ADMINISTRATIVE LAW — *AUER* DEFERENCE — SEVENTH CIRCUIT DEFERS TO DEPARTMENT OF EDUCATION AMICUS BRIEF INTERPRETING STUDENT LOAN REGULATIONS. — *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir.), *reh'g denied*, 807 F.3d 839 (7th Cir. 2015), *cert. denied*, 2016 WL 2842875 (U.S. May 16, 2016).

James Madison wrote that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[1] In his final years on the bench, Justice Scalia invoked that specter to condemn the rule of judicial deference he once championed in *Auer v. Robbins*.[2] When litigants dispute the meaning of a rule promulgated by an administrative agency, *Auer* tells judges to give that agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[3] *Auer*'s defenders extol its provision of flexibility to expert administrators and dismiss as "wildly disproportionate" the accusation that the doctrine menaces the separation of powers.[4] But the Supreme Court has withheld *Auer* deference "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment'"[5] and four Justices have lately advertised their willingness to consider scrapping the doctrine altogether.[6]

Recently, in *Bible v. United Student Aid Funds, Inc.*,[7] the Seventh Circuit applied *Auer* to reverse a district court ruling in conflict with the Department of Education's (ED) interpretation of its own student loan regulations, as expressed in an amicus brief.[8] Concurring in the subsequent denial of rehearing, Judge Easterbrook reckoned the case not worth reviewing "when *Auer* may not be long for this world."[9]

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[1] THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961).

[2] 519 U.S. 452 (1997); *see* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) (adjudging *Auer* to "violate a fundamental principle . . . that the power to write a law and the power to interpret it cannot rest in the same hands").

[3] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). Justice Scalia's opinion for the Court in *Auer* is the canonical modern restatement of the longstanding precedent of *Seminole Rock*. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 359 n.11 (2012).

[4] Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2016 SUP. CT. REV. (forthcoming) (manuscript at 26), http://ssrn.com/abstract=2631873 [http://perma.cc/L4DT-CCUA].

[5] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (quoting *Auer*, 519 U.S. at 462).

[6] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); *Decker*, 133 S. Ct. at 1338 (Roberts, C.J., concurring); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

[7] 799 F.3d 633 (7th Cir. 2015), *cert. denied*, 2016 WL 2842875 (U.S. May 16, 2016).

[8] *Id.* at 650–51.

[9] Bible v. United Student Aid Funds, Inc., 807 F.3d 839, 841 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc). Commentators read the concurral as an invitation

But the faults exposed in *Bible* — where a fractured panel produced three distinct approaches to the key interpretive question — call out for the Supreme Court to domesticate rather than euthanize this troublesome doctrine. The Court could ease *Bible*'s tensions but preserve *Auer*'s advantages by withholding deference from regulatory interpretations advanced for the first time in litigation briefs, as Professor Matthew Stephenson and Miri Pogoriler have advocated.[10]

Bryana Bible took out a student loan in 2006 under terms incorporating provisions of the Higher Education Act[11] (HEA).[12] In the event of a default, she agreed to pay "reasonable collection costs" as defined by ED regulations issued pursuant to the HEA.[13] Bible defaulted on her loan in 2012 and signed a "rehabilitation agreement" with her guarantor, United Student Aid Funds (USA Funds), setting a reduced payment schedule to resolve her debt.[14] Although Bible complied with that agreement, USA Funds charged her $4,547.44 in collection costs.[15]

Bible sued USA Funds in the Southern District of Indiana alleging breach of contract as well as fraud in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).[16] She argued that USA Funds had fraudulently concealed the prospect of collection costs, and that their imposition violated the terms of her loan and the underlying statutes and regulations.[17] The district court disagreed and granted USA Funds' motion to dismiss for failure to state a claim.[18]

The Seventh Circuit reversed and remanded.[19] Writing for the panel, Judge Hamilton[20] held Bible to have stated a claim for relief on both the contract and RICO counts.[21] Because the HEA did not de-

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to the Supreme Court to take the case as a vehicle to overrule *Auer*. *See, e.g.*, C. Ryan Barber, *Student Loan Guarantor Takes Agency Dispute to SCOTUS*, NAT'L L.J. (Jan. 6, 2016), http://www.nationallawjournal.com/id=1202746438665 [http://perma.cc/RMA7-KS86] (quoting an attorney's observation that the opinion was "'basically a cert petition' for USA Funds").

