

GEORGIA JUDICIAL DEFERENCE TO EXECUTIVE BRANCH AGENCY LEGAL INTERPRETATIONS

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INTRODUCTION

As with many legal subjects, it may be tempting to think of “administrative law” only in terms of federal law.¹ But because state law often differs from federal law in important ways,² and because state agencies often escape federal oversight,³ state administrative law merits consideration. In Georgia, recent appellate decisions may indicate increasing skepticism of judicial deference to executive branch agency legal interpretations. But rather than changing course on deference, the principal impact of these decisions so far has been to reaffirm that deference is permissible only after a court has exhausted all interpretive tools and still found a legal text ambiguous.⁴ This renewed high bar for finding ambiguity may lower

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1. Cf. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 7–10 (2018) (noting tendency to think of “constitutional law” as limited to federal constitutional law).

2. See, e.g., *Elliott v. State*, 824 S.E.2d 265, 272–73 (Ga. 2019) (explaining how state constitutional provisions that appear similar to federal provisions may carry different meanings); *State v. Turnquest*, 827 S.E.2d 865, 869–75 (Ga. 2019) (interpreting state constitutional provisions differently from equivalent federal provisions).

3. See, e.g., *Dep’t of Transp. & Dev. v. Beaird-Poulan, Inc.*, 449 U.S. 971, 973 (1980) (Rehnquist, J., dissenting from denial of certiorari) (noting that avenues for review of federal administrative determinations may be inapplicable to similar state determinations, even when the state agency is administering federal law).

4. *City of Guyton v. Barrow*, 828 S.E.2d 366, 367 (Ga. 2019).

the stakes of future deference debates; deference that applies only rarely is deference that matters less.⁵

I. GEORGIA-SPECIFIC CONSTITUTIONAL INTERPRETIVE PRINCIPLES
INFORM ENGAGEMENT WITH AGENCY DEFERENCE.

Unlike the United States Constitution, the Georgia Constitution has an explicit Separation of Powers provision.⁶ This provision is implicated when we consider whether the judiciary should defer to executive agency legal interpretations.⁷ For this reason, we must begin with a brief summary of Georgia-specific constitutional considerations.

Unlike the United States, Georgia has had multiple constitutions,⁸ adopting the current one only four decades ago.⁹ Many provisions of the current constitution existed in materially equivalent form in previous constitutions,¹⁰ and this has interpretive implications for the original public meaning of those provisions. Two presumptions are particularly significant. First, Georgia courts presume that a provision that was carried forward from a previous constitution into the 1983 Constitution without material change carries with it the same original public meaning the provision had when it first

5. See Matthew A. Melone, *Kisor v. Wilkie: Auer Deference is Alive but Not So Well. Is Chevron Next?* 12 N.E. U. L.R. 581, 621 (2020) (questioning whether it is “conceivable that regulatory ambiguities [will frequently] exist after all traditional tools of construction have been exhausted,” because it is likely that “such tools will provide cover for the courts to discern the true [meaning] of a regulation based on its structure, history, and purpose”).

6. GA. CONST. of 1983, art. 1, § 2, para. 3 (“The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.”).

7. *City of Guyton*, 828 S.E.2d at 367.

8. *Elliott v. State*, 824 S.E.2d 265, 268 & n.3 (Ga. 2019).

9. GA. CONST. of 1983, art. 11, § 1, para. 6 (providing generally that constitution became effective July 1, 1983).

10. *Elliott*, 824 S.E.2d at 268 (“many of the provisions of the Constitution of 1983 first originated in an earlier Georgia Constitution”).

entered a Georgia constitution.¹¹ And second, Georgia courts presume that a provision that was carried forward from a previous constitution into the 1983 Constitution without material change carries with it any definitive and consistent construction that the Georgia Supreme Court has afforded it.¹² Both of these presumptions are rebuttable and may sometimes operate in tension with each other.¹³

A Separation of Powers provision first entered a Georgia constitution in the Constitution of 1777,¹⁴ has been in every constitution since then except for one,¹⁵ and the current language has been unchanged since 1877.¹⁶ The original meaning of that provision as it appears in the 1983 Constitution, therefore, is informed by legal context (including prior similar provisions¹⁷), the original meaning of its 1877 predecessor, and by whatever consistent and definitive constructions the Georgia Supreme Court handed down between 1877 and 1983.

