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## STARE DECISIS AND THE IDENTITY- OVER-TIME PROBLEM: A COMMENT ON THE MAJORITY’S WRONGNESS IN *KISOR V. WILKIE*

Christian Talley\*

### ABSTRACT

*In Kisor v. Wilkie, the Supreme Court recently confronted whether to overrule the doctrine under which courts defer to agencies’ interpretations of their own ambiguous regulations—so-called Auer or Seminole Rock deference. In its prior reexaminations of Seminole Rock, the Court had progressively restricted the doctrine’s scope, leading observers to wonder whether the Justices would scrap it for good. This question of administrative law ignited a corollary debate about stare decisis. Writing for the majority, Justice Kagan argued that stare decisis mandated the preservation of Seminole Rock. Yet as she appealed to stare decisis, her opinion further restricted the conditions under which deference applies. Concurring in the judgment, Justice Gorsuch contended that the majority was wrong to invoke stare decisis while simultaneously modifying the doctrine in basic respects. Preservation of precedent, in his view, was inconsistent with its continued modification. Embedded in Justice Gorsuch’s opinion was a deep question about identity over time: If a precedent is heavily modified through subsequent case law, may the final case “reaffirming” and further modifying the precedent justifiably trace its lineage to the original case announcing the principle, such that the principle’s supposed “antiquity” lends it enhanced stare decisis weight? This Article, extending Justice Gorsuch’s critique, answers in the negative. Continuous and profound modification of a precedent casts doubt on the quality of the Court’s original reasoning and erodes the connection between earlier and later cases, thus weakening the stare decisis weight due the precedent upon its reconsideration.*

### INTRODUCTION

A well-worn thought experiment in metaphysics goes something like this: To

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honor the achievements of Theseus, founder and king of Athens, the Athenians decided to preserve his warship in the Athenian harbor as a floating memorial. As some of the ship's planks began to rot away, the Athenians replaced them with "new and stronger timber."<sup>1</sup> Over many years, this process continued such that the ship eventually contained none of its original components, yet was still recognizable as the original. Was this ship still the "ship of Theseus"?<sup>2</sup> Or did the Athenians' progressive rebuilding erase its former identity? These questions have no "solution" per se.<sup>3</sup> Rather, they serve as an acid test for how philosophers conceptualize identity over time. One's answer might depend upon intuitions about whether "identity" is tantamount to form, function, constitution from certain elements, or some combination of all three.<sup>4</sup>

During the Supreme Court's last two terms, a roughly analogous dispute has developed among the Justices about the proper conception of the doctrine of stare decisis.<sup>5</sup> Stare decisis counsels that the Court, rehearing an issue at Time Two, should not disturb its decision at Time One unless some compelling reason has arisen in the interim that casts the Time One precedent into significant doubt.<sup>6</sup> Buried within this maxim is a crucial but often unrecognized question about the nature of precedential identity. To "reaffirm" a precedent implies that the precedent promulgated at Time Two is materially the same as was announced at Time One. Yet is it always the case that such identity has persisted over time?

In certain cases, the answer is clearly "yes." In the absence of modification to a precedent, the precedent at Time Two is the same as at Time One, and thus may justifiably trace its lineage to the Time One decision. But imagine, instead, the following scenario: At Time One, the Court decides *Smith v. Jones*. At Time Two, the Court relitigates the issue, purports to "reaffirm" *Smith*, yet modifies the rule that case stood for in certain key respects. At Time Three, the Court relitigates the issue again, again purporting to "reaffirm" the (now-modified) *Smith*, but it reconfigures the precedent even further. Finally, at Time Four, the Court is asked to "reaffirm" *Smith* with even more updates and alterations. The precedent for which the *Smith* line of cases stands now bears only scant relation to the contours

1. PLUTARCH, PLUTARCH'S LIVES 34 (A.H. Clough, ed., John Dryden trans., Little Brown & Co. 1906).

2. Andre Gallois, *Identity Over Time*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 6, 2016), <https://plato.stanford.edu/entries/identity-time/> [<https://perma.cc/3UP5-CLZZ>].

3. *Id.* (discussing many of the proposed solutions and various complications with each).

4. *Id.* For a representative disagreement, compare S. Marc Cohen, *Identity, Persistence, and the Ship of Theseus*, U. WASH. DEP'T OF PHIL. (Oct. 6, 2004), <https://faculty.washington.edu/smcohen/320/theseus.html> [<https://perma.cc/6RJJ-E7RS>] (arguing for the coincidence of Theseus's ship and its "original pieces"), with Mark Johnston, *Constitution Is Not Identity*, 101 MIND 89, 104 (1992) ("[T]here are systematic reasons to distinguish objects from the matter which constitutes them.").