10 *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1496 (2011).

11 Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended at 20 U.S.C. §§ 1001–1161aa-1, 42 U.S.C.A. §§ 2751–2756b (West 2012 & Supp. 2015)).

12 *Bible*, 799 F.3d at 641–42.

13 *Id.* at 638 (quoting Complaint, Amended Exhibit 2 at 1, Bible v. United Student Aid Funds, Inc., No. 1:13-CV-00575, 2014 WL 1048807 (S.D. Ind. Mar. 14, 2014)).

14 *Id.*

15 *Id.* at 643.

16 *Id.* at 638. RICO claims must show an enterprise's pattern of racketeering activity, such as mail fraud, affecting interstate commerce. *Id.* at 655.

17 *Id.* at 644–45, 658.

18 *See Bible*, 2014 WL 1048807, at *6, *9–10. The specific ground for the ruling was that the HEA preempted the claims, but the court would have dismissed even absent preemption because Bible's loan contract permitted the assessment of these "reasonable" collection costs. *Id.* at *10.

19 *Bible*, 799 F.3d at 661.

20 Judge Hamilton was joined in part by Judges Flaum and Manion.

21 *Bible*, 799 F.3d at 639. The court unanimously held that there was no preemption, *id.* at 652–55; *id.* at 663 (Manion, J., concurring in part and dissenting in part); *id.* at 661 (Flaum, J.,

fine "reasonable collection costs," the court afforded *Chevron* deference to the ED regulations defining that term.[22] Those rules themselves then demanded interpretation. Writing only for himself, Judge Hamilton found that the regulations unambiguously forbade USA Funds from imposing costs on a first-time borrower in default, like Bible, who promptly signed and complied with a "repayment agreement."[23]

But the thicket of rules implementing the HEA variously used two terms for post-default agreements, and neither of Judge Hamilton's colleagues agreed that Bible's "rehabilitation" agreement clearly qualified as a "repayment" agreement under those provisions.[24] That "inferential leap" was a crucial step toward the conclusion that Bible had plausibly alleged a breach of contract.[25] So Judge Hamilton mustered a majority by embracing *Auer* as an alternative ground for his holding, "even if this were not the best interpretation of the statutes and accompanying regulations."[26] In an amicus brief filed at the Seventh Circuit's request, the ED endorsed Bible's theory that a rehabilitation agreement was a form of repayment agreement, and that the regulations therefore barred the collection of these costs.[27] Bolstered by *Auer* deference to the ED's "fair and considered judgment,"[28] Judge Hamilton held that Bible's suit deserved to go forward.[29]

Judge Flaum concurred in part and in the judgment.[30] He ultimately agreed that Bible's claims should survive, but only with *Auer*'s aid.[31] He rejected his colleagues' (mutually contradictory) claims to find clear meaning in the regulations, instead seeing two "plausible readings of this complex and ambiguous regulatory scheme."[32] Judge Flaum therefore deferred to the ED brief's position favoring Bible.[33] But he noted that "an unambiguous regulatory scheme is preferable to

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concurring in part and concurring in the judgment), and Judges Flaum and Hamilton held that Bible had alleged a RICO violation, *id.*

[22] *Id.* at 650 (majority opinion).

[23] *Id.* at 645–50 (opinion of Hamilton, J.). Critically, Judge Hamilton read 34 C.F.R. § 682.410(b)(2), which establishes that a guarantor "shall charge" certain costs, to be circumscribed by § 682.410(b)(5)(ii), which makes prompt entry into a repayment agreement a "safe harbor" for a first-time defaulter to avoid paying any such costs. *Id.* at 646–47.

[24] *See id.* at 661 (Flaum, J., concurring in part and concurring in the judgment).