Also relevant may be a provision in the 1983 Georgia Constitution that vests the judicial power in state courts.¹⁸ The initial sentence of this paragraph vests the judicial power “exclusively” in the “magistrate courts, probate courts, juvenile courts, state courts, superior

11. *Elliott*, 824 S.E.2d at 269–70.

12. *Id.* at 270–72.

13. *Id.* at 271 n.6.

14. GA. CONST. of 1777, art. I (“The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”)

15. The exception is GA. CONST. of 1865. See *Black Voters Matter Fund v. Kemp*, 870 S.E.2d 430, 446 n.27 (Ga. 2022) (Peterson, J., concurring).

16. *Id.*

17. See *id.* (citing GA. CONST. of 1798, art. 1, § 1 (“The legislative, executive, and judiciary departments of Government shall be distinct, and each department shall be confined to a separate body of magistracy . . .”); GA. CONST. of 1789, arts. 1–3 (separating three branches); GA. CONST. of 1777, art. 1 (“The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”); 1776 R. & REG. OF COLONY OF GA. 3d, 5th, & 7th (separating three branches)).

18. GA. CONST. of 1983, art. 6, § 1, para. 1.

courts, state-wide business court, Court of Appeals, and Supreme Court.”¹⁹ Four sentences later, the Constitution goes on to provide that, “[i]n addition, the General Assembly . . . may authorize administrative agencies to exercise quasi-judicial powers.”²⁰ While this language may appear permissive, the Georgia Supreme Court has pointed out that it actually is more restrictive than a previous version,²¹ which vested the judicial powers in the various classes of courts and in “such other courts as have been or may be established by law.”²² And the Supreme Court has held that the “quasi-judicial power” that the General Assembly may vest in administrative agencies is essentially just the power to decide a particular contested matter after a hearing with certain procedural requirements;²³ in other words, a power inferior to the judicial power vested exclusively in the courts.²⁴ The Georgia Supreme Court has not cited the judicial vesting provision as support for deference;²⁵ in fact, it has explicitly rejected an argument that this language authorizes conferring judicial power on administrative agencies.²⁶

19. *Id.*

20. *Id.*

21. *Sentence Review Panel v. Moseley*, 663 S.E.2d 679, 682 (Ga. 2008).

22. *Tax Assessors of Gordon Cnty. v. Chitwood*, 218 S.E.2d 759, 763 (Ga. 1975) (quoting GA. CONST. of 1945, art. 6, § 1, para. 1).

23. *See Hous. Auth. of Augusta v. Gould*, 826 S.E.2d 107, 111–12 (Ga. 2019).

24. *See Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm’rs.*, 880 S.E.2d 177–78, (Ga. 2022) (“The judicial power is ‘that which declares what the law is, and applies it to past transactions and existing cases; it expounds and judicially administers the law; it interprets and enforces the law in a case in litigation.’”) (cleaned up) (quoting *Thompson v. Talmadge*, 41 S.E.2d 883, 891 (Ga. 1947)).

25. Most of the Georgia precedent defining quasi-judicial powers arises not from the context of separation of powers, but from that of determining appellate jurisdiction. This is so because under Georgia law, a challenge to quasi-judicial action by an administrative agency has different procedural requirements than does a challenge to an administrative action by the same agency. *See City of Cumming v. Flowers*, 797 S.E.2d 846, 852 (Ga. 2017) (“[F]or generations this Court has held that judicial and quasi-judicial decisions made by city and county governing authorities may be appealed to the superior court by certiorari . . .”).

