The Boring Supreme Court Case That Could Help Make America Great Again

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Supreme Court justices pose for their group portrait at the Supreme Court in Washington, D.C., November 30, 2018. *(Jim Young/REUTERS)***SCOTUS could begin dismantling the legal foundation of the administrative state.**

Yesterday the Supreme Court made headlines — but for the wrong case. Over a blistering dissent from Justice Clarence Thomas, the Court declined to hear a case that would decide whether a Medicaid recipient has a "private right of action to challenge a state's determination of 'qualified' Medicaid providers." The case made headlines because the question is relevant to Planned Parenthood's funding, and Thomas accused his colleagues of "abdicating" their judicial duties, perhaps to avoid ruling on a case involving abortion.

But that case was small potatoes, judicially speaking. It's barely relevant to the larger abortion-funding fight. There was a much bigger — but much more boring — case that that the Supreme Court accepted for review yesterday, and that case could strike at the heart of the administrative state.

The case is called *Kisor v. Wilkie*, and it's a veteran's-benefit case involving a Marine seeking retroactive benefits for his PTSD. The case hinged on the VA's interpretation of the word "relevant" in the applicable federal regulations. In his petition for Supreme Court review, Mr. Kisor submitted two questions:

1. Whether the Court should overrule *Auer v. Robbins* and *Bowles v. Seminole Rock and Sand Co*.

2. Alternatively, whether *Auer* deference should yield to a substantive canon of construction.

The Court granted review on Question 1 only.

Asleep yet? Well, wake up because I'm going to explain now why this is a Big Deal in the battle against the metastasizing administrative state. *Auer* and *Bowles* are the Supreme Court cases that "direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation." It's the Little Satan that works with the Great Satan — *Chevron* deference — to fuel the explosive growth in the power of executive-branch agencies.

Here's how it works. As I've explained before, the core holding of *Chevron* is that when a court confronts an executive agency's "construction of the statute which it administers," then it will defer to the agency so long as Congress hasn't "directly spoken" to the issue and the agency has engaged in a "permissible construction" of the statute. *Auer* builds on the *Chevron* framework by requiring courts to defer to the agency when even its own regulation is ambiguous. The result is a regime of deference upon deference that gives regulatory agencies enormous authority to craft and then interpret their own regulations.

This deference permits executive-branch agencies to expand their constitutional role and essentially combine all three constitutional functions under a single bureaucratic tent. It's the lawmaker as it drafts regulations, the judge as it interprets its own laws, and the executive as it enforces the laws that it has drafted and interpreted. Deference supercharges the executive branch. It's a cornerstone of the imperial presidency and the root of much modern presidential authoritarianism.

But don't take it from me, I'll leave it to Justice Gorsuch to explain — in words he wrote when he was merely Judge Gorsuch, rising star on the Tenth Circuit Court of Appeals:

Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions. Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed,

they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail.

Essentially, the *Auer* doctrine amplifies all of the *Chevron* problems outlined above. Under *Auer*, there are actual advantages in drafting broad and vague regulations: They give regulators maximum flexibility. But for the rest of us, they create legal uncertainty and open the door to political mischief.

There was a time when some conservatives celebrated *Chevron*. Even Justice Scalia famously endorsed it in a speech to Duke law students shortly after he joined the Court, and he actually wrote the *Auer* opinion for a *unanimous* court. But Justice Scalia was wrong about agency deference, and there is evidence that he knew that he was wrong. As George Mason's Adam White has noted, "recent years had seen Justice Scalia expressing serious doubts about judicial deference to agency interpretations of their own rules — that is, doubts about the *Seminole Rock–Auer*doctrine that he had expounded for so long."

This Supreme Court has an opportunity to finish the rethinking that Scalia started. It has the opportunity to begin the arduous process of paring back the powers of the president. The Court can't, however, work miracles. It can push the president back a bit and reassert its own authority, but it can't make Congress step forward and reassert its rightful lawmaking primacy. If the presidency recedes, the legislative branch must step forward.

That's a battle for a different day. For now, our focus shifts to the Supreme Court. It's got a judicial mistake to correct. The Court may finally take serious steps to shove the bureaucracy back into its proper constitutional box.