A Tale of Transformation: The Non-delegation Doctrine and Judicial Deference

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Introduction

Legal doctrines are not created equal. Some doctrines are solid and survive the test of time, some are short-lived, and others transform and adapt in order to serve specific legal and political purposes. The transformation can be radical (hence constituting a metamorphosis) or can be a minor adaptation to new circumstances.

The doctrine of non-delegation is one that has transformed radically over time. Since 1935, the courts interpreted the non-delegation doctrine as a *de-facto* delegation doctrine (hence so-called dormant non-delegation) and have provided the constitutional grounds for the expansion of the administrative state.[1] In its dormant version, it constitutes the backbone for the doctrine of judicial deference which has in turn evolved since its first 1984 *Chevron* formulation and has expanded to *Auer* and *Skidmore* variants.[2]

Moved by distrust in the growth of the administrative state, conservative judges and legal scholars have recently attacked both doctrines.[3] At the core of the debate is the constitutional legitimacy of the administrative state and of the delegation of power from the legislative branch to the executive branch. Professors Cass Sunstein and Adrian

[1] *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388, 420–21 (1935) ("[T]he necessity and validity of [rulemaking] provisions and the wide range of administrative authority which has developed by means of them cannot . . . obscure . . . the authority to delegate, if our constitutional system is to be maintained.").

[2] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."); Auer v. Robbins, 519 U.S. 452, 461–63 (1997) ("[The Secretary of Labor] is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute."); Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944) ("This Court has long given considerable and in some cases decisive weight to [executive agency] [d]ecisions and to interpretative regulations of the [agency.]").

[3] *See* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2463 (2017).

Vermeule have named this attitude towards the administrative state "The New Coke" and made a parallel between the resistance to the executive prerogative of the English judge and the current aversion to executive delegation of power.[4] Two years ago, the Supreme Court considered a challenge to the dormant non-delegation doctrine in the *Gundy* case;[5] Justice Kagan's plurality opinion sheltered the doctrine from the attacks of Justice Gorsuch, Justice Roberts, and Justice Thomas.[6] However, the fragmented decision has prompted wide scholarly and media speculation on the uncertain future of the doctrine.[7] President Biden's climate agenda, for instance, relies upon the creation of new regulations by agencies such as the EPA and new regulations often face legal challenges.[8] If the doctrine is scrutinized again by the Supreme Court, the conservative majority is expected to be less supportive of delegation.[9] Justice Alito's concurrence in *Gundy* seemed to indicate that he would be prepared to resurrect the non-delegation doctrine and he may be able to persuade his conservative colleagues.[10] This means that the non-delegation doctrine may soon go through a transformation, the extent of which remains to be seen.

This note engages with a review of the historical developments surrounding the doctrine of non-delegation and how it has morphed over time. It examines the theoretical link between the practice of judicial deference and the dormant non-delegation doctrine and argues that a change of jurisprudence around the non-delegation doctrine would also have an inevitable impact on the jurisprudence around judicial deference. If courts could strike regulations that they deem involve improperly delegated powers, then they may be keener on interpreting statutes and regulations that would otherwise be deferred to agencies' interpretation.

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[4] CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 19 (2020).
[5] Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).
[6] *Id.*
[7] Wayne A. Logan, Gundy v. United States: *Gunning for the Administrative State*, 17 OHIO ST. J. CRIM. L. 185, 186 (2019); Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden's Administration*, SLATE (Dec. 1, 2020, 12:56 PM), https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html.
[8] *See* Mullen & Singh, *supra* note 7.
[9] *Id.*
[10] *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring).

Part I reconstructs the history of the non-delegation doctrine and, in particular, argues that it has evolved into a *de-facto* delegation doctrine.[11]

Part II discusses the seminal cases of *Chevron* and *Mead* and identifies the latter as the theoretical connecting ring between the delegation doctrine and judicial deference.[12]

Part III considers deference to an agency's interpretation of its own ambiguous regulations and discusses the call for a revision of *Auer*.[13]

Part IV continues the discussion on agencies' interpretation of their own ambiguous regulations with particular reference to the *Kisor* case.[14]

Part V discusses the latest challenge to the dormant delegation doctrine in the *Gundy* case.[15]

I. From "non-delegation" to "dormant non-delegation" doctrine

The American Constitution attributes the legislative power to Congress (Art. I), the executive power to the President (Art. II), and the "judicial power" to the courts (Art. III) but it is silent on agency powers.[16] The provisions related to the executive power mainly concern the President and officers commissioned by the president.[17] Such an omission sits uncomfortably with the recent growth of the administrative state and the consequent increase of the power of agencies that constitute, according to some, a fourth branch of government.[18] It is a fact that administrative agencies have executive, legislative, and

[11] *See* discussion *infra* Part I.
[12] *See* discussion *infra* Part II.
[13] *See* discussion *infra* Part III.
[14] *See* discussion *infra* Part IV.
[15] *See* discussion *infra* Part V.
[16] *See* U.S. CONST. art. I; *id.* art. II; *id.* art. III.
[17] *Id.* art II, § 3.
[18] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574–78 (1984). For an early reflection on the role of agencies, see Justice Jackson's dissenting opinion in *FTC v. Ruberoid Co.*:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. *Cf. United States v. Spector*, 343 U.S. 169 (1952). They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

judicial functions. They perform executive functions through agency enforcement, legislative functions through rulemaking, and judicial functions through administrative hearings and judicial deference.[19] Even though their role had not been explicitly acknowledged in the text of the Constitution, administrative agencies *de facto* perform the functions above on delegation of Congress.[20]

Hence, a question is in order: how have the courts justified the delegation of legislative, executive, and interpretive power to administrative agencies? The answer is controversial and resides in the modern recognition of the impracticability of a strict application of the traditional non-delegation doctrine. This is the legal doctrine according to which Congress, vested with "all legislative powers" by Article I of the Constitution, cannot delegate these powers to another branch. [21]

With the growth of the administrative state, the courts started to take distance from the traditional understanding of the principle of separation of powers and recognized that overlaps and delegations were necessary for the functioning of the modern state. A first acknowledgment of the ability of Congress to delegate regulatory powers was made in 1911 when the Supreme Court held that Congress may delegate authority in the form of "power to fill up the details" under general provisions of law "by the establishment of administrative rules and regulations."[22] However, the Court first directly upheld a

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343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (internal parallel citation omitted, date added).

