In Defense of Deference:
The *Kisor* Decision and Its Role in Defining the American Administrative State

by

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Part I: Introduction

The regulatory agencies of the executive branch of the federal government are tasked with writing rules pursuant to the laws of Congress and more often than not, they do so with a high degree of precision; doing so avoids confusion among parties being regulated and reduces the likelihood of litigation. Sometimes, however, rules are written with language that lends itself to more than one reasonable reading of the same lines of text, and that becomes problematic when an individual or group reads the regulation in one way and the agency that wrote and enacted it reads it in a different, but equally reasonable way. In such a situation, when the judiciary is tasked with rendering a judgment, which party is right?

This question may seem trivial on its face and to some, the answer may be clear: the regulated party should sue the agency and let the courts say which interpretation is right. Accepting that view, however, would condemn the courts to a seemingly endless barrage of lawsuits, all involving plaintiffs who believe they understand the regulations of the government better than the government itself. A general rule regarding how ambiguous regulations should be read, on the other hand, would make judicial outcomes more predictable while also making it less likely that regulated parties will engage in litigation unless they *truly* believe that their reading is better than what the general rule dictates.

Such a general rule exists in Supreme Court jurisprudence and goes by the name of "*Auer* deference," a doctrine upheld and affirmed in *Auer* v. *Robbins* (1997).[1] The holding of that case directed courts, when choosing between two equally reasonable readings of the same regulation, to defer to the agency's interpretation. But does this doctrine give too much leverage to the

[1] *Auer* v. *Robbins*, 519 U.S. 455 (1997)

agency in litigation? Does it give an unreasonable disadvantage to a party who may have a valid lawsuit against the government? Will it encourage agencies to write more vague regulations so they can effectively create policy on an *ad hoc* basis each time they are sued? Justices of the Supreme Court do not agree on the answers to these questions.

A recent case before the Court, *Kisor* v. *Wilkie* (2019)[2], brought these questions to the forefront and the Justices were split 5-4 as to whether to uphold *Auer* deference. In studying *Kisor*, one may observe the intensity of the academic debate within the legal community over this issue, one that has sweeping implications for regulatory agencies. *Kisor* ultimately upheld administrative deference, but if the conservative wing of the Supreme Court's becomes stronger in the future, it is conceivable to imagine the overturning of *Auer* and a subsequent reappraisal of the value of agencies' interpretations of their own rules.

This paper will discuss the precedent set forth in the *Auer* decision, analyze its affirmance in *Kisor*, evaluate the arguments on both sides of the debate surrounding this subject, and conclude with my own assessment of *Auer* and its merits. For the reasons soon to be discussed, the *Auer* doctrine deserves its place in the jurisprudence of the Supreme Court. It effectively addresses the needs of the modern administrative state in a practical way, despite criticism stretching many years into the Court's past.

[2] *Kisor* v. *Wilkie*, No. 18-15 (U.S. Sup. Ct. June 26, 2019)

Part II: *Auer* v. *Robbins* (1997)

Decided by the Supreme Court in early 1997, the case of *Auer* v. *Robbins* remains a cornerstone of federal administrative law. Though it is a relatively brief decision, it makes up in importance what it lacks in length and by studying its holding, one derives a more comprehensive understanding of the Court's view regarding its role in the federal administrative state. In sum, the justices would prefer that they not become too involved, especially when it comes to interpreting the language of a regulation written by an executive agency.

The case itself involved a group of police sergeants and one lieutenant from the St. Louis Police Department who sued their commissioner under the Fair Labor Standards Act of 1938. Under the Act, "bona fide executive, administrative, or professional" employees did not have to be paid overtime.[3] Department of Labor regulations defined such employees as those earning a specified minimum amount on a "salary basis," which amount was "not subject to reduction because of variations in the quality or quantity of the work performed."[4]

The policemen asserted that their handbook specified that their pay *could* be reduced in response to various disciplinary infractions, even though that was not common practice in the department. They argued that since disciplinary sanctions relate to the "quality or quantity" of work performed, their work fell under the protections of the FLSA regulations and that they were therefore entitled to overtime pay. The Secretary of Labor countered that the jobs of the policemen do not meet the standard required by the FLSA regulations because employees are not generally punished for disciplinary infractions via a reduction in their pay – they are typically

[3] 29 U.S.C. §213(a)(1)
[4] 29 C.F.R. §541.118(a)

"terminated, demoted, or given restrictive assignments."[5] Therefore, since it was effectively unheard of for a police officer to have his pay reduced, the overtime regulations did not apply to the St. Louis Police Department.

In its ruling, the Court sided against the officers and ruled that the Department of Labor's reading of the regulation was superior. More important, however, was the reasoning of the Court whose opinion was articulated by Justice Antonin Scalia. Writing for all nine justices, he used an earlier decision, *Bowles* v. *Seminole Rock* (1945)[6], and applied it to create what is known today as "*Auer* deference." In *Auer*, he explained that "[because] the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is… controlling unless 'plainly erroneous or inconsistent with the regulation.'"[7]

Consequently, a court using the *Auer* precedent must find an agency's interpretation of an ambiguous rule "controlling" if it meets two criteria: 1) the agency's reading is not "plainly erroneous" in the sense that a reasonable person could read the rule as written and come to a similar conclusion as the agency and 2) it is not "inconsistent with the regulation" to the point where there seems to have little connection to the rule itself. Together, these tenets form the basis for *Auer* deference, which has been applied in cases involving an ambiguous regulations since its inception.

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[5] *Auer* v. *Robbins*, 519 U.S. 456 (1997)
[6] *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945)
[7] *Id.*, at 410, 414 (1945); That caveat is important because the Administrative Procedure Act (APA) requires regulatory agencies to conduct a "notice and comment" period before effectuating new rules, which prevents agencies from issuing rules that could affect millions of people without advance warning or an opportunity to voice opposition to the new rule. In court, if an agency decides to suddenly rearticulate its understanding of its own rule in a way that is "plainly erroneous" with the rule itself, then that could have the effect of changing the rule without a notice and comment period, thus violating the APA. Consequently, courts must rely on a common understanding of the English language to determine if the agency's reading could be considered correct given its own phraseology used in its rules.

Part III: *Kisor* v. *Wilkie* (2019)

This leads to the current case which directly challenged the practice of deferring to federal agencies. James Kisor, the appellant, was a veteran of the Vietnam War who claimed to have suffered post-traumatic stress disorder (PTSD) as a result of his service in a mission called Operation Harvest Moon. In 1982, he applied for disability benefits from the Department of Veterans' Affairs (V.A.) but his application was denied because the examining psychiatrist determined that Kisor had not provided sufficient proof that he suffered from PTSD. Years later, in 2006, Kisor reopened his claim for the same benefits and the V.A. approved the application. However, the agency granted him benefits only from the date of his second application rather than from the date of his first. This was because V.A. regulations dictated that retroactive benefits could be granted only if his claim was accompanied by "relevant official service department records."[8] In the time between 1982 and 2006, Mr. Kisor was able to produce further documentation that confirmed his participation in Harvest Moon, but none that proved that he had suffered from PTSD at the time of his initial claim.