[25] *Id.*

[26] *Id.* at 645 (majority opinion).

[27] *See* Brief for the United States as Amicus Curiae in Support of the Appellant and Reversal at 2–4, *Bible*, 799 F.3d 633 (No. 14-1806). The brief cited three older ED documents — two mid-1990s letters to guarantors and a 2002 amicus brief — in support of the claim that this position was the ED's own "consistently taken" interpretation of its regulations. *Id.* at 14–16, 22.

[28] *Bible*, 799 F.3d at 651.

[29] *Id.* at 661.

[30] *Id.* (Flaum, J., concurring in part and concurring in the judgment).

[31] *Id.* at 661–63.

[32] *Id.* at 663.

[33] *Id.*

soliciting the agency's interpretive guidance" and urged the ED to revise the unclear rules themselves.[34]

Judge Manion concurred in part and dissented in part.[35] For him, two insurmountable hurdles blocked Bible's claims.[36] First, the regulations clearly permitted the collection of these costs, and the ED's contrary reading was "plainly erroneous."[37] Judge Hamilton had misread a regulation covering a different kind of agreement.[38] Second, substance aside, *Auer* could not be Bible's "saving grace"[39] because the ED's litigation stance was "entirely new and inconsistent with its prior interpretations."[40] As the Supreme Court had recently reaffirmed in *Christopher v. SmithKline Beecham Corp.*,[41] an agency interpretation advanced without "fair warning" deserved no deference.[42] Judge Manion pronounced it "manifestly unjust" to allow the ED to impose significant liability retroactively on USA Funds and, by implication, the entire guarantor industry.[43]

When the Seventh Circuit denied rehearing en banc two months later, Judge Easterbrook aligned himself with Professor John Manning, who would disavow *Auer* deference altogether in order to purge the administrative sins denounced by Judge Manion: inconsistency, arbitrariness, and lack of notice.[44] But a narrower remedy could cure *Bible*'s ills. Thus far, the Court has responded to such concerns by soldering a series of caveats onto *Auer*'s rule.[45] This proliferation of uncertain exceptions, and not *Auer* itself, deserves blame for much of the *Bible* panel's discord. Instead of overruling *Auer*, the Court could deny deference to interpretations announced for the first time in litigation briefs. This rule would simplify hard cases like *Bible* and avoid

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[34] *Id.*

[35] *Id.* (Manion, J., concurring in part and dissenting in part). His concurrence extended only to the preemption issue. *Id.*

[36] *Id.* at 665. By his reading of the regulations, there was no fraud or RICO violation. *Id.*

[37] *Id.* at 674. Judge Manion also found *Chevron* inapplicable because the delegated authority to define "reasonable" costs did not allow the ED to decide "*when* costs will be charged." *Id.*

[38] *See id.* at 665–69.

[39] *Id.* at 665.

[40] *Id.* at 674. To Judge Manion, the ED's own citations demonstrated the inconsistency of its prior interpretation. *See id.* at 669 & n.2.

[41] 132 S. Ct. 2156 (2012).

[42] *See Bible*, 799 F.3d at 676 (Manion, J., concurring in part and dissenting in part) (quoting *Christopher*, 132 S. Ct. at 2167).

[43] *Id.*

[44] *See* Bible v. United Student Aid Funds, Inc., 807 F.3d 839, 841 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 669–73, 681 (1996).

[45] *See* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 49 n.8 (2015).

arbitrariness while preserving the expert flexibility that justifies *Auer* in the first place.[46]

Judge Manion's protests that undue deference undermines "fair warning" have found purchase elsewhere in administrative law. Courts now deny *Chevron* deference to statutory interpretations announced in briefs or other forms unlikely to "foster the fairness and deliberation that should underlie a pronouncement of such force."[47] But no such reformation has yet arrived for regulatory interpretation. The *Auer* Court acknowledged similar arguments against deference to a brief interpreting a regulation, but concluded that the document's form did "not, *in the circumstances of this case*, make it unworthy of deference."[48] Today, the Justices depart from that presumption of deference when they face case-specific doubts "that the litigating position reflects the 'agency's fair and considered judgment.'"[49]

