Encouraging Reasoned Decision Making: *Kisor v. Wilkie* and the Future of *Auer* Deference

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In 2019, the Supreme Court decided Kisor v. Wilkie*, a case that asked the Court to revisit* Auer *deference, the doctrine which instructs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.* Auer *deference, along with other judicial deference doctrines, has received vehement criticism from legal scholars and political scientists. Among these criticisms is the assertion that* Auer *deference allows too much opportunity for judges' own views of "reasonableness" to infiltrate their legal analysis, increasing the likelihood that judicial deference to agency interpretations will be significantly influenced by ideology. The majority decision in* Kisor *purported to articulate clearer standards for the application of* Auer *deference and require judges to more clearly articulate their analysis in cases where* Auer *deference may be appropriate.*

This Note considers whether the Kisor *framework could mitigate the impact of judicial ideology on deference decisions. It focuses in particular on the use of* Auer *deference in cases involving the Endangered Species Act, a statute which has been highly polarizing along party lines. The Note examines several cases, decided before and after* Kisor*, in which federal courts were asked to rule on the meaning of Endangered Species Act regulations. This analysis suggests that while* Kisor *is unlikely to completely remove the influence of judicial ideology on deference decisions, its requirement that judges "show their work" has the potential to significantly reduce the role that judicial ideology plays in determining what constitutes a "reasonable" interpretation of an ambiguous regulation. While it is too soon to definitively evaluate* Kisor*'s impact on*

DOI: https://doi.org/10.15779/Z38KD1QM1G

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INTRODUCTION

Auer deference is the judicial doctrine that directs courts to defer to an agency's interpretation of its own regulations when the regulation is ambiguous and the agency interpretation is reasonable.[1] Critics argue that *Auer* encourages agencies to craft ambiguous regulations that they can later manipulate, and suggest that, in close cases, judges' determinations of "reasonableness" are influenced by their ideology.[2] Proponents of *Auer* respond that agencies are much better positioned than judges to interpret agency regulations, particularly in areas that require significant expertise.[3] In 2019, the Supreme Court of the United States heard *Kisor v. Wilkie*, in which the Court considered whether *Auer* deference should remain good law.[4] In what was a surprising decision to some,[5] instead of overturning *Auer*, the Court decided not only to preserve the doctrine but also to more clearly articulate the circumstances under which *Auer* deference is appropriate.[6]

This Note argues that, by providing clearer direction to the lower courts on *when* and *how* to apply *Auer* deference, *Kisor* may help judges limit the subconscious influence of their own ideological biases on their determinations about whether an agency's interpretation is *reasonable*. While by no means a panacea, *Kisor* is an important step toward a more impartial and consistent *Auer* deference doctrine. This analysis considers the impact of *Kisor* in the context of the Endangered Species Act (ESA), a statute that has generated controversy along political lines for decades.[7] However, the conclusions of this Note have broad implications for the future of *Auer* deference and judicial decision making across many bodies of law.

The Note begins with an overview of deference doctrines and the debates surrounding their use. Part II discusses *Kisor v. Wilkie*, and the degree to which it marks a significant departure from the Court's previous jurisprudence. Part III analyzes scholarship on judicial decision making and highlights research about the influence of judicial ideology on case outcomes. Part IV examines use of

1. Auer v. Robbins, 519 U.S. 452, 457–58 (1997).

2. Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1730–31 (2010).

3. *See* Stephen M. Johnson, *Advancing Auer in an Era of Retreat*, 41 WM. & MARY ENVTL. L. & POL'Y REV. 551, 562 (2017).

4. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

5. *See, e.g.*, Tom Lorenzen et al., *The Final* Auer *Midnight Approaches for an Important Deference Doctrine*, AMERICAN BAR ASSOCIATION (Mar. 8, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/march-april-2019/the-final-auer/.

6. *Kisor*, 139 S. Ct. at 2408 (noting that "even as we uphold [Auer], we reinforce its limits").

7. *See* Gabby Raymond, *Here's Why the Endangered Species Act was Created in the First Place*, TIME (July 23, 2018, 7:06 PM), https://time.com/5345913/endangered-species-act-history/ (noting the politically controversial nature of the ESA).

Auer deference in three pre-*Kisor* cases involving ESA regulations and considers how *Kisor* would have impacted the outcomes in those cases. This Part then analyzes the way that *Auer* deference was applied in *American Tunaboat Association v. Ross*,[8] the first case to apply the *Kisor* framework to an ESA regulation. The analysis in Parts IV and V suggests that while *Kisor* is unlikely to completely remove the influence of judicial ideology on deference decisions, its requirement that judges "show their work" has the potential to significantly reduce the role that judicial ideology plays in determining what constitutes a "reasonable" interpretation of an ambiguous regulation. While it is too soon to definitively evaluate *Kisor*'s impact on deference decisions, this Note suggests that the *Kisor* framework encourages a more principled and ideologically neutral approach to difficult agency deference decisions.

I. OVERVIEW OF JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS

In order to understand the debate surrounding *Auer* deference and the impact of *Kisor* on the future of administrative law, it is helpful to discuss the debates surrounding deference to agencies more broadly. This Part provides an overview of three important deference doctrines: *Chevron* deference, *Skidmore* deference, and *Auer* deference. It will then discuss the praise that these doctrines have garnered and the criticisms that have been levied against them.

A. Types of Judicial Deference to Government Agencies

There are several types of deference that courts give to agencies. Their application depends on the type of agency action in question. This Subpart provides a brief overview of judicial deference, in order to better orient the reader to the debate surrounding *Auer*.

Chevron v. Natural Resources Defense Council has become the most cited administrative law decision in American jurisprudence[9] due to its dramatic effect on statutory interpretation. The case gave rise to *Chevron* deference, which directs courts to defer to reasonable agency interpretations of statutes where Congress has left room for the agency to use its expertise to interpret ambiguous portions of the statute.[10] There are three essential steps of *Chevron* deference analysis. First, a court must consider whether Congress has conferred power upon the agency to interpret the statute.[11] Next, the court must consider whether Congress has spoken directly to the issue at hand.[12] If it has, the court must

8. Am. Tunaboat Ass'n v. Ross, 391 F. Supp. 3d 98 (D.D.C. 2019).

9. Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REG. (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

10. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 842–44 (1984).

11. *Id.* at 843–44.

12. *Id.* at 842–43.

enforce the statute as Congress intended it.[13] If it has not, the court must move on to the final step: When Congress has not spoken directly to the question at hand (such as when the statute is ambiguous), the court must defer to a *reasonable* agency interpretation of the statute, even if the court does not find that reading to be the *best* or *most natural* reading of the statute.[14] Notably, *Chevron* deference allows agency interpretations of an ambiguous statute to shift over time, provided that the reading remains reasonable.[15] This flexibility allows new administrations expanded control over their enforcement of existing statutes and, as one might imagine, has been a source of considerable debate among legal scholars.[16]

Skidmore deference provides that agencies' informal rulemakings are entitled to judicial deference if they are: (1) issued in pursuance of official duties of the agency and (2) based on specialized expertise of the agency.[17] *Skidmore* deference is considered the weakest and most limited form of agency deference.[18] Unlike *Chevron* deference, where agency interpretation must simply be reasonable, courts have held that the degree of deference granted to agencies under *Skidmore* should be proportional to the *persuasiveness* of the agency's interpretation.[19] Courts may count the fact that an agency interpretation has shifted over time against the agency when determining whether deference to the interpretation of an informal rulemaking is appropriate.[20]

Finally, observers consider *Auer* deference[21] to fall in the middle of the deference spectrum in terms of the degree of judicial deference to which agencies are entitled.[22] Unlike *Chevron* and *Skidmore*, *Auer* deference applies to an agency's interpretations of its own regulations.[23] Under *Auer*, courts must defer to an agency's interpretation of its own regulation unless the interpretation is clearly erroneous or inconsistent with the regulation.[24] Before *Kisor v. Wilkie*, courts were split over whether an agency should be granted *Auer* deference if it

13. *Id.*
14. *Id.* at 843–45.
15. *Id.* at 863.
16. Scott H. Angstreich, *Shoring Up* Chevron *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 61–66 (2000).
17. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).
18. *See* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 16 (2016) (noting that *Skidmore* "recognizes an agency's 'power to persuade'. . . but it does not require that agency interpretations be 'controlling on the courts.'").
19. *Skidmore*, 323 U.S. at 140.
20. *Id.*
21. *Auer* deference is sometimes referred to as *Seminole Rock* deference, after *Bowles v. Seminole Rock & Sand Co.*, which is the case that initially gave rise to this form of deference. *See generally* 325 U.S. 410 (1945) (introducing a form of deference to agency statutory construction).
22. *See* COLE, *supra* note 18, at 17.
23. Auer v. Robbins, 519 U.S. 452, 461–62 (1997).
24. *Id.*

has reinterpreted a regulation in a way that is reasonable but conflicts with past interpretations.[25]

B. Deference Doctrine Debate—What Do Agencies Know, Anyway?

Legal scholars and judges have engaged in fierce debate about whether deference doctrines lead to desirable judicial decisions. Understanding this debate is critical to understanding the importance of *Kisor v. Wilkie* and the concerns that the Justices had in mind while deciding that case.