5. See Stephen Wermiel, *SCOTUS for Law Students: Supreme Court Precedent*, SCOTUSBLOG (Oct. 2, 2019, 9:54 AM), <https://www.scotusblog.com/2019/10/scotus-for-law-students-supreme-court-precedent/> [<https://perma.cc/94X7-9XG5>].

6. See, e.g., *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455-56 (2015) ("[I]t is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'") (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

of the original *Smith* decision. Despite this, should the party opposing reaffirmance have to persuade the Court on the merits *and* overcome the additional hurdle of stare decisis?

Justice Kagan's answer to this question in her opinion for the Court in *Kisor v. Wilkie* was "yes."<sup>7</sup> *Kisor* concerned whether the Court should overturn the doctrine under which courts defer to administrative agencies' interpretations of their own ambiguous regulations.<sup>8</sup> First announced in *Bowles v. Seminole Rock & Sand Co.*,<sup>9</sup> this doctrine was famously reaffirmed in *Auer v. Robbins*<sup>10</sup> and subsequent cases.<sup>11</sup> Though Justice Kagan believed petitioner *Kisor* had lost the argument for overturning the deference regime on the merits,<sup>12</sup> it was stare decisis—"the special care we take to preserve our precedents"<sup>13</sup>—that drove a stake through the heart of his case.<sup>14</sup> After her investigation of *Seminole Rock*'s validity, Justice Kagan detailed the reasons stare decisis supported upholding a heavily modified version of that regime;<sup>15</sup> a version that, as this Article contends, bore only questionable resemblance to the original deference principle outlined in *Seminole Rock*.

Justice Gorsuch's concurrence in the judgment, by contrast, disputed that stare decisis lent much support to retaining *Seminole Rock*.<sup>16</sup> Considering several of the factors the Court uses to assess the weight of stare decisis, Justice Gorsuch argued that it represents a mere judge-made doctrine, that the doctrine has engendered "no serious reliance interests," and that it lacks any "persuasive rationale."<sup>17</sup> This Article, in particular, focuses on his contention about identity over time. Justice Gorsuch accused the majority of "reshaping our precedent in new and experimental ways,"<sup>18</sup> so "freely . . . remodel[ing]" *Seminole Rock* that the resultant, novel regime was undeserving of stare decisis.<sup>19</sup> So extensive was this doctrinal

7. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18, 2422 (2019) (restating and explicitly modifying aspects of *Seminole Rock/Auer* doctrine, yet indicating the petitioner would also have to overcome stare decisis to topple the deference regime).

8. *Id.* at 2408 ("This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies.") (citations omitted).

9. 325 U.S. 410, 414 (1945).

10. 519 U.S. 452, 461 (1997).

11. See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 601 (2013); see also *id.* at 616–17 (Scalia, J., concurring in part and dissenting in part) (noting that the respondent had asked the Court to "reconsider *Auer*" and disagreeing with the majority's decision not to). Justice Scalia, the author of the *Auer* decision, later vociferously disowned his own opinion. See *id.* at 616–21 (castigating *Auer* deference as invalid and lacking "persuasive justification").

12. *Kisor*, 139 S. Ct. at 2422 ("Kisor's last [merits] argument to dispatch *Auer* deference fails as roundly as the rest.")

13. *Id.* at 2418.

14. *Id.* at 2422 ("If all that were not enough, *stare decisis* cuts strongly against Kisor's position.")

15. *Id.* at 2423. For the majority's modifications in *Kisor* to the *Auer/Seminole Rock* deference regime, see *id.* at 2414–18; see also *infra* Part II (cataloguing *Kisor*'s reconfiguration of *Seminole Rock* deference). For Justice Kagan's stare decisis-based defense of *Auer* and *Seminole Rock*, see *Kisor*, 139 S. Ct. at 2422.

16. *Kisor*, 139 S. Ct. at 2443–47 (Gorsuch, J., concurring).

17. *Id.* at 2445, 2447.

18. *Id.* at 2443.

19. *Id.* at 2445.