The Seventh Circuit's tortuous dispute over the ED brief illustrates the defects of that incremental, case-by-case approach to policing *Auer*'s borderlands. Judges Hamilton and Manion agreed that courts should not defer to an agency's "*post hoc* rationalization," which risks imposing unfair liability.[50] But they diverged sharply at every step in the application of that standard. Judge Hamilton downplayed its relevance by situating the Supreme Court's warnings against such rationalization in the context of an "agency seeking to defend past agency action against attack."[51] This qualification suggests that deference is less dangerous when, as in *Bible*, the agency is an amicus and not a party to the suit. But the Court has also construed the "post hoc" limitation more broadly to apply to litigation between private parties.[52]

These and other divisions in the *Bible* panel reflect indeterminacy in the Court's tests for *Auer*'s applicability.[53] Just as the Seventh Cir-

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[46] *See* Stephenson & Pogoriler, *supra* note 10, at 1492–94. The Court has offered pragmatic justifications for *Auer* similar to those underlying *Chevron*. *See id.* at 1454–57.

[47] United States v. Mead Corp., 533 U.S. 218, 230 (2001); *see also id.* at 238 n.19. Agencies acting without sufficient procedure or notice may also run afoul of the Administrative Procedure Act's safeguards against "arbitrary and capricious" action. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015).

[48] Auer v. Robbins, 519 U.S. 452, 462 (1997) (emphasis added).

[49] Cedar Rapids Cmty. Sch. Dist. v. Garret F. *ex rel.* Charlene F., 526 U.S. 66, 83 n.3 (1999) (Thomas, J., dissenting) (quoting *Auer*, 519 U.S. at 462); *see also id.* ("Nor do I think that it is appropriate to defer to the Department of Education's litigating position in this case. The agency has had ample opportunity to address this problem but has failed to do so . . . .").

[50] *See Bible*, 799 F.3d at 651; *id.* at 663 (Manion, J., concurring in part and dissenting in part).

[51] *Id.* at 651 (majority opinion).

[52] *See, e.g.*, Fed. Express Corp. v. Holowecki, 552 U.S. 389, 400 (2008) (considering whether "the agency's position . . . was framed for the specific purpose of aiding a party in this litigation").

[53] *Cf.* Vieth v. Jubelirer, 541 U.S. 267, 297 (2004) (plurality opinion) ("No test — yea, not even a five-part test — can possibly be successful unless one knows what he is testing *for*."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 3 (1996) ("The Court's most hurtful sin is its pervasive imprecision. Too often, even

cuit disputed the relevance and consistency of the ED's prior interpretations, so too have the Justices offered contradictory dicta on the significance of consistent agency practice and even the meaning of "consistency" itself.[54] Judge Manion looked for a public record of consistent practice, while Judge Hamilton suggested that the mere absence of contradiction would suffice.[55] Precedent supplies ammunition to both sides.[56] *Bible*'s conflicting opinions could all claim fealty to the Court's cases scrutinizing agency interpretations for *Auer* eligibility, because those opinions weighed — without identifying as dispositive — a diverse array of factors including an interpretation's timing, precedent, and medium.[57] This sprawling inquiry yields inconsistent application by judges and Justices alike.[58] And that uncertainty itself undermines the principles of fairness and predictability motivating Judge Manion and others' attempts to rein in *Auer* deference.

The Court could protect those values in a more easily administrable way by categorically withholding deference from interpretations announced in briefs.[59] Compared to other forms by which agencies communicate their positions, a brief drafted in response to a particular lawsuit is more likely to impose unfair surprise and less likely to reflect expert judgment.[60] As Stephenson and Pogoriler observe, an agency's failure to address a question before litigation makes it "much less plausible . . . that the agency had no choice but to confront [that issue] in

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sound holdings are accompanied by gratuitous and ill-considered dicta that are susceptible to damaging misapplication.").