This situation presented two possible readings of the V.A. rule:

1) According to Kisor: the documentation he provided was "relevant" because it proved his participation in the operation which resulted in his ongoing PTSD.[9]
2) According to the V.A.: "[The] documents were not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat."[10] Kisor's

[8] *Kisor*, No. 18-15 at 2
[9] *Id.*
[10] *Id.*, at 3

documents needed to directly show that he had suffered PTSD at the time of his first application.

Which party's interpretation was correct? It could be reasoned either way, especially since the word "relevant" does not lend itself to a precise standard of documentation. One person could find a document relevant while another could find it not to be so. Kisor, therefore, sued the V.A. for declining to grant him retroactive benefits dating from his first application and claimed that his reading of the regulation was better than that of the V.A.

Kisor's case was heard before the Board of Veterans' Appeals, which acknowledged that Kisor did produce more documentation, but that it did not fulfill the agency's requirements for relevant records pertaining to his diagnosis.[11] The Court of Appeals for the Federal Circuit subsequently also affirmed the decision but in deference to the agency's interpretation of the rule per the *Auer* doctrine.[12] Summing up the reason for the lawsuit, the Court of Appeals noted that the rule does not specifically address "whether 'relevant' records are those casting doubt on the agency's prior rationale or those relating to the veteran's claim more broadly."[13] This meant that the court, in applying *Auer*, was compelled to give controlling weight to the V.A.'s interpretation of the rule. Believing that he still had a better reading of the regulation, Kisor then appealed to the Supreme Court, which granted certiorari as an opportunity to reexamine the merits of *Auer*.

The Supreme Court was unanimous in its ruling to vacate the judgment and remand the case for further proceedings, but there was a 4-4 split as to the reasoning. The four dissenting justices wanted the case to be reconsidered but with the precedent of *Auer* thrown out and the

[11] *Kisor*, No. 18-15 at 2
[12] *Id.*, at 3
[13] *Kisor* v. *Shulkin*, 869 F. 3d 1366 (2017)

case considered without any deference to the V.A. The others, led by Justice Elena Kagan, wanted Kisor's case to be reexamined using more thoroughly delineated guidelines for *Auer* deference, which she listed and explained thoughtfully in the decision. She and her allies sought a clearer definition of *Auer* deference that was "potent in its place, but cabined in its scope."[14] The fifth vote at the end came from the Chief Justice, who voted to uphold *Auer* on the basis of *stare decisis*, thus lending Kagan the ability to write a Court opinion upholding the standard as redefined in *Kisor*.

Speaking for herself and three other justices in the plurality portion of the decision, Justice Kagan began with an examination of the presence of ambiguity in the various rules of the executive branch. "Sometimes… ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction," she wrote. "But often, ambiguity reflects the well-known limits of expression or knowledge."[15] She continued to list several examples of rules that were written ambiguously and could have more than one reasonable way to read them. In essence, she showed that ambiguity is a reality of the rulemaking process, and that the courts must have a means of addressing cases that arise as a result. Kagan also cited cases dating back to 1898 that referenced the necessity to lend deference to executive departments,[16] and offered three principal reasons as to why deference has been the going practice of the Court.

First, "when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue."[17] This can be deduced given a few key observations – for example, the fact that ambiguity is inevitable per the

[14] *Kisor*, No. 18-15 at 1
[15] *Id.*, at 4
[16] *Id.*, at 7
[17] *Id.*, at 8

aforementioned reasons, yet Congress has neglected (or declined) to legislate as to who should decide in cases of ambiguity. If Congress anticipated that such problems were to occur, it seems reasonable, then, to assume that by saying nothing, it intended to allow courts to continue deferring to executive agencies. Additionally, as Kagan notes, in delegating some of its lawmaking powers to the executive, Congress presumed that agencies could have the ability to best resolve conflicts under their own rules.[18] Doing away with deference to administrative agencies would seem to invite a torrent of grievances onto the courts with no way to address them besides adjudicating each one. Though the courts serve a necessary function as neutral arbiters, it is simply more sensible to defer to the agency to respect their ability to make rules on intricate subject matters.

Second, the "[resolution of] genuine regulatory ambiguities often 'entails the exercise of judgment grounded in policy concerns.'"[19] Many ambiguities will lead to questions such as: Is this regulation a wise idea? How much will it cost to implement this rule if it is read one way or another? These are textbook examples of policy concerns which the Supreme Court endeavors to avoid as often as possible. Such questions are better answered, again, by those who have extensive knowledge about the subject. To that end, agencies also have more ways of attaining information, according to Kagan, such as through investigation and consultations with affected parties and experts within the agency itself.[20] The Court is privy to none of this information and so it has been reluctant to rule against the significantly more effective fact-finding capacities of federal agencies. Additionally, agencies are ultimately more politically accountable than the courts,[21] allowing for a redress of grievances through Congress or the ballot box. The Supreme

[18] *Kisor*, No. 18-15 at 7
[19] *Id.*, at 9
[20] *Id.*, at 10
[21] *Id.*

Court would prefer to defer to the agency rather than issue a judgment that only allows for one outcome when changing times may merit a different reading or set of rules in the future.

Finally, when it comes to making rules, there are "well-known benefits of uniformity."[22] Executive agencies are national in scope, and often regulate matters that affect the entire country. The court system, on the other hand, is designed in a fragmented way where the Supreme Court is the only court with nationwide jurisdiction. This means that a lower federal court may reach a decision in a certain case, but that decision would not necessarily apply in other jurisdictions, leading to the possibility for judicial chaos if the two are out of sync. Take Kisor's case as an example. Imagine that one circuit court ruled in favor of the V.A., and in another circuit, a veteran with a very similar case sued the V.A. In the second veteran's case, the defense could cite the other circuit court's decision to bolster the government's position, but the court could rule in favor of the veteran regardless. Without any standard of deference, this scenario means that there would then be two circuit jurisdictions with opposing views of the regulation and those affected by the regulation nationwide would be uncertain of which is correct. The Supreme Court wants to avoid such a situation as often as possible. By instructing lower courts to defer to the agency when both parties' interpretations are equally reasonable, it allows for the regulation to be applied nationally and for instances where lower courts oppose one another to be less frequent.[23] This makes it more likely that rulings will be made consistently and that those subject to regulation will be able to reasonably gauge whether they are likely to win in a lawsuit.