“overhaul,”<sup>20</sup> in his opinion, that it rendered the majority’s purported reliance on stare decisis not merely wrong, but insincere.<sup>21</sup>

Not content to let these fault lines lie, Justices Kagan and Gorsuch debated the point again at the oral argument for *Ramos v. Louisiana*.<sup>22</sup> In *Ramos*, the State of Louisiana urged the Court to reaffirm a 1972 precedent<sup>23</sup> under stare decisis<sup>24</sup> as it simultaneously asked the Court to modify that precedent in key respects.<sup>25</sup> Justice Kagan asked Ramos’s counsel whether it was really the case that “a decision is entitled to less stare decisis effect because the parties have come into Court and tried to kind of improve the reasoning . . . of the earlier decision,” stating that she had “never liked that argument.”<sup>26</sup> Justice Gorsuch shot back a few minutes later, extracting the concession from Louisiana’s counsel that the State’s requested modifications confounded its arguments about stare decisis, permitting the Court to take up the issue “afresh.”<sup>27</sup>

The acrimony of the dispute in *Kisor*, its resurfacing in *Ramos*, and the increased attention afforded to stare decisis as observers question the longevity of controversial precedents,<sup>28</sup> all suggest that we have not heard the last of the identity-over-time debate. In the context of *Kisor* and the persistence of *Seminole Rock*, this Article does not feign to settle whether *Seminole Rock* is constitutional, consistent with the Administrative Procedure Act (APA), or even wise policy. Instead, it contends that Justice Gorsuch had the upper hand in *Kisor*’s identity-over-time debate and that the majority was therefore wrong to invoke stare decisis as a compelling argument for the retention of *Seminole Rock*.

This Article presents that thesis in three sections. Part I provides a brief historical overview of the important cases—culminating with *Kisor*—that shaped *Seminole Rock* deference, illustrating the fluid and contingent nature of that doctrine over time. Part II analyzes why those modifications, as Justice Gorsuch

20. *Id.*

21. *Id.* at 2425 (“[T]he doctrine emerges maimed and enfeebled—in truth, zombified. . . . All to what end? So that we may *pretend* to abide *stare decisis*?”); *id.* at 2443 (“While pretending to bow to *stare decisis*, the majority goes about reshaping our precedent in new and experimental ways.”).

22. Transcript of Oral Argument at 35–37, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924).

23. *Apodaca v. Oregon*, 406 U.S. 404 (1972). *Apodaca* involved an odd 4–1–4 split in which the four-Justice plurality concluded the Sixth Amendment did not require unanimous jury verdicts in felony criminal cases, while the four Justices in dissent concluded it did. *Id.* at 411–12, 414. Justice Powell’s concurrence agreed with the dissenters that there *was* a right to unanimity, but he believed such a right was not incorporated against the states under the Fourteenth Amendment. *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring). The result was a requirement of unanimity in *federal* felony convictions, but not in *state* felony convictions. See *Apodaca*, 406 U.S. at 411–12. The Supreme Court recently overturned this result in *Ramos*, holding that the Sixth Amendment’s requirement of unanimity in felony convictions applies in both state and federal court. See *Ramos*, 140 S. Ct. at 1397.

24. Brief in Opposition at 3–6, *Ramos*, 140 S. Ct. 1390 (No. 18-5924) (“The doctrine of stare decisis counsels against overruling *Apodaca v. Oregon*.”).

25. Transcript of Oral Argument at 32, *Ramos*, 140 S. Ct. 1390 (No. 18-5924) (Louisiana’s counsel arguing that “nothing in the text, structure, or history of the Sixth Amendment requires unanimous jury verdicts”).

26. *Id.* at 29.

27. *Id.* at 36–37.

28. See *infra* Conclusion.

contended, undermined the stare decisis-based arguments for the retention of *Seminole Rock*. Finally, the Conclusion highlights other precedents susceptible to the identity-over-time objection, suggesting that the arguments developed in *Kisor* are likely to soon reappear.

### I. THE DEEP CONTINGENCY OF THE DEFERENCE DOCTRINE

The idea of deferring to agency interpretations of agency regulations did not enter the world fully formed. Rather, it emerged through a process of common law adjudication at the Supreme Court in the latter twentieth century. Though some have traced the principle's roots even deeper,<sup>29</sup> its watershed modern statement came in the Supreme Court's aforementioned 1945 decision, *Seminole Rock*.<sup>30</sup>

*Seminole Rock* involved a dispute about whether wartime price controls capping prices to the "highest price charged during March 1942" applied to a specific sale of crushed stone to a government contractor.<sup>31</sup> In October 1941, *Seminole Rock* contracted to furnish a private company crushed stone at \$0.60 per ton, and delivered that stone in March 1942.<sup>32</sup> In January 1942, in a separate transaction, it agreed to furnish a government contractor crushed stone at \$1.50 per ton, which it delivered in August 1942.<sup>33</sup> Upon discovering the first sale, the government argued that *Seminole Rock* should have charged it only \$0.60 per ton.<sup>34</sup> It claimed that the delivery of stone in March 1942 at \$0.60 per ton represented the price *Seminole Rock* had "charged" for the transaction, even if the contract had been signed months before.<sup>35</sup> Thus, in the government's view, the regulation capped prices at March 1942's \$0.60 per ton.<sup>36</sup> *Seminole Rock* countered that a "charge" in March 1942 would have required both delivery and the initial contracting.<sup>37</sup>