Defenders of *Auer* and *Chevron* often make the institutional choice argument[26] that agencies are better positioned than judges to interpret complex statutes or regulations.[27] These scholars argue that agencies have the expertise necessary to properly interpret regulations in complex and technical areas of law.[28] Defenders also contend that failure to defer to agencies creates a separation of powers problem, in which the judiciary is engaging in policy making that should be left to Congress (and agencies that are enacting the will of Congress).[29]

The criticisms levied against deference doctrines abound. Some argue that *Auer* deference incentivizes agencies to issue vague regulations with the hope that courts will allow them free reign to reinterpret those regulations.[30] Others argue that the reasonableness inquiry involved in deference analysis is too subjective and gives judges too much discretion in determining which interpretations of regulations are "reasonable."[31] This argument stems in part from the sense that statutory and regulatory interpretation is an imprecise science. As a recent law journal note put it, "the judiciary owns a vocabulary of

25. *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (noting that an agency interpretation "that conflicts with a prior interpretation is 'entitled to considerably less deference than a consistently held agency view'"). *But see* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) (holding that "as long as interpretative changes create no unfair surprise . . . the change alone presents no separate ground for disregarding the [agency's] present interpretation").

26. I use the term "institutional choice" to refer to arguments about which institutional actor is best positioned to make a certain type of decision or address particular sets of problems. *See* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 555–56 (2012) (defining the "institutional choice" approach to deference questions).

27. *See* Johnson, *supra* note 3, at 554 (citing agency expertise as a reason to defer to its interpretations).

28. *Id.*

29. Doug Karpa, *Loose Canons The Supreme Court Guns for the Endangered Species Act in* National Association of Home Builders v. Defenders of Wildlife, 35 ECOLOGY L.Q. 291, 325 (2008).

30. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 618 (1996) (noting that *Seminole Rock* and *Auer* "provid[e] the agency an incentive to promulgate vague regulations").

31. *See* Raso & Eskridge, Jr., *supra* note 2, at 1727 (observing that "deference regimes are more like canons of statutory construction, applied episodically but reflecting deeper judicial commitments, than like binding precedents, faithfully applied, distinguished, or overruled").

canons that permit it to render a statute ambiguous or unambiguous as it desires."[32]

The debate surrounding *Auer* deference, and other deference doctrines, highlights a critical question in administrative law: Whom do we trust to interpret our laws? Should this power lie with the judiciary, in the hopes that its reading will be apolitical and consistent with congressional intent, or should we defer to agencies in recognition of the fact that they may be better positioned to interpret complex regulations due to their technical expertise? The answer to these questions is normative, and it must apply equally regardless of who sits on the bench or occupies the Oval Office.

The criticisms surrounding *Auer* deference set the stage for the Supreme Court's opinion in *Kisor v. Wilkie*, which many believed would mark the end of *Auer* deference altogether. Instead, the Supreme Court articulated more specific circumstances to govern its application.

II. THE COURT CLARIFIES *AUER* DEFERENCE: *KISOR V. WILKIE*

In 2018, the Supreme Court granted certiorari in the case *Kisor v. Wilkie*, announcing that it would consider whether *Auer* deference should be overruled.[33] The Court declined to overrule *Auer* and instead attempted to more clearly articulate the circumstances under which a court should apply *Auer* deference.[34] The decision surprised many legal analysts, who predicted that, given the controversial nature of deference doctrines and the recent additions of Justice Gorsuch and Justice Kavanaugh to the Court, *Auer* would be overruled.[35]

A. Legal Issue and Procedural History

The controversy at the center of *Kisor v. Wilkie* involved the meaning of a Department of Veterans Affairs (VA) regulation that allowed disability benefits to be retroactively granted if the VA "found that there were 'relevant official service department records'" not considered during the initial denial of benefits.[36] The VA understood "relevant" to require that the new records be related to the reason an original request was denied, while Kisor argued that "relevant" should be interpreted more broadly, to include any official files that

32. Charles Fried & Kathleen M. Sullivan, *Endangered Species Act-Judicial Deference to Agency Interpretation*, 109 HARV. L. REV. 299, 305 (1995) (using *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), as launching point for criticism of *Chevron's* malleability).

33. Kisor v. Wilkie, 139 S. Ct. 657 (2018) (granting certiorari); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2409 (2019) (noting certiorari was granted to determine whether *Auer* should be overruled).

34. *Id.* at 2414–19.

35. *See, e.g.*, Lorenzen et al., *supra* note 5.

36. *Kisor*, 139 S. Ct. at 2409.

were not originally considered in the decision, regardless of whether they speak to the reason benefits were denied.[37]

The Board of Veterans' Appeals affirmed the agency's decision to deny Kisor retroactive benefits, interpreting the "relevant" records regulation to require relevance to the original denial.[38] The case was then appealed to the Court of Appeals for the Federal Circuit, which affirmed the decision.[39] The Court of Appeals granted *Auer* deference to the VA's interpretation, finding that because the regulation was ambiguous, the court was required to defer to the agency's interpretation of the term "relevant."[40] The Supreme Court granted certiorari to decide whether *Auer* should be overruled.[41]

B. The Court Revisits Auer *and Articulates More Stringent Prerequisites to Deference*

The *Kisor* decision highlights the diversity of views on the Court about the wisdom of *Auer* deference and the benefit of relying upon agency expertise to interpret law. Justice Kagan wrote the lead opinion for the Court, only part of which had the majority. Kagan began by discussing the history of *Auer* deference and justifying its use by pointing to situations in which deference to agencies' interpretations has been useful.[42] Here, writing for the plurality, Kagan asserted that "our account of why the doctrine emerged—and also how we have limited it—goes a long way toward explaining our view that it is worth preserving."[43]

While Justice Kagan pointed to several reasons not to overrule *Auer*, the only reason that had the endorsement of the majority of the Court was that *Auer* should be upheld out of respect for *stare decisis* and in order to avoid the practical consequences of overruling it. [44] Were the Court to overrule *Auer*, dozens of Supreme Court decisions and thousands of lower court decisions would be thrown into question.[45] Justice Kagan expressed concern that overruling *Auer* "would cast doubt on many settled constructions of rules" and would have a destabilizing effect on many areas of law.[46] Further, the majority found that Kisor did not present compelling reasons to overrule the doctrine.[47] As the majority put it, "all [Kisor] can muster is that '[t]he administrative state has evolved substantially since 1945.'"[48] The Court did not find such evolution to

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See id.* at 2410–14.
43. *Id.* at 2410.
44. *Id.* at 2408, 2422.
45. *Id.* at 2422.
46. *Id.*
47. *Id.* at 2423.
48. *Id.*

be a compelling enough reason to overturn *Auer*.[49] The majority's decision to uphold *Auer* was bolstered by the fact that Congress could overrule *Auer* by passing a statute that required courts to conduct a *de novo* review of ambiguous regulations.[50]

A majority of the Court joined Justice Kagan to articulate a more coherent framework for the application of *Auer* deference. The Court acknowledged confusion among the lower courts about the circumstances under which *Auer* deference is appropriate.[51] The majority's new framework was an effort to provide clarity around *Auer* by "reinforc[ing] its limits."[52] The majority articulated a multi-step test that courts should follow when determining whether *Auer* deference is appropriate. First, a court should apply *Auer* deference only when a regulation is truly ambiguous—it is not enough to base this determination solely on the assertion of the parties to the case.[53] Instead, courts must apply all the tools of regulatory interpretation available to them.[54]

Once a court has explicitly gone through an interpretive analysis and determined that the regulation is ambiguous, the court must determine whether the agency is entitled to *Auer* deference as to the regulation in question.[55] In order to be entitled to *Auer* deference, the agency's interpretation of the regulation must be: (1) reasonable, (2) entitled to controlling weight, (3) drawn from the "substantive experience" of the agency, and (4) a reflection of "fair and considered judgment" by the agency.[56] Notably, the majority clarified that courts should *not* give *Auer* deference to new interpretations of an agency regulation if doing so would cause "unfair surprise" to regulated parties.[57] However, such a standard is not a bright line rule and may be an area where additional clarification is required. The majority noted that *Auer* is not always appropriate, even where ambiguity exists, because there are situations in which the resolution of an ambiguous regulation is more within the "bailiwick of judges" than of government agencies (such as a regulation related to the award of attorneys' fees).[58]

On its face, this new framework has the potential to mitigate some of the criticisms levied against *Auer*. Most crucially, by requiring judges to walk through a more clearly structured analysis, this framework may provide judges

49. *Id.*
50. *Id.* at 2422–23.
51. *See id.* at 2414–15 (noting that "[w]e take this opportunity to restate, and somewhat expand on, those principles here to clear up the mixed messages we have sent").
52. *Id.* at 2408.
53. *Id.* at 2415.
54. *Id.*
55. *Id.* at 2416.
56. *Id.* at 2416–18.
57. *Id.* at 2417–18.
58. *Id.* at 2417.

the necessary guidance to produce more consistent and well-reasoned deference decisions.