Justice Kagan used the above three reasons in her plurality opinion to justify the Court's reliance on administrative deference, but conceded, perhaps as a nod to the conservative

[22] *Kisor*, No. 18-15 at 10
[23] *Id.*, at 11

naysayers, that the occasions for deference to executive agencies should be more clearly defined. Emphasizing the importance of adherence to precedent, and thereby earning the fifth vote of Chief Justice Roberts, Kagan went on to produce a majority opinion upholding and reaffirming the *Auer* doctrine. Her majority opinion, however, also imposed a set of requirements intended to set more precisely the boundaries of *Auer* deference. In her words, "when the reasons for [the presumption of deference] do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency's reading, except to the extent it has the 'power to persuade.'"[24]

The decision's first condition restricting deference would be when the regulation in question is not genuinely ambiguous. The principle of administrative deference hinges on the scenario whereby there are two equally reasonable readings of a rule, which creates a conundrum for the deciding court. "[The] core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over," Kagan writes, "But if the law gives and answer – if there is only one reasonable construction of a regulation – then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense… [To do otherwise] would permit the agency… to create *de facto* a new regulation."[25] While some judges may find it difficult to rule against a plaintiff when their claim seems more valid than the agency's, that quandary does not exist where the regulation, carefully and logically analyzed, can only be read one way. The *Auer* decision was never intended to give agencies legal immunity from lawsuits regarding their own regulations; rather, it was meant to resolve a specific conflict that will only be relevant in a fraction of lawsuits.[26] Where there is no ambiguity

[24] *Kisor*, No. 18-15 at 12
[25] *Id*., at 13
[26] *Id.*, at 14

to be found, there is no need to consider the agency's reading as being any more controlling than the plaintiff's.

Second, deference is not appropriate where the agency's reading is not "reasonable,"[27] Which reflects the very real possibility that an agency's reading may simply be incompatible with the text of its rule or contrary to ordinary logic. Kagan admits that this may happen very infrequently but notes it nonetheless because it is not enough to say that agencies should receive deference every time there is ambiguity in one of their rules. Their reading must conform to some level of reasonable logic before they are given any degree of favorable treatment by a court.

Finally, the Court may not grant deference if the agency's reading fails the test as to "whether the character and context of the agency interpretation entitles it to controlling weight."[28] Kagan notes that there is no exhaustive test for this standard – rather, she outlines a set of key requirements that must be satisfied before an agency is entitled for deference, all based upon the precedent of previous decisions. Together, these requirements outline the standard which the 5-member majority hopes will finally provide the *Auer* doctrine with clearer boundaries.

These three requirements are:

1. "The regulatory interpretation… must be the agency's 'authoritative' or 'official position.'"[29] The opinion of a random bureaucrat from within the agency cannot be said to encompass the agency's true stance on a given subject, nor can a department

[27] *Kisor*, No. 18-15 at 15
[28] *Id.*, at 15
[29] *Id.*

secretary's offhand statements be considered authentic policy. The "official position" of the agency stems from those within the agency who have the authority to make such pronouncements and is made using "vehicles understood to make authoritative policy in the relevant context,"[30] such as through official internal memoranda.

2. "[T]he agency's interpretation must in some way implicate its substantive expertise."[31] Administrative deference is rooted in the presumption that when Congress delegated its lawmaking powers to the executive, it presumed that agencies would resolve disputes better than courts due to having greater subject expertise. Kagan notes that there will be times where a court may be able to know enough to make a reasoned judgment on the subject depending on the question at issue in the case,[32] so in situations such as those, deference would not be necessary or appropriate.
3. "[A]n agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference."[33] This is to protect against what the Court refers to as "a *post hoc* rationalization,"[34] which would entail the agency enacting a rule for a certain reason (or possibly for no reason) and then citing a different reason when challenged in court. This restriction, therefore, serves two purposes: it allows a potential plaintiff to have a fair chance at understanding the agency's position when he decides to sue, and it serves to encourage the degree of uniformity Kagan views as necessary. If agencies are allowed to explain their policies in any way that seems most expedient at

[30] *Kisor*, No. 18-15 at 16
[31] *Id.*
[32] *Id.*, at 17.
[33] *Id.*
[34] *Id.*, at 18

> the point of litigation, then those subject to their regulations would have no idea of what to expect from a trial. Whatever its explanation, the agency must show some form of proof that the explanation is grounded in thoughtful decision-making that occurred before the case began to be entitled to any degree of deference.

If any one of the above requirements are not met, an agency ought not to be entitled to deference from a court according to the majority. These restrictions also serve as a means of curtailing the power of the executive branch; since *Auer* deference itself is a doctrine in favor of the executive, these standards prevent it from being overused to the detriment of the separation of powers. Justice Kagan also effectively portrays *Auer* deference as a necessary function of the rulemaking process. Without it, every similar lawsuit against an agency could be decided differently and the concept of having a uniformly applied federal code of rules would be forfeited. The essence of the *Kisor* decision is the articulation of these realities and a clearer statement as to how the Supreme Court intends to utilize *Auer* going forward while not allowing it to become a blank check to the executive branch.

Part IV: The Dissenting View

As with virtually every legal issue, the *Kisor* decision has its skeptics; among them is Justice Neil Gorsuch who penned a concurrence in the judgment that also functioned as a dissent in this case. In his 42-page rebuke, he cited several popular criticisms of the concept of *Auer* deference. These arguments can be boiled down to the following: to permit the courts to give deference to regulatory entities would amount to an abandonment of the judiciary's

constitutional duty to serve as a neutral arbiter of the law. The *Kisor* decision would legalize this abdication while also encouraging the growth of an ever more powerful federal government.

Gorsuch begins by portraying the *Kisor* decision as a "stay of execution"[35] for *Auer*, since, he argues, the numerous requisite conditions required for deference by the majority maintain *Auer* in theory but overturn it in practice. However, while being restricted to the point of near non-existence, Gorsuch maintains that *Auer* nevertheless can give the government the upper hand when it deserves no more than a just decision from the court. "[R]etaining even this debilitated version of *Auer* threatens to force litigants and lower courts to jump through needless… hoops and in the process deny the people the independent judicial decisions they deserve," he writes. "All to what end? So that we may *pretend* to abide *stare decisis*?"[36] It is noteworthy that Gorsuch also seeks to discredit the decision by pointing out Chief Justice Roberts' concurrence, which supplied the necessary fifth vote not on the grounds of technical agreement, but rather on adherence to the Court's precedent. In Gorsuch's view, this is further evidence that the majority did not win because it had the better argument.

