

Baseball, Legal Doctrines, and Judicial Deference to an Agency's Interpretation of the Law: *Kisor v. Wilkie*

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Introduction: The Ups and Downs of Baseball Teams and Legal Doctrines♦

Sports teams undergo fundamental transformations over time. Take the 1927 New York Yankees. That team had a lineup, known affectionately (for Yankees fans, that is) as “Murderers’ Row.” It included seven future Hall of Famers—Babe Ruth, Lou Gehrig, Tony Lazzeri, Earle Combs, Herb Pennock, Waite Hoyte, and manager Miller Huggins—who, at the zeniths of their careers, were among the greatest players in baseball history. The 1927 Yankees won 110 of 154 games, were in first place every day of the season, and swept the Pittsburgh Pirates in the World Series. For almost the next 40 years, the Yankees remained the most successful team in Major League Baseball.

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♦ If you think that baseball has no bearing on the proper understanding of legal doctrines, read all the way through to the end of *Kisor v. Wilkie* and think again. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in the judgment) (“Formally rejecting *Auer* would have been a more direct approach, but rigorously applying [*Chevron*] footnote 9 should lead in most cases to the same general destination. Umpires in games at Wrigley Field do not defer to the Cubs manager’s in-game interpretation of Wrigley’s ground rules. So too here.”).

Then, there were the 1966 Yankees. That team also had future Hall of Famers—Mickey Mantle and Whitey Ford—but each one was approaching the nadir of his career. The team finished with a win-loss record well below .500 and wound up in last place for the first time since Kaiser Wilhelm II was the German emperor. The 1966 team was still the Yankees, but with a very different lineup from the 1927 team, one that lacked nearly all the punch of Murderers’ Row.

Decisions by the Supreme Court of the United States (an institution of prestige comparable to that enjoyed by the Yankees) also undergo major transitions. Take the Court’s 1945 decision in *Bowles v. Seminole Rock & Sand Co.*,¹ along with its great-grandson, *Auer v. Robbins*.² *Seminole Rock* held that federal courts must “defer” to—in truth, accept as binding³—an agency’s reasonable interpretation of a vague or ambiguous regulation or rule.⁴ The effect was to give one party to a lawsuit—the federal government, the most frequent and powerful

¹ 325 U.S. 410 (1945).

² 519 U.S. 452, 461 (1997).

³ The relevant portion of *Seminole Rock* reads as follows: “The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. 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. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But *the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*” 325 U.S. at 413–14 (emphasis added). The proposition that a court should respect the expertise of an administrative agency long pre-dates *Seminole Rock*. See *United States v. Eaton*, 169 U.S. 331, 343 (1898) (“The interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight.”). What *Seminole Rock* added was the proposition that the agency’s interpretation is entitled to “controlling weight.”

⁴ “Legislative rules” and “interpretive rules” differ materially. Legislative rules, colloquially known as regulations, are junior-varsity statutes because they establish legally enforceable directives as to what private parties may and may not do. To require agencies to follow something resembling the type of democratic process that Congress (admittedly, only ideally) pursues before adopting statutes, the Administrative Procedure Act, (APA), 5 U.S.C. § 701 et seq. (2019), demands that agencies satisfy the “notice-and-comment rulemaking” procedures that the APA specifies. 5 U.S.C. §§ 801–05 (2019); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015). By contrast interpretive rules, also known informally as simply “rules,” consist of agency statements that have the intent or effect of identifying or describing the agency’s position as to what conduct federal statutes and regulations require, forbid, or permit. 5 U.S.C. § 551(4) (2019).

litigant in federal court—the power to decide the outcome of a case when the meaning of an agency’s rule is the fulcrum of the dispute.⁵

Since 1945, the Court has affirmed *Seminole Rock* and *Auer* time and again.⁶ Like the post-1927 Yankees, the post-1945 federal government, the principal and intended beneficiary of *Seminole Rock*, racked up an enviable win-loss record, prevailing in perhaps 75–90 percent of the cases in which *Seminole Rock* or *Auer* provided the rule of decision.⁷ That’s enough to make even the Yankees jealous.

Yet no team remains world champion forever, and no legal doctrine should remain unquestioned. For the last two decades, conservative scholars have engaged in an unrelenting assault on not merely the application of *Seminole Rock* and *Auer*, but the very legitimacy of those decisions. Then-Harvard law school professor (now dean) John Manning began the rally. In his 1996 article “Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,”⁸ Manning distinguished *Seminole Rock* deference from the similar interpretive rule that the Court adopted in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.⁹ The *Chevron* rule affords agencies deference to an agency’s interpretation of a vague or ambiguous law passed by Congress, he noted, not a rule of an agency’s own devise. That difference, he maintained, was a critically important one. The rationale of *Chevron* rests on the assumption that Congress intended to authorize agencies to construe ambiguous statutory terms, to consider policy and practical factors when doing so, and to require courts to defer to agencies’ reasonable implementation of their statutory responsibilities.¹⁰ *Seminole Rock*, by contrast, never claimed to rest on a congressional

⁵ The *Seminole Rock-Auer* rule, however, applies even when the federal government is not a party. *Auer*, 519 U.S. at 461–63.

⁶ See, e.g., *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 613–14 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 613 (2011); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59–63 (2011); *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965).

⁷ See, e.g., Sanne H. Knudsen & Amy J. Widermuth, *Unearthing the Lost History of Seminole Rock*, 65 *Emory L.J.* 47 (2015); Sanne H. Knudsen & Amy J. Widermuth, *Lessons from the Lost History of Seminole Rock*, 22 *Geo. Mason L. Rev.* 647, 652 n.58, 659 (2015); Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 *Admin. L. Rev.* 519–20 (2011).

⁸ John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612 (1996).

⁹ 467 U.S. 837 (1984).