C. Chief Justice Robert's Concurrence—Kisor *as a Substantial Narrowing of* Auer

Notably, Chief Justice Roberts joined the portions of the majority opinion that set new standards for *Auer* deference and justified its preservation through *stare decisis*.[59] However, he also wrote a separate concurrence to emphasize his belief that, in practice, the approaches of Justice Kagan and Justice Gorsuch, discussed in this Partt, are quite similar.[60] According to Roberts, while the language adopted by each Justice differs, the processes they describe require courts to apply similar analysis to ambiguous regulations.[61] He wrote that "the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation."[62]

D. Justice Gorsuch's Concurrence—Predicting the Demise of Auer *Deference*

In his partial concurrence, Justice Gorsuch wrote that "it should have been easy for the Court to say goodbye to *Auer*."[63] Justice Gorsuch argued that *Auer* deference "creates a systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else."[64] He wrote that *Auer* forces judges to "subordinate their own views about what the law means to those of a political actor, one who may even be a party to the litigation before the court."[65] Justice Gorsuch also argued that *Auer* deference violates the separation of powers provision of the Constitution.[66] Gorsuch argued that *Auer* deference encourages the blurring of lines between the judicial and executive branches.[67] He wrote that by allowing agencies to interpret their own regulations, most litigants are left "unsure of what the law is, at the mercy of political actors and the shifting winds of popular opinion. . . . The rule of law begins to bleed into the rule of men."[68]

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59. *Id.* at 2422–24.

60. *Id.* at 2424–25.

61. *Id.*

62. Justice Gorsuch responds to this characterization harshly, suggesting that it is evidence that the Court should have simply overruled the doctrine of *Auer* deference. He writes that Roberts "see[s] little practical difference between keeping it on life support . . . and overruling it entirely . . . . So the doctrine emerges maimed and enfeebled—in truth, zombified." *Id.* at 2425 (Gorsuch, J., concurring in part).

63. *Id.* at 2425.

64. *Id*. (quoting Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J. L. & PUB. POL'Y 625, 641 (2019)).

65. *Id.* at 2429.

66. *Id.* at 2437.

67. *Id.* at 2437–39.

68. *Id.* at 2438.

Most critically for our analysis here, Gorsuch argued that while *Auer* should have been overruled, the new framework articulated by the majority substantially limits *Auer* and creates avenues for judges to circumvent it altogether.[69] Specifically, Justice Gorsuch pointed to the majority's emphasis on the use of canons of statutory interpretation in the ambiguity analysis to argue that *Auer* has been reduced by the majority to something resembling *Skidmore*—where the deference owed to an agency's interpretation of its own regulation will be proportional to the persuasiveness of that interpretation.[70]

E. Kisor v. Wilkie—*Has* Auer *Deference Been Clarified or Obliterated?*

The *Kisor* opinion revealed a Court that remains deeply divided on whether *Auer* deference should be preserved. Although the majority aimed to preserve *Auer* deference and create a more coherent analytical framework for its application, the Roberts and Gorsuch concurrences raise important questions about what the real-world impact of *Kisor* will be. Is Gorsuch correct that the emphasis on the ambiguity analysis will allow judges to effectively ignore *Auer*? Or has the majority created a deference inquiry that will encourage judges to make more consistent and logically coherent deference decisions?

In order to understand the impact of *Kisor* on judges' deference analyses, it is important to understand the literature about how judges make decisions, particularly in close cases involving uncertain legal doctrines. The next Part provides that critical foundation against which *Kisor* can be read.

III. FORECASTING *KISOR*'S LEGACY: THEORIES OF JUDICIAL DECISION MAKING

In order to understand the impact of *Kisor* on *Auer* deference, it is critical to consider the factors that influence judicial decision making. This Part highlights legal and political science scholarship which suggests that in close cases, judicial ideology may influence case outcomes. It then argues that creating clearer intellectual frameworks to guide judges' deference analyses could dampen the effect of ideology on case outcomes. I do not mean to suggest that judges' decisions are *primarily* driven by ideology; rather, I argue that in cases where the law provides no clear guidance, there is an increased danger for ideology to influence outcomes. By providing a clearer intellectual framework for determining whether *Auer* deference is appropriate, *Kisor* has the potential to lead to more rational and consistent deference decisions.

69. *Id.* at 2425.
70. *Id.* at 2448.

A. Legal Realism and the Role of Ideology in Judicial Decisions

Scholars have long struggled to understand judicial decision making and have theorized on how to best encourage principled and nonpartisan decision making from the courts. Reflecting upon her experience on the bench, Judge Wood, of the Court of Appeals for the Seventh Circuit, noted that while most cases she heard produced unanimous decisions from ideologically diverse judges, she also regularly heard appeals that "present[ed] more difficult questions—difficult because the law is unsettled, difficult because judicial philosophies differ."[71] In these cases, Judge Wood observed, reasonable judges will disagree.[72]

"Legal realists" argue that, while judges may see themselves as neutral and principled decision makers, because the law does not always provide clear answers, the law itself cannot completely explain the decisions made by judges.[73] In addition to being constrained by legal doctrines, legal realists argue that judges are also influenced by their own ideologies.[74] Legal realism uses empirical analyses of judges' decisions to better understand the factors that make a difference in close cases.[75] Because federal judges are nonpartisan figures, this scholarship has used proxies for judicial political ideology—most often, the party of the president that nominated the judge will be used as an indicator of that judge's ideology.[76] While not perfect, such a proxy is reasonable, particularly as judicial appointments at all levels of the judiciary have become increasingly influenced by the ideology of prospective jurists, in addition to their professional qualifications.[77]

In order to evaluate the connection between ideology and case outcomes, some empirical analyses have coded case outcomes as "liberal" or "conservative," based on the underlying policies at issue.[78] For instance, an analysis of outcomes in Title VII sex discrimination cases found that Democratic appointees vote in favor of plaintiffs (coded as a "liberal" outcome), more often than Republican appointees.[79] The study found that panels of three Republican appointees found for the plaintiff 25.8 percent of the time, whereas panels of

71. Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445, 1464 (2012).

72. *Id.*

73. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 832 (2008).

74. *Id*. at 835–36.

75. *Id*. at 832–34.

76. *Id*. at 836.

77. *See* Daniel A. Farber & Suzanna Sherry, *Building a Better Judiciary*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 285, 291 (David Klein & Gregory Mitchell eds., 2010) (noting also that despite this trend, they believe judges are not principally motivated by partisan aims).

78. *See, e.g.*, Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1328 (2009) (discussing the methodology employed to evaluate Title VII sex discrimination case outcomes).

79. *Id.* at 1329.

three Democratic appointees found for plaintiffs 79.2 percent of the time.[80] Notably, these differences are diminished on mixed panels (panels with appointees of both parties), suggesting that increased deliberation with diverse viewpoints may dampen the impact of ideological differences on case outcomes.[81] Other scholars have observed that clear legal frameworks constrain ideology's influence on case outcomes, finding virtually no evidence of political ideology consistently influencing outcomes in criminal law and property law cases, which, these scholars argue, tend to have clearer legal frameworks than other areas of law.[82] However, empirical analyses suggest that *Auer* and *Chevron* may not provide legal frameworks clear enough to remove the influence of political ideology.[83]

B. Judicial Ideology and the Application of Deference Doctrines

Scholarship suggests that ideology may influence judges' application of deference doctrines, including *Auer*.[84] These findings suggest that *Auer* could benefit from clearer analytical frameworks to guide judges.