The justice then proceeds to give his version of the history of *Auer* deference to illustrate its supposed lack of solid legal foundations. For example, Kagan references *United States* v. *Eaton* (1898)[37] as the earliest known example of the Court granting deference to a federal agency, but Gorsuch contends that such an estimation is an overstatement. "*Eaton* thus simply followed the well-worn path of acknowledging that an agency's interpretation of a regulation can supply *evidence* of its meaning."[38] For the *Eaton* Court, Gorsuch points out, it was still important

[35] *Kisor,* No. 18-15, Gorsuch concurrence at 1
[36] *Id.,* at 2
[37] *United States* v. *Eaton* 169 U.S. 331 (1898)
[38] *Kisor,* No. 18-15, Gorsuch concurrence at 5

for the Justices to conduct their own assessment. Only if the agency's explanation lined up with the Court's assessment would the Justices side with said agency. A subsequent decision, *Skidmore* v. *Swift* (1944)[39], likewise relied on the agency's interpretation of a rule so far as it provided evidence, but even there the Court remained firmly in control.[40] Justice Jackson wrote, in the decision, "[The agency's readings] are not, of course, conclusive… [nor do they] constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[41] Gorsuch maintains that courts should be careful to maintain ultimate control but also acknowledged that an agency may sometimes be able to answer questions better than a court.

Then came the *Seminole Rock*[42] decision, the case which proponents of administrative deference cite as the true beginning of the practice.[43] While the Supreme Court did rule in favor of the agency and did cite similar reasoning to that used in *Skidmore*, *Seminole Rock* had the effect of reaching for the best of both sides of the dispute. "Since this involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt,"[44] said the Court. This assertion of deference, however, was seemingly undercut when the Court later stated, "As we read the

[39] *Skidmore* v. *Swift*, 323 U.S. 139 (1944)
[40] *Kisor*, No. 18-15, Gorsuch concurrence at 6
[41] *Skidmore*, 323 U.S. 139
[42] *Bowles* v. *Seminole Rock*, 325 U.S. 413 (1945)
[43] *Kisor*, No. 18-15 at 7
[44] *Seminole Rock*, 325 U.S. 413

regulation, however, rule (i) clearly applies to the facts of this case,"[45] implying that the Court still engaged in its own independent investigation. The result was a standard that seemed to empower the agency in cases against itself while also leaving the courts with some ability to make a final determination. Gorsuch emphasized that legal scholars at the time were not in agreement as to whether the decision gave any more leverage to agencies than they had before, citing, in particular, an article from the 1950 edition of *The Columbia Law Review*. In that article, Kenneth Davis made the case that relying on an agency's interpretation could be useful but warned of its limitations.

> "The argument that administrative intent should govern the interpretation of a regulation and that the agency must be assumed to know its own intent is sound only within limits. If the regulation is designed to control conduct of private parties and a violation is punishable, what the agency intended but did not adequately express can hardly be controlling, unless, of course, the parties affected have sufficient notice of the agency's interpretation. When advance notice to the parties is of no consequence, the guide may be administrative intent whether or not expressed."[46]

Perhaps the fact that even in the immediate wake of the *Seminole Rock* decision, legal scholars questioned whether there was reason to defer to an agency's reading of an ambiguous regulation lends credibility to the idea that *Auer* rests on shaky foundations.

The trail of decisions from *Seminole Rock* leads ultimately to the *Auer* case, which Gorsuch and other like-minded legal scholars view as the culmination of a line of poorly

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[45] *Seminole Rock*, 325 U.S. 415
[46] Davis, Kenneth, Scope of Review of Federal Administrative Action, 50 Colum. L. Rev. 598 (1950).

interpreted asides and dicta. He writes that as they have interpreted *Auer* today, "courts have in recent years 'mechanically applied and reflexively treated' *Seminole Rock's* dictum as 'a constant constraint upon the careful inquiry that one might ordinarily expect of courts engaged in textual analysis."[47] Conservatives on the Court have long decried the practice of deference as it appears to take some of the judicial legwork away from the courts in the name of convenience while, in the process, sacrificing their judicial responsibility and authority.

Kisor v. *Wilkie*, therefore, was wrongly decided according to Gorsuch and his allies. As time goes on and the Supreme Court continues to review cases that challenge the rules made by various executive agencies, it is possible that this viewpoint could become more popular among conservative members of the Court. One need only look to the last thirty years, a relatively short period of time, to see the evolution from complete consensus to contentious debate, with the partisan divide being the primary predictor of which justice is likely to land on which side. Whoever wins the presidency in the autumn of 2020, therefore, could potentially have a monumental impact on the future of this question, especially if he is given the opportunity to appoint another justice to the Court.

Part V: An Evaluation of *Auer* Deference

Having examined the arguments presented both by Justice Kagan and Justice Gorsuch in the *Kisor* case, there remains the question: who is correct? Both offer compelling reasons for why each believes that their viewpoint is correct, and both are supported by outside sources, but

[47] *Kisor*, No. 18-15, Gorsuch concurrence at 9

future courts may have to decide which is more persuasive if the controversy surrounding *Auer* deference persists.

Section 1 – How We Arrived Here

Through *Kisor*, those immersed in the nuances of administrative law are faced with two powerful arguments packed into one case. On one hand, the majority opinion offers a standard that, while potent as applied, is extremely limited in the cases where it would be applicable. The courts must be aware that their decisions can have a debilitating effect on the functioning of government when they are lacking in uniformity. Applying *Auer* as a means of resolving a case where there seems to be no uniform resolution in sight is a reasonable way to provide a degree of cohesion while keeping the courts in control. At the same time, the majority notes the objections raised by a sizable segment of the Court and seeks to restrain the standard as much as possible, perhaps in an attempt to appease them. Justice Gorsuch and three others, meanwhile, are not easily swayed and they are concerned that *Auer* is the epitome of a misreading having gone too far. They would prefer that the Court approach each new case with the same degree of scrutiny as any other, regardless if one of the parties happens to be an agency of the executive branch, and they offer a compelling argument for scrapping a standard whose proponents seem hesitant to uphold in the first place.

But why is this debate so fierce to begin with? After all, the original *Auer* decision was decided unanimously by the Supreme Court. It seems strange that the entire Court would agree that the deference doctrine would be a good one to keep, only to be voting on it by such close margins a relatively short time later. By examining the origins of the *Auer* controversy, it may become more clear as to whether it holds up to today's scrutiny.

An interesting place to begin an inquiry into this subject involves the late Justice Antonin Scalia, who penned the *Auer* decision, but who also gradually came around to oppose the standard in the years that followed. It is certainly common for a justice to sign onto a decision and change his mind later after some months or years, but for the author to do so is certainly very rare, especially given the fact that he came to oppose it so staunchly.

Again, *Auer* v. *Robbins* was decided unanimously but in the case of *Talk America, Inc.* v. *Michigan Bell Telephone Co.* (2011)[48] Scalia showed the first signs of wavering on his earlier decision, stating that he had been relatively "uncritical" of the standard and that he would be "receptive" to reexamining it in the future.[49] In his concurring opinion he wrote:

> "It is comforting to know that I would reach the Court's result even without *Auer*… On the surface, it seems to be a natural corollary… of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing. But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation... The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's *meaning*. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems

[48] *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, No. 10-313 (U.S. Sup. Ct. June 9, 2011).
[49] Funk, William, "Saving *Auer*," *The Journal of Things We Like Lots*. 23 June 2016, pp. 2.