¹⁰ *Id.* at 842–66.

delegation of any type of law-interpreting or law-implementing power to agencies. (In fact, *Seminole Rock* never gave *any* rationale for its rule.¹¹)

To make matters worse, the unjustified grant of law-interpreting authority gave agencies the incentive to write vaguely or ambiguously worded draft rules that could avoid raising contentious disputes during the notice-and-comment rulemaking process, while saving for later use in a guidance document the agency's position on any hot-button issues. The result was that *Seminole Rock* undermined the Framers' chosen structure for constitutional governance and diserved the public's interest in having a robust policy debate before the rulemaking processes became final.¹²

Over the ensuing 20-plus years, other members of the academic community enthusiastically joined in Professor Manning's criticisms of *Seminole Rock* (and *Auer*).¹³ Eventually, the discontent spread to members of the federal judiciary. Several Supreme Court justices questioned the doctrine's validity.¹⁴ As members of inferior courts,

¹¹ See Paul J. Larkin Jr. & Elizabeth H. Slattery, *The World after Seminole Rock and Auer*, 42 Harv. J.L. & Pub. Pol'y 625, 632–34 (2019).

¹² The Administrative Procedure Act, Pub. L. No. 324, 60 Stat. 237 (1945) (codified as amended in scattered sections of 5 U.S.C.).

¹³ See, e.g., Jonathan H. Adler, *Auer Evasions*, 16 Geo. J.L. & Pub. Pol'y 1, 7 (2018); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. 1, 4–12 (1996); Kristin E. Hickman & Mark R. Thomson, *The Chevronization of Auer*, 103 Minn. L. Rev. Headnotes 103 (2019); Aaron L. Nielson, *Cf. Auer v. Robbins*, 21 Tex. Rev. L. & Pol. 303, 305 (2016); Jeffrey Pojanowski, *Revisiting Seminole Rock*, 16 Geo. J.L. & Pub. Pol'y 87 (2018); Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 Geo. Mason L. Rev. 669 (2015). See generally Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103 (2018). Of course, there were also scholars who found *Seminole Rock* and *Auer* to be right on the money. See, e.g., Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297 (2017).

¹⁴ See, e.g., *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari) ("Any reader of this Court's opinions should think that the doctrine is on its last gasp."); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215–22 (2015) (Thomas, J., concurring in the judgment); *id.* at 1210–11 (Alito, J., concurring in part and in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring); *id.* at 616–21 (Scalia, J., concurring in part and dissenting in part); *Talk Am. Inc.*, 564 U.S. at 67–69 (Scalia, J., concurring); see also Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 Yale L.J. 1600, 1603 (2017) ("[A] few Terms ago, as we came off the bench after hearing arguments in a case involving judicial deference to agencies, Nino announced that *Auer v. Robbins* was one of the Court's 'worst decisions ever.' Although I gently reminded him that he had written *Auer*, that fact hardly lessened his criticism of the decision or diluted his resolve to see it overruled.").

court of appeals judges continued to apply those decisions when deciding cases. Yet, because they remain free to criticize Supreme Court decisions they are nonetheless obliged to follow,¹⁵ an increasing number of judges have openly expressed their doubts about the legitimacy of *Seminole Rock* and *Auer*.¹⁶

After two decades of hearing the criticism of *Seminole Rock* and *Auer* that agencies should not be free to delegate to themselves the final authority to adjudicate a legal issue, the Supreme Court decided to reexamine *Seminole Rock* and *Auer*. The case chosen for that vehicle was *Kisor v. Wilkie*.¹⁷ Given that several justices had been quite critical of *Seminole Rock* and *Auer*, the Court's order granting certiorari in *Kisor* portended nothing but doom for supporters of those decisions. Perhaps reflecting the decisions' unpopularity, the number of amicus briefs filed asking the Court to ditch them was far greater than the number of briefs in their defense. It seemed that *Seminole Rock* and *Auer*'s supporters assumed that those decisions were goners and were husbanding their arguments for a defense of *Chevron*. If so, a betting man would have put his money on the proposition that those decisions would soon resemble the 1966 Yankees, not the 1927 version.

If he did, he lost. The Court decided to rewrite *Seminole Rock* and *Auer* rather than overrule them—a “mend it, don't end it” approach to administrative law, if you will.¹⁸ The decisions survived, albeit in an entirely different form. *Seminole Rock* and *Auer* now far more closely resemble *Chevron* than their original opinions. Whether that is good or bad remains to be seen.

¹⁵ Lower court judges are not soldiers (or pre-free agency baseball players). They must follow the rulings of higher courts, see, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016), but are free to criticize them, see, e.g., *Dronenberg v. Zech*, 746 F.2d 1579, 1583 (D.C. Cir. 1984) (opinion of Bork, J., joined by Scalia, J., on denial of rehearing en banc).

¹⁶ See, e.g., *Forrest Gen. Hosp. v. Azar*, 926 F.3d 221, 229–30 (5th Cir. 2019); *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 145, n.4 (D.C. Cir. 2019) (Randolph, J., dissenting).

¹⁷ 139 S. Ct. 2400 (2019).

¹⁸ See *Kisor*, 139 S. Ct. at 2410–23 (lead opinion); *id.* at 2424–25 (Roberts, C.J., concurring in the judgment).

Kisor has already attracted a fair amount of commentary.¹⁹ Some scholars lament the lost opportunity to rein in some of the excesses of the regulatory state entrenched by *Seminole Rock* and *Auer*. Others take heart from the numerous limitations that the Court placed on what should henceforth be known as the *Kisor* deference doctrine²⁰ and also believe that the two sides will meet again in another case. My own view falls somewhere between the somewhat muted pessimism of the former group and unenthusiastic optimism of the latter, although I am far closer to the latter's views. I believe that we do not yet know what the new deference doctrine will be. We could see either the 1927 or the 1966 Yankees; it's too early to know which one.

This article will proceed as follows. Part I will discuss the three principal opinions in *Kisor*. Part II will summarize the new deference standard that *Kisor* adopted. Part III will close by asking whether Justice Neil Gorsuch was right that the five justices in the majority merely granted *Seminole Rock* and *Auer* a reprieve and left open the possibility that those decisions might be carted to the gallows again.

