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Michael Herz

Benjamin N. Cardozo School of Law, herz@yu.edu

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Symposium: In “Gundy II,” Auer survives by a vote of 4.6 to 4.4

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By [Michael Herz](#)

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Michael Herz is the Arthur Kaplan Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University.

Under the “*Auer* doctrine,” named for the 1997 decision *Auer v. Robbins*, courts accept an agency’s interpretation of its own ambiguous regulation unless that interpretation is clearly erroneous, or flatly inconsistent with the text of the regulation, or unreasonable, or something like that. *Auer* is a principle of long standing. Just how long is one of the sources of disagreement in *Kisor v. Wilkie*, but however you count, it is a doctrine universally understood as well-settled until relatively recently. But a revolt has been brewing.

In the academy, the attack was launched by John Manning in a well-known 1996 law review article, “Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules.” Manning hypothesized that *Auer* deference creates terrible incentives for agencies, who will promulgate intentionally vague regulations through notice and comment, and then make their real decisions later via “interpretations,” effectively free of public input or judicial scrutiny. At the Supreme Court, the attack began in 2011 when Justice Antonin Scalia (who had, to his later chagrin, authored *Auer*), went after *Auer* in a concurring opinion in *Talk America v. Michigan Bell Telephone Co.* Scalia invoked Manning and also decried *Auer* as inconsistent with separation of powers in that it effectively makes the rule-writer the rule-interpreter. The ensuing years saw some additional shots in concurring opinions by Scalia and others as well as modest chipping away in majority opinions (no *Auer* deference for interpretations of regulations that simply parrot statutory language; no *Auer* deference for interpretations that could not have been foreseen and upset strong reliance interests).

In *Kisor v. Wilkie* the Supreme Court granted cert to consider whether *Auer* should be overruled. It answered that question in the negative. Justice Elena Kagan wrote the majority opinion for herself, the other liberals, and, in part, Chief Justice John Roberts. Justice Neil

Gorsuch wrote a concurrence (a concurrence because all nine justices rejected the decision below, but a dissent in feel and tone). The chief justice and Justice Brett Kavanaugh wrote brief concurrences as well.

The usual, hardly surprising, understanding is that the closest a Supreme Court decision can be is 5-4. Strictly speaking, that was the vote in *Kisor*. But it was much closer than that.

Kagan's opinion begins by ticking off justifications for *Auer*, something on which the Supreme Court has been remarkably silent to date. The core idea (echoing *Chevron U.S.A. v. Natural Resources Defense Council*) is a presumption regarding congressional intent. This congressional command is implicit only, however, and is inferred from a set of secondary justifications (that also echo *Chevron*): a belief in authorial intent, the fact that the agency is in the best position to make what is really a policy decision, and the benefits of uniformity. Then she sets out limitations: *Auer* kicks in only if the regulation is "genuinely ambiguous" and the court has exhausted all the traditional tools of construction; the agency's interpretation must be reasonable; it must be an authoritative statement by agency higher-ups of a considered position; it must implicate agency expertise; the underlying regulation must do more than simply repeat statutory language; and the new interpretation cannot create unfair surprise. Strikingly, the chief justice joins only the second portion of this part of the opinion; the defense of *Auer* gets four votes, the discussion of its limitations gets five. Part III of Kagan's opinion rejects statutory and constitutional arguments against *Auer* and then says that in any event *stare decisis* is reason enough not to overrule. Again, the chief joins only the second portion.

In short, the opinion for the court (a) catalogues the limitations on *Auer* and (b) rests solely on *stare decisis* as the reason not to overrule it. Kagan's defense of *Auer* on the merits gets only four votes. Moreover, the chief writes a brief separate concurrence to suggest the substantive gap between Kagan and Gorsuch, though real, is not as large as all that. And indeed, a striking aspect of Kagan's opinion is the attention she lavishes on the limits of *Auer*. (In this, she was tracking, and confirming the strategic wisdom of, the argument of the U.S. solicitor general.) This emphasis culminates in reversing and remanding because the U.S. Court of Appeals for the Federal Circuit had not conscientiously determined that the regulation really was ambiguous or that the agency's interpretation really reflected the considered judgment of the agency as a whole. It might be that this is not an *Auer* case at all.