Legal scholars and political scientists have observed that judges, and Supreme Court Justices in particular, tend to apply deference doctrines as canons of interpretation rather than as binding precedents that dictate case outcomes.[85] One empirical study found that between 1984 and 1990, the Supreme Court applied *Chevron* in just one third of the cases in which its use may have been appropriate.[86] Another study found that Supreme Court Justices' application of deference regimes to agency interpretations can be explained, at least in part, by the "attitudinal model" of judicial decision making.[87] The attitudinal model posits that judges' decisions are motivated to a certain degree by their policy preferences and that judges will be less likely to defer to an agency when doing so would allow the agency to implement a policy with which the judge disagrees.[88] The study examined the application of *Auer* deference, in addition to other deference regimes.[89] It found that "justices systematically support less deferential regimes for policies with which they disagree . . . [and] are more likely to vote to overturn policies with which they disagree."[90]

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80. *Id.*
81. *See id.*
82. *See* Miles & Sunstein, *supra* note 73, at 839.
83. *See discussion infra* Subpart III.B.
84. *See* Raso & Eskridge, Jr., *supra* note 2, at 1734.
85. *See id.* at 1733–34.
86. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L J. 969, 981 (1992).
87. *See* Raso & Eskridge, Jr., *supra* note 2, at 1784.
88. *See id.* at 1745–48.
89. *See id.* at 1779.
90. *Id.* at 1784.

Notably, a study by Professors Eskridge and Raso found that divergent use of deference doctrines by Supreme Court Justices cannot be explained by the Justices' views about the deference doctrines themselves.[91] Instead, the study revealed that between 1984 and 2006 the conservative and liberal Justices applied deference regimes at roughly the same rates, "because each group supports applying more deferential regimes when faced with ideologically compatible agency policies."[92] The authors summarized their conclusions as follows: "These findings strongly suggest that Justices do not select deference regimes solely on the basis of legal considerations. As political scientists maintain, ideology matters."[93] These findings indicate a need for clearer and more structured intellectual frameworks through which judges analyze deference questions. By providing additional guidance through a decision like *Kisor*, the Court may constrain the degree to which ideology influences the application of deference doctrines.

Scholars have observed similar problems in the context of environmental law, noting that current deference regimes allow judges to narrow the scope of environmental legislation or regulations in ways that may subvert congressional intent.[94] A recent article noted that the application of deference doctrines to the ESA is indicative of broad "judicial reluctance to permit broad language to have broad effect."[95] The piece criticizes the Supreme Court's *Chevron* analysis of the ESA in *National Association of Homebuilders v. Defenders of Wildlife* and notes that "the Court starts with the assertion that it is absurd to read the ESA as written because so many actions would be subject to the ESA."[96] The implications of this observation are deeply concerning, particularly as we consider the ability of Congress to enact its legislative intent and the consistency with which agencies will be able to faithfully execute that intent. Clearer guidance on the application of *Auer* deference, and how to conduct a proper ambiguity analysis, may strengthen the ability of Congress and agencies to draft environmental regulations that apply broadly.

While it is tempting to conclude from this data that deference doctrines fail to give judges a principled way to decide questions of regulatory interpretation, there is some evidence that these doctrines have had a moderating effect on appellate court judges.[97] In other words, some evidence shows that while ideology may influence the application of deference doctrines, its role is much smaller than it might be if deference doctrines were disposed of completely. Eskridge and Raso note that empirical evidence about the impact of *Chevron* on

91. *Id.* at 1786.
92. *Id.*
93. *Id.* at 1784.
94. *See generally* Fried & Sullivan, *supra* note 32 (citing judges' hesitancy to broadly interpret environmental regulations).
95. Karpa, *supra* note 29, at 313.
96. *Id.* at 325.
97. *See* Raso & Eskridge, Jr., *supra* note 2, at 1799–1800.

the Court of Appeals for the Federal Circuit "tentatively suggests that . . . [*Chevron*] has made a difference, and has reduced that court's tendency toward political polarization with respect to statutory interpretation issues."[98] This finding, along with the findings of other scholars that clearer legal standards moderate the potential impact of judicial ideology,[99] suggests that a clearer analytical framework for *Auer* could lead to more consistent decision making by ideologically diverse judges.

C. Encouraging Fair Consideration through the Promulgation of Clear Frameworks

This Note argues that judicial application of *Auer* deference can be made more consistent and impartial by establishing clearer guidance for judges and by forcing them to explicitly walk through their analysis in their opinions. Many scholars have noted that deliberation among judges tends to lead to more ideologically moderate case outcomes.[100] Others have argued that legal frameworks can be structured in a way that encourages deliberation and may help judges avoid being significantly influenced by their own ideological perspectives.[101] The threat of review by higher courts and the tradition of articulating the reasons behind a decision in written opinions may also facilitate more careful legal analysis in judicial opinions.

In the Parts that follow, I argue that while judicial ideology may currently have a problematic influence on the outcomes of difficult deference cases, by providing a clearer analytical framework for *Auer* deference, *Kisor* has the potential to result in more consistent case outcomes and allow judges to more easily reach determinations about agency interpretations without relying on their own unconscious biases.

IV. *AUER* AND THE ENDANGERED SPECIES ACT

This Note analyzes of the impact of *Kisor* on the application of *Auer* deference to cases involving the ESA, in order to better understand how the *Kisor* framework will change the circumstances under which judges defer to agency interpretations of their own regulations. I have chosen to look at deference in the context of the ESA for several reasons. First, the importance of the ESA to the protection of biodiversity makes it an important case study for considering legal

98. *Id.* at 1800.

99. *See* Miles & Sunstein, *supra* note 73, at 839.

100. *See* Kim, *supra* note 78, at 1371 (noting that mixed panels—appellate panels composed of appointees of both parties—may dampen the effect of ideological differences on judicial decision making).

101. *See, e.g.*, DANIEL FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 57 (2008) (stating that "[w]e should avoid having an ideologically uniform bench").

frameworks governing *Auer* deference. Second, because this Note considers the role of ideology in deference decisions, it is helpful to examine a statute that is polarizing along party lines.[102] The ESA has long drawn the ire of conservatives who believe that it places too burdensome of restrictions on developers and industry.[103] The Trump administration has recently announced regulatory reforms to the ESA that will chip away at its scope.[104] Finally, the ESA presents a limited body of *Auer* cases for examination, which allows us to embark on a thorough analysis of the way in which deference doctrine has unfolded in this area of law and to make reasoned predictions about the impact of *Kisor* on the future of judicial deference in this context.

The following Subparts argue that the *Kisor* framework will encourage judges to more deliberately and explicitly consider whether to apply *Auer* in the context of the ESA and that ESA case outcomes would be substantially different had the Court overruled *Auer*. The analysis borrows some methodology from legal realism, including the decision to use the appointing party as a rough proxy for judicial ideology.[105] The cases I have chosen to analyze represent ESA cases in which *Auer* deference plays a central role. I have coded court interpretations that result in a stronger and broader reading of the ESA as liberal and interpretations that result in a narrower and less protective reading of the ESA as conservative. As discussed in Part III, this methodology has been relied upon by legal scholars aiming to understand ideology's influence on judicial behavior.[106]

A. The Endangered Species Act

The ESA is one of the most significant pieces of environmental legislation in the history of the United States. The ESA was enacted in 1973 in response to a growing concern in Congress that the biodiversity of the United States, which is of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people" was in danger, due to the threat of extinction of many species.[107] It is administered by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).[108]

At its heart, the goal of the ESA is to prevent the extinction of species by placing protections on endangered and threatened species and their natural

102. *See* Raymond, *supra* note 7 (noting the politically controversial nature of the ESA).

103. *See* Coral Davenport & Lisa Friedman, *Lawmakers, Lobbyists, and the Administration Join Forces to Overhaul the Endangered Species Act*, N.Y. TIMES (July 22, 2018), https://www.nytimes.com/2018/07/22/climate/endangered-species-act-trump-administration.html (citing the conservative argument that the ESA stymies development).

104. *Id.*

105. *See* Miles & Sunstein, *supra* note 73, at 836 (noting that the political party of the appointing President is commonly used as an indicator of judicial ideology in this line of research).

106. *See, e.g.*, Kim, *supra* note 78, at 1328 (discussing the methodology employed to evaluate Title VII sex discrimination case outcomes).

107. Endangered Species Act, 16 U.S.C. § 1531(a)(2) (2012).

108. 16 U.S.C. § 1532(15) (2006); 50 C.F.R. § 402.04 (2001).

environment.[109] The statutory language is strikingly sweeping. For example, the ESA declares it "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this [Act]."[110] Specific details about the ESA's statutory and regulatory framework will be provided alongside the discussion of the ESA cases that follow in order to provide the context necessary to understand the regulations in question.

The goal of the following analysis is to understand how *Kisor* may encourage judges to notice their own biases as they reason through deference decisions. As discussed above, empirical studies have suggested that judicial ideology is a factor that influences judges' decision making, both in cases generally and deference cases in particular.[111] The goal of this Note is not to assert that deference decisions are *motivated* by ideology, but instead to consider whether, given what we know about the potential for ideology to influence outcomes, the *Kisor* framework may lessen the degree to which these cases are influenced by judicial ideology.

