If Justices End Chevron Deference, Auer Could Be Next Target

By **Sohan Dasgupta** (August 9, 2023)


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The U.S. Supreme Court is poised to recalibrate, and perhaps jettison, Chevron deference. Derived from a 1984 Supreme Court case — Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc. — that doctrine stands for the overall proposition that unless a federal agency's interpretation of a statute is unreasonable, the agency effectively gets to decide what an ambiguous statute means.[1]

Federal judges must, in those circumstances, heed the determinations of executive branch bureaucrats, both in executive agencies and independent ones. Next term, the court will decide, in Loper Bright Enterprises v. Raimondo,[2] whether Chevron stays, goes or is recalibrated.

What happens to Chevron will spill over into other contexts. That is because Chevron is the twin of Auer v. Robbins, a 1997 Supreme Court decision maintaining that the same deference is owed to federal agencies where the interpretation of their own regulations is concerned.[3] If federal administrative agencies lose their accustomed deference as far as the meaning of "statutes" is concerned, a similar argument may — and will — be leveled against their claim to deference where the meaning of "regulations" is concerned.

Chevron's defenders maintain that the federal agency in question knows best what the statute it routinely applies means. Unsurprisingly, that assurance does not satisfy Chevron's detractors. Even if that is an accurate understanding of administrative practice, Chevron's critics contend, this abdication of the judicial role allows the executive to stray outside its lane, and to set aside any concern about democratic accountability.

To Chevron's critics, moreover, judicial review is a pillar of the U.S. Constitution, as the Supreme Court has recognized since no later than its 1803 decision in Marbury v. Madison,[4] and promised by the federal administrative state's ultimate super-statute, the Administrative Procedure Act.[5]

Under this view, judicial review recognizes the federal court's duty to figure out the best meaning of a legal instrument, not just its reasonable meaning. Holders of this view sometimes also believe that the executive branch has its own tendentious view of the law, which will affect its interpretation — a deficiency from which neutral federal judges do not ordinarily suffer.

While presidential control of the political appointees in executive agencies is, of course, direct — career civil servants, on the other hand, enjoy insulation from removal by the president, who is the head of the executive branch — independent agency co-heads often are removable only for good cause.[6] Many of these concepts are applicable to Auer deference as well, to the extent they govern private conduct. After all, both statutes and regulations govern what private entities and the states get to do — or may forgo doing.

In 2019, the Supreme Court had the opportunity to formally overrule Auer. The case was Kisor v. Wilkie.[7] The court fractured badly. Four justices would have overruled Auer on its face. And five justices morphed Auer and enfeebled Auer significantly. In the words of Justice Neil Gorsuch, who would have overruled Auer completely, the court left Auer a

"paper tiger."[8]

The traditional tools of statutory interpretation, the court insisted, would have to be completely exhausted before a court can claim the regulation is ambiguous. The subtext was obvious: When a court takes the trouble to exhaust all the tools of interpretation, rarely will a regulation be found ambiguous.

Chief Justice John Roberts Jr., who supplied the fifth vote declining to overrule Auer, took pains to insist that this decision did not foreclose whether a statute deserved the same deference, i.e., whether Chevron would be upheld. One obvious reason for such disparate treatment is that whereas an agency arguably might be able to claim, with a straight face, it knows best what its own regulation — one it promulgated — means, it has no superior wisdom about what a statute enacted by Congress means.[9]

In any case, if Chevron goes or is substantially truncated, then Auer's detractors may well get a do-over and be able to have that precedent formally interred.

This article endeavors to lay out the reasons those detractors may invoke, particularly with respect to stare decisis. After all, stare decisis — the judicial policy of generally adhering to precedent unless that precedent has become unworkable, obsolete, and/or manifestly erroneous — is often regarded as a valuable pillar of the rule of law.

While stare decisis undoubtedly provides stability and continuity in the development of the law, it is not "inexorable"[10] and can — and often does — yield to "persuasive justification[s]."[11] Auer's and now Kisor's detractors, it safely may be predicted, will level some of the ensuing arguments.

Constitutional Structure

The Supreme Court has rarely hesitated to overrule long-standing precedents that it believes have eroded the separation of powers or federalism. For example, in a 1983 case called Immigration and Naturalization Service v. Chadha, the court deemed unconstitutional the line-item veto practice, thereby undermining the constitutionality of more than 200 federal statutes spanning numerous policy spaces over at least five decades.[12]

The Supreme Court generally believes it to be worthwhile to right the ship of how the federal government functions, both in relation to its own branches and regarding its relationships with the states, even if that means discarding significant case law and upsetting settled expectations.

Here, the court might say that Auer represents an unacceptable constitutional anomaly permitting the executive branch — the branch least connected to the creation of laws and thus least able or empowered to shed light on their meaning — to give often-authoritative interpretations to statutes.

Historical Basis for Separation of Powers

The Constitution's ratifying generation did not commingle the judicial power with the law-making one because, in Alexander Hamilton's words, "[f]rom a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application."[13] "The same spirit," Hamilton noted, "which had operated in [law]making ... would be too apt in interpreting them."[14]

Unlike the federal judges protected by life tenure and the security of compensation protection "during their continuance in office," federal agencies might be viewed as having too much skin in the game when they are construing their own regulations. An appearance of tendentiousness might always taint their substantial power to interpret ostensibly ambiguous regulations with something approaching authoritative effect.