26. *Moseley*, 663 S.E.2d at 682.

II. JUDICIAL DEFERENCE UNDER GEORGIA'S CONSTITUTION.

Some forms of judicial deference to agency interpretations may be consistent with the original meaning of the 1983 Constitution, but others that more closely resemble federal approaches to deference have recently been the subject of question.

A. *Georgia courts have a long tradition of affording some deference to agency statutory construction.*

Deference to executive branch legal interpretations has a long history in Georgia, but the nature of the deference afforded has been inconsistent. It was not until 2014 that Georgia Supreme Court precedent made explicit that Georgia courts apply *Chevron*²⁷-style deference to agencies' interpretations of statutes that the agency is charged with administering.²⁸ The court's recent articulation of the Georgia version of *Chevron* goes like this:

[I]t usually is for the courts to resolve [statutory] ambiguity by ascertaining the most natural and reasonable understanding of the text. But when it appears that the General Assembly has committed the resolution of such an ambiguity to the discretion and expertise of an agency of the Executive Branch that is charged with the administration of the statute, the usual rule may not apply. In those instances, the courts must defer to the way in which the agency has resolved the ambiguity in question, so long as the agency has resolved the ambiguity in the proper exercise of

27. *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that federal courts defer to an agency's reasonable interpretation of a statute which the agency administers, if the statute is ambiguous or silent on an issue).

28. *See Cook v. Glover*, 761 S.E.2d 267, 271 (Ga. 2014) (stating in the first Georgia Supreme Court decision ever to cite *Chevron* that "the level of deference this Court gives state administrative agency decisions interpreting ambiguous statutes is in accord with that identified by the United States Supreme Court in *Chevron* as appropriate for the judicial review of a federal administrative agency's statutory interpretation").

its lawful discretion, and so long as the agency has resolved it upon terms that are reasonable in light of the statutory text.²⁹

This rule that courts *must* defer to a reasonable agency interpretation of ambiguous statutory text makes failure to do so reversible error.³⁰

Taken literally, the court's articulation of this rule suggests that a statute that has one most natural and reasonable understanding may nevertheless still be considered ambiguous if an inferior (but still reasonable) interpretation exists. Not only that, this articulation also suggests that if an agency charged with administering the statute adopts the inferior interpretation, it is reversible error for a court to refuse to adopt that inferior interpretation. Indeed, it is difficult to understand it any other way; the "usual rule" is that courts select the most natural and reasonable understanding of the text, but administrative deference is a circumstance in which that "usual rule" does not apply.

But it is unclear just how consistently this articulation is applied. The court has also held that agency statutory interpretations are "not binding on the courts" and "will be adopted only when they conform to the meaning which the court deems should properly be given."³¹ And the court does not always agree about just how ambiguous a statute has to be before deference is afforded to an agency interpretation.³² To some extent, Georgia's deference precedent

29. *Tibbles v. Teachers Ret. Sys. of Ga.*, 775 S.E.2d 527, 529 (Ga. 2015) (internal citation omitted).

30. *See Cook*, 761 S.E.2d at 272 (reversing a "plausible" construction by the court of appeals because the agency construction was "reasonable").

31. *Handel v. Powell*, 670 S.E.2d 62, 65 (Ga. 2008) (citing *McKee v. City of Geneva*, 627 S.E.2d 555, 555 (Ga. 2006) and *Sawnee EMC v. Ga. Pub. Serv. Comm'n*, 544 S.E.2d 158, 161 (Ga. 2001)).