B. The Application of Auer *in ESA Cases before* Kisor

Before *Kisor*, judges paid varying levels of attention to *Auer* in ESA cases that involved regulatory interpretation. However, as the following analysis demonstrates, decisions of whether to grant deference to the agency often aligned with the ideological views of the party that appointed the presiding judge. This Subpart examines several cases in which *Auer* was applied to the ESA and notes the ways that the *Kisor* framework may have affected the outcome. I have chosen to examine cases in which the court explicitly considered granting *Auer* deference to the agency, but a future study could expand this analysis to also include cases in which the court could have applied *Auer* but did not even mention the possibility. My analysis here pays particular attention to judges' conclusions about whether agency interpretations are "reasonable," since that component of deference doctrine has been the subject of particularly zealous criticism.[112]

This Subpart analyzes three cases that thoroughly engage with *Auer* as the judge determines whether or not deference is appropriate. The analysis concludes that under the *Kisor* framework, one of the cases would likely have come out differently, and the other two would be much closer cases.

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109. § 1531(c)(1).
110. *Id*.
111. *See* Raso & Eskridge, Jr., *supra* note 2, at 1784.
112. *See*, *e.g.*, Fried & Sullivan, *supra* note 32.

1. United States v. One Etched Ivory Tusk of African Elephant

In *United States v. One Etched Ivory Tusk of African Elephant*, the District Court for the Eastern District of New York considered whether the FWS interpretation of the term "sport-hunted trophy" was entitled to deference.[113] The FWS regulation, promulgated under the ESA, defines sport-hunted trophy as:

> raw or tanned parts of a specimen that was taken by a hunter, who is also the importer, exporter, or re-exporter, during a sport hunt for personal use. It may include claws, hair, head, hide, hooves, horns, meat, skull, teeth, tusks, or any taxidermied part, including, but not limited to, a rug or taxidermied head, shoulder, or full mount. It does not include articles made from a trophy, such as worked, manufactured, or handicraft items for use as clothing, curious, ornamentation, jewelry, or other utilitarian items.[114]

The case arose when FWS refused to allow the claimant to bring an elephant tusk, which was harvested after a successful hunt, into the United States.[115] Under the ESA, FWS had promulgated an exception to the general ban on ivory importation for "sport-hunted elephant trophies that . . . have [been] legally taken in an ivory producing country that has submitted an ivory quota."[116] FWS concluded that because the claimant had paid to have a scene etched into the tusk, it was no longer a "sport-hunted trophy" for the purposes of the ESA.[117] FWS interpreted the qualification that "sport-hunted trophy" excludes "articles made from a trophy" to mean that an etched article was no longer a sport-hunted trophy.[118] The claimant argued that *Auer* deference was not appropriate in this case because the term "sport-hunted trophy" was "self-defining" and therefore, Congress did not delegate power to define the term to FWS.[119]

The court walked through an *Auer* analysis and concluded that deference was appropriate in this case.[120] The court first looked to the plain language of the ESA, noting that the term is not self-defining because Congress could have used the word "specimen" to describe any article taken in a hunt.[121] Additionally, the court noted that the term is not self-defining because "trophy is a concept dictated by subjective values of individual importers."[122] The court then turned its attention to the legislative history of this portion of the ESA and observed that members of Congress were interested in preventing the trade of animal skins and

113. United States v. One Etched Ivory Tusk of African Elephant, 871 F. Supp. 2d 128, 137 (E.D.N.Y. 2012).

114. 50 C.F.R. § 23.74(b) (2013). The regulation was changed in 2014 to expand the definition of "sport-hunted" trophy. *See* 50 C.F.R. § 23.74 (2014).

115. *One Etched Ivory Tusk*, 871 F. Supp. 2d at 131.

116. 16 U.S.C. § 4222(e) (2018).

117. *One Etched Ivory Tusk*, 871 F. Supp. 2d at 131.

118. *Id.* at 133.

119. *Id.* at 135, 139.

120. *Id.* at 139.

121. *See id.* at 135–36.

122. *Id.* at 136.

ivory.[123] The court also concluded that Congress had delegated the definition of the term to FWS.[124]

The next step in the court's *Auer* analysis was to ask whether FWS's interpretation of the term "sport-hunted trophy" was reasonable.[125] The court held that the interpretation was reasonable because FWS's interpretation supported the purpose of the ESA by preventing the import of items that "could supply an illegal market for things such as ivory jewelry[,]" thereby increasing threats to protected species.[126] However, the court also commented that the interpretation of sport-hunted trophy as an item that was taken in a hunt and has not been altered creates a bright-line rule that FWS can easily enforce.[127] The court noted that while both the claimant and FWS had "reasonable" interpretations of the regulation, "the agency's view need only be reasonable to warrant deference . . . [therefore] the agency's reading . . . must prevail."[128]

This case fits with the trend scholars have observed of *Auer* deference cases conforming with the ideology of the deciding judge.[129] *One Etched Ivory Tusk* was decided by Judge Nicholas Garufis, who was appointed by President Clinton, a Democrat.[130] The court's decision to grant deference to FWS in this case made the regulation—and the ESA—more protective of species by further restricting the types of animal parts that could be imported. Judge Garufis's decision to defer in this case is an outcome that likely also comports with more liberal ideological views about the ESA.

Applying the *Kisor* framework to *One Etched Ivory Tusk* would have made this a much closer case. As noted above, the *Kisor* framework requires courts to first determine whether the regulation is genuinely ambiguous by applying all tools of interpretation. If the regulation is ambiguous, the court must consider whether the agency's interpretation of the regulation (1) is reasonable, (2) is entitled to controlling weight, (3) draws upon the "substantive experience" or expertise of the agency, and (4) is a "fair and reasoned judgment" rather than a post-hoc rationalization or convenient litigating position.[131] *Kisor* also allows courts to consider whether the interpretation has shifted over time. Under *Kisor*, the court would likely have found that the regulation was ambiguous, by applying

123. *Id.*

124. *See id.* (stating "[t]he court concludes that the term is ambiguous or vague in a manner that gives the executive branch discretion to interpret it").

125. *Id.* at 137.

126. *Id.*

127. *Id.*

128. *Id.* at 139 (citations, internal quotations omitted).

129. *See* Raso & Eskridge, Jr., *supra* note 2, at 1786 (observing this trend in the context of Supreme Court decisions).

130. U.S. DISTRICT COURT EASTERN DISTRICT OF NEW YORK: JUDGE NICHOLAS G. GARAUFIS, https://www.nyed.uscourts.gov/content/judge-nicholas-g-garaufis (last visited May 16, 2020).

131. Kisor v. Wilkie, 139 S. Ct. 2400, 2414–18 (2019).

both the plain meaning and legislative history analysis that was applied under *Auer*. However, the *Kisor* standard would have compelled the court to engage in a more thorough analysis of whether FWS's interpretation draws upon the substantive experience of the agency.

The claimant in *One Etched Ivory Tusk* could use the substantive experience requirement of the *Kisor* framework to argue that interpreting the term "sport-hunted trophy" does not require specialized expertise of the agency.[132] This argument would note that FWS is no better positioned than hunters or laypeople to understand the term, and therefore the agency's interpretation does not draw upon specific agency expertise. However, FWS could counter that the definition draws on agency expertise as it relates to animal trade and the agency's goal of effectively limiting illegal ivory trading within the United States.[133] Here, FWS would likely point to Justice Kagan's acknowledgment that the rationale for deferring to agency expertise, over the expertise of judges, is "most obvious when a rule is technical . . . [but] more prosaic-seeming questions also commonly implicate policy expertise."[134] FWS has a strong argument that this is an example of a "prosaic question" that is best answered by drawing upon the agency's understanding of the policy motives underpinning the ESA and the nuances of animal trade.

One Etched Ivory Tusk provides an important example of the limited substantive impact of the *Kisor* framework on ESA cases. FWS's argument for deference remains compelling under the new standard. However, the case would likely have been a closer call under *Kisor* and would have required the judge to walk through their analysis in additional detail. The case underscores that deference decisions and reasonableness inquiries are often susceptible to multiple interpretations, depending on one's own views about how the regulatory scheme should function. For instance, a more conservative judge might never reach the *Auer* inquiry, instead finding that the plain meaning of the term "sport-hunted trophy" is obvious and should be read to include any animal piece lawfully taken in a hunt. In considering *Auer* questions, we should be cognizant of the fact that while *Kisor* clarifies the standard and requires judges to more carefully articulate the analysis that leads to their conclusions, it still requires judges to apply their best judgment and presents plenty of opportunities for inconsistent outcomes.