> contrary to fundamental principles of separation of powers to permit the person who promulgates a law to *interpret* it as well [emphasis added]."[50]

In essence, Scalia argues that the establishment of a rule is a power reserved to the executive branch since Congress has delegated its lawmaking power to the president, but that power only extends to the implementation of the rule. Once the rule goes into effect, the agency is defining the rule by carrying it out, so any further re-examinations of the rule by the agency itself goes beyond the scope of the agency's power. As Chief Justice Marshall once famously wrote: "It is emphatically the duty of the Judicial Department to say what the law is."[51] In other words, once an agency begins to interpret its own rules, which have the power of law, and those interpretations are given controlling weight in a court, then the agency is effectively exercising a judicial function and grossly exceeding its delegated power.

This concurrence forms the foundation of the argument used to discredit *Auer* in every relevant decision afterward. In *Decker* v. *Northwest Environmental Defense Center* (2013)[52], Scalia went on the record to call for the overturning of his own previous decision for the first time,[53] and its echoes can be heard even in Justice Gorsuch's concurrence in *Kisor*. The conservative justices are notoriously wary of any perceived threat to the separation of powers and they view the *Auer* doctrine as one that was rooted in a misunderstanding of precedent which has gone on to threaten the power of the judiciary to check the power of the executive.

Kisor stood at the threshold of an opportunity for conservative justices to, in their view, overturn the long-festering doctrine stemming from a misreading of even older precedent. Had it

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[50] *Talk America, Inc.*, No. 10-313, Scalia concurrence at 1
[51] *Marbury* v. *Madison*, 5 U.S. 137 (1803)
[52] *Decker* v. *Northwest Environmental Defense Center*, 568 U.S. 597 (2013)
[53] Funk, William, "Saving *Auer*," *The Journal of Things We Like Lots*. 23 June 2016, pp. 2.

not been for Justice Scalia and later Justice Thomas criticizing a decision for which they themselves voted to create in the first place, it is possible that the doctrine would not be so harshly challenged today. Presumably, the litigation of a doctrine implies that the doctrine has weaknesses, and who better to expose the supposed weaknesses of the doctrine than its author?

Section 2 – The Academic Debate Rages On

In *Decker* v. *Northwest Environmental Defense Center* (2013), Chief Justice Roberts signaled, in reference to the *Auer* doctrine, that he would "await a case in which the issue is properly raised and argued."[54] In the years that followed, legal scholars have published paper after paper both in support of and in opposition to that doctrine and virtually all of the salient points they have made can be seen having influenced the *Kisor* opinion. It therefore appears appropriate to examine, in greater detail, the nuances of that debate in order to gain insight into the origin of the *Kisor* outcome.

A good place to start is the article titled "Unearthing the Lost History of *Seminole Rock*," published in the *Emory Law Journal* by professors Sanne H. Knudsen and Amy Wildermuth. The authors' critique of the precedent is reminiscent of that of Justice Gorsuch: *Seminole Rock* and *Auer* were improperly derived from other decisions and taken too far. Their article reviews early applications of *Seminole Rock* and the authors make three key observations that challenge the way its successor, *Auer*, is used today:

> "First, the doctrine did not start as one that applied to a wide range of agencies or types of regulations; for at least a decade after its inception, *Seminole Rock* deference was applied only in cases that arose in the precise context of price

[54] *Decker* v. *Northwest Environmental Defense Center*, 568 U.S. 597 (2013), Roberts concurrence

> control… Second, in the early cases, *Seminole Rock* deference was given mainly when the agency interpretation was published as an official interpretation, which was often published concurrently with the regulation itself. Third, when an agency interpretation was not an official publication, the lower courts rejected Seminole Rock deference and appeared to apply *Skidmore*'s framework."[55]

While *Auer* was upheld on the basis of *stare decisis*, it would seem that that same commitment was not a priority of the Supreme Court in the years following *Seminole Rock*. Since then, apparently, a willingness on the part of the Court to take the standard "and run with it" has led to deference being granted to agencies in a wide variety of cases, perhaps in contrast to the purpose behind the original decision. This is a classic constructionist argument: look to the past to see the true intent – and here it is applied to show that *Auer* does not have a long lineage in the Supreme Court.

Many academic critics of *Auer* have used Scalia's arguments as a foundation for their own while others rely on even more fundamental principles, as do Paul Larkin and Elizabeth Slattery in "The World After *Seminole Rock* and *Auer*."[56] For these writers, the *Auer* decision was a departure from older principles governing the Western legal tradition. First among them is *nemo judex in cause sua*, translated as "no one is a judge in his own case." The authors contend that the practice of giving additional weight to an agency's interpretation of a rule, which began after *Seminole Rock*, effectively violates this rule since each party should be given an equal degree of consideration in a lawsuit.[57] When an agency is able to give its argument for the

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[55] Knudsen, Sanne and Wildermuth, A, Unearthing the Lost History of *Seminole Rock*, 65:47 Emory Law Journal 54-55 (2015).

[56] Larkin, Paul and Slattery, Elizabeth, The World After *Seminole Rock* and *Auer*, 42 Harvard Journal of Law and Public Policy 627 (2019).

[57] *Id.*

meaning of a rule and a court automatically treats that argument as more valid by virtue of the party making it, then the agency becomes unfairly persuasive in its own case.

The other classic maxim referenced by Larkin and Slattery is: *audi alteram partem*, or "hear the other side," meant to reference a judge hearing both sides of a case.[58] If a judge hears one argument in a case and it is automatically granted "controlling weight" by virtue of the fact that it comes from a government agency, then the judge cannot be said to be fairly hearing both sides of a case. The *Seminole Rock* doctrine, therefore, conflicts with the idea that a person ought to be able to fairly sue the government if he thinks it is in violation if its own rule.[59] Instead, abandoning that doctrine will, in the authors' view, revive the judiciary's role in individually reviewing each case that comes before them and maintain the delicate system of checks and balances.

But not all scholars agree with the assessment that *Auer* is a threat to that system. For example, Daniel Walters, writing for the *Columbia Law Review*, uses the example of the Department of Education in the 2000's. In a rule written in 2000, the Department said that school bathrooms designed for different sexes must be comparable in amenities.[60] Many years later, the same agency used the same rule but interpreted it to address a controversy regarding transgender students, saying that under that rule, transgender students must be accommodated for their gender identity.

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[58] Larkin, Paul and Slattery, Elizabeth, The World After *Seminole Rock* and *Auer*, 42 Harvard Journal of Law and Public Policy 628 (2019).

[59] In order to move away from the de facto "inquisitorial system" created by *Auer*, Larkin and Slattery prescribe that the Court look to the APA, passed just shortly after Seminole Rock, to see that Congress' intent was not to give so much favor to the federal government.

