STARE DECISIS AND THE MISSING ADMINISTRABILITY INQUIRY

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Administrative law is undergoing a tremendous amount of change. Presidential administrations have abandoned long-held practices and embraced new strategies to make policy through adjudication and regulation. Meanwhile, the Supreme Court has reworked foundational principles of federal administrative law including agency independence, adjudication, and legal interpretation. What does the pace and degree of change in administrative law mean for the federal courts? We posit that some answers lie in the Supreme Court's decision in Kisor v. Wilkie *and its application in the lower courts over the last five years.*

In Kisor v. Wilkie*, the Court was asked to reconsider its longstanding precedents concerning judicial deference to federal agencies' interpretations of their own regulations. The result was a splintered decision that produced more questions than answers. Justice Kagan, writing for the plurality (and in parts, the Court), reaffirmed those precedents, including* Auer *and* Seminole Rock*, but also clarified and expanded the ways in which such deference should be constrained. Justice Gorsuch penned the principal opposing opinion, arguing that the Court should abandon* Auer *deference entirely. Chief Justice Roberts cast the deciding vote based on stare decisis, suggesting that "the distance between the majority and Justice Gorsuch is not as great as it may initially appear." Justice Kavanaugh, also writing separately, predicted that under the Court's new approach to* Auer *deference, courts will almost always afford no deference to an agency regulatory interpretation. Scholars and commentators have debated the impact* Kisor *will have on* Auer *deference going forward.*

This Article sheds some empirical light on Kisor*'s impact and what it means for the future of administrative law. In this Article, we present the findings of our review of every decision available on Westlaw from federal and state courts that cite* Kisor*—nearly 1,000 judicial decisions—to better understand how the decision has affected judicial deference of agency legal interpretation on the ground. We find, perhaps unsurprisingly, that lower courts have struggled to apply* Auer *deference in a consistent fashion after* Kisor *and that courts seem more likely to embrace Justice Kavanaugh's approach than Justice Kagan's. These findings illustrate the challenges of effectuating change in administrative law through the hierarchical structure of the federal judiciary. When overturning precedent, courts and litigants pay substantial attention to whether the current doctrine is workable. But judges and lawyers often*

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ignore whether and how the replacement doctrine will be administrable. Following the Supreme Court's decisions in Loper Bright, Jarkesy, *and* Corner Post, *much more attention should be paid to how such reforms will be implemented by the lower courts and in the regulatory trenches. One way to achieve that, we argue, is for the Supreme Court to require this missing administrability inquiry to be part of the doctrine of stare decisis.*

INTRODUCTION

Last year, in *Loper Bright Enterprises v. Raimondo*,[1] the Supreme Court overruled *Chevron v. Natural Resources Defense Council*[2]—a bedrock precedent in administrative law that a reviewing court must defer to a federal agency's reasonable interpretation of an ambiguous statute that the agency administers. For nearly four decades, *Chevron* guided courts, federal agencies, the regulated public, and even congressional drafters when interpreting statutes and regulations.[3]

[1] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[2] Chevron v. Nat'l Res. Def. Council, 467 U.S. 837, 842–43 (1984).

[3] *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 35 fig.3 (2017) (providing empirical data regarding circuit courts' use of *Chevron* step one and step two); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 927–28 figs.1 & 2 (2013) (empirical study of congressional staffers who draft legislation regarding their familiarity with and use of *Chevron* and other deference canons); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999,

Questions abound about the fallout from *Chevron*'s demise. How will this change affect the regulatory behavior of federal agencies? How about the compliance behavior of the regulated public? Will Congress legislate more or differently? The answers to those questions depend, in part, on how the lower courts implement the Supreme Court's new instructions.

This is not uncharted territory. Five years ago, the Court was faced with a petition similar to *Loper Bright*: whether to overrule *Auer v. Robbins*—the precedent instructing how courts should defer to federal agencies' interpretations of their own regulations.[4] In *Kisor v. Wilkie*, the Court split 5–4 on whether to overrule *Auer*, resulting in four competing opinions.[5] First, writing for the plurality (and at times, the Court), Justice Kagan reaffirmed *Auer* but also clarified and expanded on important constraints on judicial deference to an agency's regulatory interpretation.[6] Second, Justice Gorsuch penned the principal opinion in support of overruling *Auer*. He argued that the Court should abandon *Auer* deference entirely and return to the less-deferential *Skidmore* standard.[7] Third, Chief Justice Roberts cast the deciding vote, based on the pull of stare decisis. He wrote separately to note that the decision here has no bearing on the future of *Chevron* deference (a position that proved prophetic).[8] On the merits, he also suggested that "the distance between the majority and Justice Gorsuch is not as great as it may initially appear."[9] Fourth and finally, Justice Kavanaugh's separate opinion similarly predicted that the majority's approach in *Kisor* would be quite restrictive on agencies. He asserted that courts "will almost always reach a conclusion about the best interpretation of the regulation" and thus "will have no need to adopt or defer to an agency's contrary interpretation."[10]

As one of us reacted when the Court decided *Kisor*, Justice Kagan's *Kisor* framework seems "much, much narrower than [how] *Auer*

1019–20 figs.1 & 2 (2015) (empirical study of agency rule drafters' knowledge and use of *Chevron* and other interpretive tools).

4 Auer v. Robbins, 519 U.S. 452, 461 (1997) (reaffirming that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'" (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))).

5 Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

6 *See id.* at 2414–18, 2422–23.

7 *Id.* at 2428–29, 2443 (Gorsuch, J., concurring in the judgment) (first discussing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); and then discussing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

8 *Id.* at 2425 (Roberts, C.J., concurring in part); *see* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (writing for the Court that "*Chevron* is overruled").

9 *Kisor*, 139 S. Ct. at 2424.

10 *Id.* at 2448 (Kavanaugh, J., concurring in the judgment).

deference is conventionally understood"; *Seminole Rock*'s original bright-line rule has been replaced with "a new, five-step inquiry that in some ways seems more searching than *Chevron* deference."[11] Other commentators also viewed *Kisor* as a departure from *Auer* deference.[12] Others disagreed, arguing that *Kisor* made no meaningful changes to *Auer* and related precedents.[13] When the Justices cannot even agree on the contours, much less the impact, of their decision, it should come as little surprise to find similar disagreement among scholars and commentators.

This Article sheds some empirical light on this debate. In this Article, we explore the impact *Kisor* has had on judicial review of agency regulatory interpretations in the lower courts. *Kisor* has been on the books for more than five years, and in its first five years (2019–2024) Westlaw reports that it had been cited in more than 900 judicial decisions by the lower federal courts and state courts. We reviewed all of these decisions along with the 170 or so post-*Kisor* decisions that cited *Auer* or *Seminole Rock* but not *Kisor*. Using the methodology one of us implemented for a prior study on *Chevron* deference in the federal courts of appeals,[14] we then coded each decision for forty-seven variables, ranging from the subject matter of the agency regulatory interpretation to the *Kisor* factors mentioned in the decision.[15]

To be clear, our goal in this Article is not to try to generalize about whether or how *Auer* deference in the lower courts has changed since *Kisor*; we intentionally did not code pre-*Kisor* decisions applying *Auer* deference. Instead, our goal is more modest: to assess how lower courts are reading and applying *Kisor* itself. So far, has Justice Kagan's vision prevailed? Or were some commentators correct that Justice Gorsuch's

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11 Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference: The New Five-Step* Kisor *Deference Doctrine*, YALE J. ON REGUL.: NOTICE & COMMENT (June 26, 2019), https://www.yalejreg.com/nc/what-kisordoctrine [https://perma.cc/NV6R-JU2Z].

12 *See, e.g.*, Ronald A. Cass, *The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Actions*, 73 ADMIN. L. REV. 553, 569–71 (2021) [hereinafter Cass, *Umpire*] (discussing how the majority opinion implicated *Chevron* and *Auer*, and concluding that "*Kisor* manifestly did not leave the law where it was"); Jennifer Nou & Julian Nyarko, *Regulatory Diffusion*, 74 STAN. L. REV. 897, 951–52 (2022) (writing that in *Kisor* the Supreme Court "demanded greater judicial skepticism"); *see also* Ronald A. Cass, *Deference After* Kisor, REGUL. REV. (July 10, 2019) [hereinafter Cass, *Deference*], https://www.theregreview.org/2019/07/10/cass [https://perma.cc/A9HL-3QQS] ("The Court's view of the APA is not clear. But it is clear that, absent a sharp U-turn, *Auer* now exists in name only.").

13 *See infra* Section I.B.

14 Barnett & Walker, *supra* note 3, at 5; *see also* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018); Kent Barnett, Christina L. Boyd & Christopher J. Walker, *The Politics of Selecting* Chevron *Deference*, 15 J. EMPIRICAL LEGAL STUD. 597 (2018).

15 *See infra* note 89 and accompanying text.

approach would carry the day? Or is it possible to assess whether Chief Justice Roberts is correct that there is, in fact, little daylight between those positions? For what purposes are lower courts engaging with and citing *Kisor*? Which steps get the most traction? Are there emerging questions, challenges, or benefits to *Kisor*'s five-step framework?

Perhaps unsurprisingly, the cases reviewed reveal that lower courts are struggling to apply *Auer* deference in a consistent fashion after *Kisor*. Agency regulatory interpretations are upheld in federal court 57.0% of the time. Agency-win rates vary dramatically based on the reviewing circuit court (or district court) and based on the agency interpreting the regulation. Of the five constraining factors Justice Kagan identifies, the first factor (akin to *Chevron* step one) is the most invoked—in nearly nine in ten cases (88.4%). That compares to around one in five cases for the final three factors. In this sense, it appears Justice Kavanaugh may have been right, at least to some degree, that courts will often *not* defer to agency regulatory interpretations because they find the regulations unambiguous after applying the traditional tools of legal interpretation.[16] Indeed, in two of three cases (65.8%) where *Chevron* step one is mentioned, the reviewing court finds the regulation unambiguous, with the agency winning half of the time (51.7%) when the regulation is found unambiguous compared to 84.4% of the time when the reviewing court finds the regulation ambiguous. Conversely, when a reviewing court defers to an agency's regulatory interpretation, one would expect the court to address all five of the required *Kisor* steps from Justice Kagan's opinion. Yet in our dataset, reviewing courts only do so 42.1% of the time. That is a failing grade, to put it mildly. These are just a few of the top-level findings explored in depth in Part II.

Moreover, as we discuss in detail in Part III, our review of the cases foregrounds two pressing issues in this new and uncertain era of federal administrative law. First, *Kisor*'s application to date in the lower courts provides an important case study on the Supreme Court's attempts to effectuate change in administrative law. When reconsidering *Auer* deference in *Kisor*, too little attention was paid to how to construct a legal doctrine that would be administrable in the lower courts. Justice Gorsuch, for instance, argued for replacing a bright-line *Auer* rule with a squishier, less workable *Skidmore* standard. Justice Kagan, by contrast, attempted to preserve and refine a bright-line rule. Yet, based on the cases reviewed, *Kisor* does not appear to have produced consistency and predictability for lower courts' application of *Auer* deference.

[16] Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring).

The *Kisor* approach strikes us as unadministrable.[17] That may be because of the complexity of Justice Kagan's new rule. A five-factor test runs the risk of being applied more like a standard than a rule. And the splintered nature of the four *Kisor* opinions no doubt contributes to the challenge of developing a workable doctrine for lower-court implementation.

Second, regardless of the causes of confusion over *Kisor* in the lower courts, much more attention should be paid to how the hierarchical structure of the federal judiciary will speed, slow, and shape similar reforms in administrative law going forward. The Supreme Court's attempts to bring about change in administrative law depend substantially on how those changes are embraced and further developed in the lower courts.[18] For instance, under the doctrine of stare decisis, the Court often considers whether the *existing* precedent has proven workable or administrable. It would seem intuitive that such consideration would also involve assessing whether the proposed new doctrine will be workable in the lower courts and in the public more generally. That implicit assumption should be explicit. The Court, litigants, and scholars should pay more attention to exploring whether—and how—the new doctrine can be made workable in the lower courts, at federal agencies, and with the regulated public. This administrability challenge echoes familiar debates about rules versus standards.[19]

Kisor's lessons for administrability and workability of doctrinal change in administrative law are not limited to judicial review of administrative interpretations of law. Last year, the Supreme Court toppled in-house agency adjudication in *SEC v. Jarkesy*[20] and effectively

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17 To be sure, our dataset and study design do not allow us to establish a baseline against which to draw comparisons about administrability before and after *Kisor* or to the relative administrability of other legal doctrines. We are left with descriptive findings about how lower courts have struggled to apply the *Kisor* framework and a qualitative, impressionistic assessment that the *Kisor* approach has been notably unworkable in the lower-court decisions in our dataset. *See infra* notes 148–49 and accompanying text (addressing these limitations in greater detail).

18 *See generally* Andrew Hammond, *The D.C. Circuit as a Conseil d'État*, 61 HARV. J. ON LEGIS. 81 (2024) (discussing this dynamic with a focus on how the Supreme Court and the D.C. Circuit interact to shape administrative law doctrine).

19 *See, e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 72–76 (1983) (arguing that the optimal degree of precision for any agency rulemaking "depends on a series of variables peculiar to the rule's author, enforcer, and addressee"); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (discussing the relative efficiency of and effects associated with implementing rules and standards); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 565 (1992) ("The problem of choosing between rules and standards can be viewed as one concerning how the government should acquire and disseminate information about the appropriate content of the law.").