¹⁹ See, e.g., Jonathan H. Adler, *Auer* Deference Survives Supreme Court Review (as the Liberal Justices Rule the Day), Reason: Volokh Conspiracy, June 26, 2019, <https://reason.com/2019/06/26/auer-deference-survives-supreme-court-review-as-the-liberal-justices-rule-the-day/>; Ronald A. Cass, Deference after *Kisor*, Penn. Reg'y Rev. July 10, 2019, <https://www.theregreview.org/2019/07/10/cass-deference-after-kisor/>; Ronald Levin, *Auer* Deference—Supreme Court Chooses Evolution, Not Revolution, SCOTUSBlog, June 27, 2019, <https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/>; Thomas W. Merrill, Shadow Boxing with the Administrative State, SCOTUSBlog, June 27, 2019, <https://www.scotusblog.com/2019/06/symposium-shadow-boxing-with-the-administrative-state/>; Eric Schmitt, *Kisor v. Wilkie*: A Swing and a Miss, SCOTUSBlog, June 27, 2019, <https://www.scotusblog.com/2019/06/symposium-kisor-v-wilkie-a-swing-and-a-miss/>; Daniel E. Walters, A Turning Point in the Deference Wars, Penn. Reg'y Rev. July 9, 2019, <https://www.theregreview.org/2019/07/09/walters-turning-point-deference-wars/>; Daniel E. Walters, Laying Bare the Realpolitik of Administrative Reconstruction, SCOTUSBlog, June 27, 2019, <https://www.scotusblog.com/2019/06/symposium-laying-bare-the-realpolitik-of-administrative-deconstruction/>.

²⁰ The lead opinion in *Kisor* by Justice Elena Kagan prefers to label the original doctrine as "*Auer* deference" rather than *Seminole Rock* deference, even though the latter decision was the origin of the rule. See, e.g., *Kisor*, 139 S. Ct. at 2412 (lead opinion of Kagan, J.) (labeling the doctrine as "*Auer* deference (as we now call it)"). Justice Kagan's opinion so completely rewrote the *Seminole Rock-Auer* deference rule, however, that the doctrine truly should now be called *Kisor* deference. For good or ill, the doctrine should bear the name of the decision that fundamentally rewrote it.

I. Kisor

James Kisor served in the Marine Corps during the Vietnam War. Afterwards, he sought disability compensation benefits from the Department of Veterans Affairs (DVA) for post-traumatic stress disorder. The DVA eventually granted his claim, but it fixed a later effective date than he sought, based on its interpretation of DVA regulations. The U.S. Court of Appeals for the Federal Circuit upheld the DVA's decision on the ground that, under *Seminole Rock*, *Auer*, and related decisions, the government's interpretation of its regulations was dispositive if the regulation was ambiguous, which, in the court's opinion, this rule was.²¹ The Supreme Court granted certiorari limited to the question of whether to overrule *Seminole Rock* and *Auer*.²²

The Supreme Court reversed. All nine justices voted to reverse the circuit court's judgment; that much is certain.²³ Beyond that, there is considerable uncertainty in what the Court held and what will happen next.

The justices split three ways in four separate opinions. Justices Elena Kagan and Neil Gorsuch wrote the two principal opinions. They disagreed over every issue arising from reconsideration of *Seminole Rock* and *Auer*. Joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, Kagan found that *Seminole Rock* and *Auer* made sense as a matter of congressional intent, administrative law, and judicial review.²⁴ Kagan also reworked those decisions into *Chevron* deference. So revised, she wrote, *Seminole Rock* and *Auer* together provided a valuable tool for construing ambiguous agency rules in the implementation of regulatory programs.²⁵ In any event, she concluded, given stare decisis considerations, the argument for overruling those decisions was unpersuasive.²⁶

²¹ *Kisor v. Shulkin*, 869 F.3d 1360, 1361–69 (Fed. Cir. 2017), reversed and remanded, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

²² *Kisor v. Wilkie*, 139 S. Ct. 657 (2018).

²³ *Kisor*, 139 S. Ct. at 2424 (lead opinion of Kagan, J.); *id.* (Roberts, C.J., concurring in part); *id.* at 2447–48 (Gorsuch, J., concurring in the judgment); *id.* (Kavanaugh, J., concurring in the judgment).

²⁴ *Id.* at 2410–14, 2418–22 (lead opinion of Kagan, J.).

²⁵ *Id.* at 2408–24.

²⁶ *Id.* at 2422–23.

By contrast, Gorsuch concluded that *Seminole Rock* and *Auer* were illegitimate at birth, in part because the Administrative Procedure Act (APA)²⁷ requires courts to conduct a de novo review of agency actions, and the decisions have created nothing but mischief ever since. As he read Kagan's opinion, she tried to make the *Seminole Rock-Auer* rule acceptable by transforming those decisions into "zombi[es]" fated to cause misery to whoever crosses their path.²⁸ Finally, stare decisis factors, he decided, did not justify retaining *Seminole Rock* and *Auer*.²⁹ Whether Kagan's opinion transformed those decisions into "zombi[es]"³⁰ from *The Walking Dead* or into "a tin god—officious, but ultimately powerless,"³¹ the only humane and efficient step to take was to put them out of their (and our) misery by overturning them now.

Chief Justice John Roberts wrote a separate concurring opinion. Despite its brevity, his opinion is significant for three reasons. First, he joined two parts of Justice Kagan's opinion: the section that declined to overrule *Seminole Rock* and *Auer* decisions for stare decisis reasons, and the section describing how the new deference doctrine should work.³² Because he did so, those portions of the Kagan opinion became a majority ruling. Second, the chief justice sought to bridge the gap between the Kagan and Gorsuch opinions. In his view, given the limited circumstances in which Kagan's new version of the *Seminole Rock-Auer* rule should apply and Gorsuch's acceptance of the principle that courts should defer to agencies in some instances, there was more commonality than disagreement in their opinions. Despite their variations in verbal formulations," he wrote, the difference between the Kagan and Gorsuch opinions "is not as great as it may initially appear."³³ Third, he was emphatic that *Kisor* and *Chevron* involved materially different

²⁷ The Administrative Procedure Act, Pub. L. No. 324, 60 Stat. 237 (1945).

²⁸ *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment).

²⁹ *Id.* at 2443–47.

³⁰ *Id.* at 2425.

³¹ *Id.* at 2448.