[60] Walters, Daniel, The Self-Delegation False Alarm: Analyzing *Auer* Deference's Effects on Agency Rules, 119 Colum. L. Rev. 87 (2019).

"Whether the Department actually intended it or not at the time, the fact that it left out any mention of transgender students in the original rule in 2000 gave the Department of Education interpretive flexibility in 2016 when it decided to make clear that schools must treat transgender students in a manner consistent with their gender identity," noted Walters. "*Auer* deference all but guaranteed that the exercise of this flexibility would not be substantially curtailed by reviewing courts."[61] Without the existence of *Auer*, Walters argues that the Department would not have been able to pivot the way that it did, since changing the way the agency interpreted its own rule in the absence of *Auer* would have required a formal process to alter the text of the regulation. *Auer*, therefore, allowed the D.O.E. to make responsive changes to its policies to benefit students, which may not have been possible as quickly without the deference standard.

Additionally, what Walters calls the "self-delegation" thesis, the belief that agencies will intentionally write vague regulations for future flexibility, is simply not supported by his research or by the way regulatory bodies are known to operate. "The self-delegation thesis is based on a simplified model of the choices officials must make in determining the timing of clarification of their meaning. Regulators issue rules to address certain problems before them, and as a result they always face functional pressures in the short term for making rules clear."[62] Among those pressures are: the desire of regulated parties to be able to clearly understand a new rule and institutional pressure to be concise with policymaking.[63] These realities cannot be ignored and Walters' article emphasizes the necessity to look beyond a long-term interest that seems powerful on its face but in reality is overshadowed by other interests which cause the

[61] Walters, Daniel, The Self-Delegation False Alarm: Analyzing *Auer* Deference's Effects on Agency Rules, 119 Colum. L. Rev. 88 (2019).
[62] *Id.*, at 89
[63] *Id.*

basic assumption of the self-delegation theory to fall apart. Agencies simply do not benefit from writing vague regulations. The conspiratorial belief that they are purposefully using vague rules to gain power is without justification.

Others elect to defend *Auer* more so for its role in the modern administrative state, as do Cass Sunstein and Adrian Vermeule in *The University of Chicago Law Review*.[64] They note that the conversation surrounding *Auer* has remained almost entirely within the legal context, but the realities of policymaking, in their view, do not simply end with the written word of the law. "Some people believe that the interpretation of ambiguities calls for purely legal skills – as it plainly does not," they write. "[Interpretation] necessarily includes consideration of policy consequences, and of the institutional roles that best serve to allocate responsibility for policy consequences."[65] As Justice Kagan indicated, the courts are in no such position, and *Auer* reasonably addresses that inadequacy in a way that keeps the power to adjudicate within the judicial branch. Abandoning *Auer*, to these scholars, does more than simply make the work of the judiciary more difficult – it tasks them with the impossible and deprives parties under regulation the ability to have politically-accountable agencies issue interpretations.

Both sides of this debate have influenced the arguments at the Supreme Court, and it shows in the writing of the justices. Legal scholars offer a useful perspective because their analyses can sharpen the view of the issues at stake. Nevertheless, they remain divided like the Court itself, and ultimately it is not for the scholars to decide.

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[64] Sunstein, Cass and Vermeule, Adrian, The Unbearable Rightness of *Auer*, 84 The University of Chicago L. Rev. 299 (2017).

[65] *Id.*

Section 3 – With *Amici* Like These…

Another important perspective to consider is that of the *amici curiae*, organizations or people who weigh in at the Supreme Court to give their viewpoint as to the appropriate outcome of a case. *Amici* will submit briefs before the start of oral arguments in the hopes that the justices will read the briefs and allow their arguments to influence the Justices' view of a case. Typically, these *amici* are motivated by some policy concern, even when it may seem that the interest group would be impacted very minimally by the outcome of the case. Nevertheless, such briefs provide important insight as to the political stakes that exist in virtually every case heard by the Court.

One such brief in support of the petitioner, James Kisor, was submitted by the U.S. Chamber of Commerce, the members of which seek to advocate for the interest of various businesses and industries. Their brief emphasized the necessity of a robust notice-and-comment period for executive rules and argued that *Auer* threatens to upend that process. "Every decision that a business makes — from hiring employees and opening new facilities to marketing and selling its products — requires an assessment of the legal implications of that decision,"[66] they stated. "The temptation for the agency to side-step formal rulemaking makes sense from the agency's perspective: issuing 'vague regulations… maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.'"[67] In other words, each way a business turns, it must consider the legal ramifications of its actions. With *Auer* on the books, agencies are not held to an

[66] *Kisor* v. *Wilkie*, No. 18-15, Brief for The Chamber of Commerce of the United States of America et al. as Amici Curiae supporting petitioner at 5

[67] *Id.*, at 6

appropriate standard of predictability, thus making the endeavor of always following regulations near impossible.

The National Association of Home Builders and their allies echoed many of the Chamber of Commerce's claims. At first glance, it might seem strange that a trade association from the construction industry would have an opinion in a case about a veteran challenging the V.A., but upon closer inspection, the connection becomes more clear. Those signing onto this brief are often subject to executive oversight and the *Auer* doctrine has had an impact on how they do business. In their words, "when agencies reinterpret their own regulations in a manner that fundamentally changes settled understandings, it denies the regulated public, like *amici*'s members, the certainty and predictability that they need to order their affairs."[68]

Evidently, these *amici* do not subscribe to the viewpoint of Kagan and her allies: that regulatory agencies cannot simply change policies as a response to litigation. These businesses and trade associations are concerned that their members might be following a rule by operating in one way, but when a dispute comes before a court, the company's activity could be regarded as a violation because the agency interpreted its own regulation differently from what the business expected. To the *amici*, it would be better for courts to strictly use an agency's rules as written for the purposes of interpretation.[69] This would put the burden on the agency to write a rule the way they want it to be interpreted and would allow those suing the executive branch on the grounds that a rule is ambiguous to do so on equal footing.

[68] *Kisor* v. *Wilkie*, No. 18-15, Brief for the National Association of Home Builders et al. as Amici Curiae supporting petitioner at 2

[69] *Id.*, at 5

But the effects of *Auer* do not only extend to the business world – state and local politics are greatly impacted by federal policymaking. As stated in the brief by various "State and Local Government Associations," "[programs] and policies are often designed at the national level but implemented at the state and local levels."[70] When an agency articulates the meaning of a regulation in court, local governments will often have to scramble to make appropriate changes to their own practices which they believed, before the court case, were in compliance with the federal rule. "This, in turn, invites dramatic shifts in federal policy with each new administration—and tends to result in policies that lack the clarity and wisdom that public participation can engender."[71] Instead, they argue that the process of policymaking should be clearer and more collaborative, that way local governments can effectively enforce consistent rules that take regional needs into account.