After an independent analysis of the regulation at issue, the Court concluded that the government's interpretation was superior.<sup>38</sup> Curiously, however, the Court went further, declaring without citation that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>39</sup> Pursuant to this apparently bespoke principle, the Court pointed to a bulletin issued by the Office of Price Administration explaining that "*actual delivery* during March" was

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29. See, e.g., Transcript of Oral Argument at 23–24, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15) (Justice Sotomayor arguing that a *Seminole Rock/Auer*-like principle could be traced to case law from the nineteenth century).

30. See Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J. L. & PUB. POL'Y 87, 88 (2018) (describing *Seminole Rock* as the doctrine's "originating case").

31. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945).

32. *Id.* at 412.

33. *Id.*

34. *Id.*

35. *Id.* at 415.

36. *Id.*

37. *Id.*

38. *Id.* at 415–17.

39. *Id.* at 414.

dispositive of price, regardless of the date of contracting.<sup>40</sup> The Court claimed that this declaration removed “[a]ny doubts” about its foregoing, independent construction of the regulation.<sup>41</sup>

For many years, the significance of this “controlling weight” language was uncertain.<sup>42</sup> On the one hand, the Court had put forth a muscular declaration that administrative interpretations were “of controlling weight unless . . . plainly erroneous or inconsistent with the regulation.”<sup>43</sup> The Court hinted at no conditions precedent that would have to be satisfied for this robust deference doctrine to apply.<sup>44</sup> If taken literally, it represented a broad grant of deference to agency interpretations of agency regulations. On the other hand, few agencies at the time “engage[d] in rulemaking and even fewer . . . asked . . . for deference” to their regulatory interpretations.<sup>45</sup> Mid-century administrative law professors expressed uncertainty about whether *Seminole Rock*’s deference principle was to “be taken at face value,”<sup>46</sup> and pointed out that the Court’s directive to consult agency interpretations was “hardly more than dictum.”<sup>47</sup> Indeed, the Court had independently concluded the government’s interpretation was correct through ordinary interpretive methods.<sup>48</sup>

Perhaps indicative of the case’s original obscurity, the Supreme Court did not cite its “controlling weight” language until 1965<sup>49</sup>—a full two decades later—in *Udall v. Tallman*.<sup>50</sup> The Court’s invocation of the deference principle in *Udall*, however, was as categorical as it had been in *Seminole Rock*, seemingly confirming that the Court took the principle seriously. Reciting the “controlling weight” dictum, it added that “[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.”<sup>51</sup> The Court posited that those who promulgated the regulation—that is, the regulators themselves—were those best positioned to offer authoritative insight into its

40. *Id.* at 417 (emphasis added).

41. *Id.*

42. See Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 63 (2015) (noting the “unremarkable response to *Seminole Rock*” and explaining that “[i]n the aftermath of [the decision], there was no indication from scholars or the Court that a new doctrine of administrative law had just been announced”); Jonathan H. Adler, *Auer Evasions*, 16 GEO. J.L. & PUB. POL’Y 1, 7 (2018) (noting that “commentators largely ignored the decision” when it was first announced).

43. *Seminole Rock*, 325 U.S. at 414.

44. See *id.* It is true that the Court noted the Office of Price Administration’s bulletin was made available to manufacturers and was “uniformly . . . taken” and “consistent.” *Id.* at 417–18. But the Court made no attempt to explain how these factors meshed with its “controlling weight” dictum, as evidenced by the contemporary academic perplexity at the meaning of the case. See Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 597 (1950).

45. Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of Seminole Rock*, 22 GEO. MASON L. REV. 647, 658 (2015).

46. Davis, *supra* note 44, at 597.

47. *Id.*

48. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 415–417 (1945).

49. Knudsen & Wildermuth, *supra* note 42, at 63.

50. 380 U.S. 1, 4, 16–17 (1965) (citing the *Seminole Rock* dictum to sustain the Secretary of Interior’s interpretation of an administrative regulation).