³² *Id.* at 2424–25 (Roberts, C.J., concurring in part) (referring to *id.* at 2414–18, 2422–24 (lead opinion of Kagan, J.)).

³³ *Id.* at 2424–25.

considerations³⁴ and that the Court's decision in *Kisor* did not resolve the legitimacy of the *Chevron* deference doctrine.³⁵

Finally, Justice Brett Kavanaugh, joined by Justice Samuel Alito, wrote his own short opinion concurring in the judgment in which he emphasized two points. One was his agreement with the chief justice that the gap between the Kagan and Gorsuch opinions was hardly a canyon. Because Kagan's opinion endorsed the *Chevron* approach to construe agency rules, courts would be free to "exhaust all the traditional tools of construction' before concluding that an agency rule is ambiguous and deferring to an agency's reasonable interpretation."³⁶ The result would be that "the court will almost always reach a conclusion about the best interpretation of the regulation at issue," thereby giving courts "no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations."³⁷ The second point he emphasized was that the *Auer* and *Chevron* doctrines were neither twins nor even siblings. He therefore plainly signaled his agreement with the chief justice that *Kisor* did not settle the validity of *Chevron*.³⁸

II. The *Kisor* Deference Standard

Much of the debate among the justices turned on what any new deference standard should be and how it should be applied. *Seminole Rock* and *Auer* effectively turned the law-interpreting process over to an agency in any case where a government lawyer could keep a straight face while arguing that the agency had reasonably read an arguably ambiguous rule. *Kisor* clearly rejected any such principle. Instead, Kagan's opinion started from scratch and constructed an entirely new deference standard, one that more resembles *Chevron* than either *Seminole Rock* or *Auer*. It is worth reading closely the

³⁴ *Id.* at 2425 (citing *Chevron* and stating the following: "issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress").

³⁵ *Id.* at 2425 ("I do not regard the Court's decision today to touch upon the latter question.").

³⁶ *Id.* at 2448 (Kavanaugh, J., concurring in the judgment).

³⁷ *Id.*

³⁸ *Id.*

Kagan lead opinion's rationale for upholding a deference doctrine, for it is a masterful piece of lawyering. It is also important to review Gorsuch's opinion, because it offers a different analysis of the deference standard.

Kagan starts out with a brilliant maneuver that makes sure the game will be played on the agency's home field. She starts by asking two questions: first, can language—which is ultimately all that the law is—precisely identify all the instances in which the government must or may take some type of action, and, second, who is best situated to answer that question in all of the myriad ways that it can arise?³⁹ For example, given the need to decide whether, for purposes of the federal food and drug laws, a company has created “a new active ‘moiety’ by joining together a previously approved moiety to lysine through a non-ester covalent bond,” would you prefer to ask an attorney or a biochemist for the answer?⁴⁰ That question fairly well answers itself. Average, everyday terms are understandable, but often imprecise, while technical terms are precise, but often incomprehensible. So, we would likely turn to a scientist for the answer. Of course, not all inquiries are esoteric, so perhaps the “moiety” problem is an odd duck. Fine. We know that “baseball” is a game (at least, anyone who has read this far knows that). But what about “pepper”? Pepper is a pregame exercise in which one of a small line of players softly throws a ball to a batter standing about 20 feet away, who then must hit soft ground balls or line drives toward the line, and whoever catches the ball renews the exercise. Is that also a “game”?⁴¹ If we have to answer that question, we are likely to ask a professional baseball player or a sportswriter, not someone who thinks that pepper is a spice. Here, too, expertise matters.

Once Kagan persuades the reader that professionals are better able than amateurs to answer the “moiety” question and others that

³⁹ *Id.* at 2410–11 (lead opinion of Kagan, J.).

⁴⁰ *Id.* at 2410. She found the subject of “moieties” particularly fascinating, pointing to it on three separate occasions in her opinion, *id.* at 2410, 2413, 2423—four, in fact, if you count the footnote defining that term for the 99-plus percent of lawyers who otherwise would have been bewildered by her reference to it. *Id.* at 2410 n.1.

⁴¹ For the general difficulties in defining the term “game,” see Ludwig Wittgenstein, *Philosophical Investigations* ¶¶ 68–75, at 32–35 (3d ed. G.E.M. Anscombe trans., 1973).

share a “family resemblance” or “similarity” to that one,⁴² the rest of the game will be played on the agency’s home field. Why?—because the reader will *want* to rely on the expertise of agency officials. They have education, training, and experience that the average person does not, and they also have on their side a legal, and practical, presumption that they will act in the public interest.⁴³ The result is that readers will be likely to conclude that agency officials have the same advantage over lawyers that professional ballplayers have over amateurs.

Kagan’s second step is also a big one, and, like her first step, it principally relies on common sense, not legal doctrine. She invokes the proposition that a document’s author is more likely to know what it said than anyone reading it. In her words, “the agency that promulgated a rule is in the better position to reconstruct its original meaning” than any judge.⁴⁴ She then offered another common-sense example. “Consider that if you don’t know what some text (say, a memo or an email) means, you would probably want to ask the person who wrote it.”⁴⁵ She acknowledged that there were common-sense limitations on when that interpretive approach is useful.⁴⁶ Asking an agency what it meant might not be helpful when the agency did not anticipate a new problem or when “lots of time has passed between the rule’s issuance and its interpretation.”⁴⁷ But those are details; she’s concerned with the big picture. “All that said, the point holds good for a significant category of ‘contemporaneous’ readings.”⁴⁸ Now, the finale: “Want to know what a rule means? Ask its author.”⁴⁹

⁴² See *id.* ¶ 66, at 31–32, ¶ 67, at 32, ¶ 185, at 75, ¶ 444, at 131.

⁴³ See, e.g., *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (“Certainly, the Secretary’s decisions are entitled to a presumption of regularity.”).

⁴⁴ *Kisor*, 139 S. Ct. at 2412 (lead opinion of Kagan, J.) (citation and internal punctuation omitted).