[19] Strauss, *supra* note 18, at 577–79.

[20] DAVID A. STRAUSS, THE LIVING CONSTITUTION 122 (2010) (stating that "[t]he New Deal is famous for having greatly increased the number of . . . agencies" that combined "executive, legislative, and judicial functions").

[21] *See* U.S. CONST. art. I. Notably, the non-delegation doctrine finds deep roots in John Locke's social contract theory: "[t]he power of the legislative, being derived from the people by a positive voluntary grant . . . can be no other than what the positive grant conveyed, which being only to make laws, and not to make legislators[.]" JOHN LOCKE, TWO TREATISES OF GOVERNMENT 193 (Thomas I. Cook, ed., Hafner Publ'g Co. 1947) (1690). The Supreme Court discussed this principle in numerous instances; *see* Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers . . . ."); *see also* Marshall Field & Co. v. Clark, 143 U.S. 649, 692 ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.").

[22] United States v. Grimaud, 220 U.S. 506, 517 (1911) ("From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations . . . . None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were

congressional delegation of legislative power to the executive (in the form of fixing of customs duties on imported merchandise) in 1928.[23] In the decision, Chief Justice Taft specified that an agency's legislative action is not forbidden if it is guided by "an intelligible principle" laid down by the legislative act.[24] He explained that such a delegation was possible because what was being delegated was not legislative discretion but the ability "to enforce [a congressional declaration] by regulation equivalent to law."[25] The focal point of the decision is the formulation of the "intelligible principle" test that the Supreme Court has used, since then, to determine the constitutionality of congressional delegations.[26]

Further scrutiny on the doctrine—and indeed use of the intelligible principle test—took place in 1935 when, despite striking down certain provisions of the NIRA that delegated to the President the authority to promulgate regulations to stabilize the economy, Chief Justice Hughes recognized that the Constitution was to be interpreted as granting Congress "flexibility and practicality" and that therefore Congress could "[leave] to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply".[27] Chief Justice Hughes confirmed his belief in the delegation principle again in the *Shechter Poultry* case but eventually struck down the regulations of the poultry industry put forward by President Roosevelt for other reasons (as an invalid use of

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to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations . . . .").

[23] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 410–11 (1928) ("[W]hile Congress could not delegate legislative power to the President, [fixing tariff rates on imported goods] did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to . . . the President. . . . What the President was required to do was merely in execution of the act of Congress. It was not the making of law.").

[24] *Id.* at 409 (So long as "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). "Concepts of control and accountability" help define an "intelligible principle." Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971).

[25] *J.W. Hampton, Jr., & Co.*, 276 U.S. at 408–09 ("They have not delegated to the commission any authority or discretion as to what the law shall be-which would not be allowable-but have merely conferred upon it an authority and discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is entirely permissible.").

[26] *Id.* at 409.

[27] Pan. Refin. Co. v. Ryan, 293 U.S. 388, 421, 433 (1935).

Congress' commerce power).[28] The line of cases that struck down congressional use and delegation of police powers culminates with *Carter v. Carter Coal,* a case similar to the previous two which determined that Congress' legislation and delegation of regulatory power regarding coal production was unconstitutional under the commerce clause.[29] At this point it should be emphasized that despite the negative outcomes, the above decisions paved the way to the development and further elaboration of the delegation doctrine. Since the New Deal, Prof. Sandra Zellmer argued, "the nondelegation doctrine has been, for all practical purposes, a dead letter."[30] In fact, since the *Carter* decision in 1936 the Supreme Court has employed a more liberal approach to delegation of legislative power and to some extent explicitly disregarded the non-delegation doctrine. For example, in the 1941 decision *Opp Cotton Mills, Inc. v. Administrator* the Supreme Court approved the congressional delegation of the power to prescribe the minimum wage in an industry to an Administrator (up to a certain threshold).[31] In the majority opinion, Justice Stone argued:

> In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy . . . . The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.[32]

The Court continued to apply the doctrine in several areas such as the delegation to the Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity,"[33] the delegation to the Price Administrator to fix commodity prices as per the Emergency Price Control Act of 1942,[34] the delegation to the Federal Power Commission to determine just and reasonable rates,[35] the delegation of authority

[28] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530, 550–51 (1935).
[29] Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).
[30] Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 943 (2000).
[31] Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div. of Dep't of Lab., 312 U.S. 126, 146 (1941).
[32] *Id.* at 145.
[33] Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943).
[34] Yakus v. United States, 321 U.S. 414, 426 (1944).
[35] Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 600–01 (1944).

to determine excessive profits,[36] the delegation of authority to the Sentencing Commission to issue binding sentencing guidelines,[37] and, more recently, the delegation of authority to the Environmental Protection Agency (EPA) to issue rules pursuant to Clean Air Act (CAA).[38] Not least, the delegation doctrine had been further strengthened by the enactment of the Administrative Procedure Act in 1946, which conferred a large degree of authority upon the executive and sanctioned Congress's ability to hand over to a given agency official the authority to make policy decisions. [39]

This note argues that as a result of this development, the non-delegation doctrine has been weakened to the point of becoming dormant, and that has provided the theoretical foundation for the development of the administrative state and for the practice of judicial deference, intended here as the delegation of interpretive power to agencies over statutes and regulations that they administer. The assumption is that if Congress is allowed to delegate lawmaking authority to administrative agencies by providing guidance in the form of intelligible principles, then Congress can also delegate interpretive power over ambiguous statutes administered by the agencies (*Chevron* deference)[40] or the agencies' own regulations (*Auer* deference).[41] As explained by Professor Jon D. Michaels, "[t]he seminal *Chevron* and *Mead* cases can themselves be explained through the lens of an enduring, evolving separation of powers jurisprudence.