20 144 S. Ct. 2117 (2024).

abolished the statute of limitations for pre-enforcement challenges to agency rules in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.[21] The years after *Kisor* also saw the Supreme Court's development of the major questions doctrine and repeated rulings against agency independence.[22] There is good reason to think the Court is not done in its efforts to fundamentally reshape federal administrative law with the potential reinvigoration of the nondelegation doctrine and overturning of *Humphrey's Executor*.[23] As our *Kisor* case study illustrates, the impact of not just *Loper Bright*, but also *Jarkesy*, *Corner Post*, and the decisions soon to come will strain the predictability and stability of judicial review of agency action. Indeed, after examining *Kisor*'s application in the lower courts, one is left to wonder whether the Supreme Court's project to reshape administrative law is itself administrable.

As we conclude in this Article, the Supreme Court should take an important first step to correct course: formally recognize the administrability of the new doctrine as a critical element of the stare decisis inquiry. In so doing, the parties seeking to overturn precedent would be required to brief this missing administrability inquiry. Scholars, litigants, amici curiae, and lower courts would likely follow suit, leading to more predictability and stability in administrative law and public law more generally.

I
Kisor in the Supreme Court

To fully understand *Kisor*'s lessons for the future of federal administrative law, we first need to understand what the Supreme Court did and did not do when it decided *Kisor v. Wilkie*. This Part summarizes the Court's decision in *Kisor* as well as the three concurrences. It concludes by synthesizing the literature and commentary immediately after the Court decided *Kisor*.

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[21] 144 S. Ct. 2440 (2024).

[22] *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2374–76 (2023); West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (announcing major questions doctrine); Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 665–66 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489–90 (2021); Collins v. Yellen, 141 S. Ct. 1761, 1801 (2021) (Kagan, J., concurring) (disagreeing with the majority's "unnecessary" extension of the at-will removal requirement); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

[23] *See, e.g.*, FCC v. Consumers' Rsch., No. 24-354 (argued Mar. 26, 2025) (considering, among other questions, whether the FCC's delegation of administrative responsibilities to a private company violates the nondelegation doctrine); Schs., Health & Librs. Broadband Coal. v. Consumers' Rsch., No. 24-422 (argued Mar. 26, 2025).

We lack space to provide a historical and doctrinal overview of *Seminole Rock* and *Auer* deference leading up to *Kisor v. Wilkie*.[24] Put briefly, while judicial deference to agency interpretations of their own regulations stretches back to at least the late nineteenth and early twentieth century,[25] the Supreme Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.* firmly established the principle that an agency's interpretation of its own ambiguous regulation should be given "controlling weight unless it is plainly erroneous or inconsistent with

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[24] Fortunately, there are a series of excellent studies on *Seminole Rock* and *Auer* deference. *See, e.g.*, Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 252 (2013) (discussing a "pattern of citing *Seminole Rock*, but articulating a slightly different standard than the original opinion"); Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effect on Agency Rules*, 119 COLUM. L. REV. 85, 92 (2019) (concluding from a study of federal rules issued between 1982 and 2016 that "agencies did not measurably increase the vagueness of their rules in response to *Auer*"); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 924–27 (2017) (discussing the Court's debates over judicial deference and arguing that the Justices have "fail[ed] to engage with the nineteenth-century cases on which *Chevron* relied"); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47 (2015) (documenting the evolution of cases citing to *Seminole Rock*); Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 521 (2011) (finding from a study of cases applying *Seminole Rock* and *Auer* deference in the early 2000s that "the ideological and political preferences of judges had no significant effect on their votes"); Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 OHIO ST. L.J. 813, 815 (2015) (observing "a steady decline from 2011 to 2014 in the rate at which [federal courts of appeal] grant *Auer* deference"); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1451–52 (2011) (noting that the trend of questioning *Seminole Rock*'s proper scope "accelerated in the wake of *Mead*"). *See generally* Symposium, *Reflections on* Seminole Rock*: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, YALE J. ON REGUL.: NOTICE AND COMMENT (Sept. 13–26, 2016), https://www.yalejreg.com/topic/reflections-on-seminole-rock-and-the-future-of-judicial-deference-to-agency-regulatory-interpretations [https://perma.cc/7GN7-T666] (an online symposium with contributions from over two dozen scholars discussing *Seminole Rock* and *Auer* deference).

[25] *See, e.g.*, Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933) ("True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." (citation omitted)); McLaren v. Fleischer, 256 U.S. 477, 481 (1921) ("[T]he practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect . . . ."); La Roque v. United States, 239 U.S. 62, 64 (1915) ("[The] construction given to the act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons." (citations omitted)); United States v. Hammers, 221 U.S. 220, 228–29 (1911) ("Conceding then that the statute is ambiguous, we must turn . . . to the practice of the officers whose duty it was to construe and administer it."); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 34 (1895) ("[I]f there be reasonable ground for adopting either one of two constructions; this court, without departing from sound principle, may well adopt that construction which is in harmony with the settled practice of the executive branch of the government . . . .").

the regulation."[26] In 1997, the Court reaffirmed and arguably expanded *Seminole Rock* deference in *Auer v. Robbins*.[27]

However, in the two decades after *Auer*, the doctrine faced mounting criticism from scholars, judges, and even some Supreme Court justices.[28] Indeed, Justice Scalia, the author of the Court's opinion in *Auer*, later questioned whether such deference "encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases."[29] Justice Thomas similarly made clear his dissatisfaction with the doctrine,[30] as did Justice Alito,[31] and to a lesser extent, Chief Justice Roberts.[32] In 2016, then-Judge Brett Kavanaugh predicted publicly that the Supreme Court would overrule *Auer* "someday," though he hedged by saying that his comments were just his "predictions," not necessarily his "wants" or "fears."[33] As Justice Thomas put it in the denial of a petition for certiorari that same year:

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[26] 325 U.S. 410, 414 (1945).

[27] 519 U.S. 452, 462–63 (1997) (refusing to limit the power of the Secretary of Labor to interpret his regulations).

[28] *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 696 (1996) (arguing that *Seminole Rock* is even less defensible than *Chevron* and "the Court should abandon [it] . . . and replace it with an independent judicial check on agency interpretations of agency rules"). *But see* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297, 321 (2017) ("The contemporary challenges to *Auer* rest on three weak foundations: a question-begging argument about the APA; unhelpfully abstract and overly sweeping rhetoric about separation of powers; and an unrealistic (and somewhat fearful) claim about agency opportunism, exemplifying the sign fallacy. The best approach to agency regulations is simple: Use the conventional tools of interpretation, and if ambiguity remains, the agency's interpretation prevails.").

[29] Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring); *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 111 (2015) (Scalia, J., concurring in the judgment); Decker v. Nw. Env't. Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part).

[30] *See* United Student Aid Funds, Inc. v. Bible, 578 U.S. 989, 990 (2016) (Thomas, J., dissenting from the denial of certiorari) (describing the case as "emblematic of the failings of *Seminole Rock* deference"); *Mortg. Bankers Ass'n*, 575 U.S. at 112–13 (Thomas, J., concurring in the judgment) (describing the doctrine as "undermin[ing] our obligation to provide a judicial check on the other branches, and . . . subject[ing] regulated parties to precisely the abuses that the Framers sought to prevent").

[31] *Mortg. Bankers Ass'n*, 575 U.S. at 108 (Alito, J., concurring in part and concurring in the judgment) (citing Justice Thomas and Justice Scalia's critiques of *Seminole Rock* and *Auer* with approval and concluding that he "await[s] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument").

[32] *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Seminole Rock*] in an appropriate case. But this is not that case.").

[33] Jimmy Hoover, *'*Auer *Someday Will Be Overruled,' Kavanaugh Said in 2016*, Law360 (Dec. 17, 2018, 5:37 PM), https://www.law360.com/articles/1112357 [https://perma.cc/4PK2-2AWQ].

"Any reader of this Court's opinions should think that the doctrine is on its last gasp."[34] The stage was set for *Kisor v. Wilkie*.

A. The Supreme Court's Decision in Kisor v. Wilkie

When the Supreme Court decided *Kisor v. Wilkie*, the Court admitted that James Kisor's particular circumstances did not have "much bearing" on the Court's decision.[35] But here is how Kisor's petition came to the Court. In 1982, James Kisor applied for disability benefits from the Veterans Administration (VA), now known as the U.S. Department of Veterans Affairs, alleging that he had developed PTSD as a result of his participation in Operation Harvest Moon in the Vietnam War. The VA denied Kisor's benefits in 1983. He moved to reopen his claim in 2006. Relying on a psychiatrist's more recent diagnosis, the VA granted Kisor benefits. However, the VA only granted him benefits retroactively to 2006 instead of 1983. Kisor challenged the agency's decision via the Board of Veterans' Appeals. The Board affirmed the agency's decision as did the Court of Appeals for Veterans Claims on the grounds that Kisor's new service records confirming his participation in Operation Harvest Moon were not "relevant" within the meaning of the governing regulation. Because Kisor's new service records did not go to the question of whether he had PTSD, they were not relevant to why the VA denied him benefits in 1983.[36]

Kisor appealed the decision to the Federal Circuit where he argued that for a service record to be "relevant," it did not need to "counter[] the basis of the prior denial."[37] In considering Kisor's appeal, the Federal Circuit determined that it owed *Auer* deference to the Board's interpretation of the regulation.[38] The Federal Circuit held that the regulation was "ambiguous" as to "whether 'relevant' records are those

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[34] *United Student Aid Funds*, 578 U.S. at 989 (Thomas, J., dissenting from the denial of certiorari).

[35] Kisor v. Wilkie, 139 S. Ct. 2400, 2408–09 (2019); *see also* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 10–11 (2019) (discussing the background of the case); Kristin E. Hickman & Mark R. Thomson, Essay, *The* Chevron*ization of* Auer, 103 MINN. L. REV. HEADNOTES 103, 110–11 (2019) (same).

[36] *See* 38 C.F.R. § 3.156(c)(1) (requiring that new service records be relevant in order to reconsider a claim); *see also Kisor*, 139 S. Ct. at 2409 (relating that the Board determined that the "documents were not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat" (quoting App. to Petition for Writ of Certiorari app. at 43a, *Kisor*, 139 S. Ct. 2400 (No. 18-15))).

[37] *Kisor*, 139 S. Ct. at 2409 (alteration in original) (quoting Kisor v. Shulkin, 869 F.3d 1360, 1368 (Fed. Cir. 2017)).

[38] *See* Kisor v. Shulkin, 869 F.3d 1360, 1368 (Fed. Cir. 2017) ("[W]e see no plain error in the Board's conclusion that the records were not 'relevant' for purposes of [Section] 3.156(c)(1).").

casting doubt on the agency's prior [rationale or] those relating to the veteran's claim more broadly."[39] The Federal Circuit then reasoned that the Board's construction was neither "'plainly erroneous [n]or inconsistent' with the VA's regulatory framework" and concluded that the Board's reading had to be upheld under *Auer*.[40] In June 2018, Kisor filed his petition for writ of certiorari challenging the Federal Circuit's ruling.

A few months earlier, Justice Thomas, joined by Justice Gorsuch, had dissented from a denial of certiorari that invited the Court to reconsider *Auer* and *Seminole Rock*.[41] However, this time the Court granted Kisor certiorari. The difference may have been that Justice Kavanaugh had since joined the Court.[42] Indeed, Kisor had presented an alternative question of whether *Auer* deference should be replaced with a canon of regulatory construction.[43] In granting certiorari, the Court granted Kisor's petition only on one question: whether to overrule *Auer* and *Seminole Rock*.[44] To spare the suspense, the Court decided not to overrule *Auer* and *Seminole Rock* deference in *Kisor v. Wilkie*. Beyond that, figuring out what the Court did and did not do in *Kisor* requires more explanation.

Kisor resulted in a splintered decision, with no opinion fully garnering a majority. Justice Kagan wrote the principal opinion, and Chief Justice Roberts cast the deciding vote to make parts of that opinion the opinion for the Court.[45] The plurality part of Justice Kagan's opinion lays out why *Auer* deference is "worth preserving."[46] Justice Kagan explained that this kind of deference "traces back to the late nineteenth century, and perhaps beyond" and is "rooted in a presumption about congressional intent."[47] She then reviewed how the Court's jurisprudence lays out various reasons for why Congress

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39 *Id.* at 1367.

40 *Id.* at 1368 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007)).

41 Garco Const., Inc. v. Speer, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., dissenting from the denial of certiorari) (describing *Seminole Rock* deference as "constitutionally suspect").

42 *See* Walters, *supra* note 24, at 106 n.95 (arguing that Justice Kavanaugh, a deference skeptic, presented a change to the Court and an opportunity to revisit *Auer* deference).

43 Petition for Writ of Certiorari at i, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15).

44 *See* Walters, *supra* note 24, at 91 n.19 (describing how "[t]he grant, along with the Court's decision to limit the review to the question of whether *Auer* and *Seminole Rock* should be overturned" led commentators to believe that the Court would "use the case as a vehicle to overturn the doctrine").

45 *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring in part) ("For the reasons the Court discussed in Part III–B, I agree that overruling [*Auer* and *Seminole Rock*] is not warranted. I also agree with the Court's treatment in Part II–B of the bounds of *Auer* deference.").

46 *Id.* at 2410 (plurality opinion).