[54] On the one hand, "an agency's interpretation . . . that conflicts with a prior interpretation is 'entitled to considerably less deference,'" Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987)), but then again, "change in interpretation alone presents no separate ground for disregarding the [agency]'s present interpretation," Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007). The threshold of inconsistency may rise with the agency's size. *See Holowecki*, 552 U.S. at 400 ("Some degree of inconsistent treatment is unavoidable when the agency processes over 175,000 inquiries a year.").

[55] *See Bible*, 799 F.3d at 651 ("There is no indication from the record that the Secretary has ever taken a contrary position . . . ."); *id.* at 663 (Manion, J., concurring in part and dissenting in part) ("There is no evidence to suggest that the Department of Education ever interpreted the regulations in the manner advanced by Bible prior to our request for an amicus brief . . . .").

[56] *Compare* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 289 (2009) ("[T]here was no earlier agency practice or policy to the contrary."), *with* Udall v. Tallman, 380 U.S. 1, 4 (1965) ("[T]his interpretation has been made a repeated matter of public record.").

[57] *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166–69 (2012); Gonzales v. Oregon, 546 U.S. 243, 256–58 (2006); Christensen v. Harris County, 529 U.S. 576, 588 (2000).

[58] *See, e.g.*, *Thomas Jefferson Univ.*, 512 U.S. 504 (dividing five to four as to the consistency of an agency's position); Kevin O. Leske, *Splits in the* Rock*: The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 787 (2014) (documenting "widespread confusion . . . on many aspects of the *Seminole Rock* doctrine").

[59] *See* Stephenson & Pogoriler, *supra* note 10, at 1492–94.

[60] *See* Anthony, *supra* note 53, at 22–23; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 519 ("A position formulated . . . in a brief to a court, does not seem like the last stage of an 'expert' search for the truth.").

the course of implementing the statute."[61] In litigation, there is greater risk that an agency stance may reflect institutional self-interest or other considerations orthogonal to sound administration.[62] If, as is commonly supposed, *Auer* rests on a presumption that Congress meant to commit thorny policy questions to expert deliberation,[63] it is here that that legal fiction wears thinnest. And developments in administrative law since *Auer* have aggravated these problems.[64] *Auer*'s uncritical confidence in agency briefs may thus no longer ring so true.[65] Practically, it appears that most judges already afford less deference to briefs than to more formal documents.[66] The Court should bless those jurists' wise instincts and fortify their inclination into a clear rule.[67]

Under *Auer* so amended, an agency could retain deference to positions announced outside of litigation, but its briefs would be assessed only by their own "power to persuade."[68] Applied to *Bible*, this rule would avert the contentious "unfair surprise" inquiry that consumed so many pages of the *Federal Reporter*. Of course, the ED could (and did) claim that its interpretation predated litigation.[69] But briefs making such arguments will face an uphill battle without *Auer*'s assistance.[70] This particular diminution of deference is no panacea, but it will likely prevent some of the most troubling uses of *Auer*.[71] Here the lowest hanging fruit are also the ripest.

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[61] Stephenson & Pogoriler, *supra* note 10, at 1493.

[62] *See* Anthony, *supra* note 53, at 9–10.

[63] *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991).

[64] The curtailment of *Chevron* deference to informally announced statutory interpretations may drive agencies to evade that limit by writing vague regulations that can be given form through interpretation. *See* Stephenson & Pogoriler, *supra* note 10, at 1464, 1493. And the Court's rejection in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), of the D.C. Circuit's attempt to police the amendment of interpretive rules has left regulated parties with even less protection against interpretive inconsistency. *See id.* at 1203, 1209.

[65] *Cf.* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) ("[T]here is an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation.").

[66] An analysis of 2011–2014 case law found that circuit courts denied *Auer* deference to briefs approximately twice as often as to agency orders. *See* Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 OHIO ST. L.J. 813, 833 (2015).

[67] Besides making wise policy, this rule would arguably hew closer to the original understanding of *Seminole Rock*. *See* Knudsen & Wildermuth, *supra* note 45, at 66–68.

[68] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2169 (2012) (quoting United States v. Mead Corp., 533 U.S. 218, 228 (2001)).