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[36] Lichter v. United States, 334 U.S. 742, 753 (1948).

[37] Mistretta v. United States, 488 U.S. 361, 374 (1989) ("In light of our approval of these broad delegations, we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.").

[38] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486 (2001). Other examples of Supreme Court decisions in favor of the principle of delegation are: United States v. Robel, 389 U.S. 258, 274 (1967) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function . . . .") (quoting Pan. Refin. Co. v. Ryan 293 U.S. 388, 421 (1935)); Nat'l Cable Television Ass'n. v. United States, 415 U.S. 336, 337 (1974) (establishing that federal agencies can impose fair and equitable fees for services rendered).

[39] *See* Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 207–08 (2016); *see generally* Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2018) (outlining the procedures administrative agencies must follow to exercise their rulemaking authority within Congressional limits).

[40] *See* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 103–04, 110 (2018).

[41] *Id.* at 105.

Though not constitutional cases per se, both deal with constitutional actors ceding power to a rival."[42]

The next section discusses the doctrine of judicial deference as developed by the courts.

II. *Chevron* and *Mead*: deference to administrative agencies' interpretation of statutes

Chevron is the seminal case concerning judicial deference in the United States.[43] The 1984 Supreme Court decision is now the most cited case in federal administrative law.[44]

The case involved a regulation of the Environmental Protection Agency (EPA) that defined "stationary source" under the nonattainment provisions of the Clean Air Act (CAA) as an entire plant rather than a single pollution-emitting unit within the plant.[45] The issue concerned whether the courts should defer to the EPA's interpretation of the term "stationary source."[46] The answer was that deference to the agency interpretation is due, so long as it is permissible as a reasonable interpretation.[47] The Supreme Court hence created a rule for judicial deference, the *Chevron* rule, which provides that if the meaning of the statutory term is ambiguous, the courts should defer to a "permissible construction" of the term made by the agency that administers the program.[48] According to the Court, "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[49] In other words, the Court suggested that the theoretical basis for judicial deference is the assumption that when Congress delegates implementation to an agency, it also implicitly delegates interpretive authority, including the authority to make policy decisions. Justice Stevens delivered the opinion of the Court explaining judicial deference as a two-step process. The first step involves an assessment as to whether

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[42] Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 565 (2015).
[43] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[44] *See* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. UNIV. L. REV. 551, 552–53 (2012).
[45] *Chevron*, 467 U.S. at 839.
[46] *Id.* at 840.
[47] *Id.* at 843.
[48] *Id.* at 842–43.
[49] *Id.* at 843–44.

Congress has already spoken to the precise question at issue.[50] The second step—reached only if Congress did not speak clearly on the issue—is to question whether the administrative agency's interpretation is reasonable.[51] In the words of Justice Stevens:

> When a court reviews an agency's construction of the 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; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. 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 for the court is whether the agency's answer is based on a permissible construction of the statute.[52]

He then added, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[53] The decision was revolutionary because it created a broad rule for shifting the responsibility of statutory construction from the courts to the administrative agencies. Such a revolution has been endorsed by prominent scholars such as Professor Merrill[54] and Professor Cass Sustein.[55]

During a Yale Law School Symposium on the Executive power, Professor Sunstein argued that constitutional ambiguities "should be resolved by those who are most accountable,"[56] referring to the executive branch. He based his argument on the assumption that interpretation is policymaking and therefore a prerogative of the executive, stating, "For the resolution of ambiguities in statutory law, technical expertise

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[50] *Id.* at 839, 842.
[51] *Id.* at 843–44.
[52] *Id.* at 842–43.
[53] *Id.* at 844.
[54] Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).
[55] *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2086 (1990).
[56] Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2582–84 (2006).

and political accountability are highly relevant, and on these counts the executive has significant advantages over courts."[57]

In the aftermath of the decision, then Judge Breyer and Justice Scalia, commented on *Chevron* respectively in a First Circuit decision[58] and in the Duke Law Journal.[59] Both justices seemed to agree that Congress can implicitly delegate the power to interpret the law to administrative agencies, but their approach differed on the scope of such deference.[60] More specifically, Justice Breyer seemed to believe that deference should be accorded only when a technical and narrow question arise i.e. questions that only agency experts are able to answer.[61] When it comes to major policy issues, Justice Breyer argues, the courts should take responsibility for the interpretation and avoid deference.[62] His position was explicitly explained in his First Circuit decision *Mayburg*:

> The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.[63]

In other words, Justice Breyer suggested that the courts should tailor their approach to the different issues under review. Such position was later clarified by Justice Breyer in his Administrative Law Review article that proposes a distinction between judicial review of questions of law and policy:

> [T]here are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive . . . . To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as "always defer to the agency when the statute is silent," would be seriously overbroad, counterproductive and sometimes senseless.[64]

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[57] *Id.* at 2583.
[58] Mayburg v. Sec'y of Health & Hum. Servs., 740 F.2d 100, 106 (1st Cir. 1984).
[59] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.
[60] *See Mayburg*, 740 F.2d at 106; Scalia, *supra* note 59, at 512, 516–17.
[61] *Mayburg*, 740 F.2d at 106.
[62] *Id.*
[63] *Id.* (citations omitted).
[64] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

Justice Scalia was in favor of a blanket approach that encompasses all types of judicial review issues and believed that deference should be accorded without distinction:

> *Chevron* is unquestionably better than what preceded it. Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.[65]

The disagreement between Breyer and Scalia as to whether there should be different levels of deference for different types of interpretation shaped the broader debate as to what should be the "*Chevron* domain."[66] For example, do interpretive rules, such as agency opinion letters or general statements of interpretation and policy, deserve the same level of deference afforded to legislative rules (issued via the formal notice-and-comment rulemaking)?[67]

The Supreme Court addressed this question in *Christensen v. Harris County* (2000) and established that opinion letters do not receive *Chevron* deference but are instead persuasive and should receive a less deferential standard of deference, the so-called *Skidmore* deference.[68] If a court concludes that *Chevron* or *Auer* deference cannot be applied because an agency's construction of a statute that it administers lacks the force of law or a regulation is not eligible for rationality review, the court should generally apply the framework of *Skidmore* deference.[69]