47 *Id.* at 2412.

would prefer the agency's interpretation, rather than the court's.[48] Chief Justice Roberts did not join this part of Justice Kagan's opinion; instead, he agreed with Justice Kagan that stare decisis required the Court to preserve *Auer*.[49]

That said, as Justice Kagan explained, the Court had "cautioned that *Auer* deference is just a 'general rule'" and "does not apply in all cases."[50] As Justice Kagan pithily put it, "*Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it."[51] Writing for the Court's majority, Justice Kagan took the "opportunity to restate, and somewhat expand on, those principles" underlying *Auer* and *Seminole Rock* and "clear up some mixed messages we have sent."[52] For present purposes, it is sufficient to summarize the five constraints on *Auer* deference Justice Kagan recognized in *Kisor*:

1. The regulatory provision must be "genuinely ambiguous" after applying all the traditional tools of legal interpretation.[53]
2. The agency's regulatory interpretation must be "reasonable," and "[t]hat is a requirement an agency can fail."[54]
3. The agency's regulatory interpretation must be the agency's "authoritative" or "official position," which means it must "at the least emanate from [the agency head or equivalent final policymaking] actors, using those vehicles, understood to make authoritative policy in the relevant context."[55]
4. The agency's regulatory interpretation must implicate the agency's substantive expertise.[56]
5. The agency's regulatory interpretation must reflect "fair and considered judgment"—not an ad hoc litigating position or otherwise an interpretation that causes regulated entities unfair surprise.[57]

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[48] *See id.* at 2412–13 (discussing Congress's preference for agencies' interpretations of statutes and the ways agencies' expertise is relevant to applying complex regulation).

[49] *See id.* at 2422–23; *id.* at 2424 (Roberts, C.J., concurring in part) (joining Part III–B of Justice Kagan's opinion and "agree[ing] that overruling those precedents is not warranted").

[50] *Id.* at 2414 (majority opinion) (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012)).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 2415 (incorporating *Chevron* step one) (citing *Chevron*, 467 U.S. at 843, n.9).

[54] *Id.* at 2415–16 (incorporating *Chevron* step two).

[55] *Id.* at 2416–17 (citing, inter alia, United States v. Mead Corp., 533 U.S. 218, 257–59 & n.6 (2001) (Scalia, J., dissenting)).

[56] *Id.* at 2417; *see also id.* at 2417 n.5 (citing Gonzales v. Oregon, 546 U.S. 243, 257 (2006)) (explaining that agencies are denied deference when they do not use their expertise and experience to formulate regulation).

[57] *Id.* at 2417–18 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

Or as Chief Justice Roberts put it in his concurring opinion, the majority opinion recognizes the following "prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise."[58]

In three separate concurrences, five Justices disagreed with various parts of Justice Kagan's opinion. While concurring in the judgment in *Kisor*, Justice Gorsuch wrote an opinion that outstrips many dissents with its lengthy and vociferous attacks on the Court's decision.[59] Joined by Justice Thomas and in part by Justices Alito and Kavanaugh, Justice Gorsuch heaped scorn on the decision to retain *Auer* deference. Justice Gorsuch opened his opinion by claiming that the Court "invented" *Auer* deference "almost by accident and without any meaningful effort to reconcile it" with the Constitution or the Administrative Procedure Act (APA).[60] Justice Gorsuch then launched various critiques at Justice Kagan's plurality opinion. First, Justice Gorsuch disputed Justice Kagan's characterization of pre- and post-*Seminole Rock* case law.[61] Then, he turned to the APA, arguing that Sections 553 and 706 of the APA prohibit *Auer* deference.[62] Justice Gorsuch then disputed Justice Kagan's characterization of the deference doctrine as reflecting "a reasonable 'presumption about congressional intent.'"[63] And Justice Gorsuch explained why *Auer* "sits uneasily with the Constitution," specifically Article III, Section 1.[64] Justice Gorsuch then attacked Justice Kagan's policy arguments and the majority's reliance on stare decisis.[65] Justice Gorsuch concluded that "the majority's attempt to remodel *Auer*'s rule into a multi-step, multi-factor inquiry" will render *Auer*

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58 *Id.* at 2424 (Roberts, C.J., concurring in part).

59 *See* Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 126 n.7 (2021) (pointing out that while Gorsuch's opinion was "technically a concurrence . . . [i]n its substance . . . it was more like a dissent").

60 *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment).

61 *See id.* at 2427–29 (identifying *Seminole Rock*'s dictum as the foundation of *Auer* deference, criticizing Justice Kagan's suggestion that *Auer* was foreshadowed in *United States v. Eaton*, and arguing that "*Auer* represents the apotheosis of this line of cases").

62 *See id.* at 2432 (characterizing 5 U.S.C. § 706 as an "unqualified command [that] requires the court to determine legal questions—including questions about a regulation's meaning—by its own lights, not by those of political appointees or bureaucrats who may even be self-interested litigants in the case at hand"); *id.* at 2434 (explaining how "*Auer* is also incompatible with the APA's instructions in [5 U.S.C.] § 553").

63 *Id.* at 2435 (quoting *Kisor*, 139 S. Ct. at 2412 (majority opinion)).

64 *Id.* at 2437.

65 *See id.* at 2441–47.

deference either "more resilient" or "ultimately powerless."[66] He hoped for the latter and explained why that may be the case:

> The majority leaves *Auer* so riddled with holes that . . . courts may find that it does not constrain their independent judgment any more than *Skidmore*. As reengineered, *Auer* requires courts to "exhaust all the 'traditional tools' of construction" before . . . deferring to an agency. Courts manage to make do with these tools in many other areas of the law, so one might hope they will hardly ever find them inadequate here. And if they do, they will now have to conduct a further inquiry that includes so few firm guides and so many cryptic "markers" that they will rarely . . . have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading.[67]

Regardless, Justice Gorsuch predicted that *Kisor* "hardly promises to be this Court's last word on *Auer*."[68]

While Chief Justice Roberts concurred in part with Justice Kagan's decision on stare decisis grounds, he wrote separately to suggest that "the distance between the majority and Justice Gorsuch is not as great as it may initially appear."[69] He emphasized that the majority opinion "catalogs the prerequisites for, and limitations on, *Auer* deference."[70] Notably, he also wrote that the Court's decision in *Kisor* did not "touch upon" the question of *Chevron* deference.[71] Rather, the Chief wrote that the "[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress."[72]

Justice Kavanaugh penned an opinion concurring in the judgment, which Justice Alito joined. In it, Justice Kavanaugh wrote that he agreed with Justice Gorsuch's conclusion that *Auer* should be overruled, but wrote separately to emphasize two of the Chief Justice's points.[73] First, Justice Kavanaugh agreed with the Chief Justice that the majority and Justice Gorsuch's opinions were not so far apart. After all, he noted, the majority borrowed from footnote nine of the Court's opinion in *Chevron* that a reviewing court must "exhaust all the 'traditional tools

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66 *Id.* at 2447–48.
67 *Id.* at 2448.
68 *Id.*
69 *Id.* at 2424 (Roberts, C.J., concurring in part).
70 *Id.*
71 *Id.* at 2425.
72 *Id.*
73 *Id.* at 2448 (Kavanaugh, J., concurring in the judgment).

of construction' before concluding that an agency rule is ambiguous."[74] While overruling *Auer* "would have been a more direct approach," Justice Kavanaugh predicted that "rigorously applying footnote 9 should lead in most cases to the same general direction."[75] In other words, under the *Kisor* majority's framework, courts "will almost always reach a conclusion about the best interpretation of the regulation," and thus "will have no need to adopt or defer to an agency's contrary interpretation."[76] Second, Justice Kavanaugh wrote that, like the Chief Justice, he did not consider the decision in *Kisor* to affirm *Auer* as bearing on the question of whether to overrule *Chevron*.[77]

B. Making Sense of Kisor

Once the Court handed down its decision, administrative law scholars began parsing *Kisor*. Some saw the Court as preserving *Auer* and *Seminole Rock* deference. For example, scholars like Jeffrey Pojanowski noted that *Kisor*, at bottom, demonstrated a continued commitment to judicial deference to a federal agency's reasonable interpretation of its own regulations.[78] Other scholars saw *Kisor* as a more radical departure from *Seminole Rock* and *Auer*.[79] Ron Levin offered a slightly different view that while *Kisor* may not represent immediate change, it is an example of the instability of administrative law.[80] Justice Gorsuch himself in *Kisor* wrote that the Court's decision was "more a stay of execution than a pardon."[81] If there is something approaching a scholarly consensus on what the Supreme Court did in *Kisor*, it is that the Court upheld *Seminole Rock* and *Auer* in so far

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74 *Id.* (quoting *Kisor*, 139 S. Ct. at 2443 (Gorsuch, J., concurring in the judgment)).

75 *Id.*

76 *Id.*

77 *Id.* at 2449.

78 *See* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 877 (2020) (characterizing *Kisor* as "preserving *Auer*"); *see also, e.g.*, Edward L. Rubin, Auer, Chevron, *and the Future of* Kisor, 48 FLA. ST. U. L. REV. 719, 758–59 (2021) ("Far from being a temporary respite on the way to ultimate demise, *Kisor* reaffirms a doctrine that courts reviewing administrative action will continue to use and continue to find useful."); William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 315 (2019) (claiming that "the [*Kisor*] Court declined to overrule two cases requiring deference to agency interpretations of ambiguous regulations").

79 *See, e.g.*, Cass, *Umpire*, *supra* note 12, at 571 ("*Kisor* manifestly did not leave the law where it was."); Nou & Nyarko, *supra* note 12, at 951–52 (writing that in *Kisor*, the Supreme Court "demanded greater judicial skepticism"); *see also* Cass, *Deference*, *supra* note 12 ("The Court's view of the APA is not clear. But it is clear that, absent a sharp U-turn, *Auer* now exists in name only.").

80 *See* Levin, *supra* note 59, at 126 (describing *Kisor* as "the most conspicuous evidence" that the questions of judicial deference to agency interpretation of statutes and regulations are "up for grabs").

81 *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment).

as it maintained that courts should, sometimes, defer to an agency's reasonable interpretation of its own regulations, but the Court in *Kisor* attempted to limit the circumstances in which courts grant agencies such deference.[82]

Despite that seeming agreement among academics that *Kisor* upheld but narrowed *Seminole Rock* and *Auer*, there is also a recognition among scholars that to understand *Kisor*'s impact, we need to see how agencies and lower courts have responded. One could imagine analyzing agency briefing strategy or their approach to guidance more generally since 2019. But an obvious place to start to understand what *Kisor* did to deference is to look at how lower federal courts have applied the decision.[83] Scholars are beginning to do so. Some have explored *Kisor*'s effect on a certain area of law,[84] a canon of statutory interpretation,[85] or a particular agency.[86] However, so far, no one has attempted to get a

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[82] *See* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 386 (2022) (characterizing *Kisor* as "a fairly pragmatic opinion that constrained existing deference doctrine without overruling a longstanding precedent"); Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1453 (2020) (suggesting that "the Court could claim that it was following precedent (*Auer*) while at the same time significantly modifying the law"); Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 167 (2019) (characterizing *Auer* deference as "retained, but narrowed"); Metzger, *supra* note 35, at 5 (suggesting "the Court did not overturn the *Auer* doctrine of deference to agency regulatory interpretations, although it tempered such deference in significant ways").

[83] *See* Kevin O. Leske, *A New Split in the* Rock*: Reflexive Deference Under* Stinson *or Cabined Deference Under* Kisor*?*, 74 ADMIN. L. REV. 761, 765 (2022) ("Unsurprisingly, in the wake of *Kisor*, many questions have been left for the lower courts to answer."); *see also* Louis J. Virelli III, *Recusal in Administrative Adjudication*, 64 ARIZ. L. REV. 135, 189 (2022) (characterizing *Kisor* as "updat[ing]" *Auer* but cautioning that "it is still unclear precisely how *Kisor* will impact judicial review of agency regulatory interpretations").

[84] *See, e.g.*, Marissa Corry, Comment, Kisor*'s Chaos: Conflicting Meanings of the Clean Air Act's "Applicable Requirements" in the Fifth and Tenth Circuits*, 74 SMU L. REV. 749, 778 (2021) (arguing that "the Court's recent limitations on *Auer* have only increased confusion in the lower courts as demonstrated by the circuit split" over Clean Air Act regulations).

[85] *See, e.g.*, Lacey Ferrara, *Uncommon Allies: Bridging the Gap Between* Auer *Deference and the Rule of Lenity in Criminal Cases*, 54 SUFFOLK U. L. REV. 157, 169–79 (2021) (considering how *Kisor* can be reconciled with the rule of lenity).

[86] *See, e.g.*, Leske, *supra* note 83 (analyzing *Kisor*'s applicability to the Sentencing Commission Guidelines); Andrew Schneider & Jonathan Stroud, *The Eleventh* Auer*: The Effect of* Kisor v. Wilkie *on Rulemaking and Adjudication at the United States Patent and Trademark Office*, 19 CHI.-KENT J. INTELL. PROP. 485, 493–500 (2020) (discussing how the Federal Circuit has applied *Kisor* to the USPTO); Islame Hosny, *Interpretations by Treasury and the IRS: Authoritative Weight, Judicial Deference, and the Separation of Powers*, 72 RUTGERS U. L. REV. 281, 301–33 (2020) (identifying over a dozen types of Treasury and IRS actions that regularly interpret statutes and regulations); Melissa Fullmer, Comment, *Judicial Deference of the Board of Immigration Appeals' Regulatory Interpretations in Light of* Kisor v. Wilkie, 52 ST. MARY'S L.J. 867, 894–902 (2021) (discussing *Kisor* and a handful of Board of Immigration Appeals (BIA) appeals).

more complete picture of how the federal courts of appeals, the federal district courts, and the state courts have interpreted and applied *Kisor*. The next Part attempts to show how these courts have applied *Kisor* in the last five years.