Of course, there were also several briefs filed in support of the government, such as the one titled "Brief of Administrative Law Scholars in Support of Affirmance." These *amici*, which included law professors from institutions such as Columbia, Stanford and Harvard, made the argument for *Auer* from the angle of pragmaticism. In their view, "[agencies] possess technical and policy expertise that reviewing courts generally lack. They are therefore in a far better position to discern which interpretation of an ambiguous regulation will best advance the policy objectives the agency is charged with achieving in a variety of complex regulatory and factual contexts."[72] Kagan accepted this argument in the *Kisor* decision, which goes to show that a persuasive argument made by *amici* can make a difference. "At the same time," they continued, "deference promotes democratic accountability by ensuring that these discretionary and

[70] *Kisor* v. *Wilkie*, No. 18-15, Brief for Local Government Associations as Amici Curiae supporting petitioner at 5
[71] *Id.*, at 6
[72] *Kisor* v. *Wilkie*, No. 18-15, Brief for Administrative Law Scholars as Amici Curiae supporting affirmance at 2

inevitably policy-inflected judgments are made by an elected Executive that can be held responsible for its judgments and actions, rather than by unelected judges."[73] Both of these arguments on the side of the government appeal to a desire for "common sense" governance. The practicality of a doctrine, even despite other flaws it may have, can often influence the thinking of the justices, especially when its impact is as far-reaching as *Auer*.

Senator Whitehouse of Rhode Island, interestingly, also filed a brief in support of the V.A. as a member of the Senate Judiciary Committee. His approach was different, however. He highlighted the supposed utility of having an administrative state which was removed from the corporate interests espoused by the opposing *amici.* "[Executive agencies] bring a special combination of technical substantive expertise, focused persistence and adaptiveness in face of complex problems, and relative independence from raw political pressure,"[74] he wrote. This means that although several powerful businesses and industries can exert pressure on public discourse and elected officials, the *Auer* doctrine allows the government to be able to push back against such formidable interests. "Obviously, this will annoy forces of influence for whom the deployment of raw political power confers immense advantage."[75] In the senator's view, corporations are simply accustomed to getting their way, and the *Auer* doctrine allows the government to counter their powerful influence with a deference to the agency's reading in a case regarding an ambiguous rule. Without *Auer*, conversely, businesses with boundless access to money and other resources would be able to skirt around regulation altogether[76] to the detriment of the broader public.

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[73] *Kisor* v. *Wilkie*, No. 18-15, Brief for Administrative Law Scholars as Amici Curiae supporting affirmance at 2
[74] *Kisor* v. *Wilkie*, No. 18-15, Brief for Senator Sheldon Whitehouse as Amici Curiae supporting respondent at 1
[75] *Id.*
[76] *Id.*, at 3

The *amici* in favor of the petitioner presented arguments rooted in a distrust of the executive branch; they believed that if given the opportunity, the government would avoid abiding by its legally mandated procedures for issuing rules. Many of those in support of *Auer* have argued that agencies, notwithstanding the doctrine, have a vested interest in drafting clear and unambiguous regulations because to do otherwise would invite constant litigation. In summary: when the regulatory language leaves room for debate, that debate will inevitably find itself in a courtroom.

However, critics will argue that with *Auer* as a precedent, agencies *may* draft vague regulations because there exists a doctrine which, at the end of the day, will afford them a likely victory in court. Under normal circumstances (i.e. assuming *Auer* never existed), it would indeed be imprudent for an executive agency to invite the possibility of a lawsuit, since to do so would also be to invite the possibility of defeat. If *Auer* treats the agency's reading of a regulation as "controlling," then the risk associated with writing vague regulations is greatly diminished and it seems more reasonable that an agency may be more willing to implement intentional ambiguity.

But while *Auer* and the other cases associated with it have been criticized for years, there is still a very good reason to hesitate erasing the doctrine from Supreme Court jurisprudence. In many ways, the following argument is perhaps more practical than others because it avoids denying the obvious separation of powers issues with the doctrine and focuses simply on the effect that overturning *Auer* in *Kisor v. Wilkie* would have on the American judiciary.

Section 4 – The Practicality Argument

The Kagan plurality was evidently more swayed by the perceived utility of *Auer* than by its supposed shortcomings, since the doctrine is grounded in the desire to reinforce the implied will of Congress.[77] Congress itself cannot independently regulate every aspect of day-to-day life, and so it relies on executive agencies to accept delegated authority and to pass rules in furtherance of congressional policies. Lawmakers, even on committees, are typically not nearly as specialized in their fields as agency officials and typically cannot pass laws that are as effective and consistent as the rules passed by a more specialized executive agency. Instead, agencies may pass a rule with the intent to be specific but there can still be ambiguity because the complexity of rulemaking does not always lend itself to specificity. But as with lawmaking in Congress, the prospect of delineating each individual possible contingency would make the process of rulemaking nearly impossible, both because the human mind can barely conceive of every possible contingency and because the result would be a document too long and too specific to be of any use.

Inevitably, such an ambiguous rule will find itself before a court and the court will have to decide one way or the other. Choosing to side with the agency which issued the rule, the court would allow that agency to clarify its rule and enforce it consistently going forward. This outcome would also have the added benefit of political accountability since the executive, unlike the judiciary, can be changed through voting if the public disagrees with the policy being debated.

[77] *Kisor*, No. 18-15 at 7

On the other hand, the hypothetical court could rule against the agency. In that situation, even if the public votes to elect a new executive to make changes to the policies of his predecessor, the means of reversing the effect of the decision become much more difficult to attain. Additionally, the lower courts do not have nationwide jurisdiction, meaning their pronouncements would not necessarily apply in other parts of the United States. This would create quite a predicament for the agency trying to facilitate a functioning government, as its rules would apply one way in one jurisdiction but differently in another. Those being regulated would also be confused as to how to properly follow the agency's rule since there would be more than one prevailing application of the same rule.

A large portion of this contradiction and lack of flexibility is remedied by a Supreme Court doctrine to simply revert to the agency's reading of an ambiguous regulation when that reading is not clearly erroneous or inconsistent with the statute. Critics of *Auer* have argued that in its whittled state following *Kisor*, the doctrine is essentially neutered to the point of ineffectiveness.[78] Even if *Kisor* does impose several limitations on the application of deference, without the fundamental commitment to give an agency's interpretation of its own regulation controlling weight, there remains the possibility that different courts will reach different conclusions about the meaning of a regulation and the cohesion of national policy-making would begin to unfold. *Auer* exists to facilitate federal governance because it places a final stopping point where courts may recognize their lack of subject knowledge and allow the agency to be held accountable for its policies. Up to that point, however, the courts continue to exercise complete control over the judicial process as they execute their constitutional role.