⁴⁵ *Id.*

⁴⁶ *Kisor*, 139 S. Ct. at 2412. What she did *not* acknowledge is that there are also material common-sense differences between a *law* that governs private conduct and a *memorandum* that just explains why the law was adopted or what it says.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

Kagan then discussed congressional intent. Enter administrative law's presumptions, also known as "legal fictions," but better known (in my opinion) as judicial lies.⁵⁰ She did not identify any actual legislative intent to make agencies into law-interpreting bodies. Instead, she invoked "a presumption about congressional intent": Congress intended agencies "to play the primary role in resolving statutory ambiguities."⁵¹ That presumption "stems from the awareness that resolving genuine regulatory ambiguities often entails the exercise of judgment grounded in policy concerns,"⁵² and is "attuned to the comparative advantages of agencies over courts in making such policy judgments."⁵³ Finally, that presumption "reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules," and gives effect to Congress's frequent "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation."⁵⁴ All that Kagan needed next was a reasonable explanation of how the new common-sense approach was consistent with existing law. Without a basis in legal doctrine, the approach would appear to be grounded entirely in reason. That approach works well in philosophy, but not in law. Remember, Kagan had gotten this far in her opinion without once adverting to, let alone quoting from, the rationale in *Seminole Rock* (hint: there was none⁵⁵) and without even mentioning that the author of *Auer* later concluded that he had gotten it wrong.⁵⁶ Without a firm grounding in precedent, the opinion would have left the reader wondering why the *Seminole Rock-Auer* critics were not right to complain that those decisions were little more than a lawless delegation of judicial law-interpreting authority to federal agencies.

⁵⁰ Compare Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989) (referring to *Chevron* as relying on "a fictional, presumed intent."), with Martin Shapiro, *Judges as Liars*, 17 Harv. J.L. & Pub. Pol'y 155, 156 (1994) ("Such is the nature of courts. They must always deny their authority to make law, even when they are making law. . . . Judges necessarily lie because that is the nature of the activity they engage in.").

⁵¹ *Kisor*, 139 S. Ct. at 2412 (lead opinion of Kagan, J.).

⁵² *Id.* at 2413 (citation and internal punctuation omitted).

⁵³ *Id.*

⁵⁴ *Id.* (citation and internal punctuation omitted).

⁵⁵ See *supra* note 11.

⁵⁶ See *supra* note 14.

That is where *Chevron* comes in. *Chevron* did all the work for her. She incorporated the *Chevron* deference standard into the new rule.⁵⁷ But Kagan didn't stop at adopting *Chevron's* justification; she went all the way and effectively adopted *Chevron's* methodology, too.

She started by stating that "the possibility of deference can arise only if a regulation is genuinely ambiguous."⁵⁸ That is, Kagan imported *Chevron* "Step One" into the *Seminole Rock* framework. Just as *Chevron* held that clear statutory language binds the courts,⁵⁹ Kagan stated that unambiguous regulatory terms control as well, regardless of what the agency thinks the rule says.⁶⁰ Next, Kagan declared that the task of rule interpretation must be resolved in the same manner as statutory interpretation. Just as *Chevron* held that a court must use all the "traditional tools" of statutory interpretation before deciding that an act of Congress is ambiguous,⁶¹ Kagan concluded that a court must use "that legal toolkit" and cannot consider giving the agency's position deference unless the court's inquiry turns up "empty."⁶² Only then can a court consider deferring to the agency's interpretation. Policymaking considerations come into play at that point, as *Chevron* explained and *Kisor* noted. An ambiguous statute gives rise to a presumption that Congress implicitly delegated to the agency the authority to fill in the blanks, *Chevron* explained,⁶³ which is a policymaking function.⁶⁴ Unlike courts, agencies may make policy judgments, and if Congress empowered an agency to do so, the courts may not overrule Congress's or the agency's decision.⁶⁵ Kagan declared that the agency's interpretation must always be a reasonable one, essentially importing *Chevron's* "Step Two" into the *Seminole Rock* framework. *Chevron* required just that inquiry when an agency construed a statute,⁶⁶ and Kagan saw no reason for any

⁵⁷ *Kisor*, 139 S. Ct. at 2414–18 (lead opinion of Kagan, J.).

⁵⁸ *Id.* at 2414

⁵⁹ *Chevron*, 467 U.S. at 842–43.

⁶⁰ *Kisor*, 139 S. Ct. at 2415 (lead opinion of Kagan, J.).

⁶¹ *Chevron*, 467 U.S. at 843 n.9.

⁶² *Kisor*, 139 S. Ct. at 2415 (lead opinion of Kagan, J.).

⁶³ *Chevron*, 467 U.S. at 843.

⁶⁴ *Id.* at 843–44.

⁶⁵ *Id.* at 865–66.

⁶⁶ *Id.* at 845–66 (evaluating the agency's position for reasonableness).

different result simply because an agency rule was under consideration.⁶⁷ In that regard, Kagan noted, not every agency interpretation would automatically be deemed “reasonable” and therefore controlling. Only an agency’s “official” and “authoritative” exposition counts,⁶⁸ and, even then, only if it “implicate[s]” the agency’s “substantive expertise.”⁶⁹ Finally, the agency’s interpretation must reflect a “fair and considered judgment.”⁷⁰ An interpretation that is just a “convenient litigating position”; reflects a “post hoc rationalization”; creates, by virtue of its novelty, “unfair surprise” to a regulated party; or that conflicts with an earlier agency interpretation—all those (and possibly other) factors would generally counsel against deference.⁷¹ The new deference rule, in Kagan’s words, is “not quite so tame as some might hope, but not nearly so menacing as they might fear.”⁷²

Responding to Kagan, Justice Gorsuch started with a bit of history by chronicling the provenance and growth of the *Seminole Rock-Auer* rule. The Gorsuch opinion explained that the rule could not trace its lineage to “the Constitution, some ancient common-law tradition, or even a modern statute.”⁷³ Rather, “it began as an unexplained aside in a decision about emergency price controls at the height of

⁶⁷ *Kisor*, 139 S. Ct. at 2415 (lead opinion of Kagan, J.).

⁶⁸ *Id.* at 2416–17.

⁶⁹ *Id.* at 2417.

⁷⁰ *Id.* (citations and internal punctuation omitted).

