6.11; *Hickman & Pierce*, supra. note 29 at §6.11.

⁶⁷ John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996).

⁶⁸ *E.G. Gates & Fox Co. v. Occupational Safety and Health Review Commission*, 790 F. 2d 154, 56 (D. C. Cir. 1986), cited favorably in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67.(2012).

⁶⁹ *Christopher v. SmithKline Beecham Corp.* 132 U.S. at 2166-67.

⁷⁰ *Id.* at 2166-67.

⁷¹ *Id.* at 2169.

⁷² *Id.* at 2169.

⁷³ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

⁷⁴ E.g. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. ____,__(2015) (Thomas and Scalia).

consider overruling *Auer* in an appropriate case and have invited parties to bring the Court an appropriate case.⁷⁵

C. Counting the Justices

It is easy to identify Justices who want to overrule the deference doctrines or to qualify and interpret them out of existence. It is hard to identify any Justice who is in favor of maintaining a strong version of the deference doctrines.

Two Justices have urged the Court to overrule *Auer*.⁷⁶ Two have invited a petitioner to bring the Court a case that would provide an appropriate vehicle to allow it to overrule *Auer*.⁷⁷ All of the Justices have shown their lack of support for a strong version of *Auer* by qualifying the doctrine in important ways.⁷⁸

Two Justices have expressed their opposition to *Chevron*.⁷⁹ Only Justice Scalia has repeatedly said that he supports *Chevron*,⁸⁰ and there are reasons to doubt that he continues to support *Chevron* today. Justice Scalia's approach to *Chevron* has always been puzzling. *Chevron* is the most deferential of the doctrines that the Court applies to agency statutory interpretations, but Justice Scalia defers less frequently to agency actions than any other Justice.⁸¹ He rarely finds ambiguity in a statute, so he often avoids

⁷⁵ E.g., *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1341-44 (2013) (Roberts and Alito).

⁷⁶ *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. ____, __ (Thomas and Scalia)

⁷⁷ *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1341-44 (Roberts and Alito).

⁷⁸ Text at notes 65-75, *supra*.

⁷⁹ Justice Thomas has repeatedly expressed the view that *Chevron* is unconstitutional. E.g., *Michigan v. EPA*, 135 U.S. at ____ (Thomas, concurring). Justice Breyer was highly critical of *Chevron* even before he joined the Court, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363 (1986), and his pattern of opinions since he joined the Court has been consistent with that view. E.g., *Barnhart v. Walton*, 535 U. S. 212 (qualifying *Chevron* by adding the factors the Court has used in applying the *Skidmore* test).

⁸⁰ E.g., *INS v. Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, concurring). See generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L. J.* 511, 513-17.

⁸¹ Thomas Miles & Cass Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, *U. Chi. L. Rev.* 823, 826 (2006).

conferring any deference on an agency's statutory interpretation by concluding that Congress resolved the interpretative issue before the Court.⁸²

Justice Scalia also dissented from the decision in *Brand X* that explicitly authorized agencies to change statutory interpretations that a court has upheld as reasonable even though *Brand X* seems to be just a restatement of *Chevron*.⁸³ In fact, *Chevron* itself involved the same sequence of agency and judicial interpretations that the Court held to be permissible in *Brand X*.

In one opinion he wrote for a majority of Justices during the 2015 Term, Justice Scalia ignored the first step of the *Chevron* test and then applied an extraordinarily strong version of step two that has the effect of precluding the agency from adopting an interpretation of the statute that differs from the Court's interpretation.⁸⁴ In dicta in another opinion he wrote during the 2015 Term, Justice Scalia engaged in a harsh critique of *all* deference doctrines:

The [APA] was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.

* * *

The Act thus contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations.

* * *

Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the "reviewing court ... interpret ... statutory provisions," we have held that *agencies* may

⁸² Pierce, *supra*. note 59; Scalia, *supra*. note 80, at 521.

⁸³ 545 U.S. at 1005-21.

⁸⁴ Text at notes 53-56, *supra*.

authoritatively resolve ambiguities in statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*. . . . And never mentioning § 706’s directive that the “reviewing court ... determine the meaning or applicability of the terms of an agency action,” we have—relying on a case decided before the APA, *Bowles v. Seminole Rock & Sand Co.* . . . ---held that *agencies* may authoritatively resolve ambiguities in regulations. *Auer v. Robbins*. . . . [citations omitted].⁸⁵

None of the other Justices has expressed an opinion for or against *Chevron*, but all have joined in opinions that ignore *Chevron*, opinions that conclude that it does not apply for some reason, and qualified it in important respects.⁸⁶

D. Inferring the Motives of the Justices

The opinions described in sections B and C provide persuasive evidence that the Court is in the process of making major changes in its deference doctrines. Those opinions are likely to foreshadow opinions that overrule the doctrines, apply them less frequently, and/or weaken them further.