II
Our Study of *Kisor* in the Lower Courts

The Supreme Court hands down fewer than 100 decisions each term. The thirteen federal circuits and ninety-four district courts then must apply those decisions to new disputes, some with unforeseen complications. That's how our federal courts function. But the rate of destabilizing administrative law decisions from the Supreme Court seems to have quickened. As a result, lower courts must parse and grapple with the implications of these fast and furious decisions.

This Part summarizes our analysis of nearly 1,000 cases that cite *Kisor* since the Supreme Court's decision over five years ago. We look at how the lower courts have interpreted *Kisor*, how they have applied *Kisor*, including whether the government can waive *Auer* deference, and what ongoing controversies and circuit splits can tell us about judicial deference to agency interpretation.

A. Study Design and Methodology

We modeled our study design and methodology on a prior study one of us conducted on *Chevron* deference in the circuit courts.[87] Our dataset includes every judicial decision in Westlaw that cites *Kisor* or *Auer*, from June 26, 2019—the day *Kisor* was decided—to June 27, 2024—the day before *Loper Bright* was decided. We ultimately had 1,165 decisions in our dataset, including 991 cases that cite *Kisor* and another 175 that cite *Auer* and/or *Seminole Rock* but not *Kisor*.[88] Of the 991 cases that cite *Kisor*, we deemed that 466 cases are relevant for our purposes because the lower court is reviewing an agency regulatory interpretation. Of the 466 relevant cases, 182 are from the federal courts of appeals (39.1%); 224 are from the federal district courts (48.1%); 36 are from other federal tribunals, such as federal claims, international

[87] *See* Barnett & Walker, *supra* note 3, at 21–27 (detailing that survey design and methodology).

[88] The Article does not explore the 175 post-*Kisor* cases that cite *Auer* or *Seminole Rock* but not *Kisor*. Our coding of those cases suggests that courts are occasionally citing those cases for propositions irrelevant to administrative law. However, there are also instances where courts are reflexively awarding deference to agency interpretation without engaging in *Kisor*'s five-step framework.

trade, tax, and veterans (7.7%); and the remaining 24 are from the state courts (5.2%).

Our research assistants initially reviewed the decisions, and we then completed a secondary review of every decision to increase uniformity and validity. In our secondary review, we divided the cases up randomly for one of us to review, and we flagged cases for a third-level review where the other then weighed in. One of us then conducted a more systematic review of the cases in preparing the dataset for analysis.

We coded the decisions on a spreadsheet for forty-seven variables identified in our "Codebook," which provided guidance to our reviewers in coding.[89] In broad strokes, aside from relevance, we coded the decisions for:

- identifying information, such as the relevant circuit, judges, and additional opinions concerning regulatory interpretation;
- the nature of the agency's interpretation, such as the agency, the subject matter, the agency's format and final decisionmaker, the political valence of the interpretation largely based on Eskridge and Baer's definitions,[90] and the longstanding nature of the agency's interpretation or novelty (and reasons for any new interpretation);
- whether the agency's interpretation concerned certain sensitive topics, such as its own jurisdiction, state-law preemption, or foreign affairs; and

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[89] The variables were as follows: (1) date issued; (2) court; (3) relevance; (4) authoring judge (and other judges, where applicable); (5) en banc; (6) dissent; (7) other opinions; (8) agency; (9) subject matter; (10) final decisionmaker; (11) agency interpretation's political valence; (12) agency format; (13) continuity; (14) reason for evolution, if any, of agency's interpretation; (15) separation of powers questioned; (16) jurisdictional issue; (17) state-law preemption; (18) foreign-affairs issues; (19) judicial interpretation's political valence; (20) whether the court accepted the agency's interpretation; (21) the outcome of the petition or challenge; (22) whether the court applied *Auer* framework; (23) mention of *Kisor* step one (ambiguity); (24) mention of *Kisor* step two (reasonableness); (25) mention of *Kisor* step three (authoritativeness); (26) mention of *Kisor* step four (expertise); (27) mention of *Kisor* step five (unfair surprise); (28) whether all *Kisor* factors addressed if deference granted; (29) whether Kagan *Kisor* opinion cited; (30) whether Roberts *Kisor* opinion cited; (31) whether Gorsuch *Kisor* opinion cited; (32) whether Kavanaugh *Kisor* opinion cited; (33) which *Kisor* opinion got most treatment; (34) which *Kisor* opinion court embraced most; (35) consideration of agency expertise; (36) consideration of accountability; (37) consideration of anti-parroting principle; (38) consideration of national standards; (39) consideration of the consistency/longstanding nature of an agency's interpretation; (40) consideration of contemporaneity of the agency interpretation with statutory enactment; (41) consideration of public reliance; (42) consideration of regulatory authority; (43) consideration of agency procedures; (44) consideration of congressional acquiescence; (45) key opinion language; (46) other opinion language; and (47) subsequent Supreme Court history. The Codebook is on file with authors.

[90] *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1205–06 (2008) (defining coding for interpretations).

- the nature of the judicial decision, such as the result for the agency, political valence of the court's interpretation based on Eskridge and Baer's definitions, the applied deference regime, how the court applied *Auer* if it was the applicable regime, and which *Kisor* factors and opinions seemed to matter in that application.

As we discuss our findings and their implications in Parts II–III, we will explain additional methodological matters as relevant to our findings' implications. Because of the wealth of information provided by the raw numbers alone, in this Article we have chosen to present our findings descriptively, saving more sophisticated statistical analysis of the data for subsequent work. Indeed, our primary focus in this Article is to better understand qualitatively how the lower courts have responded to *Kisor* when reviewing agency regulatory interpretations.

Section II.B presents the general findings from our dataset, including agency-win rates and differences by subject matter and federal courts of appeals, whereas Section II.C takes a closer look at the mechanics of how *Kisor* has been applied in the lower courts. Section II.D zooms out to explore how lower courts have responded to *Kisor* even when they are not reviewing agency regulatory interpretations.

B. General Findings: From Agency-Win Rates to Subject Matter and Circuit Court Disparities

***Agency-Win Rates After* Kisor.** Among the 466 relevant cases in our dataset, the overall agency-win rate is 57.5% (268 of 466 cases). If one only includes federal court cases, the agency-win rate is 57.0% (253 of 442 cases), compared to 62.5% (15 of 24 cases) in the state courts. Among the levels of federal courts, the agency-win rate is essentially the same for circuit courts and district courts, with a lower rate for other federal courts: 59.3% (108 of 182 cases) in the federal courts of appeals; 57.1% (128 of 224 cases) in the federal district courts; and 47.2% (17 of 36 cases) for the other federal tribunals (the courts of claims, international trade, tax, veterans, etc.). There are only thirty-six cases from these other federal tribunals, so we are cautious to not read much into the ten-percentage-point difference between these cases and those decided by circuit courts and district courts.

We also hesitate to reference and compare pre-*Kisor* studies on *Auer* deference because of the severe methodological limitations of such comparisons. Among other things, the coding approach, range of cases, and human coders are different. But even if we could control for those factors, we cannot control for selection effects—i.e., which agency regulatory interpretations are challenged in court—as well as how agencies (and litigants) may adapt their behavior as courts became

increasingly skeptical of *Auer* deference over the years. These are just a few of the critical limitations.

With those caveats—and a reemphasis that our study is not designed to compare pre- and post-*Kisor* judicial behavior—we note the agency-win rates from the key pre-*Kisor* studies. For instance, William Yeatman assembled a dataset of all published circuit court decisions that invoke *Auer* deference from 1993 through 2013 (416 judicial decisions).[91] The overall agency-win rate in his dataset is 74.4%, but the win rate is higher (77.8%) from 1993–2005 than from 2006–2013 (71.4%).[92] These results are similar to those in a study by Richard Pierce and Joshua Weiss.[93] Analyzing a dataset of 219 circuit and district court decisions that invoke *Auer* deference from two three-year periods (1999–2001 and 2005–2007), Pierce and Weiss found the agency-win rate to be 76.0%.[94] Finally, Cynthia Barmore analyzed 190 circuit court decisions that invoke *Auer* deference from 2011–2014, finding that the agency-win rate falls from 82.0% (2011–2012) to 71.0% (2013–2014).[95]

Differences Across Agencies/Subject Matters. Among the 466 relevant cases in our dataset, courts review agency regulatory interpretations from some forty-two federal agencies and several state agencies, and we coded for twenty-eight different subject matters. Perhaps unsurprisingly, the agency-win rates vary substantially by agency and subject matter. For instance, the two agencies with the most cases in the dataset—Department of Labor (n=59) and the immigration agencies Department of Homeland Security and Executive Office of Immigration Review (n=59)—have win rates of 35.6% and 64.2%, respectively. The Social Security Administration (n=13) has a perfect win rate in the dataset. So do the Consumer Product Safety Commission (n=1), Drug Enforcement Agency (n=1), Equal Employment Opportunity Commission (n=4), Federal Aviation Administration (n=3), Federal Reserve (n=3), International Trade Commission (n=2), National Credit Union Administration (n=1), National Railroad Adjustment Board (n=1), and Surface Transportation Board (n=1)—though the number of cases in the dataset for all of these agencies is less than ten.

Of the agencies with at least ten cases in the dataset, the Department of Labor (n=59) has the lowest win rate at 35.6%. But there are several agencies with very few cases who do not have any wins: the Commodity

91 William Yeatman, Note, *An Empirical Defense of* Auer *Step Zero*, 106 GEO. L.J. 515, 533–35 (2018).

92 *Id.* at 545 tbl.1.

93 Pierce, Jr. & Weiss, *supra* note 24, at 520.

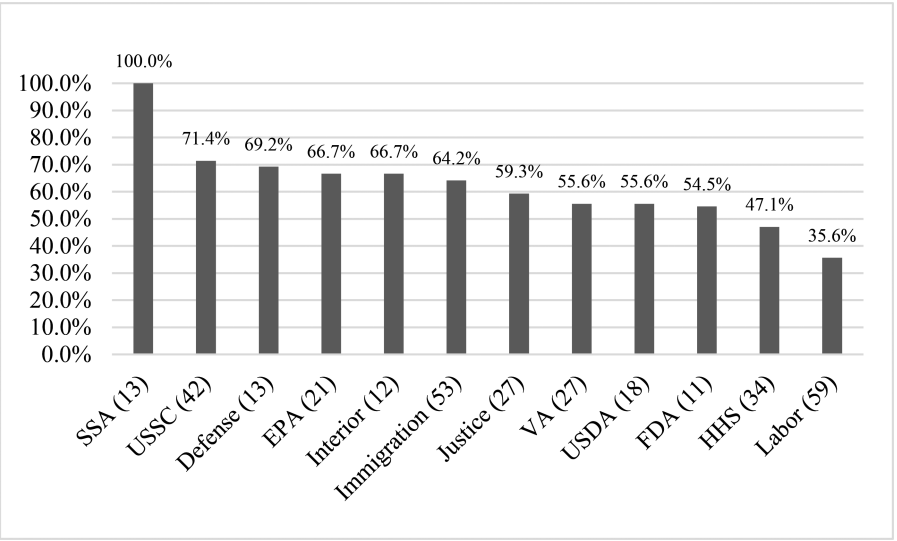
94 *Id.* at 519–20.

95 Barmore, *supra* note 24, at 825–27.

Futures Trading Commission (n=1), Department of Housing and Urban Development (n=1), Federal Bureau of Prisons (n=1), Federal Deposit Insurance Corporation (n=1), Federal Election Commission (n=1), National Labor Relations Board (n=1), U.S. AbilityOne Commission (n=1), and U.S. Post Office (n=1). Similar variations exist when the cases are grouped by subject matter instead of agency.

Again, many of these agencies have so few cases in the dataset, such that no generalizations should be drawn. But Figure 1 below depicts the agency-win rates for the twelve agencies with at least ten decisions in the dataset. The agency-win rates are represented by percentages, and the number of cases for each agency is in parentheses after the agency's name.

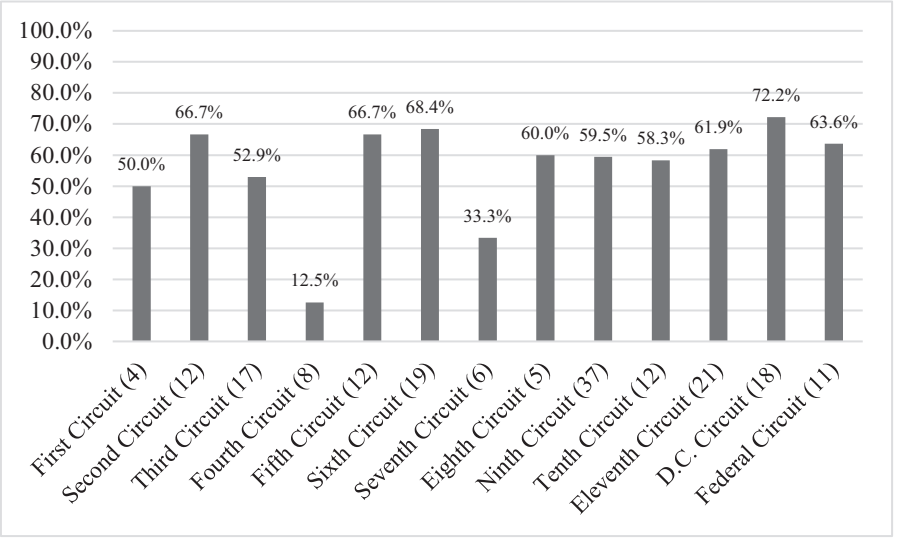
FIGURE 1. WIN RATES BY AGENCY (n>9)



Differences Across Circuits. Zooming in on the 182 relevant circuit court decisions in our dataset, the average agency-win rate across the circuit courts is 59.3% (n=182). But we see similar differences across the circuit courts as we do for agencies and subject matters. For instance, agencies have win rates below 50.0% in only two circuits: the Fourth Circuit (12.5%, n=9) and Seventh Circuit (33.3%, n=6)—though there are few cases in the dataset from either of those circuits. By contrast, four circuits have agency-win rates higher than 65.0%, listed from highest to lowest: the D.C. Circuit (72.2%, n=18), Sixth Circuit (68.3%, n=19), Second Circuit (66.7%, n=12), and Fifth Circuit (66.7%, n=12). Not

surprisingly, we see similar variations across the federal district courts. Figure 2 depicts the agency-win rates by circuit court. The agency-win rates are represented by percentages, and the number of cases for each circuit is in parentheses after the circuit's name.