As Professors Aziz Z. Huq and Jon D. Michaels argued, the Supreme Court's approach to the Constitution's separation of powers is a puzzle; there is no unitary approach but a cyclical approach to the doctrine as a rule or a standard.[70] They referred to the different approaches that the Court took in *Skidmore* and *Chevron*. In *Skidmore*, judicial deference was interpreted as "respect" that the courts owe to the rulings, interpretations, and opinions of the agencies, a respect that it is not controlling over the

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[65] Scalia, *supra* note 59, at 517.
[66] *See* Merrill & Hickman, *supra* note 54, at 835.
[67] The lower courts issued contradictory rulings on letters. In *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 525 (5th Cir. 1999), a court denied deference to an opinion letter whereas a different court granted deference in *Herman v. Nationsbank Tr. Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997).
[68] Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).
[69] *See id*. at 587–88.
[70] Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 349, 351 (2016).

opinion of the courts but can be used for guidance.[71] *Skidmore,* they note, hence constituted a standard because the emphasis was on "pragmatic considerations to measure the deference owed to agency interpretations,"[72] and *Chevron* constituted a rule because "the interpretive deference given to agencies no longer depended on a searching, case-specific analysis. Instead, only one fact mattered: whether the relevant statute is ambiguous. If so, agencies are automatically entitled to deference."[73]

The different extent to which courts should accord *Chevron* deference was elaborated further by Justice Souter (joined by Rehnquist, C.J., Stevens, O' Connor, Kennedy, Thomas, Ginsburg, and G. Breyer) in *United States v. Mead Corp* (2001).[74] The issue at stake was whether ruling letters issued by the United States Customs Service to classify and fix the rate of duty on imports should be accorded judicial deference.[75] Justice Souter clarified that *Chevron* is typically applied to agency regulations that hold the "force of law," that is, those regulations that have been preceded by the notice and comment as under the Administrative Procedure Act (APA). [76] The ruling letters did not fall under this definition and could only be accorded *Skidmore* deference.[77] Justice Scalia dissented and manifested opposition to the concept of different types of deference.[78] In

[71] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a 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 which give it power to persuade, if lacking power to control.").
[72] Huq & Michaels, *supra* note 70, at 365.
[73] *Id.*
[74] United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (holding that when agencies acted with the "force of law," the Court should accord them *Chevron* deference).
[75] *Id.* at 221.
[76] *Id.* ("We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore*, the ruling is eligible to claim respect according to its persuasiveness." (citations omitted)). *But see id.* at 230–31 (noting that notice-and-comment regulations are the most popular indication a regulation carries the "force of law" but an absence of a notice-and-comment period is not decisive if delegated authority can be shown in another form).
[77] *Id.* at 221.
[78] *Id.* at 250 (Scalia, J., dissenting).

his opinion, if the interpretation in question is "authoritative" and "represents the official position of the agency" it should be accorded deference.[79]

A more in-depth discussion of what counts as authoritative regulation is conducted below in conjunction with the analysis of the *Kisor* and *Perez* decision.[80] For now, it is sufficient to acknowledge that Justice Souter took the opportunity to clarify the different scopes of *Chevron* and *Skidmor*e deference and to point out that the variety of regulations and measures enacted by the agencies deserved different levels of deference.[81]

More important for the purpose of examining the theoretical foundation of deference is that the decision added a step zero to the two steps devised by *Chevron*. According to *Mead*, before proceeding to step one, a court must inquire whether there was congressional intent to delegate to the agency so as to establish that "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[82]

By creating a step zero, *Mead* formally recognized that when Congress delegates the authority to implement a particular provision, it may also choose to delegate interpretive authority on the same provision.[83] In the words of the then Harvard Professor Elena Kagan, *Mead* represented "the apotheosis of a developing trend in *Chevron* cases" that treated *Chevron* "as a congressional choice, rather than either a constitutional mandate or a judicial doctrine."[84] *Mead* clarified that Chevron is based on congressional intent and that such intent does not need to be explicit:

> Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result.[85]

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[79] *Id.* at 256–57.
[80] *See infra* Part IV.
[81] *Mead*, 533 U.S. at 236–38.
[82] *Id.* at 226–27.
[83] *Id.* at 226–27, 231–34. *See also id.* at 245–46 (Scalia, J., dissenting).
[84]David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212.
[85] *Mead*, 533 U.S. at 229 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)).

Judicial deference is, according to *Mead* and its progeny, "a judicial construction" or a "fictionalized statement of legislative desire" that nonetheless reflects the needs of the contemporary administrative state.[86] If *Chevron* constituted a pillar of administrative law, the *Mead* development makes it a constitutional law seminal case with deep roots in theoretical constitutional discourse.

It is not surprising that, for its relevance in U.S. constitutional dynamics, it has been at the center of heated debates on the proper allocation of interpretive power and defined by Professor Sunstein as "a kind of counter-*Marbury* for the administrative state"[87] and "the administrative state's very own *McCulloch v. Maryland*."[88] The parallel with *Marbury* highlights Professor Sunstein's belief that the interpretation of statutory provisions should be a prerogative of government, not the court nor the legislative branch.[89] This is because, in his opinion, interpretation constitutes policymaking: "if we believe that the interpretation of ambiguous constitutional provisions calls for judgments of policy and that democratic institutions are in a particularly good position to make those judgments, then *Marbury* is indeed vulnerable."[90]

Mead represents the explanation of the theoretical foundation of judicial deference and this note argues that "step zero" is the connecting ring between the non-delegation doctrine and judicial deference.