⁷¹ But not necessarily always. *Id.* (noting that the Court has only “rarely” deferred to an agency construction that conflicts with an earlier one).

⁷² *Id.* at 2418. Want to see some additional great lawyering (or another great magic trick)? Read Section II.B. of Kagan’s opinion in full. She goes out of her way to explain why the new deference rule will be relatively innocuous and infrequently applied. See, e.g., *id.* at 2414, 2416, 2418, 2424. Henceforth, the deference doctrine would largely be a bench-sitter, playing only a minor, supporting role in the law. Now, turn to Section III.B. of Kagan’s opinion, which deals with *stare decisis*. There, she argues that overturning the deference doctrine would leave a hole in administrative law the size of the Tunguska event of 1908. See *id.* at 2422 (“First, *Kisor* asks us to overrule not a single case, but a long line of precedents—each one reaffirming the rest and going back 75 years or more. . . . This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. . . . It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.”) (citations and internal punctuation omitted). It took only a dozen or so pages for the deference doctrine to be transformed from a singles hitter into a slugger.

⁷³ *Id.* at 2426 (Gorsuch, J., concurring in the judgment).

the Second World War.”⁷⁴ There, its “dictum sat on the shelf, little noticed for years,” until lawyers and judges “began to dust it off and shape it into the reflexive rule of deference we know today” without asking whether it “could be legally justified or even made sense.”⁷⁵ *Auer* merely reiterated what was said in *Seminole Rock*. The result was that the deference rule came about more by accident than design.⁷⁶

Gorsuch then asked whether the *Seminole Rock-Auer* rule, though of dubious legitimacy at birth, had perhaps become legitimized over time. For several reasons, he concluded that it had not. One reason was that any such rule conflicted with the lessons of the nation’s early history, which revealed a clear intent to lodge the judicial power in the hands of an independent judiciary.⁷⁷ A second reason was that the *Seminole Rock-Auer* rule conflicted with the APA, which not only requires courts to resolve legal issues, but also requires an agency memorandum of whatever nature to withstand the APA notice-and-comment rulemaking process before it could be deemed a valid law.⁷⁸ *Seminole Rock* and *Auer*, however, sometimes permit such a document to bind the courts even when the agency has not even begun the notice-and-comment process, let alone completed it. A third reason was that the *Seminole Rock-Auer* rule allowed the “judicial Power”⁷⁹ to “be shared” between the judicial and executive branches.⁸⁰ Even *Marbury v. Madison*⁸¹ ruled that it belongs exclusively to the courts.⁸² Finally, Gorsuch found the policy rationales of the Kagan opinion irrelevant or unpersuasive.⁸³

⁷⁴ *Id.* Of course, some “asides” are quite authoritative. See William S. Stevens, *Aside: The Common Law Origins of the Infield Fly Rule*, 123 U. Pa. L. Rev. 1474 (1975). That “aside” is particularly relevant here because, like judicial review of agency rules, baseball’s infield fly rule is designed to prevent “trickery” from affecting the outcome of a game. *Id.* at 1478. But I digress.

⁷⁵ *Kisor*, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment).

⁷⁶ *Id.*

⁷⁷ *Id.* at 2437–38.

⁷⁸ *Id.* at 2432–37.

⁷⁹ U.S. Const. art. III, § 1.

⁸⁰ *United States v. Nixon*, 418 U.S. 683, 704 (1974).

⁸¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁸² *Kisor*, 139 S. Ct. at 2437–41 (Gorsuch, J., concurring in the judgment).

⁸³ *Id.* at 2441–43.

At the end of the day, Gorsuch would have jettisoned *Seminole Rock* and *Auer* in favor of the Court's earlier decision in *Skidmore v. Swift & Co.*,⁸⁴ which was decided only shortly before *Seminole Rock* but went unmentioned in the latter decision.⁸⁵ *Skidmore* concluded that an agency's interpretation of a statute is entitled to whatever persuasive value its reasoning can convey.⁸⁶ The effect would require a court to consider an agency's construction of a statute or rule in much the same way that a court would treat the views of a scholar like John Henry Wigmore or Arthur Corbin on the law of evidence and contracts, respectively.⁸⁷ Their views should be accorded respect, given their proven mastery of their fields of scholarship, but with the knowledge that the court must always have the final say on what a law means, because, ever since *Marbury*, that is what the judicial function has always demanded.

* * * * *

Over the next few years, the lower federal courts and the academy will take up the burden of elaborating what the new *Kisor* deference standard means in the context of interpreting legal rules.⁸⁸ If those courts conclude that the revised deference rule is just the *Chevron* standard applied not to acts of Congress but to agency rules—which, in my opinion, is the best reading of *Kisor*—the lower courts

⁸⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁸⁵ *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., concurring in the judgment).

⁸⁶ Justice Robert Jackson's opinion for the Court in *Skidmore* offered the following explanation: "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

⁸⁷ Justice Gorsuch even used those specific examples. *Kisor*, 139 S. Ct. at 2442 (Gorsuch, J., concurring in the judgment).

⁸⁸ For a partial list of authorities explaining how courts should undertake the legal interpretation of contracts, statutes, rules, and so forth, see Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Texts* (2012); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527 (1947); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 *Harv. L. Rev.* 417 (1899); James M. Landis, *A Note on "Statutory Interpretation,"* 43 *Harv. L. Rev.* 886 (1930).

will simply wind up expanding the already ginormous corpus of administrative law decisions that *Chevron* has created.⁸⁹ The result is that we will continue to see and hear what pedestrians and drivers have always seen and heard whenever the police want to avoid having them congregate at the scene of a crime, arrest, accident, or similar law enforcement intervention: “Nothing to see here. Move on. Just keep moving.”