2. Permian Basin Petroleum Association v. Department of Interior

Permian Basin Petroleum Association v. Department of the Interior also affords an opportunity to consider the application of *Auer* to the ESA and the potential impact of *Kisor* in this arena. In 2015, the District Court for the Western

132. *See id.* at 2417.

133. *See, e.g.*, *One Etched Ivory Tusk*, 871 F. Supp. 2d at 137 (considering this argument for interpretation drawing upon agency expertise).

134. *See Kisor*, 139 S. Ct. at 2417.

District of Texas heard *Permian Basin Petroleum*.[135] The case involved a dispute over interpretation of the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE), promulgated under the ESA.[136] Plaintiff Permian Basin Petroleum argued that FWS failed to comply with the requirements of the PECE by not considering the cumulative impacts of a Range-wide Conservation Plan together with the impacts of current and pending conservation efforts.[137]

The PECE requires FWS to "take into account those [conservation] efforts, if any, being made by any state" when making listing decisions.[138] The PECE directs FWS to consider efforts that have not yet begun or been effective, so long as FWS "evaluates the certainty that the conservation effort will be implemented and effective."[139] FWS interprets these regulations to allow it to consider conservation efforts independently and to not require a cumulative assessment of all conservation efforts currently underway.[140]

The court held that the language of the PECE was unambiguous, and therefore deference to FWS (and a full *Auer* analysis) was unnecessary.[141] In making this determination, the court looked to the stated purpose of the PECE and the factors that it required FWS to consider in making listing decisions.[142] Specifically, the court noted that FWS promulgated the PECE to ensure that all current and impending conservation efforts could "contribute to a listing decision analysis."[143] The court held that even the potential impacts of "fledgling efforts not yet demonstrating effectiveness must be evaluated under the PECE."[144]

The decision not to grant *Auer* deference to FWS in this case represents a victory for Permian Basin Petroleum. It requires FWS to consider the collective impact of all conservation efforts when determining what type of protection is appropriate for a species in terms of listing decisions, which results in individual conservation efforts appearing less crucial to species protection.[145] The decision again fits the trend of correlation between the political party appointing the deciding judge and the implications of the case for the ESA. This case was

135. Permian Basin Petrol. Ass'n v. Dep't of the Interior, 127 F. Supp. 3d 700, 700 (W.D. Tex. 2015).
136. *Id.* at 710.
137. *Id.*
138. *Id.* at 706 (citing 16 U.S.C. § 1533(b)(1)(A)) (internal quotations omitted).
139. *Id.* (citing Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100, 15,114 (Mar. 28, 2003) (codified at 50 C.F.R. ch. IV)).
140. *Id.* at 710.
141. *Id.*
142. *Id.*
143. *Id.* at 711.
144. *Id.*
145. *Id.*

decided by Judge Junell, an appointee of President George W. Bush, a Republican.[146]

Applying the *Kisor* framework to *Permian Basin Petroleum* would have resulted in the same outcome here and, in fact, would have reinforced the decision of Judge Junell. The limits on *Auer* articulated by Justice Kagan place particular emphasis on the ambiguity inquiry.[147] Justice Kagan notes that "only when the legal toolkit [of interpretation] is empty and the interpretative question still has no single right answer" can *Auer* deference come into play.[148] Kagan writes that such exhaustive use of interpretive tools (including plain meaning, structure, history, and purpose) "will resolve many seeming ambiguities out of the box, without resort to *Auer* deference."[149]

In *Permian Basin*, the court's analysis stopped at the determination that PECE was unambiguous. While *Kisor* encourages judges to explicitly articulate the justification for their finding on ambiguity, it instructs judges to exhaust their interpretive toolbox before putting deference to the agency on the table.[150] In this case, the court found the underlying motives behind PECE to be dispositive because they revealed a concern with the overall well-being of the species in question.[151] Notably, the court did not point to any language that explicitly requires a *cumulative* assessment of all conservation efforts underway.[152] However, the court reasoned that such a reading better conforms to the agency's stated motives for promulgating PECE.[153]

This case may illustrate one of the potential hazards of *Kisor*—namely, that judges will be able to resolve genuine ambiguities at the outset, without reaching the reasonableness inquiry. Although placing such emphasis on the ambiguity analysis does represent a principled way of narrowing the circumstances in which *Auer* deference is appropriate, it also creates a risk that judges will resolve genuinely ambiguous regulations without deferring to the agency. Here, for example, Judge Junell could have more thoroughly considered whether the regulation was ambiguous, given the existence of multiple reasonable readings of the cumulativeness question.[154] One might argue that this illustrates the way in which *Kisor* allows judges to circumvent deference questions so long as they can use interpretive tools to find that a regulation is unambiguous.

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146. UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS: SENIOR U.S. DISTRICT JUDGE ROBERT A. JUNELL, https://www.txwd.uscourts.gov/court-staff/senior-u-s-district-judge-robert-a-junell/index.html (last visited May 16, 2020).

147. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415–17 (2019).

148. *Id.* at 2415.

149. *Id.*

150. *Id.*

151. Permian Basin Petroleum Ass'n v. Dep't of the Interior, 127 F. Supp. 3d 700, 711 (W.D. Tex. 2015).

152. *See generally id.* (noting an absence of language explicitly requiring a cumulative assessment).

153. *Id.* at 711.

154. *See id.* at 710.

3. Turtle Island Restoration Network v. United States

The controversy surrounding *Auer* deference is on stark display in *Turtle Island Restoration Network v. United States.*[155] The case illustrates the need for more coherent guidance on the application of *Auer*, which *Kisor* provides. While this case focuses on interpretation of the Migratory Bird Treaty Act (MBTA), rather than the ESA, the two are broadly housed under the same statutory scheme. Further, the pithy deference debate that unfolds between the dissenting and majority opinions makes this case helpful for our analysis because it demonstrates the need for additional guidance on when *Auer* deference is appropriate. It also provides additional support for the hypothesis that ideology has some influence on *Auer* outcomes in difficult cases.

Turtle Island considered the interpretation of an FWS regulation which allowed FWS to issue a special purpose permit for "special purpose activities *related* to migratory birds."[156] To receive such a permit, the applicant must show that the activity would be "of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification."[157] These permits allow the permittee to engage in what would otherwise be an illegal taking of a migratory bird under the MBTA.[158] FWS interpreted this regulation to allow it to grant a special purpose permit to NMFS for long-line fishing, a method of fishing that would cause the incidental take of migratory birds.[159]

The court concluded that deference to FWS's interpretation was inappropriate because the "plain language of this regulation is not reasonably susceptible" to the agency's interpretation.[160] The court expressed incredulity that "special purpose" could cover incidental take of migratory birds caused by "basic commercial activities."[161] The court held that this reading flew in the face of the congressional purpose underlying the MBTA, and that FWS's interpretation was precluded by the requirement that the special purpose be "related to migratory birds" and have a "compelling justification."[162] The court relied upon the plain language of the text and the structure of the regulatory scheme to conclude that the FWS interpretation was unreasonable.[163] The court held that it "strains reason to say that every activity that risks killing migratory

155. Turtle Island Restoration Network v. United States, 878 F.3d 725, 733, 741 (9th Cir. 2017).
156. *See id.* at 733–34 (citing 50 C.F.R. § 21.27 (2001)).
157. § 21.27.
158. § 21.27(a).
159. *Turtle Island Restoration Network*, 878 F.3d at 734.
160. *Id.*
161. *Id.* at 735.
162. *Id.* at 734.
163. *Id.* at 734, 741.

birds 'relate[s] to' those birds."[164] The court noted that reading the regulation as allowing a general exception for incidental take of migratory birds "renders the majority of its text superfluous" and "does not conform to . . . the MBTA's conservation intent."[165]

The dissenting opinion in *Turtle Island* bordered on vitriolic and argued that the majority had inexplicably disregarded *Auer* deference altogether. In his dissent, Judge Callahan wrote that "under *Auer* . . . we must defer to an agency's own interpretation of its own regulation."[166] Callahan disagreed with the majority that the agency interpretation conflicted with the regulation and noted that in the past, FWS had used this regulation to issue special purpose permits for activities that do not specifically relate to migratory birds.[167] Callahan argued that FWS's reading was not unreasonable and represented a lawful reading of the regulation to permit incidental take.[168] Callahan wrote that "instead of anchoring its analysis in well-established principles of agency deference, the majority sets sail on a voyage of discovery, leaving in its wake our precedent and the doctrinal moorings of *Auer*."[169]

This case provides another example of the judges coming out along ideological lines. Judge Murguia, writing for the majority and electing a more protective reading of the MBTA, was a Clinton appointee.[170] Judge Murguia was joined in the majority by Chief Judge Thomas, also a Clinton appointee.[171] Meanwhile, Judge Callahan, arguing in the dissent for a less protective reading of the MBTA, was appointed by President George W. Bush.[172]