This theoretical assumption has not been free of criticism both from academic circles and court benches. *Chevron* has been subject to criticism and controversies over what commentators called the "legal fiction" at the basis of the decision, referring to the

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[86] Barron & Kagan, *supra* note 84, at 212.
[87] Sunstein, *supra* note 56, at 2589.
[88] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190 (2006).
[89] Prof. Sunstein stated:

> My major goal in this Essay is to vindicate the law-interpreting authority of the executive branch. This authority, I suggest, is indispensable to the healthy operation of modern government; it can be defended on both democratic and technocratic grounds. . . . For the resolution of ambiguities in statutory law, technical expertise and political accountability are highly relevant, and on these counts the executive has significant advantages over courts. Changed circumstances, involving new values and new understandings of fact, are relevant too, and they suggest further advantages on the part of the executive.

Sunstein, *supra* note 56, at 2582–83.
[90] *Id.* at 2584.

presumption that Congress could constitutionally delegate legislative powers to regulatory agencies controlled by the President.[91]

One of the scholarly arguments against *Chevron* and *Mead* is that the doctrine is not consistent with Section 706 of the APA which establishes that courts are tasked with the review of agency action and they "shall . . . interpret . . . statutory provisions."[92] The argument is that the APA does not assign any role in statutory interpretation to agencies[93] and is therefore to be interpreted as an instruction to courts to use traditional canons of interpretation.[94]

On the constitutional side of the dispute, scholars and judges alike have criticized *Chevron* and *Mead* for incompatibility with Article I and Article III of the U.S. Constitution. Justice Thomas expressed discomfort with deference to agencies in *Michigan v. EPA,* where he argued that *Chevron* delegation "is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies," and in tension with Art. I "which vests '[a]ll legislative Powers herein granted' in Congress," thus advancing the case for revision of the doctrine. [95]

Another fierce critic of the delegation doctrine and its consequences on judicial deference is Justice Gorsuch who, during his tenure as Appeal Judge, asserted that the doctrine is not only "seemingly at odds with the separation of legislative and executive

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[91] The controversy is mainly related to the scope of legislative power of Congress as established by Article I of the Constitution. *Id.* at 2590, 2607; *see generally* U.S. CONST. art. I.

[92] 5 U.S.C. § 706 (2012) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

[93] *See* Patrick J. Smith, Chevron*'s Conflict with the Administrative Procedure Act,* 32 VA. TAX REV. 813, 814 (2013). Smith states:

> It is impossible to reconcile the requirement in section 706 of the APA that "the reviewing court shall . . . interpret . . . statutory provisions" with *Chevron's* holding that, under step two, a reviewing court must accept an agency's "permissible construction of the statute" even if the agency interpretation is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding."

Id. at 818; *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998).

[94] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation,* 126 YALE L.J. 908, 976–77 (2017) ("[S]ection 706 is best interpreted as an attempt to . . . instruct courts to review legal questions using independent judgment and the canons of construction.").

[95] Michigan v. EPA, 576 U.S. 743, 762 (2015) (Thomas, J., concurring).

functions," but also creates concerns related to due process (fair notice) and equal protection that only magistrates "muster."[96] Justice Gorsuch borrowed this argument from the work of Philip Hamburger, Professor of Law at Columbia Law School, who depicted *Chevron* as an impermissible systematic bias of the Fifth Amendment right to due process in favor of the government.[97] In particular, he argued that when courts defer to administrative interpretation, they implicitly favor executive and other governmental interpretations over the interpretations of other parties.[98]

III. *Seminole/Auer*: deference to an agency's interpretation of its own ambiguous regulations

A second type of judicial deference is deference to agencies' ambiguous regulations. The principle that federal courts must defer to a reasonable construction of an agency's own ambiguous rules dates back to 1945, when the Supreme Court examined wartime price control regulations implemented by the Administrator in *Bowles v. Seminole Rock & Sand Co.*[99] In that instance, the Court decided that the regulation was clear and did not need deference.[100] However, the decision prescribed the use of judicial deference in future cases concerning unclear regulations:

> Since this [case] 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. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.[101]

The principle was then reaffirmed by Justice Antonin Scalia writing for a unanimous court in *Auer v. Robbins*, a case concerning the Secretary of Labor's interpretation of its own regulations relating to overtime pay enacted to implement the provisions of the Fair Labor Standards Act (FLSA) of 1938.[102] Specifically, the U.S. Department of Labor applied a "salary-basis test" to determine that the petitioners (sergeants and a lieutenant

[96] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152, 1154 (10th Cir. 2016).
[97] *See* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016).
[98] *Id.*
[99] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413 (1945).
[100] *Id.* at 419.
[101] *Id.* at 413–14.
[102] Auer v. Robbins, 519 U.S. 452, 454–55 (1997).

employed by the St. Louis Police Department) fell under the exemption provided by § 213(a)(1) of the FLSA for "bona fide executive, administrative, or professional" employees and were not entitled to over-time pay.[103] The Supreme Court deferred to the Secretary of Labor's regulations and confirmed that agencies' interpretations of their own rules are controlling on the court as long as they are "permissible." [104] It did so by citing to *Chevron* and justified this type of deference on the basis that Congress has not "directly spoken to the precise question at issue,"[105] and has therefore delegated both legislative and interpretive power to the agency.[106] It should be noted that *Auer* deference does not formally require a two-step process for review, but rather a single-level standard that makes it, according to its critics, broader and bigger than *Chevron*.[107] More importantly, the fact that *Auer* does not require a two-steps process makes it more susceptible to challenges to its constitutional foundations.

A major theoretical challenge to *Auer*—even before the case was decided—was advanced by Professor John Manning, a textualist scholar and Dean of Harvard Law School. Professor Manning argued that the doctrine was at odds with the principle of separation of powers and "contradict[ing] the constitutional premise that law-making and law-exposition must be distinct."[108] Similar criticism shortly followed from the bench. As previously mentioned, Justice Scalia had supported *Chevron* deference and authored

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[103] *Id.* at 454, 461.

[104] *Id.* at 457, 461 ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' That deferential standard is easily met here.") (citations omitted).

[105] *Id.* at 457 ("Because Congress has not 'directly spoken to the precise question at issue,' we must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'") (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

[106] *See* Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1991) ("[W]e presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); *see also* Bruh v. Bessemer Venture Partners III L.P., 464 F.3d 202, 208 (2d Cir. 2006).