III. Where Do We Go from Here?

Two decades ago, there was little indication that the Court would revisit the approach it has taken for five decades regarding judicial review of an agency’s interpretations of its own rules. The worm turned in 1996, however, with the publication of Professor John Manning’s challenge to the legitimacy of cases like *Seminole Rock*. His article awakened discontent in the academy over that decision. Despite the fact that Justice Antonin Scalia wrote the 1997 opinion in *Auer* reaffirming *Seminole Rock*, for nearly the last decade *Seminole Rock* and *Auer* have been under a deathwatch. Four justices had signaled their willingness to reconsider those decisions, and the Court granted review for the specific purpose of deciding whether to overrule them. Given the lead-up to and the outcome in *Kisor*, it would be understandable if critics of the administrative state became pessimistic about the possibility of reining it in, at least by returning to the courts their historic ultimate authority to adjudicate binding legal rights. Seeing their hopes for a rally dashed, those critics might abandon hope that the Supreme Court will ever overturn *Seminole Rock* and *Auer*.⁹⁰

⁸⁹ A Westlaw search revealed that, as of July 18, 2019, *Chevron* has been cited in approximately 16,400 judicial decisions.

⁹⁰ They might ask Congress to pinch hit, and some members have taken their turns at the plate. Over the past few years, several members of Congress introduced bills that would have overruled *Seminole Rock*, *Auer*, and *Chevron* by revising the APA to require federal courts to conduct a “de novo” review of any and all legal issues. See Separation of Powers Restoration Act, H.R. 1927, 116th Cong. § 2 (2019); Separation of Powers Restoration Act, H.R. 76, 115th Cong. (2017); Separation of Powers Restoration Act, H.R. 4768, 114th Cong. § 2 (2016); Separation of Powers Restoration Act, S. 909, 116th Cong. § 2 (2019); Separation of Powers Restoration Act, S. 1577, 115th Cong. § 2 (2017); Separation of Powers Restoration Act, S. 2724, 114th Cong. § 2 (2016). None of those bills became law when the same party held a majority in both houses of Congress and occupied the White House, however, so the odds of any such bill passing when Congress is divided and a presidential election is upcoming are slim to none.

They should not despair. Three features of Chief Justice Roberts's opinion offer hope.

One is that he did not join the section of Kagan's opinion in which she rejected the argument that the *Seminole Rock* and *Auer* deference rule violates the APA, as Gorsuch, writing for four justices, expressly concluded.⁹¹ Section 706 of the APA instructs reviewing courts to "decide all relevant questions of law" and "set aside agency actions" the courts finds "not in accordance with law."⁹² That command alone appears to resolve the deference issue in the critics' favor. Four justices thought so. If the chief justice agrees, even the new *Kisor* deference standard will necessarily fall.

The second hopeful feature of the chief justice's opinion is his quite emphatic statement that the *Kisor* decision did not resolve the legitimacy of *Chevron* deference. In some ways, that is the most significant aspect of his separate opinion. Kagan's opinion relied on the *Chevron* line of cases both to give content to the new deference rule and to justify that rule by invoking whatever legitimacy *Chevron* enjoys. Like *Seminole Rock* and *Auer*, however, *Chevron* itself has come under attack, and it is by no means certain that it will survive.⁹³ The chief justice's statement signals his belief that the dispute over *Seminole Rock* and *Auer* is but a prelude to a future case where the Court must reexamine the legitimacy of *Chevron*. That interpretation would explain why he reserved judgment about the effect of the APA on *Seminole Rock* and *Auer*. If those decisions conflict with the APA, so, too, does *Chevron*. Because the Court unanimously voted to reverse the judgment in *Kisor*, the chief justice likely decided to wait for a future case before resolving an issue fundamental to the survivability of *Chevron*.

The third reason for hope is that, given the disposition of *Kisor* and the rough agreement between the Kagan and Gorsuch opinions as to

⁹¹ *Kisor*, 139 S. Ct. at 2432–37 (Gorsuch, J., concurring in the judgment); see also *id.* at 2433 n.49 (collecting authorities concluding that *Seminole Rock* and *Auer* conflict with Section 706 of the APA).

⁹² 5 U.S.C. § 706 (2019).

⁹³ See, e.g., Jack M. Beerman, End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779 (2010); Cory R. Liu, *Chevron's* Domain and the Rule of Law, 20 Tex. Rev. L. & Pol. 391 (2016).

how any deference standard should work,⁹⁴ the chief justice might well have decided to wait and see how the lower federal courts apply the *Kisor* standard before deciding how the APA applies in cases like *Kisor* and *Chevron*. He might be looking for either or both of the

⁹⁴ I say “rough agreement.” Professor Tom Merrill has offered a more sophisticated description of the Kagan and Gorsuch approaches, from the direction of their disagreements:

Lawyers will want to know if there is any meaningful difference between Kagan’s contextualized *Auer* and Gorsuch’s contextualized *Skidmore*. I would characterize Kagan’s approach to contextualization as a kind of step zero for *Auer* (or more accurately, a combination of step zero and step one), borrowed from the jurisprudence associated with *Chevron*. . . . The key point would be that, if the court grinds its way through all the factors relevant to step zero and step one, then the agency view must be adopted.

The Gorsuch approach to contextualization would replace *Auer* with *Skidmore*. This draws upon roughly the same contextual factors invoked by Kagan. But the difference would seem to be that under *Skidmore*, deference exists on a sliding scale, rather than an all-or-nothing conclusion that emerges after a sequential inquiry. The court remains responsible for the interpretation, and whether the court adopts the agency view depends on how the various contextual factors stack up, either for or against the agency. The more the factors favor the agency, the more “persuasive” the agency view becomes, but at no point is the court compelled to adopt the agency view.

If this characterization is correct, there are arguably two differences between Kagan’s version of contextualization and Gorsuch’s. One difference is that the Gorsuch approach adopts an established standard of review—*Skidmore*. Like other multi-factor standards, this is highly indeterminate, and subject to different outcomes in the hands of different judges. But at least *Skidmore* is a standard that has been around for a long time—since 1944 to be exact—and has accumulated a body of precedent and gained a degree of familiarity with judges. Kagan’s new contextualized *Auer*, although it draws upon roughly the same factors as *Skidmore*, is an unknown animal at this point. Consequently, it is likely to produce significant uncertainty among lower court judges, agencies, and persons contemplating a challenge to agency interpretations. This difference, in my view, counseled in favor of adopting *Skidmore* rather than rewriting *Auer*.