This section will attempt the risky task of inferring the motives of the Justices. The starting point in any such effort must be to recognize that it is unlikely that any Justice has only one reason for doubting the wisdom of the original strong versions of the deference doctrines. Thus, for instance, Justice Thomas undoubtedly is motivated in part by his belief that the *Chevron* doctrine is unconstitutional; Justice Breyer is motivated in part by his belief that the *Chevron* test is too simplistic; and the Justices who have urged the Court to overrule the *Auer* doctrine are motivated in part by their concern that it encourages agencies to issue rules that are vague and ambiguous.

The Court's recent pattern of opinions provides circumstantial evidence of one source of concern about the effects of the deference doctrines that seems to be shared by

⁸⁵ 135 S.Ct. at 1211.

⁸⁶ See, e.g. cases cited in notes 31-55, *supra*.

all of the Justices--temporal differences in interpretations of statutes and rules based on changes in the political party that controls the Executive Branch. This concern would explain Justice Scalia's dissent in *Brand X* and many of the Court's other recent opinions.

The interpretive issue in *King* was whether the ACA makes the citizens of all fifty states eligible for large tax credits when they buy health insurance or whether only the citizens of twelve states would be eligible for the credits. The statutory provision seemed to support the latter position, and three dissenting Justices expressed that view. The majority used the structure and purpose of the statute to support its conclusion that the statute was ambiguous. Ordinarily, the majority would then have applied *Chevron* and upheld the agency interpretation as reasonable. The majority declined to apply *Chevron*, however, based in part on the importance of the issue.

King is an excellent example of a context in which it makes sense for the Court to decline to apply *Chevron*. Whether you agree with the majority's preferred interpretation or the dissenting Justices' preferred interpretation, it would make no sense to create a legal environment that would vary over time depending on whether Democrats--who strongly support the ACA--or Republicans--who strongly oppose the ACA--control the Executive Branch. The resulting vacillation in statutory interpretations would create uncertainty and chaos for citizens, insurance companies, and the agencies charged with responsibility to implement the statute. The only other case in which the Court applied the "importance" exception to *Chevron* was also a good candidate for application of the exception.⁸⁷ It would not be sensible to allow the Food and Drug Administration to regulate tobacco products during some Presidential Administrations and not during others.

In *Michigan*, the Court applied *Chevron* but in an idiosyncratic manner that

⁸⁷ FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

eliminates the potential for an agency to adopt a different interpretation in the future. All nine Justices concluded that any interpretation of an ambiguous provision of a regulatory statute that would allow an agency to make a major decision without considering its costs would be unreasonable. This unusual application of step two of *Chevron* also eliminated the potential for differing interpretations over time as a result of changes in the regulatory philosophy of each President. The resulting consistency and predictability helps both regulated firms and the agencies that regulate them. There are many other contexts in which the importance of the interpretive issue justifies a decision not to defer to an agency's "reasonable" interpretation of an ambiguous statute or a rule, thereby creating a situation in which no one who is affected by the interpretation can act in reliance on the interpretation adopted by an agency at any particular time.

There are also many other situations in which the interpretive issue is not "important" but in which the potential for temporal inconsistency in interpretations makes no sense. The case that caused Justice Scalia to complain about deference doctrines illustrates such a context. In *Mortgage Bankers*, the Court held unanimously that an agency can issue an interpretative rule that changes the prior agency interpretation of an ambiguous legislative rule without engaging in notice and comment.⁸⁸ That holding was a routine interpretation of the clear text of the APA, but it created an unfortunate situation.

The statutory provision the agency was implementing in *Mortgage Bankers*--the overtime provision of the Fair Labor Standards Act (FLSA)--required employers to pay employees time and a half for any overtime they performed unless the employees are "administrative." The statutory definition of "administrative" was sufficiently ambiguous to support as "reasonable" opposite interpretations of "administrative" in the context of

⁸⁸ 135 S.Ct. at 1207.

many types of employees. The Department of Labor (DOL) used the notice and comment procedure to issue a legislative rule, but that rule also was sufficiently ambiguous to be susceptible to opposite interpretations in the context of many classes of employees.