[107] *See* Jonathan H. Adler, Auer *Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 13–14 (2018) ("Such broad deference can neither be justified under the umbrella of *Chevron*'s domain, nor by appeal to the agency's superior knowledge. Yet, in practice, the deference agencies receive under *Auer* is as great—if not greater—than the deference they receive under *Chevron* . . . .").

[108] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996).

the *Auer* decision using the constitutional basis of *Chevron*.[109] However, towards the end of his life, Justice Scalia changed his mind and joined Professor Manning in the call for abandonment of the *Auer* doctrine in his concurrence in *Talk America, Inc. v. Michigan Bell Telephone Co.*,[110] in his dissent in *Decker v. Northwest Environmental Defense Center*,[111] and in his concurrence in *Perez v. Mortgage Bankers Association*.[112] The late Justice Scalia was particularly concerned about the weak constitutional basis of *Auer* and argued that the jurisprudence surrounding the doctrine did not provide a "persuasive justification" for it.[113] He asserted that *Auer*, as opposed to *Chevron*, could not be

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[109] Justice Scalia first elaborated a defense of a blanket approach to deference in his dissent in *Mead* and then in his concurrence in *Perez v. Mortgage Bankers*: "[T]he rule of *Chevron*, if it did not comport with the APA, at least was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.'" Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 111–12 (2015) (Scalia, J., concurring) (quoting United States v. Mead Corp., 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)).

[110] Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring)

> It is comforting to know that I would reach the Court's result even without *Auer*. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed, an a *fortiori* application—of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined.

Id.

[111] Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 616–17 (2013) (Scalia, J., concurring in part and dissenting in part) ("Enough is enough. For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations'. . . [R]espondent has asked us, if necessary, to 'reconsider *Auer*.' I believe that it is time to do so.").

[112] *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 108–12 (2015) (Scalia, J., concurring). He argued:

> I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.

Id. at 112.

[113] *See Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part).

justified on congressional delegation grounds because Congress could not constitutionally delegate the power to enact and interpret regulations to the same entity:

> While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands . . . . Auer is not a logical corollary to Chevron but a dangerous permission slip for the arrogation of power . . . . He who writes a law must not adjudge its violation.[114]

IV. 'Potent in its place but cabined in its scope': the transformation of the doctrine of deference in *Kisor v. Wilkie* (2019)

Despite fears and rumours that a majority of conservative justices would have axed *Auer*, in June 2019 the U.S. Supreme Court confirmed its constitutionality by a 5-4 majority in *Kisor v. Wilkie*.[115] Justice Kagan authored the majority opinion and used this opportunity to reiterate the standing of the doctrine and clarify the extent of *Auer* domain, such as the circumstances in which a court should give deference.[116] She started her opinion by highlighting that *Auer*, just like *Chevron*, is grounded on the presumption of congressional delegation, therefore confirming the unwillingness of the Court to revisit such a consolidated presumption of delegation.[117] The theoretical foundations of deference are safe for Justice Kagan; she insisted that the *Auer* doctrine retains an important role in construing agency regulations.[118] As expected, Justice Gorsuch argued in his concurrence that because of the new limitations that *Kisor* imposes on judicial deference, *Auer* has become "a paper tiger," meaning that it has lost its bite and efficacy.[119] What follows is a short synopsis of the facts of the case, the decision, and an analysis of its impact on the doctrine of deference in the United States.

The lawsuit involved a Marine veteran seeking appeal against the decision of the Department of Veterans Affairs (VA) to refuse him the award of retroactive disability benefits for his service-related post-traumatic stress disorder (PTSD) because the

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[114] *Id.* at 619–21.
[115] Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
[116] *Id.* at 2408.
[117] *Id.* at 2412 ("We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.").
[118] *Id.* at 2408.
[119] *Id.* at 2425–26 (Gorsuch, J., concurring).

evidence provided by the claimant was, according to the VA's interpretation of its regulations, not "relevant."[120] On appeal, the Federal Circuit Court found that "uncertainty in application suggests that the regulation is ambiguous," and therefore applied *Auer* deference in affirming the VA's construction of the regulation and, as a consequence, the VA's denial of retroactive benefits.[121] The question before the Supreme Court was whether *Auer v. Robbins*[122] and *Bowles v. Seminole Rock & Sand Co.*,[123] should be overruled.[124] The majority did not miss the chance to defend *Auer* on the basis of stare decisis and on its historical roots that go deeper than *Seminole Rock* and specifically go back to *United States v. Eaton*,[125] a late nineteenth century decision that attributed "the greatest weight" to the interpretation given to the regulations by the department charged with their execution.[126] However, adherence to stare decisis is a minimal part of the reasoning in the majority opinion. The heavy weight is in defense of the theoretical foundations of judicial deference that Justice Kagan carried out in the opinion. She recognized that the dormant non-delegation doctrine is only a theoretical presumption but also seemed to support its usefulness for the purposes of interpretation.[127] In Justice Kagan words:

> We have adopted the presumption—though it is always rebuttable—that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151, 111 S.Ct. 1171. . . . In part, that is because the agency that promulgated a rule is in the "better position [to] reconstruct" its original meaning. *Id.*, at 152, 111 S.Ct. 1171. Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor).[128]

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[120] 38 C.F.R. § 3.156 (2021) ("A claimant may reopen a finally adjudicated claim by submitting new and material evidence . . . . Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section.").
[121] Kisor v. Shulkin, 869 F.3d 1360, 1367 (Fed. Cir. 2017), *vacated*, 139 S. Ct. 2400 (2019).
[122] Auer v. Robbins, 519 U.S. 452 (1997).
[123] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
[124] *Kisor*, 139 S. Ct. at 2408.
[125] United States v. Eaton, 169 U.S. 331 (1898).
[126] *Id.* at 343.
[127] *Kisor*, 139 S. Ct. at 2412.
[128] *Id.*

Furthermore, she defended deference to agencies as convenient from a policy point of view.[129] Agencies have the advantage of being "the experts" on their areas of competence and this is particularly important when they are called to clarify interpretations of rules concerning matters of scientific or technical nature such as an FDA regulation that bans certain pharmaceutical products for their components.[130] The point is that judges sometimes just cannot embrace technicalities.