32. *Compare, e.g., Sawnee EMC*, 544 S.E.2d at 162 (four-justice majority holding statute unambiguous and rejecting agency interpretation) *with id.* at 162–64 (three-justice dissent arguing statute was ambiguous and thus deference to agency interpretation was required). This sort of sharp division among judges is, of course, at least *some* evidence of ambiguity. *But see* ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 425 (2012) (explaining that ambiguity exists when there are competing interpretations of roughly equal plausibility).

could be accused, as the D.C. Circuit criticized precedent regarding the rule of lenity, of providing “little more than atmospheric, since it leaves open the crucial question -- almost invariably present -- of how much ambiguousness constitutes an ambiguity.”³³

Some of this lack of clarity may be a matter of history. The Georgia Supreme Court has stated that its application of *Chevron*-style deference long predates *Chevron* itself.³⁴ The court acknowledged that many of the relevant “earlier cases did not acknowledge it so explicitly.”³⁵ But perhaps the failure to acknowledge the deference rule was because those cases were not in fact applying such a rule.³⁶

*B. Whatever the answer to these historical questions, the current state of the law is increasingly the subject of criticism.*³⁷

Auer/Seminole Rock-style deference is of more recent and questionable origin.

Whatever one thinks about the history of Georgia’s deference to executive branch statutory construction, another type of deference is of much more recent origin. Georgia’s deference to agencies’ interpretations of their own rules and regulations, akin to federal *Auer/Seminole Rock*-style deference,³⁸ dates only to 1988, when the Georgia Supreme Court imported the doctrine from federal caselaw uncritically and without analysis.

33. *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985).

34. *See Tibbles*, 775 S.E.2d at 529 & n.1 (citing, e.g., *Suttles v. Northwestern Mut. Life Ins. Co.*, 19 S.E.2d 396, 408 (Ga. 1942)).

35. *Id.* at 529 n.1.

36. *See Cazier v. Ga. Power Co.*, No. S22C0513, 2023 Ga. LEXIS 16 (Jan. 27, 2023) (Peterson, P.J., concurring in the denial of certiorari).

37. *See, e.g., id.*; *see also UHS of Anchor, L.P. v. Dep’t of Cmty. Health*, 830 S.E.2d 413, 418 n.16 (Ga. Ct. App. 2019) (“Some judges of this Court believe the time has come to reconsider such deference.”), *rev’d sub nom. Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 849 S.E.2d 441 (Ga. 2020).

38. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (noting that an agency’s interpretation of its own regulation is “controlling unless plainly erroneous or inconsistent with the regulation” (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (punctuation omitted))).

In *Atlanta Journal v. Babush*,³⁹ the court considered whether a proceeding before the State Personnel Board was a “hearing” within the meaning of the Board’s rule prohibiting a “hearing” from being conducted in closed session.⁴⁰ The Board had interpreted the rule as not applying to the kind of proceeding at issue, an interpretation consistent with the Board’s approach in over 200 other similar proceedings during the previous four years.⁴¹ With little explanation, the court announced that it would adopt federal law principles: “We agree with the view expressed in *United States v. Larionoff*,^[42] that in construing administrative rules, ‘the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the [rule].’”⁴³ The only reasoning the court offered for this adoption of federal law was that if a court were to “apply a different interpretation from that of the agency, the agency would simply be forced to modify the rule.”⁴⁴

Some may find this reasoning unsatisfying; while an agency certainly might modify a rule if it disagrees with the way a court interprets it, the modified rule might not apply retroactively in whatever case the court’s different interpretation arose.⁴⁵ And the political accountability inherent in formal rulemaking (and the procedural requirements for such rules under the Georgia Administrative Procedures Act⁴⁶) is lost when an agency may adopt a new rule by interpretation, rather than rulemaking.

39. 364 S.E.2d 560 (Ga. 1988).

40. *Id.* at 562.

41. *Id.*

42. 431 U.S. 864, 872 (1977).

43. *Atlanta Journal*, 364 S.E.2d at 562.