Stare Decisis Principles Inapplicable

Ordinary stare decisis principles do not apply to Auer deference. Auer connotes a method of interpretation, not a clear rule for society at large to follow. Unlike free speech or the freedom to peaceably assemble, everyday citizens do not rely, and have no occasion to rely, on Auer to plan their lives and behavior.

That is why members of the Supreme Court have long maintained that rules that govern the primary behavior of people are entitled to greater precedential weight than rules governing secondary behavior, i.e., the way that judges, juries, prosecutors and police procedurally react to situations.

Justice Sonia Sotomayor made that very point in a 2013 case, Alleyne v. United States: "[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of stare decisis is reduced."[15]

A method of statutory interpretation, like Auer, falls into this latter category because it does not, and should not — as is later suggested — affect the way that agencies interpret their own regulations.

Democratic Accountability

Overruling Auer deference would assure the public that no post-hoc agency gamesmanship is afoot, and that agencies are coming up with the best legal interpretations — regardless of whether those interpretations favor agency power and the administrative state.

Under this view, once upon a time, the public may have feared that not only would an agency most likely augment its own power through interpretation and would be subject to disproportionate interest-group influence, without due notice or opportunity for the regulated party to conform itself to the regulation's expectations.

To Auer's detractors, the result it preordains is that the regulator generally wins over the regulated and the governing agency over the governed party. But now, with Auer gone, public confidence in the agencies' democratic accountability would be enhanced.

Improved Agency Practice

When agencies no longer get to interpret their own regulations post-promulgation, they likely will devise more precise, clearer and better-considered regulations in the first place. The new crop of regulations will also have more predictive power because the agencies will know, at the front end, that they cannot later salvage the regulation through an Auer-Kisor.

Such reconstructive surgery no longer will pass muster, and at least one means of enhancing arbitrary governmental power may thus diminish. The likelihood of selective and arbitrary enforcement will similarly decrease.

As Auer's detractors point out, Caligula's subjects knew well that few things are worse than

not being able to decipher what the salient legal instrument demands of the citizenry — on pain of incarceration, monetary or other penalty, or both.[16]

Agency Reliance

Overruling Auer will not unduly upset agency reliance. If what the agencies claim — they and their specialized staff know more about some of the complex, esoteric and recondite subjects than almost anyone else[17] — is true, then not receiving Auer deference in the construction of ambiguous regulations should not matter to them. With respect to factual deference, the agencies will still have their "power to persuade" the courts.[18]

If they have the expertise, surely generalist — and capable — judges will recognize that agency mastery in individual cases. Moreover, Auer does not help them all that much because no matter what, the judges still have to determine the spectrum of ambiguity and, if the regulation is found to be ambiguous, the range of reasonable interpretations.

Judges often have to do this by staking the best interpretation as their defining anchor. Therefore, in any event, Auer, as it presently stands, does not absolve courts from having to delve into the subject matter.

Conclusion

Given that so much of the governance in the nation occurs through agency regulations, the future of Auer-Kisor deference will be important.

Businesses should watch out for what happens in this space once the court decides Chevron's fate in just under a year. If Chevron is jettisoned using sweeping language hearkening back to the core of the separation of powers, Auer-Kisor might be next.

If, on the other hand, Chevron is distinguished from Auer-Kisor on the ground that agencies have no special knowledge about what statutes mean, but might about what their own regulations mean, then Auer deference might be safe for the time being.

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[1] 467 U.S. 837.

[2] No. 22-451 (O.T. 2023).

[3] 519 U.S. 452.

[4] 1 Cranch 137, 177.

[5] 5 U.S.C. § 706.

[6] See, e.g., Seila Law LLC v. C.F.P.B., 140 S. Ct. 2183, 2192 (2020) (plurality opinion) ("In [Humphrey's Executor], we held that Congress could create expert agencies led by a group of principal officers removable by the president only for good cause."); id. at 2212 (Thomas, J., concurring in part and dissenting in part) ("[W]ith today's decision, the Court has repudiated almost every aspect ofHumphrey's Executor. In a future case, I would repudiate what is left of this erroneous precedent.").

[7] 139 S. Ct. 2400. References to Auer deference in this essay usually refer to Auer and Kisor.

[8] Id. at 2426 (opinion concurring in judgment).

[9] That being said, in our constitutional system, the meaning of all laws and legal instruments is expounded by courts, not by the political branches. See, e.g., Wayman v. Southard, 10 Wheat. 1, 46 (1825) ("[T]he legislature makes, the executive executes, and the judiciary construes the law"); The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton).

[10] Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[11] Dickerson v. United States, 530 U.S. 428, 443 (2000) (cleaned up).

[12] 462 U.S. 919.

[13] The Federalist No. 81, at p. 483 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[14] Id.

[15] 570 U.S. 99, 119 (concurring opinion).

[16] 1 William Blackstone, Commentaries on the Laws of England *46 (1765) (observing that Emperor Caligula in ancient Rome deliberately had his laws written in fine print and hung high up on walls and pillars in order to selectively enforce them against those of his subjects who had incurred his displeasure).

[17] See, e.g., Charles W. Tyler & E. Donald Elliott, Administrative Severability Clauses, 124 Yale L.J. 2286, 2299—2301 (2015).

[18] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).