Another advantage of agencies, according to Justice Kagan, is that they have political accountability and are supervised by the President who in turn reflects the latest policy choices of the electorate.[131] This ensures that the provisions related to new policies can be appropriately interpreted by the government that implemented them. Finally, the interpretation of the agency will be consistent and will avoid conflicting interpretations in the lower courts.[132]

Kisor, this note argues, was also a case that consolidated previous jurisprudence and clarified the circumstances in which the courts should be deferring interpretation to the agencies.[133] This is, indeed, the function that Justice Kagan wanted *Kisor* to play, stating that "*Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today."[134] According to Justice Kagan, the doctrine remains "potent in its place but cabined in its scope."[135] Cabined because, she explains, the courts can defer interpretation only if the following requirements are satisfied:

a) the regulation is genuinely ambiguous[136]
b) the agency's reading is reasonable[137]

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[129] *See id.* at 2413.
[130] *See* Actavis Elizabeth L.L.C. v. FDA, 625 F.3d 760, 764–66 (D.C. Cir. 2010). The case concerned whether a company created a new "active moiety" by joining a previously approved moiety to lysine through a non-ester covalent bond. *See id.* at 761–62.
[131] *Kisor*, 139 S. Ct. at 2413.
[132] *See generally id.* at 2412–14 (providing background on the benefits of *Auer* deference in administrative regulation interpretation).
[133] *See id.* at 2415.
[134] *Id.* at 2408.
[135] *Id.*
[136] *Id.* at 2414–15.
[137] *Id.* at 2415–16.

c) the regulatory interpretation is authoritative, i.e., one actually made by the agency[138]

d) the agency's interpretation is expertise based, i.e., in some way it implicates the agency's substantive expertise[139]

e) an agency's reading of a rule in question reflects a "fair and considered judgment"[140]

As to points A and B, these are well-established requirements and they apply to *Chevron* deference more generally.[141] *Chevron* specified that before according deference, the courts are required to determine whether Congress has or has not directly addressed the precise question at issue and only proceed to question whether the agency's answer is based on a permissible construction of the statute if the statute is silent or ambiguous.[142] Point C is an attempt to consolidate jurisprudence around the distinction between authoritative interpretations and non-binding ones.[143] Justice Kagan pointed out that deference is only accorded to authoritative interpretations.[144] The issue is particularly relevant with regards to what Professor Bertrall Ross of Berkely School of Law calls "the deference dichotomy" between interpretive rules and legislative rules.[145]

In *Perez v. Mortgage Bankers Association,* a unanimous Court established that when a federal administrative agency first issues a rule interpreting one of its regulations, it is generally not required to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA or Act).[146] As a consequence, *Perez* confirmed that interpretive rules do not have the force or effect of law.[147] On the other hand, legislative rules, which impose obligations or produce other significant effects on private

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[138] *Id.* at 2416 ("The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context.").
[139] *Id.* at 2417.
[140] *Id.* at 2417 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).
[141] Before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).
[142] *Id.* at 843.
[143] *See Kisor*, 139 S. Ct. at 2416.
[144] *See id.*
[145] Bertrall L. Ross II, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 U. CHI. LEGAL F. 223, 223–24.
[146] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96–97 (2015); Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A) (2018).
[147] *Perez*, 575 U.S. at 96–97.

interests, do require the notice-and-comment procedure.[148] *Kisor* confirmed the different procedural requirements for interpretive rules and legislative rules.[149] Furthermore, in an attempt to consolidate the jurisprudence around authoritativeness of agency interpretations, the Court seemed to respond to Justice Scalia's concurrence in *Perez* regarding the role of the courts.[150] In *Perez*, Justice Scalia stated that an agency can interpret its regulations, but the courts have the final say in deciding whether that interpretation is correct:

> I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written. The agency is free to interpret its own regulations with or without notice and comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.[151]

In response to Scalia's comments, Justice Kagan confirmed that interpretive rules do not have the force of law but also clarified that the meaning of legislative rules "remains in the hands of the courts":

> An interpretive rule itself never forms "the basis for an enforcement action."
> . . . .
> [T]he meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency's interpretation. Courts first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference. In short, courts retain the final authority to approve—or not—the agency's reading of a notice-and-comment rule.[152]

As to point D, expertise of the agency is a foundational requirement for *Auer* because, Justice Kagan explains, administrative knowledge and experience largely "account [for] the presumption that Congress delegates interpretive law-making power to the agency."[153] In other words, expertise is the reason why we assume that Congress

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[148] *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987); *see also* White v. Shalala, 7 F.3d 296, 303–04 (2d Cir. 1993).
[149] *Kisor*, 139 S. Ct. at 2420.
[150] *Compare id.*, *with Perez*, 575 U.S. at 109–10 (Scalia, J., concurring).
[151] *Perez*, 575 U.S. at 112 (Scalia, J., concurring).
[152] *Kisor*, 139 S. Ct. at 2420 (citation omitted) (quoting Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014)).
[153] *Id.* at 2417 (quoting Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 153 (1991)).

delegated interpretation; if the agency does not have expertise there is no presumption of delegation.

Regarding point E, deference to "fair and considered judgement," courts are required to assess whether the agency interpretation is fair and does not create "unfair surprise" to regulated parties.[154] Justice Kagan explains: "We have therefore only rarely given *Auer* deference to an agency construction 'conflict[ing] with a prior one.'"[155]

Kisor is certainly not the revolutionary decision that many were expecting.[156] Instead, this author argues, it is an exercise in doctrine transformation. The essence of judicial deference remains the same; its scope has changed. Time only will tell whether this minor transformation of the scope of the doctrine will stand future challenges or whether a wider revolution around deference.