FIGURE 2. AGENCY-WIN RATES BY CIRCUIT COURT



C. *The Mechanics of* Kisor*: Which Opinions and Steps Matter*

As discussed in Section I.B, once the Supreme Court handed down its decision in *Kisor v. Wilkie*, the first question the bench, the bar, and the academy asked was whether the Court had reaffirmed, modified, or overturned *Auer*. The lower courts appear to disagree on that very question. For instance, the First Circuit handed down a decision in which that court of appeals characterizes *Kisor* as "reaffirming and clarifying *Auer*," and a week later, the Eighth Circuit reasoned that *Auer* was "substantially restricted, if not all but overruled" in *Kisor*.[96] Other courts have interpreted *Kisor* as limiting *Auer* to "narrow circumstances."[97]

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[96] *Compare* Town of Weymouth v. Mass. Dep't of Env't Prot., 961 F.3d 34, 41 (1st Cir. 2020), *modified on reh'g*, 973 F.3d 143 (1st Cir. 2020), *with* Coates v. Dassault Falcon Jet Corp., 961 F.3d 1039, 1044 (8th Cir. 2020).

[97] *See, e.g.*, Perez v. Cuccinelli, 949 F.3d 865, 877 (4th Cir. 2020) ("As the Supreme Court recently emphasized, however, *Auer* deference applies solely to an agency's interpretation of its own ambiguous regulation and, even then, only in narrow circumstances." (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019))).

Perhaps part of the challenge of parsing *Kisor* is that there are four competing opinions. As a reminder, while the Court's decision in *Kisor* was unanimous as to the judgment to remand, the decision included (1) Justice Kagan's plurality opinion (of which parts garnered five votes to be the opinion for the Court); (2) the Chief Justice's separate opinion concurring in part; (3) Justice Gorsuch's opinion concurring in the judgment, joined by Justices Thomas and Kavanaugh, as well as by Justice Alito, in part; and (4) Justice Kavanaugh's opinion concurring in the judgment, which Justice Alito joined.[98] Lower courts sometimes rely on language in the separate opinions in *Kisor*, in addition to or instead of Justice Kagan's opinion for the Court.[99]

In particular, twenty lower-court decisions quote Justice Gorsuch's opinion, including his characterization that *Kisor* is "more a stay of execution than a pardon" and that *Kisor* leaves *Auer* deference "on life support."[100] The repeated citations to Justice Gorsuch's opinion are all the more striking because Justice Gorsuch only concurred in the judgment to remand the case. It was the Chief Justice who provided the crucial fifth vote, and then, only on the grounds of stare decisis and in support of Justice Kagan's five constraining steps for *Auer* deference. Thus, this is not a case where lower courts rely on a separate concurrence by the justice who created the majority decision.[101] Instead, lower courts are liberally quoting and citing a separate opinion that, while labeled a concurrence, is essentially a scorching dissent.[102] Generally, though, the lower courts tend to conclude that *Kisor*—while affirming *Auer*'s command to federal courts to defer to an agency's reasonable interpretation of an ambiguous regulation—also limited judicial

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98 *See supra* Section I.A.

99 *See, e.g.*, Schofield v. Saul, 950 F.3d 315, 322 (5th Cir. 2020) (using language from the *Kisor* opinions by the Chief Justice and Justice Gorsuch in addition to Justice Kagan's).

100 *See, e.g.*, Reyes-Vargas v. Barr, 958 F.3d 1295, 1301 n.7 (10th Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring)); Callahan v. U.S. Dep't of Health & Hum. Servs., 434 F. Supp. 3d 1319, 1350 (N.D. Ga. 2020) (relying on Justice Gorsuch's separate opinion in *Kisor*); Fitzgerald v. Gen. Motors, LLC, No. 2:19-CV-10450, 2021 WL 3079866, at *2 (E.D. Mich. July 21, 2021) (citing Justice Gorsuch's opinion in *Kisor*, but not Justice Kagan's opinion).

101 *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))); *see also* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795 (2017).

102 *Cf.* Berndsen v. N.D. Univ. Sys., 7 F.4th 782, 795 (8th Cir. 2021) (cautioning that "it would be error to accord the agency's authoritative clarifications the treatment urged by the separate opinions in *Kisor*, rather than the status dictated by the opinion of the Court" and that "[i]t is not this court's place to fight a rear-guard action against the *Auer* doctrine").

deference.[103] We think that's an accurate reading of Justice Kagan's opinion.[104] For courts that are dutifully trying to apply *Kisor*, though, the complications continue.

In reformulating how courts are to decide whether an agency's interpretation of its regulation deserves *Seminole Rock* and *Auer* deference, Justice Kagan's opinion for the Court instructed federal courts to engage in functionally a five-step inquiry.[105] The mechanics of such an inquiry have led to confusion in the lower courts. As we explain, some courts are answering some, but not all, of *Kisor*'s five queries, and other courts are conducting *Kisor* analysis in the alternative. A half-dozen judicial decisions cite *Kisor* but do not apply it, instead continuing to apply the old *Auer* standard. Some courts are permitting agencies to waive *Auer* deference, whereas other courts are treating *Kisor* as a standard of review that no party can waive. In this Section, we detail this heterogeneity in *Kisor*'s application, but the headline is that perhaps Justice Kagan's opinion, while reflecting an ideal version of how judges should interpret regulations, is not as workable as one would hope.

Writing for the Court, Justice Kagan took "the opportunity to restate, and somewhat expand on, those principles here to clear up some mixed messages we have sent" regarding *Auer* deference.[106] Justice Kagan reformulated the *Auer* inquiry into five independent factors, the first two functionally identical to *Chevron* steps one and two and then three inquiries that effectively narrow judicial deference similar to the Court's previous decisions such as *Mead* and *Barnhart*, often characterized as *Chevron* step zero.[107] While Justice Kagan presented this framework as a three-step test, her opinion for the Court in *Kisor* expects that a federal court will ask five questions. First, is the regulation "genuinely ambiguous"?[108] If so, is the agency's

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103 *See, e.g.*, *Reyes-Vargas*, 958 F.3d at 1301 ("In *Kisor*, a divided Supreme Court reaffirmed the general *Auer* rule with three significant limitations on judicial deference.").

104 *See Kisor*, 139 S. Ct. at 2418 (concluding that "[t]he upshot of all this" is that "this Court has cabined *Auer*'s scope in varied and critical ways . . . . What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear").

105 *See supra* Section I.A.

106 *Kisor*, 139 S. Ct. at 2414.

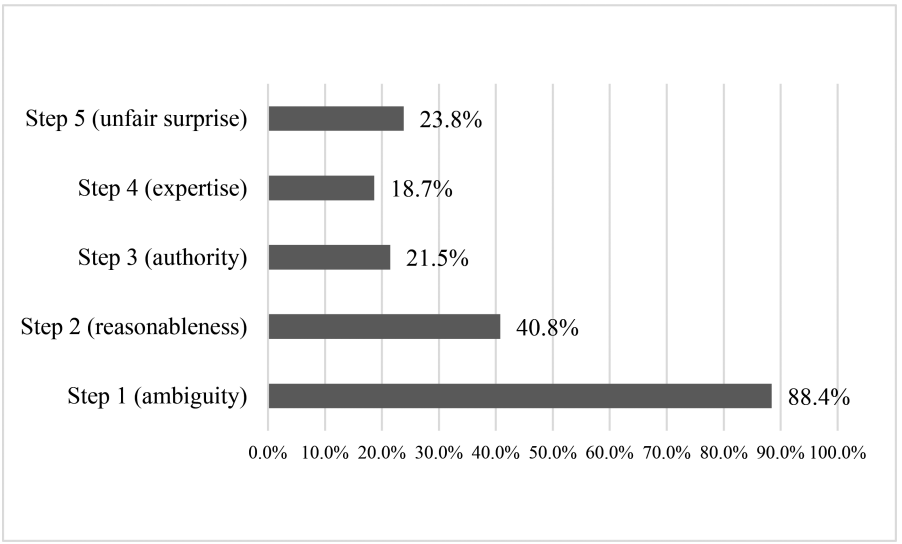
107 *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 211–19 (2006) (discussing Christensen v. Harris Cnty., 529 U.S. 576 (2000); Barnhart v. Walton, 535 U.S. 212 (2002); United States v. Mead Corp., 533 U.S. 218 (2001)).

108 *See Kisor*, 139 S. Ct. at 2415. After the Supreme Court remanded *Kisor* to the Federal Circuit, that court of appeals determined that the term "relevant" was not genuinely ambiguous. Kisor v. Wilkie, 969 F.3d 1333, 1342–43 (Fed. Cir. 2020), *opinion modified and superseded sub nom.* Kisor v. McDonough, 995 F.3d 1316 (Fed. Cir. 2021).

interpretation "reasonable"?[109] If the agency's interpretation of an ambiguous regulation is reasonable, then the court must engage in "an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[110] To determine whether the agency's interpretation is deserving of controlling weight, which we read to mean *Auer* deference, then "it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views."[111] Moreover, the "agency's interpretation must in some way implicate its substantive expertise."[112] Finally, the agency's interpretation "must reflect 'fair and considered judgment' to receive Auer deference."[113]

Somewhat surprisingly, lower courts seem to struggle to fully apply the five-step framework. Figure 3 depicts the frequency at which each *Kisor* step is mentioned in 466 relevant cases in the dataset.

FIGURE 3. FREQUENCY OF INVOCATION TO EACH *KISOR* STEP (n=466)



As Figure 3 illustrates, the vast majority of the judicial decisions do not fully apply all five steps of Justice Kagan's *Kisor* framework. Indeed, around one in five decisions mentions the final three steps. Of course,

109 *Kisor*, 139 S. Ct. at 2415–16.
110 *Id.* at 2416.
111 *Id.*
112 *Id.* at 2417.
113 *Id.*

one should not overread Figure 3. If the court refuses to defer to the agency's regulatory interpretation, it need only rule against the agency on one of the five steps. So perhaps it is not too unusual to see the final three steps seldom mentioned when courts regularly find regulations unambiguous and sometimes find them unreasonable. To attempt to tease out the nuances, we coded for all 114 cases where the reviewing court defers to the agency's regulatory interpretation. In those cases, one should expect that reviewing courts generally address all five steps. Yet in our dataset courts only do so in two of five cases (42.1%, or 28 cases).

Moreover, nearly nine in ten cases (88.4%) mention the first step—*Chevron* step one's ambiguity inquiry. Of the cases that mention step one, courts find the regulation unambiguous two-thirds of the time (65.8%). When the regulation is found unambiguous, the agency wins about half the time (51.7%). (When the reviewing court finds the regulation ambiguous, the agency-win rate soars to 84.4%.) This finding provides some support for Justice Kavanaugh's conclusion in his concurring opinion that *Chevron* step one will decide many cases.

To be sure, sometimes a judge marches through each of the *Kisor* steps; forty-eight such cases exist in our dataset.[114] And there are numerous cases in which judges are engaging in an analysis of an ambiguous regulation using the additional considerations as the Court instructs.[115] For instance, we found cases that suggest *Kisor*'s consideration of agency expertise was informing how lower courts awarded *Auer* deference. The D.C. Circuit, for example, reasoned that the EPA's interpretation of a particularly technical issue of the governing regulations for the Clean Air Act's Renewable Fuel Standard program was deserving of *Auer* deference because the interpretive issue implicated that agency's expertise.[116] Conversely, when a district court was called on to interpret a procedural requirement of the Clean Water

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114 *See, e.g.*, Wolfington v. Reconstructive Orthopedic Assocs. II PC, 935 F.3d 187, 204–05 (3d Cir. 2019); Tosdal v. Nw. Corp., 440 F. Supp. 3d 1186, 1193–94 (D. Mont. 2020); *see also* O'Neal v. Denn-Ohio, LLC, No. 3:19-CV-280, 2020 WL 210801, at *5 (N.D. Ohio Jan. 14, 2020) (describing *Kisor* as "set[ting] forth a three-step framework to determine whether *Auer* deference was appropriate in a given case").

115 *See, e.g.*, Johnson v. BOKF Nat'l Ass'n, 15 F.4th 356, 363 (5th Cir. 2021); Ordonez Azmen v. Barr, 965 F.3d 128, 139 (2d Cir. 2020) (concluding that since the BIA had "conflicting interpretations of both" the relevant statute and the relevant regulation, the agency's position "reflects neither its own 'authoritative or official position' nor its 'fair and considered judgment'" (quoting *Kisor*, 139 S. Ct. at 2416–17)); Am. Tunaboat Ass'n v. Ross, 391 F. Supp. 3d 98, 111–15 (D.D.C. 2019) (applying each factor identified in *Kisor*).