The second difference involves whether the agency is free to change its interpretation. Under Kagan’s sequencing approach, the agency should be able to change its interpretation, provided the sequencing continues to favor deference to the agency. Under *Skidmore*, the interpretation is ultimately the court’s, which means the agency may not be able to change its interpretation. (Justice Antonin Scalia made this point in his dissent in *Mead*.) Of course, insofar as agency consistency is one of the contextual factors under either approach, the agency’s ability to change its interpretation may be constrained under either approach. So I would not give this difference great weight one way or the other.

Merrill, Shadow Boxing, *supra* note 19.

following developments: the workability of the *Kisor* standard, and the government's litigation success rate under that standard.⁹⁵

A factor that the Court deems important when considering whether to overturn a precedent is the extent to which a decision has proved to be "unworkable in practice."⁹⁶ That factor could come into play here. The lower courts might find it impossible to reach a consistent application of the new factors articulated in *Kisor* or to adopt a coherent understanding of the type of considerations relevant to its analysis. *Kisor* relied on the multipart methodology adopted by *Chevron* and its offspring, as well as the type of factors that *Chevron* found relevant. Those factors, however, are not fixed in stone. In *King v. Burwell*,⁹⁷ the Court recognized an exception to *Chevron* for cases posing issues of "deep 'economic and political significance,'"⁹⁸ also known as the "Major Questions Doctrine," such as the interlocking reforms adopted by the Patient Protection and Affordable Care Act.⁹⁹ *Burwell* did not state that its new exception was exclusive, nor did it say that only the Supreme Court could recognize additional ones. The lower federal courts, therefore, might find additional

⁹⁵ The chief justice has taken a wait-and-see approach before. In 2009, he cautioned Congress in *Northwestern Austin Municipal Utility District No. 1 v. Holder* that it needed to reevaluate the preclearance features of Section 5 of the Voting Rights Act of 1965 in light of the very different features of 21st century America. 557 U.S. 193 (2009). Congress didn't. Four years after *Northwestern Austin*, he wrote the opinion in *Shelby County v. Holder*, holding Section 5 unconstitutional. 570 U.S. 529 (2013). In 2011, the Court ruled in *Bond v. United States (Bond I)*, that a defendant can challenge the constitutionality of the federal law implementing the Chemical Weapons Treaty. 564 U.S. 211 (2011). The *Bond* case did not arise out of the use of chemical weapons in a battle like the one in the Great War depicted by John Singer Sargent in his painting *Gassed*. It stemmed from "an amateur attempt by a jilted wife to injure her husband's lover" and neighbor by placing some caustic chemicals on the neighbor's doorknob. *Bond v. United States*, 572 U.S. 844, 848 (2014) (*Bond II*). When the justice department decided to press forward with *Bond*'s prosecution after its first loss in the Supreme Court, Chief Justice Roberts wrote the Court's opinion setting aside *Bond*'s conviction. We might see act III of that wait-and-see approach play out in this setting.

⁹⁶ See, e.g., *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2178 (2019).

⁹⁷ 135 S. Ct. 2480 (2015).

⁹⁸ *Id.* at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

⁹⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

factors relevant to the ones noted in *Kisor*, which could lead to very disparate results.¹⁰⁰

The other development to watch is the federal government's success rate when litigating cases under *Kisor*. As noted above, the government has won perhaps 75–90 percent of its cases under *Seminole Rock* and *Auer*. That success rate alone makes it appear that the deference standard biased the decisionmaking process against private parties.¹⁰¹ Gorsuch certainly thought so.¹⁰² Kagan's opinion assured the critics of *Seminole Rock* and *Auer* that the new deference standard would be "not nearly so menacing as they might fear."¹⁰³ If the government maintains the same success rate going forward that it has historically enjoyed, however, the *Kisor* standard will be revealed as being just an old wolf in a modern sheep's clothing. That outcome should be relevant to its continued legitimacy.

Conclusion

Baseball fans know, as Ernest Lawrence Thayer wrote, that hope springs eternal.¹⁰⁴ For some time now, four justices believed that *Seminole Rock* and *Auer* were living on borrowed time. Those decisions survived in *Kisor*, but the critics of *Seminole Rock* and *Auer* might still be proved right. The number of factors that *Kisor* directs courts to apply is so great that we might see a host of different outcomes in the federal courts and several cases that the Supreme Court will need to review to resolve conflicts among the circuits. By so closely tying the new deference standard to the *Chevron* standard, we also will learn whether those disagreements illustrate the problems that occur when the Supreme Court, as it did in *Chevron*, makes up an entirely new law-interpreting doctrine rather than sticking to the rigors of a judicial process in which courts resolve cases by using

¹⁰⁰ Justice Gorsuch found that such confusion certainly existed prior to *Kisor*. See *Kisor*, 139 S. Ct. at 2430 (Gorsuch, J., concurring in the judgment). Justice Kagan did not take issue with the conclusion, but her opinion tried to address it by identifying those circumstances as ones in which an agency should not receive deference. See *id.* at 2417; *supra* text accompanying notes 68–71. Professor Merrill believes that the uncertainty might well continue. See *supra* note 94. Only time will tell.

¹⁰¹ See Larkin & Slattery, *supra* note 11, at 641.

¹⁰² *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring).

¹⁰³ *Id.* at 2418 (lead opinion of Kagan, J.).

¹⁰⁴ See Ernest Lawrence Thayer, *Casey at the Bat*, st. 2, 2 (1888).

the traditional rules of statutory interpretation. Finally, a majority of the Court did not decide whether the APA resolves this entire matter by requiring courts to undertake a *de novo* review of all questions of law. If the APA does, courts will still consider whether an agency's interpretation of its rules is persuasive, but courts cannot defer to the agency's position.

The only certainty about the Supreme Court's *Kisor* decision is that James Kisor has another chance to prevail on his claim for disability benefits. Beyond that, we are looking through a glass darkly. It could be years before we know how the lower courts apply the teaching of *Kisor*. How coherently and consistently the lower courts decide those cases will answer the question of whether *Kisor* set administrative law on a more sensible course or whether it merely gave the lower courts just enough rope to enable the Supreme Court to hang that decision—along with its partner in crime, *Chevron*.