[69] *See Bible*, 799 F.3d at 675 (Manion, J., concurring in part and dissenting in part); *cf. The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV. 176, 367 (2012) ("Agencies may frequently argue that their current position falls within the scope of an earlier interpretation, with [opponents] arguing that the agency's position is a novel interpretation.").

[70] And they did not appear to sway any votes in *Bible*. The only judge to address the ED's citations to sources predating the briefs at issue, Judge Manion, dismissed them as irrelevant or misleading. *See Bible*, 799 F.3d at 675–76 (Manion, J., concurring in part and dissenting in part).

[71] *See* Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 149 (2000).

This reform would thus address the fairness and notice concerns raised by three of the four circuit judges' opinions in *Bible*.[72] Others, like Professor Cass Sunstein, dismiss such fears as overblown, "phantasmal terrors."[73] But in the recent case of *Christopher*, the Supreme Court was sufficiently spooked to deny deference to a brief threatening "unfair surprise" and "massive liability" by its interpretation of a rule affecting 90,000 workers.[74] And the ED rules in *Bible* govern the loans of nearly 18,000,000 borrowers with collective debt of over $357 billion.[75] That the financial plans of so many should depend on an agency's litigation stance seems both surprising and unfair.[76]

Perhaps the simplest answer to administrative deference run rampant would be to declare, as *Auer*'s remorseful author did in another context, "We did not use to do it, and we should do it no more."[77] But indiscriminate retreat from *Auer* would abandon its virtues along with its flaws.[78] The *Bible* panel's fractious foray into a complex regulatory landscape confirms the wisdom of entrusting such efforts to expert administrators, in general — so long as they act with sufficient deliberation and notice. *Auer*'s adherents and adversaries should find common cause in the campaign to rationalize its limits.[79] *Bible*'s divided decision suggests that the Court could drain more bathwater and yet save the baby by reclaiming briefs from *Auer*'s domain.[80]

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[72] *See* Bible v. United Student Aid Funds, Inc., 807 F.3d 839, 841–42 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc); *Bible*, 799 F.3d at 663 (Flaum, J., concurring in part and concurring in the judgment); *id.* at 674–76 (Manion, J., concurring in part and dissenting in part).

[73] Sunstein & Vermeule, *supra* note 4 (manuscript at 24). *But cf.* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1065–66 (2015) (noting *Auer*'s influence).

[74] Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167–68 (2012).

[75] *See* U.S. DEP'T OF EDUC., FEDERAL STUDENT AID PORTFOLIO SUMMARY, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls [http://perma.cc/6AXQ-G48Q] (as of the first quarter of 2016).

[76] *See Bible*, 807 F.3d at 841–42 (Easterbrook, J., concurring in the denial of rehearing en banc) ("[D]eference has set the stage for a conclusion that conduct, in compliance with agency advice when undertaken (and consistent with the district judge's view of the regulations' text), is now a federal felony and the basis of severe penalties . . . ."); *cf. Christopher*, 132 S. Ct. at 2168 ("[W]hile it may be 'possible for an entire industry to be in violation of the [statute] for a long time without the . . . Department noticing,' the 'more plausible hypothesis' is that the Department did not think the industry's practice was unlawful." (quoting Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 510–11 (7th Cir. 2007))).

[77] ANTONIN SCALIA, A MATTER OF INTERPRETATION 37 (Amy Guttman ed., 1997) (inveighing against reference to the "incunabula of legislative history").

[78] *See* Stephenson & Pogoriler, *supra* note 10, at 1453.

[79] *Auer* booster Scott Angstreich, for instance, agrees that whether an interpretation "was first presented during litigation may be relevant to its persuasiveness." *Supra* note 71, at 124.

[80] Modest reform may also be more realistic. Outside the three *Perez* concurrences, only the Chief Justice has suggested revisiting *Auer* — and that in studiously neutral terms. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case."). But other cases show an appetite elsewhere on the Court to "tailor deference to variety." United States v. Mead Corp., 533 U.S. 218, 236 (2001).