Turtle Island would have been a much closer case after *Kisor*. The court would not have been permitted to conflate the ambiguity analysis with the reasonableness inquiry in its opinion.[173] Instead, the majority would have first had to establish that the language of the regulation was ambiguous—particularly the words "relate to" and "compelling justification"—and then consider whether the FWS interpretation was entitled to deference.[174] The ambiguity analysis may have resulted in the finding that this regulation was indeed ambiguous. However, the majority opinion does not make a substantial showing that it had exhausted its "legal toolkit" and come up without one clear interpretation, as *Kisor*

164. *Id.* at 735.
165. *Id.*
166. *Id.* at 742 (Callahan, J., dissenting in part).
167. *Id.* at 744 (noting that FWS had previously issued a special purpose permit for a wind farm).
168. *Id.* at 746.
169. *Id.* at 742.
170. FEDERAL JUDICIAL CENTER: MURGUIA, MARY HELEN, https://www.fjc.gov/history/judges/murguia-mary-helen (last visited May 16, 2020).
171. FEDERAL JUDICIAL CENTER: THOMAS, SIDNEY RUNYAN, https://www.fjc.gov/history/judges/thomas-sidney-runyan (last visited May 16, 2020).
172. FEDERAL JUDICIAL CENTER: CALLAHAN, CONSUELO MARIA, https://www.fjc.gov/history/judges/callahan-consuelo-maria (last visited May 16, 2020).
173. *See, e.g.*, *Turtle Island Restoration Network*, 878 F.3d at 735 (melding ambiguity and reasonableness inquiries).
174. *See id.* at 734.

requires.[175] The *Kisor* framework would also require more justification for the claim that the interpretation was completely at odds with the MBTA,[176] in order to demonstrate that the FWS interpretation indeed fell outside of the "zone of ambiguity" identified by the court.[177]

The heated debate between the dissenting and majority opinions in this case illustrates the reason that clearer instruction from the Supreme Court on *Auer* was necessary. When different judges can look at the same text and come out with firm opinions that correlate with the ideology of their appointing presidents, our collective alarm bells should go off. Under *Kisor*, the regulation at issue would likely make it past the ambiguity analysis. This is due to the tension between the text of the regulation, which appears to give the agency some discretion to determine what a "compelling justification is," and the conservation purposes underlying the MBTA. Had these judges applied *Kisor*, they may still have found that the FWS reading was outside the zone of reasonableness, but such a conclusion would require a more thorough analysis of the legislative history and the text. The case would have been a much closer call.

C. The Application of Auer *to ESA Cases Following* Kisor

Since the *Kisor* decision, the federal courts have heard just one *Auer* case that interprets the ESA: *American Tunaboat Association v. Ross*.[178] *American Tunaboat* is noteworthy for two reasons. First, the court clearly articulates the new framework articulated in *Kisor* and walks through a step-by-step analysis of the interpretative issue at hand.[179] Second, the case was heard by Judge McFadden, a Trump appointee,[180] who had previously heard three other cases in which he mentioned *Auer*. Notably, in each case, he relegated *Auer* to a footnote.[181] Taken together, the abrupt shift in his application of *Auer* and the fact that the outcome of this case reads the ESA in a way that does not comport neatly with the ideology of his appointing president suggest that *Kisor* may be

175. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

176. Particularly given the documentation of past practice cited by the dissent. *See Turtle Island Restoration Network*, 878 F.3d at 744 (Callahan, J., dissenting in part).

177. *See Kisor*, 139 S. Ct. at 2416.

178. Am. Tunaboat Ass'n v. Ross, 391 F. Supp. 3d 98 (D.D.C. 2019).

179. *Id.* at 111–14.

180. FEDERAL JUDICIAL CENTER: MCFADDEN, TREVOR NEIL, https://www.fjc.gov/history/judges/mcfadden-trevor-neil (last visited May 16, 2020).

181. *See* Hardy v. Powell, 314 F. Supp. 3d 359, 364 n.10 (D.D.C. 2018) (determining that "*Auer* deference does not apply because the regulation is unambiguous"); Stand Up for California! v. U.S. Dep't of Interior, 298 F. Supp. 3d 136, 143 n.9 (D.D.C. 2018) ("I need not determine whether *Auer* deference is appropriate here"); Judicial Watch, Inc. v. Off. of Dir. of Nat'l Intel., No. 1:17-cv-00508, 2018 WL 1440186, at *2 n.2 (D.D.C. Mar. 22, 2018) (holding that because the action is dismissed, the judge need not reach the question of whether *Auer* deference applies).

having a significant impact on the way that judges puzzle through deference questions.

At the center of *American Tunaboat* is a dispute about the meaning of the term "applicants" under the ESA.[182] The ESA requires federal agencies planning to take an action that is likely to adversely affect a listed species or critical habitat area to conduct a formal consultation with the overseeing agency (in this case NMFS).[183] The consultation process requires NMFS to prepare a biological opinion that details "whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat . . . ."[184] If such an action is considered likely to jeopardize the species or adversely affect critical habitat area, "reasonable and prudent alternatives" must be considered.[185] NMFS may also authorize a level of takings for the listed species.[186]

"Applicants" are entitled to participate in this consultation process. Congress did not define the term applicant in the statute itself, so its definition was promulgated by NMFS. Under 50 C.F.R. section 402.02, an applicant is "any person . . . who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action."[187] The ESA regulations define "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas."[188]

American Tunaboat arose when the American Tunaboat Association requested applicant status in order to participate in NMFS's consultation process for the "continued authorization" of the U.S. purse seine fishery.[189] The fishery posed risks to a number of listed species including some species of turtles and sharks.[190] NMFS denied the American Tunaboat Association's request. The American Tunaboat Association brought the issue before the district court, alleging that NMFS had misinterpreted the term "applicant."[191]

NMFS interpreted "applicant" to be limited to consultations involving specific permits, rather than parties that may be affected by "broad programmatic review of programs that conserve and manage fishery resources."[192] The American Tunaboat Association argued for a broader interpretation of "action"

182. *Am. Tunaboat Ass'n*, 391 F. Supp. 3d at 104.
183. 50 C.F.R. § 402.14 (2019).
184. § 402.14(h)(3).
185. § 402.02.
186. § 402.14(i).
187. § 402.02.
188. *Id.*
189. Am. Tunaboat Ass'n v. Ross, 391 F. Supp. 3d 98, 105–06 (D.D.C. 2019).
190. *Id.* at 106.
191. *Id.* at 111.
192. *Id.*

and "applicant," which would consider the action to be any fishing that could be impacted by this consultation process.[193]

The court applied the *Kisor* framework to decide the issue.[194] The court first concluded that the definition of applicant was genuinely ambiguous, because it was unclear whether fishing is "*the* action."[195] Notably, the court did not apply any tools of statutory interpretation beyond a textualist approach. However, later in the analysis, the court considered the proposed interpretations through a structural lens as well. However, the fact that this did not occur during the initial ambiguity analysis may make the finding of ambiguity vulnerable on appeal.[196]

The court next considered whether NMFS's interpretation was reasonable and held that it was.[197] The court was persuaded by the requirement that applicants be involved in mitigation measures emerging from a consultation, but found that the American Tunaboat Association's reading would require individual permittees to weigh in on "entire regulatory scheme[s]" as to which they have no expertise.[198] The court noted that the NMFS interpretation was consistent with other provisions of the ESA and that adopting American Tunaboat Association's reading would result in granting "thousands" of "applicants" the privilege of refusing NMFS the ability to extend the consultation, a prospect that the court found unadministrable.[199] The court concluded that the NMFS reading was "a fair interpretation of a genuinely ambiguous regulation."[200]

The court then moved to the next phase of interpretation and concluded that NMFS's position was consistent with previous articulations of the agency's interpretation.[201] As directed by *Kisor*, the court considered whether this was an "official position" of NMFS and concluded that it was.[202] For the foregoing reasons, the court determined that deference to NMFS was appropriate in this case.