116 POET Biorefining, LLC v. EPA, 970 F.3d 392, 408 (D.C. Cir. 2020) (reasoning that "'[t]he agency that wrote the regulation will often have direct insight into what that rule was intended to mean' in a given context and 'how it was supposed to apply to some problem'" (quoting *Kisor*, 139 S. Ct. at 2412)).

Act, that court relied on *Kisor* for the proposition that procedural questions, unlike ones that implicate an agency's technical expertise, are "well within the federal judiciary's wheelhouse" and determined that the EPA could not receive *Auer* deference.[117]

However, there are also examples of judges identifying the three additional considerations or steps in *Kisor*, but then proceeding to focus on one or two or none.[118] Occasionally, circuit judges disagree about whether *Auer* deference is owed in light of the additional *Kisor* factors.[119]

Relatedly, courts appear to be applying the *Kisor* factors in the alternative. Sometimes judges decide that the agency's regulation is unambiguous, but then decide, in the alternative, that even if the regulation were ambiguous, that the agency's interpretation would not merit deference in light of *Kisor*'s additional steps,[120] including whether it is unreasonable.[121] For instance, one district judge explained that, "[w]hile under *Kisor*, the lack of any ambiguity as to the meaning of a term ends the analysis, the Court writes briefly to state why the interpretation, even if permissible, is owed no deference."[122] And the Ninth Circuit reasoned that it did not need to apply *Kisor* step-by-step because, whether or not the agency's regulatory interpretation is entitled to *Auer* deference, the result was the same.[123] Occasionally, courts ignore *Kisor* and conduct the traditional *Auer* or *Seminole Rock* analysis,[124]

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117 Nw. Env't Advocs. v. U.S. EPA, 549 F. Supp. 3d 1218, 1231 (D. Idaho 2021).

118 *See, e.g.*, InspectionXpert Corp. v. Cuccinelli, No. 1:19-CV-65, 2020 WL 1062821, at *17 (M.D.N.C. Mar. 5, 2020), *report and recommendation adopted*, No. 1:19-CV-65, 2020 WL 3470341 (M.D.N.C. Mar. 31, 2020) (discussing *Kisor*'s steps at length, but failing to discuss whether the regulation implicates the agency's expertise).

119 *See, e.g.*, Wells Fargo & Co. v. United States, 957 F.3d 840, 855 (8th Cir. 2020) (Grasz, J., dissenting).

120 *See, e.g.*, Romero v. Barr, 937 F.3d 282, 295 (4th Cir. 2019) (reasoning in the alternative that even if the regulation was ambiguous, it would not be entitled to *Auer* deference because of unfair surprise).

121 *See, e.g.*, United Steel & Fasteners, Inc. v. United States, 947 F.3d 794, 801–02 (Fed. Cir. 2020); Sierra Club v. U.S. EPA, 964 F.3d 882, 895 (10th Cir. 2020); Se. Alaska Conservation Council v. U.S. Forest Serv., 443 F. Supp. 3d 995, 1020 (D. Alaska 2020), *appeal dismissed*, No. 20-35738, 2020 WL 6882569 (9th Cir. Oct. 22, 2020); Jean G. v. Saul, No. 8:19-CV-00521-KES, 2020 WL 584735, at *5 (C.D. Cal. Feb. 6, 2020).

122 Serenity Info Tech, Inc. v. Cuccinelli, 461 F. Supp. 3d 1271, 1283 (N.D. Ga. 2020); *see also* Mutasa v. U.S. Citizenship & Immigr. Servs., 531 F. Supp. 3d 888, 899 (D.N.J. 2021) (reasoning that "even if the regulatory text were ambiguous (it is not), interpretations contained in the AFM or an unpublished AAO decision would not receive deference" (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019))).

123 Winding Creek Solar LLC v. Peterman, 932 F.3d 861, 865 (9th Cir. 2019) ("But we need not decide if FERC's regulatory interpretation is due deference under *Auer v. Robbins* because, either way, the result is the same." (citation omitted)).

124 *See, e.g.*, Love v. Wildcats Owner LLC, 532 F. Supp. 3d 872, 878 (N.D. Cal. 2021) ("An agency's interpretation of its own regulations has 'controlling weight unless it is plainly

or simply assert that the agency's decision is entitled to deference, without any analysis.[125]

Along with the mechanics of how to apply *Kisor*'s various steps is the question of what a federal court should do if an agency did not invoke *Auer* deference. Some circuits have indicated the government must raise *Auer* deference.[126] Indeed, following the Supreme Court's remand, the government waived *Auer* deference in *Kisor II*.[127] The lower courts' decisions on whether *Auer* deference can be waived will continue until the Court weighs in on waiver or abandons *Auer* deference altogether.

Finally, what does the dataset tell us about which Justice "won" in *Kisor*? As noted above, there is some support for Justice Kavanaugh's argument that many cases will be decided at step one, with the reviewing court finding the regulation unambiguous. Nearly nine in ten cases (88.4%) mention the first step, and of those cases courts find the regulation unambiguous two-thirds of the time (65.8%). To help us more fully appreciate the use of each opinion, we coded each case for whether the reviewing court cites the particular opinion at all and also which opinion receives the most treatment—by counting the words from each *Kisor* opinion that the reviewing court quoted or paraphrased. Figure 4 depicts those results, with the percentages for each *Kisor* opinion cited in the 466 relevant decisions in the dataset.

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erroneous or inconsistent with the regulation.'" (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)) (other citation omitted)).

125 *See, e.g.*, Casillas v. Comm'r of Soc. Sec., No. 1:19-CV-00629 EAW, 2020 WL 4283896, at *4 (W.D.N.Y. July 27, 2020) ("Although [Acquiescence Rulings] are guidance documents that do not carry the full force of law, the Supreme Court has held that an agency's interpretation of its own regulations is entitled to substantial deference." (citing *Kisor*, 139 S. Ct. at 2419)); Castro Bustillo v. McAleenan, No. 3:19-CV-00388, 2020 WL 1274600, at *9 (M.D. Tenn. Mar. 17, 2020); *cf.* Contreras-Sanchez v. Garland, No. 20-4295, 2021 WL 2926133, at *3 n.3 (6th Cir. July 12, 2021) ("Because the BIA will prevail either way, we need not decide today if *Kisor v. Wilkie* changes how we apply this *Auer*-based standard" (citation omitted)).

126 *See, e.g.*, Hernandez-Lara v. Lyons, 10 F.4th 19, 50 (1st Cir. 2021).

127 *See* Kisor v. Wilkie, 969 F.3d 1333, 1343 (Fed. Cir. 2020) (Reyna, J., dissenting) (pointing out that "on remand, the VA waived *Auer* altogether").

FIGURE 4. PERCENTAGE OF CASES THAT CITE EACH *KISOR* OPINION (n=466)

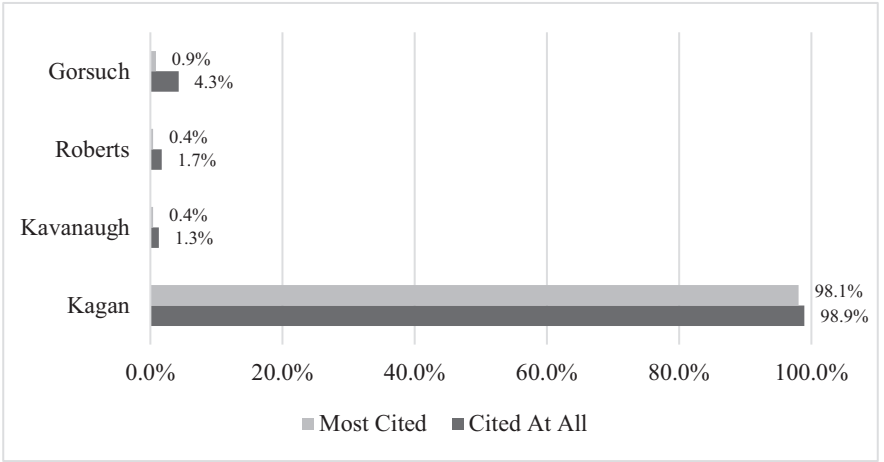
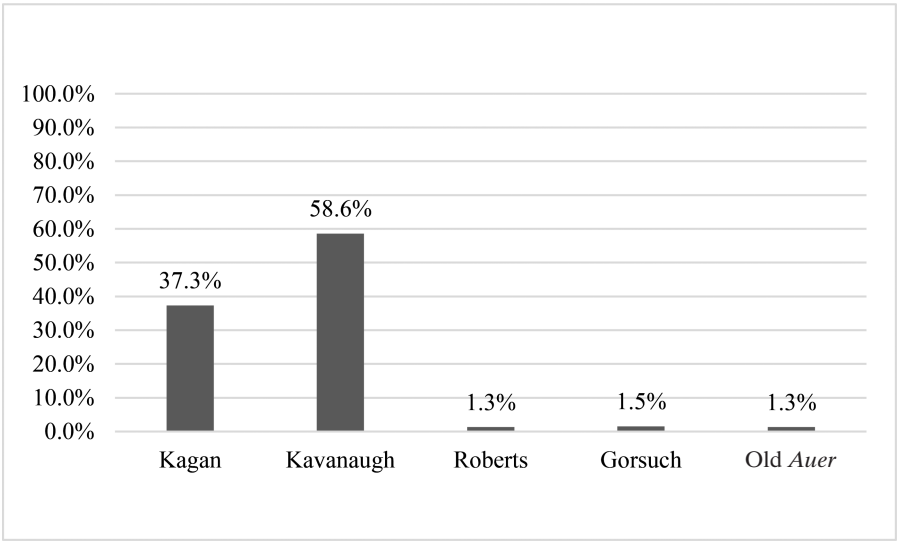


Figure 4 seems to suggest that Justice Kagan's opinion has carried the day in the lower courts. After all, Justice Kagan's opinion is cited in 98.9% of the cases, and it similarly receives the most attention in nearly all of the cases in the dataset (98.1%). Indeed, Justice Gorsuch's opinion is only cited 4.3% of the time, with Chief Justice Roberts's opinion (1.7%) and Justice Kavanaugh's opinion (1.3%) being cited even less often.

But citation percentages mask some of what is really going on in the lower courts. To further assist this inquiry, we coded each case for which *Kisor* opinion the reviewing court seems to be embracing the most. This coding is a bit tricker and requires judgment. If the reviewing court goes through several of the *Kisor* steps, we coded the case as embracing the Kagan approach. If it decided the question at step one, we coded the case as embracing the Kavanaugh approach. If the court applied *Skidmore* or otherwise rejected the *Kisor* majority approach outright, we coded the case as embracing the Gorsuch approach. And if the court said the outcome would be the same under the Kagan approach or the Gorsuch approach and did not otherwise engage one more than the other, we coded the case as embracing the Roberts approach. While coding, we also found that a half-dozen cases seem to not apply *Kisor* at all, citing *Kisor* but continuing to apply the older *Auer* deference standard. Figure 5 depicts these findings based on the percentage of the 466 relevant cases that adopt each *Kisor* approach.

FIGURE 5. PERCENTAGE OF CASES THAT EMBRACE EACH *KISOR* APPROACH (n=466)



As Figure 5 depicts, reviewing courts embrace the Kagan multi-step approach in two in five cases (37.3%). While the Roberts and Gorsuch approaches do not get much support—less than 2% each—the Kavanaugh approach accounts for nearly three in five cases in the dataset (58.6%).

Two additional points are worth making to underscore how Justice Kagan's opinion and approach have not carried the day in the lower courts. First, as noted above, in the 114 cases where the reviewing court defers to the agency's regulatory interpretation, the court only addresses all five steps of the Kagan approach in roughly two in five cases (42.1%, or 48 cases). Under the Kagan approach, one would expect the reviewing court to address all five *Kisor* factors before deferring to the agency. To be sure, it is possible that the parties did not dispute one of the steps, so the court did not feel compelled to address it. Perhaps that accounts for some of the disparity—though if the court notes the factor is not in dispute we coded that as the court addressing the factor. Even if there are some justifiable failures to engage all five steps, a compliance rate as low as 40% suggests courts are flunking Justice Kagan's *Kisor* test.

Second, as discussed in Section I.A, the brilliance of Justice Kagan's opinion is that the first half of the opinion praises and reinforces the importance of judicial deference in administrative law. That part did not garner a majority. The second half then sets forth the five guardrails for or constraints on such deference. Chief Justice Roberts joined that

part of the opinion to make it the majority opinion. The overall mood of the decisions in our dataset underscores the constraints on deference and makes no mention of the importance of judicial deference in administrative law. Indeed, although we did not code for this expressly, we cannot recall more than a half-dozen opinions in our dataset that even mention the first half of Justice Kagan's opinion.[128] When courts do not cite or appreciate the importance of judicial deference in administrative law, it should come as no surprise that courts overemphasize the constraints and that agencies receive such deference—and win—less often.

D. Kisor*'s Impact Beyond Regulatory Interpretations*

Moving past the mechanics of applying *Kisor*'s additional factors, the lower courts have also sought to integrate *Kisor* into other aspects of judicial review of agency action—these are largely the cases deemed irrelevant for the main purpose of this Article. Just as courts have wrestled with whether *Kisor* can be waived by analogizing it to *Chevron*, courts are using *Kisor* as an input to apply *Chevron*. As we explained in Part I, the relationship between *Chevron* and *Auer* deference is complicated, and *Kisor* itself did little to clarify it. On the one hand, Justice Kagan's opinion suggested that the judicial inquiry into the meaning of a regulation under *Auer* should resemble, at least initially, the approach in *Chevron*. However, Chief Justice Roberts, Justice Alito, and Justice Kavanaugh all signaled in *Kisor* that they thought that affirming *Auer* did not bear on reconsidering *Chevron*.[129] Suffice it to say that courts are citing *Kisor* when they're interpreting a statute. Courts use *Kisor* in conjunction with Supreme Court decisions on judicial deference to agency statutory interpretation, including but not limited to *Chevron*.[130]

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[128] *See, e.g.*, United States v. Brace, 2019 WL 3778394, at *20–21 (W.D. Pa. Aug. 12, 2019), *aff'd*, 1 F.4th 137 (3d Cir. 2021).