That said, nothing in Kagan's opinion directly cuts back on *Auer* or overrules a precedent. Gorsuch accuses the Supreme Court of only "*pretend[ing]* to abide *stare decisis*" and "*pretending to bow to stare decisis*," while carving huge inroads on its holding, making the majority opinion sound like *Planned Parenthood v. Casey*. This is a significant overstatement. But the opinion does, to quote an administrative law chestnut, "express[] a mood" (from 1951's *Universal Camera Corp. v. National Labor Relations Board*). Lower courts will likely be more circumspect about applying *Auer* going forward.

Gorsuch, writing for himself and Justices Samuel Alito, Clarence Thomas and Kavanaugh, cannot believe *Auer* has survived. His opinion is replete with the language of personal bravery and fortitude: The majority “flinches”; it failed to do what “should have been easy”; he hopes that judges on other courts will “take courage”; *Auer* is just a way of “making excuses for judges to abdicate their job.” He doesn’t quite tell the majority – or, more specifically, the chief justice — to grow a pair, but he sure comes close. For Gorsuch, *Auer* violates a basic principle found in the Administrative Procedure Act, the Constitution, and *Marbury v. Madison*, viz. that courts say what the law is. That assignment extends to the interpretation of binding legal texts, including regulations. (Interestingly, Manning’s argument about incentives, which got the whole anti-*Auer* ball rolling, is completely ignored by Gorsuch. (It is also effectively countered by Kagan.))

Gorsuch is also unimpressed by the majority’s invocation of stare decisis. Here it seems to me he is on pretty strong ground. If *Auer* is wrong, principles of stare decisis should not stand in the way of discarding it: It is about methodology rather than substance, reliance interests are minimal or nonexistent and the Supreme Court itself has never carefully thought it through.

The link goes unacknowledged, but this is a case in which the merits and the issue of stare decisis are linked. *Auer* and stare decisis are both deference doctrines; each calls on judges to set aside their own view of the best result in light of some other decisionmaker’s judgment. Here, the justices’ views of the one are replicated in their discussion of the other. Kagan calls for restraint in second-guessing both agencies and prior courts; Gorsuch does not want to defer either to agencies or to judicial predecessors. He wants judges to make decisions on their own; for him, judicial independence means a kind of judicial isolation.

The arrangement of the justices and the nature of the opinions in *Kisor* perfectly track last week’s decision in *Gundy v. United States*, which rejected a nondelegation challenge to the Sex Offender Registration and Notification Act. Alito and the chief justice have switched places, and Kavanaugh participated only in *Kisor*, but otherwise the two decisions align in every way. In *Gundy*, as here, Kagan and Gorsuch wrote competing opinions in which the first calmly stood by long-standing principles and the other fulminated about a fundamental violation of separation of powers. There, too, the outcome was determined by one crossover vote from the conservative side that rested on stare decisis, though in *Gundy* Alito did not deign to join any part of the plurality opinion. There too, the majority effectively had fewer than five votes, even though officially the outcome was 5-3, given Alito’s statement that he would be up for overthrowing the court’s nondelegation precedents as soon as a majority (presumably he means four other justices plus himself, not five other justices) was game. Most important, in both cases the real battle is between two fundamentally different views of the modern administrative state.

Placing *Gundy* and *Kisor* side by side helps us to understand the divisions in *Kisor*. At first blush, *Auer* (like *Chevron*) is not an obviously ideological doctrine, for it will immunize agency actions of any sort. A liberal administration might hide behind it to expand the reach and burdens of existing regulations. But a conservative administration might hide behind it to cut back on the reach and burdens of existing regulations. As the Trump administration is currently learning the hard way, undoing legislative rules is not easy. A robust *Auer* doctrine should make it easier for agencies in this administration to reverse course. (If that is not the case, then there has been a lot of fuss over nothing.)

Why, then, does the *Auer* debate break out along familiar ideological lines? The answer can only be because the justices perceive more at stake than deference. As Gillian Metzger has pointed out, the defining feature of the current period is “anti-administrativism.” Agency power is suspect per se. Anti-administrativism is driving the Gorsuch opinions in both *Gundy* and *Kisor*. For now, both decisions resulted in the preservation of the status quo. But there is nothing secure about these hair’s-breadth victories.

Posted in [Symposium on the court’s ruling in *Kisor v. Wilkie*](#)

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