44. *Id.*

45. See, e.g., GA. CODE ANN. § 1-3-5 (2022); *Deal v. Coleman*, 751 S.E.2d 337, 342–43 & nn.12–13 (Ga. 2013).

46. GA. CODE ANN. §§ 50-13-1–23 (2022).

Five years ago, in *City of Guyton v. Barrow*,⁴⁷ the Georgia Supreme Court granted certiorari on whether that deference is appropriate, posing the question of “[w]hat level of judicial deference should be afforded to a state agency in its interpretation of its own internal rules and regulations?”⁴⁸ But the court ultimately declined to reach that question because the regulation at issue was not ambiguous; instead, it re-affirmed the principle that all the tools of construction must be exhausted before a regulation is found ambiguous and deference is applied.⁴⁹ The court expressly left open the question of whether its deference precedent was correct.⁵⁰ Since *City of Guyton*, the court has again noted the openness of this question.⁵¹

C. *A rediscovered principle is that courts apply deference to interpretation only of ambiguous text, and only text that is ambiguous after exhausting all canons of construction.*

Atlanta Journal did not only invent Georgia’s version of *Auer* deference, it also appeared to articulate a much lower standard for invoking deference than was the case under *Chevron*-style deference: it stated that an agency’s interpretation of a rule is “controlling” unless “it is plainly erroneous or inconsistent” with the text of the rule.⁵² But Georgia courts had previously -- and consistently -- said

47. 828 S.E.2d 366 (Ga. 2019)

48. *City of Guyton v. Barrow*, No. S18C0944, 2018 Ga. LEXIS 612, at *1 (Aug. 27, 2018) (order granting writ of certiorari).

49. “Some have argued that [deference to an agency’s interpretation of its own rules] is in tension with our role as the principal interpreter of Georgia law, and we granted certiorari here on that question. But any such tension could exist only in cases where we have exhausted all of our interpretive tools without determining a text’s meaning. This is not one of those cases.” *City of Guyton v. Barrow*, 828 S.E.2d 366, 367 (Ga. 2019).

50. *Id.*

51. See *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 849 S.E.2d 441, 447 n.5 (Ga. 2020) (refusing to defer to agency interpretation of statute found unambiguous after application of canons of statutory construction, and observing that, “like in *City of Guyton*, this case does not present the question of whether [the Court’s deference] case law should be reconsidered”).

52. *Atlanta Journal*, 364 S.E.2d at 562 (quoting *United States v. Larionoff*, 431 U.S. 864, 872 (1977)).

that deference to an agency's interpretation of a statute was warranted only when the statute was ambiguous.⁵³ *Atlanta Journal* appeared to flip the presumption in favor of deference.

Although in *City of Guyton* the Georgia Supreme Court was unable to reach the validity of *Auer* deference, it did correct this second issue. After noting the lower standard of *Atlanta Journal*, the *City of Guyton* court observed that before *Atlanta Journal*, "our long-held rule in interpreting statutes was that courts were to defer to an agency's construction only in cases where the meaning of a statute was ambiguous."⁵⁴ The court cited multiple cases for this proposition, all of which were decided decades before *Atlanta Journal*.⁵⁵ And the court noted that post-*Atlanta Journal*, cases had also articulated this higher standard.⁵⁶ The court definitively clarified that deference was proper only when a rule was ambiguous: "Although our statement in [*Atlanta Journal*] placed no qualifiers on judicial deference to agency interpretations, it is clear that we are to defer to an agency's interpretation only when we are unable to determine the meaning of the legal text at issue."⁵⁷

The *City of Guyton* court went on to explain that true deference-permitting ambiguity is not lightly found: "We may conclude that

53. *City of Guyton*, 828 S.E.2d at 369 (citing *Suttles v. Nw. Mut. Life Ins. Co.*, 19 S.E.2d 396, 408 (Ga. 1942) (a "[reasonable] administrative interpretation and practice, continued for a long period, should be accepted as controlling . . . only when the law is ambiguous and susceptible of different interpretations"); *Elder v. Home Bldg. & Loan Ass'n*, 3 S.E.2d 75, 77 (Ga. 1939) ("[W]here the invalidity of a statute is doubtful, [an agency's interpretation] has much weight with the court in determining its validity[.]"); *Standard Oil Co. of Ky. v. Rev. Comm'n*, 176 S.E. 1, 4 (Ga. 1934) ("The rulings of departmental and executive officers are at best persuasive, and may be of great force in cases of doubt[, and] . . . should be restricted to cases in which the meaning of the statute is really doubtful[.]" (citation and punctuation omitted))).