[129] Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring in part) (reasoning that the Supreme Court's decision not to overturn *Auer* deference does not preclude reconsideration of *Chevron*); *id.* at 2448–49 (Kavanaugh, J., concurring in the judgment) (same).

[130] *See, e.g.*, Fleming v. U.S. Dep't of Agric., 987 F.3d 1093, 1112 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) (reasoning that "[s]hifting interpretations of agency regulations always carry the risk of 'creat[ing] unfair surprise or upset[ing] reliance interests'" (second and third alterations in original) (quoting *Kisor*, 139 S. Ct. at 2421)); Baez-Sanchez v. Barr, 947 F.3d 1033, 1036 (7th Cir. 2020) (Easterbrook, J.) (citing *Kisor*, 139 S. Ct. 2400; and then Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)); Sierra Club v. Trump, 929 F.3d 670, 694 (9th Cir. 2019) (applying *Kisor* in conjunction with *Gonzales* and *Mead*); Parsons v. Colt's Mfg. Co., No. 2:19-CV-01189-APG-EJY, 2020 WL 1821306, at *5 n.6 (D. Nev. Apr. 10, 2020) (concluding that since the ATF's rulings "were the product of notice and comment proceedings or are entitled to so-called *Auer* deference," the court would only "give deference to them only insofar as they have

Most often, courts cite *Kisor* for its language about traditional tools of statutory interpretation.[131] For instance, in applying *Chevron*, the Ninth Circuit relied on *Kisor* for its step one analysis to decide whether the statute was ambiguous, quoting *Kisor* that in order "[t]o maintain the proper separation of powers between Congress and the executive branch, we must 'exhaust all the traditional tools of construction' before we 'wave the ambiguity flag.'"[132] That said, not all federal courts in our dataset are using *Kisor* to conduct a *Chevron* analysis. Some courts explicitly refuse to read *Kisor* as affecting *Chevron*.[133]

Courts also rely on *Kisor* for propositions other than relating to ambiguous regulations. Federal courts have cited *Kisor* in discussions of other aspects of administrative law such as the distinction between legislative and interpretive rules, delegation, and presidential control.[134] Sometimes, judges use language from *Kisor* that goes beyond the administrative law context, especially for the value of stare decisis.[135]

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the 'power to persuade'" (citing United States v. Mead Corp., 533 U.S. 218, 228 (2001); and then *Kisor*, 139 S. Ct. at 2414)); William Beaumont Hosp.-Royal Oak v. Price, 455 F. Supp. 3d 432, 441 (E.D. Mich. 2020) (relying heavily on *SmithKline*); Seife v. U.S. Dep't of Health & Hum. Servs., 440 F. Supp. 3d 254, 274 (S.D.N.Y. 2020) (explaining that "[o]ne circumstance in which *Auer* deference is inappropriate is 'when an agency interprets a rule that parrots the statutory text'" (quoting *Kisor*, 139 S. Ct. at 2417 n.5)).

131 *See, e.g.*, Travers v. Fed. Express Corp., 8 F.4th 198, 200 (3d Cir. 2021); Gov't Emps. Ret. Sys. of Virgin Islands v. Gov't of Virgin Islands, 995 F.3d 66, 108 (3d Cir. 2021) (similar); Jaroslawicz v. M&T Bank Corp., 962 F.3d 701, 710–11 (3d Cir. 2020).

132 Medina Tovar v. Zuchowski, 982 F.3d 631, 634–35 (9th Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2415); *see also* Seminole Nursing Home, Inc. v. Comm'r of Internal Revenue, 12 F.4th 1150, 1156 (10th Cir. 2021) (citing *Kisor* in the context of applying *Chevron*).

133 *See, e.g.*, Coates v. Dassault Falcon Jet Corp., 961 F.3d 1039, 1044 n.4 (8th Cir. 2020) (recognizing that *Kisor* doesn't apply because the case involved "regulations interpreting an ambiguous statutory exemption, not with the Secretary's interpretation of the regulations"); Relentless Inc. v. U.S. Dep't of Com., 561 F. Supp. 3d 226, 237 n.7 (D.R.I. 2021), *aff'd sub nom.*, 62 F.4th 621 (1st Cir. 2023) ("Plaintiffs assert that *Chevron*'s view of agency deference has . . . been curtailed . . . at least through implication, by *Kisor v. Wilkie*. But *Kisor*, which dealt solely with deference to agency interpretations of regulations, has little to say about agency interpretation of statutes." (first alteration in original) (citations omitted)); Overdevest Nurseries, L.P. v. Scalia, 454 F. Supp. 3d 46, 55 n.5 (D.D.C. 2020), *aff'd sub nom.*, 2 F.4th 977 (D.C. Cir. 2021) (similar).

134 *See, e.g.*, Stupp Corp. v. United States, 5 F.4th 1341, 1352 (Fed. Cir. 2021) (citing *Kisor*, 139 S. Ct. at 2420) (distinguishing between legislative and interpretive rules); Texas v. Rettig, 993 F.3d 408, 415 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc) (discussing *Gundy* and *Kisor* in a discussion of delegated powers); Circus Circus Casinos, Inc. v. Nat'l Lab. Rels. Bd., 961 F.3d 469, 483 (D.C. Cir. 2020) ("Courts do not defer to an agency's arbitrary and capricious interpretation of its own standard." (citing *Kisor*, 139 S. Ct. at 2418)); Cook Cnty. v. Wolf, 461 F. Supp. 3d 779, 791 (N.D. Ill. 2020) (citing *Kisor* for the principle that the President has ultimate control over agency actions).

135 *See, e.g.*, Lucero v. Saul, No. 19-CV-00114-JHR, 2020 WL 1495285, at *10 (D.N.M. Mar. 27, 2020) ("To be sure, stare decisis is 'not an inexorable command.' But any departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" (citing *Kisor*, 139 S. Ct. at 2422)); Bates v. Schwarzenegger,

Federal courts are not the only courts interpreting and applying *Kisor*. State courts are also considering *Kisor*, although they are under no legal obligation to do so when applying it to state law. Like the federal courts, state courts are wrestling with how *Kisor* reaffirmed, narrowed, or modified *Auer* deference.[136] And like some of their counterparts in the federal judiciary, some state court judges seem eager to build on Justice Gorsuch's separate opinion.[137] When *Kisor* is being used by state courts, those courts most frequently appear to be relying on *Kisor* not as a framework to review agency interpretation of ambiguous regulations, but rather as an authority for the proposition that courts should first use all traditional tools of interpretation.[138]

III
Implications for Change in Administrative Law

The Court's decision to reconsider *Auer* deference in *Kisor* was not a singular event, but rather the beginning of a brave new world of administrative law. Two new Justices joined the Court after *Kisor*, and several important administrative law decisions have followed. In the last five years, the Court has reconsidered and sometimes abandoned bedrock administrative law doctrines. The majority's increasing embrace of some version of unitary executive theory has led to dramatic

No. 1:14CV02085LJOSAB, 2019 WL 3425922, at *5–6 (E.D. Cal. July 30, 2019), *aff'd*, 832 F. App'x 509 (9th Cir. 2020) (similar).

136 *See, e.g.*, Crown Castle NG E. LLC v. Pa. Pub. Util. Comm'n, 234 A.3d 665, 689 (Pa. 2020) ("[T]he rumors of *Auer*'s demise have proved exaggerated or at least premature [because] [j]ust last year the High Court reaffirmed *Auer*'s continuing validity, albeit in a fractured and qualified ruling." (citing *Kisor*, 139 S. Ct. 2400)).

137 *See, e.g.*, Md. Dep't of the Env't v. Cnty. Comm'rs of Carroll Cnty., 214 A.3d 61, 131 (Md. 2019) ("Granting an agency controlling authority over the interpretation of its own governing regulations amounts to an abdication of this Court's essential duty to interpret and apply the law." (citing *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J. concurring))).

138 *See, e.g.*, Salisbury Univ. v. Ramses, Nos. C-22-CV-18-000369 & C-22-CV-18-000372, 2020 WL 2779193, at *9 (Md. Ct. Spec. App. May 28, 2020) ("Although *Kisor* is not binding on us and has not yet been cited in a majority opinion by our Court of Appeals, its analysis is generally consistent with that employed by Maryland courts, and we think the structure of that analysis is useful here." (citation omitted)); Jinks v. Credico (USA) LLC, No. 1784CV02731-BLS2, 2020 WL 1989278, at *10 n.8 (Mass. Super. Ct. Mar. 31, 2020), *judgment entered*, 2020 WL 7019101 (Mass. Super. Ct. Aug. 6, 2020) ("[A] court should only defer to a statutory or regulatory interpretation that was 'actually made by the agency' and adopted as its 'authoritative' or 'official position;' it is inappropriate to defer to a 'more ad hoc statement' by agency staff." (quoting *Kisor*, 139 S. Ct. at 2416)); Roberson v. Bd. of Liquor License Comm'rs for Balt. City, No. 24-C-18-003813, 2020 WL 2511135, at *9 n.4 (Md. Ct. Spec. App. May 15, 2020) (citing *Kisor*, 139 S. Ct. at 2414); Pulliam v. HNL Auto. Inc., 60 Cal. App. 5th 396, 419–20 (Cal. Ct. App. 2021), *aff'd*, No. S267576, 2022 WL 1672918 (Cal. May 26, 2022) (engaging in analysis under the *Kisor* framework); Arias v. City of New York, 182 A.D.3d 170, 172 (N.Y. App. Div. 2020) (citing *Kisor*, 139 S. Ct. at 2417).

changes in precedents on the President's appointment and removal powers under the Constitution.[139] The Court has expressed interest in reinvigorating the nondelegation doctrine to constrain congressional delegation of lawmaking power to federal agencies.[140] This interest in a revived nondelegation doctrine arguably led to the new major questions doctrine, which requires clear congressional authorization when an agency seeks to regulate over certain major policy issues.[141] Last year, the Court held in *SEC v. Jarkesy* that certain agency adjudications violated the Seventh Amendment, and in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Court effectively scrapped the six-year statute of limitations for pre-enforcement challenges to federal regulations.[142] Perhaps most tellingly for the uncertain future of *Auer* deference, the *Loper Bright* Court overruled *Chevron*.[143]

But *Kisor*'s fate in the lower courts provides important lessons regarding the Court's efforts to make doctrinal change in administrative law. We focus here on the critical role the lower courts play in implementing the Supreme Court's administrative law jurisprudence. Our case study suggests that the realities of the judicial hierarchy in the federal system necessitate that scholars, litigants, and the Justices themselves pay more attention to how to make administrative law doctrine administrable.

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139 *See* Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021) (finding that restrictions on the President's power to remove the Federal Housing Finance Agency Director violate the separation of powers); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (concluding that the Consumer Financial Protection Bureau Director must be removable at will); Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (concluding that administrative law judges are "Officers of the United States" and are subject to the Appointments clause).

140 *See* Consumers' Rsch. v. FCC, 109 F.4th 743, 767 (5th Cir. 2024), *cert granted*, 145 S. Ct. 587 (2024) (considering nondelegation challenge); Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (expressing a desire to revisit the nondelegation doctrine).

141 Biden v. Nebraska, 143 S. Ct. 2355, 2372–75 (2023); West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665–66 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489–90 (2021). *Compare* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L.J. 191, 196 (2023) ("[S]ome version of the major questions doctrine has persisted in our law ever since [1897]. . . . *West Virginia* [*v. EPA*] is properly understood as carrying forward important historical precedents—not as a recent innovation."), *with* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1094 (2023) ("The major questions doctrine is an important tool in the Court's anti-regulatory arsenal. It not only supplies a judicial weapon against regulations and delegations in circumstances where they are practically needed and effective; it may also undermine the conceptual and theoretical bases for administrative governance. And maybe that's the point.").

142 144 S. Ct. 2440, 2452 (2024).

143 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

As detailed in Section II.C, the cases we reviewed underscore that—at least so far[144]—the lower courts have struggled to apply *Auer* deference in a consistent fashion post-*Kisor*. Very few lower-court opinions follow Justice Kagan's five-step framework to the letter. As we mentioned earlier, only a handful even cite the pro-deference part of her opinion that did not garner a majority. Instead, these lower court decisions rely on one or two of the steps, then consider the others in the alternative.[145] Some courts just apply *Auer* without considering *Kisor*'s framework at all.[146] And some other courts seem to follow Justice Gorsuch's approach, despite it not commanding a majority.[147] There appear, moreover, great inconsistencies in outcomes across courts, judges, subject matters, and federal agencies. Although we hesitate to draw any definitive conclusions based on our dataset, the returns so far seem to suggest that the *Kisor* approach to *Auer* deference has not been administrable in the lower courts.