The interpretation of the rule at issue in *Mortgage Bankers* had the effect of requiring banks to pay employees that issue and administer mortgages time and a half for overtime on the basis that they are not "administrative." The Court unanimously upheld that interpretation even though it was the opposite of DOL's prior interpretation. As the Court recited, the DOL interpretation of the statute and the rule had changed over time with great frequency.⁸⁹ Not surprisingly, the changes followed Presidential elections in which control of the Executive Branch changed from one political party to another. When a Democratic President replaced a Republican President, DOL changed its interpretations of many provision of FLSA in ways that benefited employees. When a Republican President replaced a Democratic President, DOL changed its interpretations of FLSA in ways that favored employers.

FLSA is only one of many agency-administered statutes that can support diametrically opposed "reasonable" interpretations that favor either important Democratic constituencies or important Republican constituencies. The National Labor Relations Act (NLRA) is another classic example of such a statute. The notorious changes in interpretations of NLRA by NLRB when control of the agency changes hands from one party to another explain the unusually non-deferential application of the ordinarily deferential "substantial evidence" test that the Court adopted and applied in *Allentown*

⁸⁹ Id. at 1204-05.

Mack Sales and Service v. NLRB.⁹⁰ The Court described in detail (and with obvious disapproval) the many ways in which the NLRB had changed its interpretations and applications of the NLRB to produce results that favored either employees or employers.⁹¹

Like the vast majority of the many interpretations of ambiguous statutes and rules that change from one Administration to another, the interpretations at issue in *Mortgage Bankers* and *Allentown Mack* are not "important" to anyone except politicians and some of the constituencies to which they are beholden. Yet, it seems wrong in some important sense to acquiesce in a legal regime that allows myriad changes in the meaning of legal terms every time a President of one party replaces a President of the other party. Circumstantial evidence supports the inference that all of the Justices dislike this temporal inconsistency effect of deference doctrines. They appear to share a well-founded belief that the law should not change significantly every time there is a change in the party that controls the Executive Branch.

III. Costs and Benefits of a Change in Deference Doctrines

The costs and benefits of a major change in deference doctrines depend on the nature of the change. One option would be to eliminate all deference doctrines. That change would reduce temporal inconsistency but at a very high cost in terms of increased geographic inconsistency and failure to recognize the comparative institutional advantages of agencies in the forms of superior knowledge of the field and superior understanding of the ways in which an interpretation of a statute affects the ability of the agency to implement a coherent and efficient regulatory regime.

⁹⁰ 522 U.S. 359 (1998). For detailed discussions of the substantial evidence test and the Court's unusual application of the test in *Allentown Mack*, see Pierce, *supra*. note 29 at §11.2.

⁹¹ 522 U.S. at 375-80.

Another option would be to replace *Chevron* and *Auer* deference with *Skidmore* deference. That change would reduce temporal inconsistency and retain recognition of the comparative institutional advantages of agencies. Those benefits would come at a high cost, however, in the forms of an increase in geographic inconsistency and a return to the inconsistent and unpredictable pattern of interpretations that existed prior to *Chevron* and that have followed the Court's reduction in the scope of *Chevron* and its blending of *Chevron* and *Skidmore* between 2000 and 2002.

A third option would be to eliminate deference in contexts in which a change in interpretation is motivated only by a change in the political party that controls the Executive Branch. The *Skidmore* doctrine incorporates that factor by giving greater deference to longstanding interpretations than to new or changed interpretations. That doctrinal change would have about the same costs and benefits as the second option. It would also introduce a new problem. Courts would often find it difficult to distinguish between changes that are motivated solely by politics and changes that are based in part on changed facts or changed understandings of the relationships among facts. A change in doctrine that eliminates or reduces deference in the latter situation would have particularly bad effects by rendering obsolete or inefficient regulatory regimes impervious to change.

Peter Strauss has suggested a fourth option. Reduce or eliminate deference in Supreme Court decision making by implementing any of the first three options but retain strong versions of *Chevron* and *Auer* deference in circuit courts. Since there are thirteen circuit courts and only one Supreme Court, that change might be the optimal way of balancing the goal of reduced temporal inconsistency with the goal of maximum

geographic consistency, while retaining the predictability and recognition of comparative institutional advantages that inhere in any legal regime that incorporates a high degree of deference to agency actions.

The Strauss suggestion raises another interesting question, however. Can, and should, the Supreme Court establish for the first time a legal regime in which it tells lower courts to do as we say and not as we do? I do not see any impediment to that approach, and it has the virtue of maximizing the benefits and minimizing the costs of deference doctrines. The Court has long distinguished between circuit court decisions and Supreme Court decisions for other important purposes.⁹²

⁹² Thus, for instance, in *Glebe v. Frost*, 133 S.Ct. 429 (2014), the Court held that "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'"