V. The latest challenge to the non-delegation doctrine: *Gundy v. United States* (2019)

In June 2019, the Supreme Court considered a non-delegation challenge and, despite the Federalist Society's rumors that the time was ripe for a U-turn on the non-delegation doctrine,[157] the Court confirmed that the post-1935 evolution of the non-delegation doctrine into a dormant non-delegation doctrine was not to be reversed.[158] The case involved the constitutionality of 34 U.S.C. § 20913(d), a provision of the Sex Offender Registration and Notification Act (SORNA) that delegates power to the Attorney General "to specify the applicability" of the registration requirements to offenders convicted before the statute's enactment.[159] The Court, in a plurality opinion

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[154] Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2017).
[155] *Kisor*, 139 S. Ct. at 2418 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).
[156] *See, e.g.*, Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2361–62 (2018) (suggesting that the Supreme Court was likely to diverge from the kind of judicial deference to agencies embodied in *Chevron* because of public statements made by newly-seated Justice Gorsuch).
[157] *See* Matthew Cavedon & Jonathan Skrmetti, *Party Like It's 1935?:* Gundy v. United States *and the Future of the Non-Delegation Doctrine*, 19 FEDERALIST SOC'Y REV. 42, 52–53 (2018).
[158] *See* Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).
[159] 34 U.S.C. § 20913(d). ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).").

by Justice Kagan, Ginsburg, Breyer, and Sotomayor, held such delegation constitutional.[160] Justice Kagan cited to precedents such as *Mistretta*[161] and *Hampton*[162] and reiterated that the Constitution allows Congress to delegate discretion as long as Congress provides an intelligible principle to direct the actions of the delegee.[163] She held that "Congress is on the need to give discretion to executive officials to implement its programs"[164] and therefore argued that delegation is a constitutional necessity that the Court has recognised for a long time.[165]

Justice Alito filed a concurring opinion in which he agreed with Justice Kagan that the post-1935 rejection of non-delegation arguments directed the Court to reject this challenge but that he would be open to reconsider this approach if there was a majority.[166] On the other side of the spectrum, Justice Gorsuch filed a thirty-three page dissent joined by Chief Justice Roberts and Justice Thomas. His dissenting opinion is, as expected, full of originalist verve. The reader gets the impression that Justice Gorsuch is preparing the ground for a future overhaul of the non-delegation doctrine when he appeals to the intent of the framers to confer sovereignty to the people and insists that delegation of legislative power to the executive frustrates "the system of government ordained by the Constitution."[167] He cites to passages of "The Federalist"[168] and to the work of John Locke[169] to remind the Court of its obligation to uphold the doctrine of separation of

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[160] *See Gundy*, 139 S. Ct. at 2121.
[161] Mistretta v. United States, 488 U.S. 361 (1989).
[162] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).
[163] *Gundy*, 139 S. Ct. at 2129 (citing *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409).
[164] *Id.* at 2130.
[165] *Id.* ("Consider again this Court's long-time recognition: 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" (quoting Mistretta, 488 U.S. at 372)).
[166] *Id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.").
[167] *Id.* at 2133 (Gorsuch, J., dissenting) ("The framers understood, too, that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement.").
[168] *Id.* at 2135 ("The framers warned us against permitting consequences like these. As Madison explained, '[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'").
[169] *See id.* at 2133.

powers and "to prevent Congress from 'confer[ring] the Government's "judicial Power" on entities outside Article III.'"[170] His dissent is based on the 1930's findings of *Shechter Poultry* and *Panama* (the only Supreme Court decisions that uphold the non-delegation doctrine) that he uses as examples of impermissible delegations:

> Our precedents confirm these conclusions. If allowing the President to draft a "cod[e] of fair competition" for slaughterhouses was "delegation running riot," then it's hard to see how giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices might be permissible. And if Congress may not give the President the discretion to ban or allow the interstate transportation of petroleum, then it's hard to see how Congress may give the Attorney General the discretion to apply or not apply any or all of SORNA's requirements to pre-Act offenders, and then change his mind at any time.[171]

His specific argument is that the delegation of power to specify the applicability of the registration requirement constitutes the delegation of unfettered discretion to decide which requirements to impose on which pre-Act offenders and therefore to determine offenders' rights, something that the executive cannot do.[172]

Justice Kavanaugh took no part in the consideration or decision of *Gundy* because he was not a member of the court when the case was argued in October 2018.[173] However, doubts remain as to what the decision would have been if Kavanaugh had been part of the court and whether the non-delegation doctrine could stand a future challenge in this conservative-leaning court.[174] Mila Sohoni, commenting on the case on ScotusBlog, rightly contended that "the significance of *Gundy* lies not in what the Supreme Court did today, but in what the dissent and the concurrence portend for tomorrow."[175]

Conclusion: A tale of transformation?

The question of whether courts should defer interpretation of ambiguous provisions to agencies is often regarded as a technical question. In reality, far from being

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[170] *Id.* at 2142.
[171] *Id.* at 2144.
[172] *See id.* at 2143.
[173] Kathryn E. Kovacs, *Did the Dissent in* Gundy v. United States *Open Up a Can of Worms?,* AM. CONST. SOC'Y (June 24, 2019), https://www.acslaw.org/expertforum/did-the-dissent-in-gundy-v-united-states-open-up-a-can-of-worms/.
[174] *See id.*
[175] Mila Sohoni, *Opinion Analysis: Court Refuses to Resurrect Nondelegation Doctrine,* SCOTUSBLOG (June 20, 2019, 10:32 PM), https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect-nondelegation-doctrine/.

only a technicality, judicial deference has deep political meaning and implications.[176] This is true especially since polarization in Congress has made governing by executive power the norm and federal agencies have acquired increasing power.[177]

This note has explored the theoretical link between the doctrine of judicial deference and the dormant doctrine of delegation, as developed by the courts after the New Deal revolution.[178] It highlighted that the jurisprudence around deference and the non-delegation doctrine is transforming and that court could curb discretion of administrative agencies and, more widely, the use of legislative delegations which will be of much use during the Biden presidency.[179]

[176] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912 (2017).
[177] *See* Johnathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html.
[178] *See supra* Parts I–II.
[179] *See supra* Parts IV–V.