To be sure, our dataset and study design do not allow us to establish a baseline against which to draw comparisons about administrability. We are not confident any methodology could adequately control for the relevant variables to ascertain the baseline and make generalizable comparisons regarding administrability. As such, we cannot rule out, as an empirical matter, that the pre-*Kisor* approach to *Auer* deference was comparatively unworkable. Having read hundreds of pre- and post-*Kisor* decisions—and one of us having read and coded hundreds of *Chevron*-related decisions in the circuit courts from an era when the *Chevron* deference doctrine seemed quite administrable (2003–2013)[148]—we think that is unlikely to be the case. Moreover, after our initial coding efforts, we returned to our dataset and re-coded for a number of additional variables to try to tease out and demonstrate how unworkable the *Kisor* standard has been to date in the lower courts.[149] Ultimately, we are left with these descriptive findings about how lower courts struggle to apply the *Kisor* framework and a qualitative, impressionistic assessment that the *Kisor* approach has been notably unworkable in the lower courts.

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144 To be sure, it is possible—though we do not think plausible based on our qualitative review of the cases—that this struggle to apply the *Kisor* framework is just temporary or preliminary in nature. After all, some doctrines may need time to work themselves out in the lower courts. At least in the first five years after *Kisor*, we do not see evidence of a doctrine that is working itself pure over time.

145 *See supra* notes 118–23 and accompanying text.

146 *See supra* notes 124–25 and accompanying text.

147 *See supra* note 100 and accompanying text.

148 *See* sources cited *supra* note 14.

149 *See supra* Section II.C figs. 4–5 and accompanying text.

What could be the cause(s) of this lack of workability? Although the cases reviewed do not provide the clear answers, we focus here on two plausible explanations: (1) the instability of splintered decisions; and (2) the administrability problems with complicated multi-factored tests or standards (as opposed to bright-line rules). In so doing, we recognize that it is difficult to isolate these two explanations from the larger trends in the federal judiciary, including a new wave of judicial appointments in the lower courts, a new 6–3 conservative majority at the Supreme Court, and the accompanying anti-administrativist turn in the federal judiciary.

A. The Chaotic Consequences of Splintered Decisions

First, as detailed in Section I.A, *Kisor* resulted in four competing opinions. Justice Kagan's opinion only garnered a majority on stare decisis grounds and on her five constraints on *Auer* deference. Justices Gorsuch and Kavanaugh both advanced distinct approaches to judicial review of agency regulatory interpretations. And Chief Justice Roberts and Justice Kavanaugh both predicted that, at least in terms of outcomes, there is not much daylight between the approaches advanced by Justices Kagan and Gorsuch. With a slim, limited majority and competing approaches moving forward, it should come as little surprise that the lower courts have also reached conflicting and inconsistent conclusions.

To be sure, this is not a problem that litigants, or perhaps even scholars, can help solve. Counting to five will always be required at the Supreme Court, and that can lead to plurality opinions and weaker majorities that cannot send a clear enough message to the lower courts on how to implement the new precedent. The Court no doubt takes coalition-building into account, as is well documented with respect to "defensive denials" at the certiorari stage.[150] As Aaron Nielson and Paul Stancil have remarked: "A Justice has less incentive to vote in favor of certiorari if the result of merits consideration will make national law *worse* from her perspective."[151] Indeed, it would be surprising if the

[150] *See, e.g.*, Saul Brenner, Joseph M. Whitmeyer & Harold J. Spaeth, *The Outcome-Prediction Strategy in Cases Denied Certiorari by the U.S. Supreme Court*, 130 PUB. CHOICE 225, 227 (2007) (outlining the Court's outcome-prediction strategy which evaluates both aggressive grants and defensive denials); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 825–26 (1995) (same).

[151] Aaron L. Nielson & Paul J. Stancil, *Gaming Certiorari*, 170 U. PA. L. REV. 1129, 1142 (2022); *see also* Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1, 1 (2008) (analyzing "whether, and to what extent, Justices cast their votes to grant or deny cases based on whether they expect to win on the merits").

Justices did not strive for more consensus and coherence at the merits stage as well. But perhaps such values should carry extra weight when deciding whether to make substantial changes to important doctrines, especially in the context of doctrines governing the administrative state.

B. The Downsides of Replacing Bright-Line Rules with More Complicated Standards

Second, even putting aside the splintered nature of the opinions in *Kisor*, the two main approaches advanced in *Kisor* seem to have failed to provide a workable doctrine for lower courts to apply consistently. For his part, Justice Gorsuch advocated abandoning *Auer*'s more rule-like approach in favor of the *Skidmore* standard—which only gives "weight" to an agency's legal interpretation "proportional to '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.'"[152] Or, as Chief Justice Roberts put it, "there is a difference between holding that a court ought to be persuaded by an agency's interpretation [Justice Gorsuch's approach] and holding that it should defer to that interpretation under certain conditions [Justice Kagan's approach]."[153] This doctrinal design decision implicates the longstanding debate about the tradeoffs between rules and standards.[154] Indeed, as Jim Rossi has argued, the Court's standard-like approach to *Skidmore*—as opposed to *Chevron*'s bright-line rule—leads to "ad hoc application by lower courts."[155] Writing for the Court in *City of Arlington v. Federal Communications Commission*, Justice Scalia might have put it best: "Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*."[156]

Channeling Justice Scalia, Justice Kagan in *Kisor* sought to maintain *Auer*'s rule-like stabilizing purpose and approach, but with five additional subrule constraints.[157] Although she does not expressly say she is concerned about administrability in the lower courts, this

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152 Kisor v. Wilkie, 139 S. Ct. 2400, 2427 (2019) (Gorsuch, J., concurring in the judgment) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

153 *Id.* at 2424 (Roberts, C.J., concurring in part).

154 *See supra* note 19 and accompanying text.

155 Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 Wm. & Mary L. Rev. 1105, 1110 (2001); *see also* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 Colum. L. Rev. 1143, 1144–45 (2012).

156 City of Arlington v. Fed. Commc'ns Comm'n, 569 U.S. 290, 307 (2013).

157 *See supra* Section I.A; *see also supra* Section III.B (exploring the five factors in greater detail).

five-step approach reads like an instruction manual with mechanical application. Yet, based on the cases reviewed, *Kisor* does not appear to have produced consistency and predictability for lower courts' application of *Auer* deference. As discussed in Part II, the lower courts seldom follow all the instructions, picking and choosing *Kisor* factors to address. Many seem to embrace Justice Kavanaugh's approach that *Kisor*/*Chevron* "step one" will be all that matters: whether the regulatory provision is truly ambiguous after applying all the traditional tools of legal interpretation. And, as noted above, many lower courts seem to perceive that Justice Gorsuch's approach actually won the day.

Putting aside the mixed messages of the four opinions, one has to wonder why Justice Kagan's five-factor rule-based approach seems—at least to date, in the cases reviewed—to resemble more of an ad hoc standard than a more consistently applicable rule. One possibility is that as more factors are added to a previously bright-line rule, the doctrine becomes too complicated, such that it loses its rule-like character and begins to resemble a less-administrable standard. It is also quite possible, moreover, that many of the lower courts are just trying to resolve cases efficiently. If the Supreme Court says an agency has five independent ways of losing, a lower court will identify one or two of those reasons and call it a day. To be sure, that cannot fully explain the lack of administrability. As detailed in Section II.C, in 114 cases in the dataset, the lower courts defer to the agency regulatory interpretation under *Auer*. And yet in only forty-eight of those cases—42.1%—do the reviewing courts expressly adhere to Justice Kagan's command that all five *Kisor* steps must be met for an agency to receive deference.

Perhaps the biggest takeaway from *Kisor*'s lack of administrability is that if *Kisor* is not administrable, we should be even more concerned about other new administrative law precedents that are even less rule-based, such as the major questions doctrine and *Loper Bright*'s "independent judgment" inquiry. We turn to the latter in Section III.C.

C. A Path Forward: Increased Attention on Administrability

Regardless of the cause(s), much more attention should be paid to how such reworking of administrative law by the Supreme Court will be implemented by the lower courts, not to mention federal agencies and the regulated public. This would not be a new frontier for judges, litigants, and scholars by any means. For instance, under the doctrine of stare decisis, the Court often considers whether the *existing* precedent has proven unworkable or not administrable.[158] If workability matters

[158] *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("Another traditional justification for overruling a prior case is that a precedent may be a positive

for retaining a current doctrine, it seems to naturally follow that it should also matter for introducing change to a doctrine.

Despite the inherent logic of this proposal, in practice, it does not seem to be followed by litigators before the Court, at least not often. Consider, for instance, the Supreme Court merits briefing in *Loper Bright Enterprises v. Raimondo*.[159] Nearly fifty amicus curiae briefs were filed supporting petitioners' call to overturn *Chevron*. By our count, at least fifteen of those amicus briefs made a variety of arguments about how *Chevron* is unworkable, not administrable, or otherwise destabilizing in the lower courts. Petitioners' brief similarly argued that *Chevron* is an unworkable standard.[160] As one of us argued in an amicus curiae brief,

> Petitioners are quite careful not to remind the Court of what they really request: *de novo* review or at most a squishier *Skidmore* review standard. There can be no serious argument that either of these alternative standards of review would be more workable than *Chevron*—i.e., would better promote rule-of-law values of predictability and uniformity in federal law.[161]

That is because, among other reasons, "[u]nder *Chevron*, an agency's nationwide policy implementation of a statute it administers is more likely to govern, as opposed to a patchwork scheme of potentially conflicting judicial interpretations across the federal courts of appeals with ideologically disparate panels providing their 'best readings' of the statute."[162]

It is understandable why litigants seeking to change the law do not weigh in on the workability of the new doctrine they seek the Court to embrace. After all, their focus is on demonstrating the unworkability of the current doctrine. Similarly, scholars often fixate on whether and why the doctrine should be changed—or not—not necessarily on how the hierarchical structure of the federal judiciary will affect how that doctrinal change gets implemented on the ground. To be sure, the

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detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision . . . ."). *See generally* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (arguing that a stare decisis doctrine does not need to include a presumption against overruling precedents).

159 *See generally* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

160 *See* Brief for Petitioners at 16, 32–36, *Loper Bright*, 144 S. Ct. 2244 (No. 22-451) ("*Chevron* has not only proven unworkable but enormously damaging to our system of government.").

161 Brief of Law Professors Kent Barnett & Christopher J. Walker as Amici Curiae in Support of Neither Party at 27, *Loper Bright*, 144 S. Ct. 2244 (No. 22-451); *see also id.* at 26–31 (reviewing literature and further arguing that *Chevron* increases national uniformity and predictability in judicial decision-making).

162 *Id.* at 3.

Supreme Court is not blind to these considerations. At oral argument, the Justices often ask probing questions about limiting principles of a proposed doctrine and whether the doctrine will work in future cases. Indeed, as Will Baude has written, Justice Barrett seems to have embraced a "look before you leap" principle to stare decisis: "Justice Barrett wants some account of where a theory of the law is supposed to take her before she decides whether to embrace it."[163]

To ensure appropriate attention to this missing administrability inquiry, we urge the Supreme Court to formally recognize the workability of the new doctrine as a critical element of the doctrine of stare decisis. If the replacement doctrine is not administrable, that factor should weigh heavily toward maintaining the status quo, even if the current precedent is erroneous. As such, the parties seeking to overturn precedent would be required to brief what their replacement doctrine would be and whether and how it would be administrable in the lower courts and in the regulatory trenches. The parties defending the status quo would likewise have the opportunity to weigh in on the workability of the proposed new doctrine.

If this missing administrability inquiry were part of the doctrine of stare decisis, we would expect increased amici curiae attention to this issue. If the briefing is inadequate on the issue, the Supreme Court should arrange for court-appointed amicus curiae to assist the court in understanding how the new doctrine would play out on the ground. Similarly, if this inquiry were part of the doctrine of stare decisis, we would expect the briefing and discussion to start in the lower courts, leveraging the wisdom and experience of federal judges from across the country.

We make a similar call to the field of administrative law: Administrative law scholars should not focus just on the headwaters of doctrinal change. We also need to see what is happening downstream. For the last five years, much of the focus in our field has been, somewhat understandably, on each successive Supreme Court term. Yet, we should not continue to focus exclusively on why, after a few decades of recognized stability in administrative law doctrine, the Supreme Court has begun to fundamentally reshape that doctrine.[164] We need to explore how the changes already wrought by the Court are playing out

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163 Will Baude, *The "Look Before You Leap" Principle*, Volokh Conspiracy (June 29, 2023), https://reason.com/volokh/2023/06/29/the-look-before-you-leap-principle [https://perma.cc/9BV5-XAZM].

164 *See* Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 Ga. L. Rev. 757, 759 (2015) ("[B]ecause administrative law results from reluctant compromise, equilibrium is inherently precarious. Equipoise is always fleeting because the tension at the heart of the endeavor has not been resolved. As society shifts, discretion evolves . . . .").

in lower courts, agencies, and the regulated public. This scholarly shift would benefit not only the field but also the Supreme Court. If judges, lawyers, agencies, and academics focus on how to make doctrinal change workable, we can better inform the Court as to how it should consider administrative law cases more generally.

Conclusion

More than five years ago, the Supreme Court handed down a decision that attempted to instruct and constrain the lower courts in affording deference to agency regulatory interpretations. A close reading of the hundreds of lower court cases that have followed *Kisor v. Wilkie* suggests that it may be harder to direct doctrinal change in the federal judiciary when it comes to administrative law than one might think. *Kisor* provides helpful lessons and predictions for how the lower courts will struggle to implement the Supreme Court's replacement of *Chevron* deference with *Loper Bright*'s "independent judgment" inquiry. This post-*Kisor* milieu also offers a cautionary case study as the Supreme Court considers future changes in administrative law. When making sweeping changes to administrative law (or public law more generally), much more attention needs to be paid as to whether—and how—the replacement doctrine can be administrable in the lower courts and in the regulatory trenches. As a first step, the Supreme Court should require this missing administrability inquiry to be part of the doctrine of stare decisis.