54. *See id.*

55. *See supra* note 53.

56. *City of Guyton*, 828 S.E.2d at 370 (citing *New Cingular Wireless PCS, LLC v. Ga. Dep't of Revenue*, 813 S.E.2d 388 (Ga. 2018) (requiring ambiguity before deference in construing regulation); *Tibbles v. Teachers Retirement Sys. of Ga.*, 775 S.E.2d 527 (2015) (requiring ambiguity before deference in construing statute)).

57. *Id.* at 369.

an ambiguity exists . . . only after we have exhausted all tools of construction.”⁵⁸ Indeed, “[a] significant criticism of *Auer/Seminole Rock* deference is that courts, faced with the task of interpreting difficult agency regulations, are often too eager to sidestep the obligation of discerning what the law is. A statute or regulation is not ambiguous merely because interpreting it is hard.”⁵⁹

This re-articulation of an old standard may have also had the effect of clarifying that deference-permitting ambiguity requires competing levels of plausibility. If any legal text with multiple plausible interpretations is ambiguous for deference purposes, then any time an agency interpretation is reasonable it should be deferred to; whether another interpretation is better would be beside the point. So, *City of Guyton*'s clarification that reasonableness alone is not enough may have made clear that ambiguity exists only when a text is subject to multiple different interpretations of nearly equivalent plausibility.⁶⁰ And if that is so, then deference will apply in far fewer cases.⁶¹

If this resolution sounds familiar, it might be because barely a month after *City of Guyton* was decided, the U.S. Supreme Court did precisely the same thing in *Kisor v. Wilkie*,⁶² in which it had granted certiorari to reconsider *Auer*.⁶³ In *Kisor*, the Court did not reach whether to overrule *Auer* because, just as the Georgia Supreme Court had done in *City of Guyton*, it instead clarified its precedent to make clear that “deference can arise only if a regulation is genuinely ambiguous.”⁶⁴ And the Court went on to make clear that,

58. *Id.* at 370.

59. *Id.* (citations omitted).

60. See also ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 425 (2012) (interpreting ambiguity as “[a]n uncertainty of meaning based . . . on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations” (emphasis added)).

61. See Melone *supra* note 5.

62. 139 S. Ct. 2400 (2019).

63. *Id.* at 2409 (noting the Court “granted certiorari to decide whether to overrule *Auer* and (its predecessor) *Seminole Rock*”).

64. *Id.* at 2414.

as in *City of Guyton*, “when we use that term, we mean it -- genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation.”⁶⁵ The Court concluded that the federal appellate court below “jumped the gun in declaring the regulation ambiguous,”⁶⁶ in part because it did not first “bring all its interpretive tools to bear,”⁶⁷ and so remanded for the court to do so in the first instance.⁶⁸ *Kisor* is, therefore, a case in point: the re-discovered emphasis on true ambiguity may well mean that far fewer cases will trigger deference-permitting ambiguity, shifting focus away from the underlying debate on the merits of deference regimes writ large.

CONCLUSION

Issues of federal judicial deference to federal agency determinations have long been the focus of debate. Similar debate exists in Georgia as to state law. But even if deference precedents are eventually overruled, that may have little impact. As the Georgia Supreme Court observed in *City of Guyton*, the renewed high standard for finding ambiguity may not often be met: “After using all tools of construction, there are few statutes or regulations that are truly ambiguous.”⁶⁹ This higher bar for deference may mean that deference will apply less often, dramatically lowering the stakes of future deference debates.

65. *Id.*

66. *Id.* at 2423.

67. *Id.*

68. *Id.* at 2424.

69. *City of Guyton*, 828 S.E.2d at 370.