[78] *Kisor*, No. 18-15, Kavanaugh concurrence at 1

In his piece in the *Yale Law and Policy Review*, Connor Clarke aptly summarized the conflict involved in the *Auer* discussion. He wrote: "This area of law requires negotiating two classic concerns of the modern administrative state: accommodating the need for agency flexibility while guarding against the specter of what Justice Jackson memorably described as 'administrative authoritarianism' – the 'power to decide without law.'"[79] The doctrine under examination in this case certainly edges close to the line drawn by Justice Jackson, but as Clark later pointed out, the costs of overruling it, per the suggestion of Justice Scalia, threatens to create a much larger issue.[80] In the end, the justices voted to uphold not just the doctrine itself, but the *status quo* of administrative law. Numerous cases have been decided on the basis of *Auer* and to turn back now would almost certainly do more harm than good.

Like many other precedents of the Supreme Court, *Auer* required the justices to weigh the scales of justice, with each side having arguments rooted in the desire to maintain the constitutional order and answer in a way that best suits the constitutional limits of the Court. The split vote that occurred in the end speaks to the harsh divide which exists on this fundamental issue in administrative law. For now, the *Kisor* Court has decided on a pathway that threads the needle between important concerns raised by academics, unions and others in a way that keeps the government functioning smoothly. Whether that decision will last, however, given the split of the Justices' vote, remains to be seen.

[79] Clark, Conor, The Uneasy Case against *Auer* and *Seminole Rock*, 33 Yale Law and Policy Rev. 178 (2015).
[80] *Id.*

Part V: Conclusion

The debate in *Kisor* v. *Wilkie* is emblematic of a broader conflict between opposing viewpoints on the Court. The conservatives, who may continue to grow in power if President Trump wins a second term in office, would prefer that the executive branch exercise as few non-executive powers as possible. *Auer* deference, in their view, is the epitome of a blurring of the boundaries of checks and balances. The courts exist to promote the due process of law and by allowing an executive agency's explanation of a rule to have any more weight than any other litigant's, the scales of justice are unfairly tipped in the government's favor and the protections of the Constitution are violated. Better to allow the courts to exercise their judgment on a case-by-case basis than to allow the executive branch to dictate how judges ought to rule.

Those who align with Justice Kagan, however, believe that the issue is more complex and hinges on the need to give agencies a way to keep their policies consistent across all state lines. In many ways, *Auer* was a step in the right direction toward recognizing the realities of the modern administrative state – it is not workable to simply allow any court to give its opinion on a regulation when much of the country's day-to-day life is dependent on executive agencies. The 20th century saw a great expansion of the scope of the executive branch, and with it, the growth of its power and influence in the functioning of the nation. A decision like *Auer* was necessary to help avoid conflict after conflict when two courts disagreed on a rule that might affect millions of people. *Kisor* helps to refine the doctrine established by *Auer* into a workable standard for the future. If the conservatives on the Court had their way, the ability of the executive branch to affect policy would be severely threatened, regardless of the political objectives of the administration of the day.

It is noteworthy that *Auer* was upheld by a single vote by the Chief Justice, who did so not on the basis of ideological agreement, but rather on *stare decisis*.[81] In the years since *Auer* was decided, there has been a clear shift away from the doctrine, but the debate must continue to allow the Court to see the necessity of *Auer*. If judges continue to turn away from the doctrine, its eventual erasure would make the everyday working of the executive branch needlessly complicated. There is a certain need to protect the delicate system of checks and balances, but *Auer* does not threaten the judicial branch's power – it simply helps to allow the modern government to function in a practical way.

In summary, the precedent of the *Auer* decision is worth keeping for its merits, perhaps much more so than for its deep entrenchment in the field of administrative law. It helps to make the job of governing in the contemporary United States a more feasible task and prevents an overflow of lawsuits against the federal government from reaching the courts. Gorsuch made an effective argument that the standard now utilized originated from a less than sturdy pronouncement from the Court. In life, however, there is always room for serendipity and as years have gone by, the growing administrative state has made the *Auer* doctrine even more necessary. *Kisor* will uphold the standard for the foreseeable future, ensuring that agencies are able to resolve disputes that arise under their own rules and that courts may defer to the executive branch when their own adjudication would be problematic. There is plenty of room for inconsistency without the practice of administrative deference, and *Kisor* is the right remedy for the chaos that would otherwise ensue.

[81] *Kisor*, No. 18-15 Roberts concurrence at 1

Works Cited

Auer v. *Robbins*, 519 U.S. 455 (1997)

Bowles v. *Seminole Rock*, 325 U.S. 413 (1945)

Clark, Conor, The Uneasy Case against *Auer* and *Seminole Rock*, 33 Yale Law and Policy Rev. 178 (2015).

Davis, Kenneth, Scope of Review of Federal Administrative Action, 50 Colum. L. Rev. 598 (1950).

Decker v. *Northwest Environmental Defense Center*, 568 U.S. 597 (2013)

Fair Labor Standards Act, 29 U.S.C. §213(a)(1) (1938)

Funk, William, "Saving *Auer*," *The Journal of Things We Like Lots*. 23 June 2016.

Kisor v. *Shulkin*, 869 F. 3d 1366 (2017)

Kisor v. *Wilkie*, Brief for Administrative Law Scholars as Amici Curiae supporting affirmance

Kisor v. *Wilkie*, Brief for The Chamber of Commerce of the United States of America et al. as Amici Curiae supporting petitioner

Kisor v. *Wilkie*, Brief for Local Government Associations as Amici Curiae supporting petitioner

Kisor v. *Wilkie*, Brief for the National Association of Home Builders et al. as Amici Curiae supporting petitioner

Kisor v. *Wilkie*, Brief for Senator Sheldon Whitehouse as Amici Curiae supporting respondent

Kisor v. *Wilkie*, No. 18-15 (U.S. Sup. Ct. June 26, 2019)

Knudsen, Sanne and Wildermuth, A, Unearthing the Lost History of *Seminole Rock*, 65:47 Emory Law Journal 54-55 (2015).

Larkin, Paul and Slattery, Elizabeth, The World After *Seminole Rock* and *Auer*, 42 Harvard Journal of Law and Public Policy 628 (2019).

Marbury v. *Madison*, 5 U.S. 137 (1803)

Skidmore v. *Swift*, 323 U.S. 139 (1944)

Sunstein, Cass and Vermeule, Adrian, The Unbearable Rightness of *Auer*, 84 The University of Chicago L. Rev. 299 (2017).

Talk America, Inc. v. *Michigan Bell Telephone Co.*, No. 10-313 (U.S. Sup. Ct. June 9, 2011)

The United States Department of Labor, 29 C.F.R. §541.118(a)

United States v. *Eaton* 169 U.S. 331 (1898)

Walters, Daniel, The Self-Delegation False Alarm: Analyzing *Auer* Deference's Effects on Agency Rules, 119 Colum. L. Rev. 88 (2019).