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‘Fractured and Divided,’ Justices' Agency-Power Ruling Sows Uncertainty

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In February, Justice Neil Gorsuch added a new phrase to the Supreme Court lexicon, calling one of the court’s precedents “a dog’s breakfast”—a colloquial way of saying that it was a complete mess.

On Wednesday, the court served up what may prove to be another canine meal in the form of *Kisor v. Wilkie*. The **dissent-free decision** seemed to have rescued the so-called “Auer doctrine” on deference to regulatory agencies, even though most of the nine justices criticized it and said the doctrine is just one more case away from being overruled.

“Auer deference retains an important role in construing agency regulations. Even as we uphold it, we reinforce its limits. Auer deference is sometimes appropriate and sometimes not,” Justice Elena Kagan wrote.

Several other writings followed Kagan’s. Gorsuch, joined in part by Justices Clarence Thomas, Brett Kavanaugh and Samuel Alito Jr., wrote a concurrence with stronger words disparaging *Auer v. Robbins*, a 1997 decision by Justice Antonin Scalia that critics say gives regulatory agencies too much power to devise and interpret their own regulations.

“A legion of academics, lower court judges, and members of this court—even Auer’s author—has called on us to abandon Auer,” Gorsuch wrote, adding that “Yet today a bare majority flinches, and Auer lives on.” He also wrote, “Still, today’s decision is more a stay of execution than a pardon.”

Chief Justice John Roberts also wrote a partial concurrence stating that “the distance between the majority and Justice Gorsuch is not as great as it may initially appear.” And Kavanaugh, joined by Alito, wrote another concurrence agreeing with Gorsuch that Auer should be “formally retired.”

So, what does it all mean? Some commentary from lawyers involved:

>> **Federal agencies are now on notice:** “At first blush, Justice Gorsuch’s magisterial concurring opinion (joined by three colleagues) that would’ve thrown out the Auer deference doctrine altogether reads like a dissent in all but name. Administrative agencies are now on

notice that it's not 'anything goes' when they decide to rewrite their own rules, that judges will hold their feet to the statutory fire." **—Ilya Shapiro, Cato Institute**

>> **Muddy waters for lower courts:** "The court's multiple opinions are muddled, and the Supreme Court will likely have to return to the issue because lower courts are going to come to divergent approaches. A fractured and divided court produces fractured and divided decisions. The Kisor case proves it." **—Alex Hontos of Dorsey & Whitney**

>> **The pro-business community laments:** "The Supreme Court missed an opportunity today to strike down an unconstitutional, judicially created doctrine that gives unaccountable bureaucrats the benefit of the doubt when deciding what their regulations do or do not require of small businesses and, indeed, all Americans." —**Karen Harned of the National Federation of Independent Business Small Business Legal Center**

>> **Just call it "Kisor Deference" now:** "Indeed, gone is the blunt, bright-line rule, first articulated in the court's 1945 decision in Seminole Rock, that a court must defer to any agency regulatory interpretation unless it is 'plainly erroneous or inconsistent with the regulation.' Enter a new, five-step inquiry that in some ways seems more searching than Chevron deference." **— Chris Walker, Ohio State University Moritz College of Law**