While this case provides a more thorough analysis than would have been necessary before *Kisor*, its outcome would have likely been the same. Courts applying *Auer* often reduced the inquiry to two steps: (1) is the regulation ambiguous, and (2) if so, is the agency's interpretation reasonable? Judge

193. *Id.*
194. *Id.* at 111–15.
195. *Id.* at 112.
196. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (directing judges to "exhaust all the traditional tools of construction" before finding a regulation ambiguous).
197. *Am. Tunaboat Ass'n*, 391 F. Supp. 3d at 112–14.
198. *Id.* at 112.
199. *Id.* at 112–13 (observing that "it is hard to imagine how the Service would manage all the competing interests").
200. *Id.* at 114.
201. *Id.*
202. *Id.*

McFadden answered both of these questions in the affirmative. However, it is critical to note the way in which McFadden's handling of *Auer* in this case differs from his previous applications of the doctrine, which is an initial indication that judges may be interpreting *Kisor* as a directive to be more methodical in their approach to deference decisions.[203]

American Tunaboat is a striking first post-*Kisor* case regarding interpretation of the ESA because it diverges from the trend of judges' deference decisions complying with ideological preference, and it represents a marked shift in the way that Judge McFadden approaches deference questions.[204] Here, McFadden reads the ESA to allow less intervention by industry groups—which is noteworthy because conservatives' main criticism of the ESA is that it places too many restrictions on industry.[205] In previous cases involving *Auer* deference, Judge McFadden spent no more than a few lines resolving ambiguities and determining whether deference was appropriate.[206] The change in his analysis of whether *Auer* deference is appropriate indicates that judges are interpreting *Kisor* as an instruction to be more explicit in determinations about ambiguity and reasonableness. Specifically, McFadden's decision to examine the legislative history of the ESA suggests that he has taken seriously the instruction to exhaust the interpretive toolbox,[207] especially because legislative history is so often associated with more liberal judicial approaches.

V. IMPACTS OF THE *KISOR* FRAMEWORK ON JUDGES' APPROACH TO DEFERENCE: THE ESA AND BEYOND

Conclusive evidence of the impact of *Kisor* on deference in the context of the ESA is necessarily limited by the fact that the decision is so recent and is just beginning to be applied by the lower courts. However, reflecting on the way in which *Kisor* would have impacted the outcomes of previous ESA cases and the way in which it was handled in *American Tunaboat* provide fodder for some important conclusions.

A. Kisor *Encourages Judges to Bring Additional Intellectual Care and Deliberation to Deference Decisions*

Judges are taking note of *Kisor* as the new standard for addressing deference questions involving an agency's interpretations of its own regulations.[208] While

203. *See supra* note 181.

204. *Id.*

205. *See* Davenport & Friedman, *supra* note 103 (noting the conservative argument that ESA stymies development).

206. *See supra* note 181.

207. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (directing courts to use all interpretative tools at their disposal).

208. For example, since the Court gave its opinion in *Kisor*, 112 of 165 opinions issued by federal courts that cited *Auer* also cited *Kisor* (current as of September 18, 2020). Since *Kisor* was announced,

some cases have simply referred to *Kisor* as a "reaffirmation" of old *Auer* principles, it appears that at least some judges are changing their analyses in response to the opinion.[209] This change comports with the Supreme Court's announcement in *Kisor* that "even as we uphold [*Auer*], we reinforce its limits."[210] As the analysis above indicates, *Kisor* requires additional attention to be paid to each step of the deference analysis. This is an example of the type of legal constraint that may temper the influence of subconscious ideological biases on case outcomes.

Before *Kisor*, *Auer* deference was criticized for inviting inconsistent application by judges. Studies revealed that policy preferences of judges, rather than coherent deference principles, often influenced the outcome of difficult cases involving *Auer*.[211] Such findings are particularly relevant to interpreting politically charged statutory schemes, like the ESA. Under these circumstances, we might expect the influence of political ideology on a judge's conception of "reasonableness" to have an even more significant role.

This Note's analysis of the application of *Auer* to the interpretation of ESA regulations before *Kisor* conforms to this trend. Yet, *American Tunaboat*, the one ESA case that has applied *Kisor*, resulted in a divergence between the appointing party of the judge and the outcome of the case. Although it is important to be cautious about how much stock we place in this divergence, it is noteworthy in part because Judge McFadden's *Kisor* analysis was much more robust than any of his past applications of *Auer*.[212]

Kisor does not completely remove ideology from deference decisions. However, it forces judges to go through a deliberately structured deference analysis that may make it easier for them to notice the ways in which ideology bleeds into their reasoning. By doing so, *Kisor* not only limits the circumstances under which *Auer* deference will be granted, but it also ensures that judges "show their work" when determining whether an agency interpretation is "reasonable," rather than succumbing to the temptation to dismiss an interpretation that the court does not believe is the *most* reasonable. This new framework will encourage better reasoned and more consistent deference jurisprudence.

The impacts of *Kisor* may be of particular importance for environmental law in the coming years. The ESA is just one of many federal environmental statutes that are critical tools for safeguarding natural resources. President Trump has demonstrated hostility toward these statutes and has had enormous success

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more federal court opinions have cited *Kisor* (241) than *Auer* (165), suggesting that many courts recognize *Kisor* as the new standard for agency deference (current as of September 18, 2020).

209. *See* Am. Tunaboat Ass'n v. Ross, 391 F. Supp. 3d 98, 112 (D.D.C. 2019).

210. *Kisor*, 139 S. Ct. at 2408.

211. *See* Raso & Eskridge, Jr., *supra* note 2, at 1734.

212. *See supra* note 181.

appointing judges to the federal bench during his tenure.[213] These appointments will continue to impact the implementation of federal environmental statutes long after President Trump has left office. By more specifically directing judges' assessments of the "reasonableness" of an agency interpretation, *Kisor* may help facilitate less biased determinations about deference to agency interpretation, even when the judge's own ideology might privilege a divergent outcome. Additionally, *Kisor* has clarified that *Auer* deference is less likely to be appropriate when an agency's interpretation of its own regulations has been inconsistent. This will limit the ability of presidential administrations to reinterpret federal environmental regulations in order to make them less protective of the environment.

B. Lingering Problems with Auer *and Missed Opportunities of* Kisor

While *Kisor* provides an important first step toward a more coherent *Auer* doctrine, problems remain. Most glaringly is the lack of explicit direction over how to privilege different methods of interpretation against each other when making the initial ambiguity determination. The Supreme Court directs lower courts to exhaust their legal toolbox and to only proceed to the reasonableness inquiry if no one clear reading emerges.[214] As Justice Gorsuch notes with relief in his dissent, "the majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*."[215] Gorsuch argues that courts' tools of interpretation "include all sorts of tie-breaking rules for resolving ambiguity even in the closest cases."[216] Gorsuch predicts that under *Kisor*, courts "will rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading."[217]

Although I do not share Gorsuch's view that *Auer* improperly tilts the scales in favor of agencies, I do believe that he has articulated a valid weakness of the majority opinion. By emphasizing the role of interpretive tools, without specifically indicating how judges should react to inconsistent results from different interpretive methods, the majority may be giving judges too much flexibility to resolve genuine ambiguities on their own. As we have seen in many instances, judges often disagree about how to apply modes of statutory interpretation to interpret ambiguous language. It is possible that by placing such emphasis on exhausting these methods of interpretation, the Court has given

213. *See* Davenport & Friedman, *supra* note 103; *see also* Rebecca Klar, *Trump has Officially Appointed One in Four Circuit Court Judges*, THE HILL (Nov. 7, 2019, 6:05PM EST) https://thehill.com/homenews/administration/469519-trump-has-officially-appointed-one-in-four-circuit-court-judges.

214. *Kisor*, 139 S. Ct. 2400, 2415 (2019).

215. *Id.* at 2448 (Gorsuch, J., concurring in part).

216. *Id.*

217. *Id.*

judges a means to resolve *genuine ambiguities* without deferring to agency interpretations.

American Tunaboat provides a hopeful indication that Gorsuch's theory that *Kisor* left *Auer* a "zombie" is overblown, because it offers an example of a conservative judge exhausting his interpretive toolbox and deferring to the agency. Time will tell whether *Kisor* will continue to guide judges toward such careful and considered analysis.

CONCLUSION

Many scholars have sought to explain the motivations behind judicial decision making and to propose legal doctrines that remove opportunities for political ideology to influence case outcomes. In the context of administrative law, this literature has shown that, at least in some instances, the ideology of judges influences when and how they invoke deference doctrines.

This Note argues that the framework for deference to agencies that is articulated in *Kisor* lends important clarity to *Auer* deference. By doing so, *Kisor* encourages judges to reason through deference questions purposefully and consistently, and it reduces the degree to which ideology may inadvertently influence case outcomes. All three of the pre-*Kisor* ESA cases discussed in this Note would have been much closer after *Kisor* because of the increased intellectual rigor that *Kisor* demands of judges at each step in the analysis. Prior to *Kisor*, the outcomes of ESA cases involving deference aligned with the appointing party of the deciding judge, whereas the first post-*Kisor* ESA case diverges from that trend. This provides preliminary support for the theory that judges are better constrained by the framework articulated in *Kisor* than by *Auer* alone and, as a result, are better able to limit the influence of ideology on their analyses. The legacy of *Kisor* will not be fully understood until there is more data on how the case is being applied. However, *Kisor* represents an important step toward a more principled and nonpartisan approach for judges tasked with deciding difficult agency deference cases.