51. *Id.* at 16.

meaning.<sup>52</sup>

In the succeeding years, the courts of appeals embraced and continued to expand this “strong” conception of *Seminole Rock*.<sup>53</sup> The Supreme Court confronted the validity of this deference scheme in 1997, in the aforementioned case *Auer v. Robbins*.<sup>54</sup> *Auer* concerned whether police sergeants and lieutenants qualified for overtime pay under the Fair Labor Standards Act (FLSA).<sup>55</sup> The FLSA provided an exception from overtime pay for “bona fide executive, administrative, or professional” employees, which the Secretary of Labor claimed the sergeants and lieutenants were under its “salary-basis test.”<sup>56</sup> Essentially, employees would “be considered to be paid ‘on a salary basis’”—and thus ineligible for overtime—if their compensation was not subject to reduction for disciplinary infractions.<sup>57</sup> The sergeants and lieutenants argued that they, at least technically, were subject to such reductions, even if desk duty or other non-salary penalties were more common.<sup>58</sup> Citing his own interpretation of the regulation, the Secretary countered that such reductions had to be “significantly likely,” rather than just theoretically possible, to remove the officers from the exemption.<sup>59</sup>

In a brief opinion written by Justice Scalia, the Court ruled unanimously for the government.<sup>60</sup> Justice Scalia faithfully recited the *Seminole Rock* dictum, indicating that because an agency interpretation of an agency regulation was at issue, that interpretation was, “under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”<sup>61</sup> “That deferential standard,” he contended, was “easily met here.”<sup>62</sup> Given the broad range of penalties potentially applicable to the officers’ conduct, the Secretary’s attempt to deduce which of those was a realistic possibility through a more empirical test was perfectly acceptable.<sup>63</sup>

At the same time, however, the characteristic claim that *Auer* “mechanically . . . and reflexively” applied the *Seminole Rock* dictum<sup>64</sup> tends to obscure a subtle change *Auer* introduced into the formulation. In *Auer*, the officers objected that the Secretary’s interpretation came to the Court “in the form of a legal brief.”<sup>65</sup> Justice Scalia argued that despite that fact, “[t]he Secretary’s position [was] in no

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52. *Id.*; see also Knudsen & Wildermuth, *supra* note 42, at 80 (explaining how the Court’s unqualified endorsement of *Seminole Rock* deference in *Udall* “opened the door to broader deference in important ways”).

53. Pojanowski, *supra* note 30, at 89 n.10 (describing the D.C. Circuit’s approach from the 1960s to the 1980s as “strong *Seminole Rock* doctrine”).

54. 519 U.S. 452, 461–63 (1997) (endorsing the continued validity of *Seminole Rock* deference).

55. *Id.* at 455.

56. *Id.* (quoting 29 C.F.R. §§ 541.118(a) (1996)).

57. *Id.*

58. *Id.* at 455, 462.

59. *Id.* at 461; see also *id.* at 455 (explaining the nature of the inquiry as whether “as a practical matter” the officers fell outside the test).

60. *Id.* at 454, 462–64.

61. *Id.* at 461 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

62. *Id.*

63. *Id.* at 461–62.

64. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2429 (2019) (Gorsuch, J., concurring).

65. *Auer*, 519 U.S. at 462.

sense a ‘post hoc rationalizatio[n],’” and thus that the Secretary’s interpretation still qualified for deference.<sup>66</sup> The implication of his statement was that *had* the Secretary’s interpretation constituted a post hoc rationalization, the Court would have shied away from deference. Thus, while reaffirming *Seminole Rock*, the Court mentioned and codified a qualification upon the doctrine—it was potentially inapplicable when the agency advanced after-the-fact interpretations to defend against litigation. This affirmation-with-modification approach inaugurated a trend that would persist through *Kisor*.

*Auer*’s summary affirmance of *Seminole Rock* is often considered surprising, especially given the negative attention the newly christened “*Auer* deference” attracted from the legal academy in subsequent years.<sup>67</sup> Scholars argued that *Auer* lacked a principled rationale, violated separation of powers, built in unfair bias toward government interpretations, and frustrated the APA’s requirement of notice-and-comment rulemaking.<sup>68</sup> Reflecting these concerns was the Court’s opinion in the transitional 2013 case *Christopher v. SmithKline Beecham Corp.*<sup>69</sup> *Christopher*, like *Auer*, concerned a Department of Labor (DOL) regulation; in this case, the proper construction of the term “outside salesman.”<sup>70</sup> In previous litigation, the DOL took the position that an outside “sale” occurred when a salesman was involved in a “consummated transaction,” whether or not title actually transferred in the exchange.<sup>71</sup> Yet at the Court, the DOL advanced the more restrictive position that only those who “actually transfer[red] title to the property at issue” qualified as “outside salesmen.”<sup>72</sup> This new interpretation, which shrank the universe of “outside salesmen” exempt from certain FLSA wage and hour restrictions, concomitantly meant that their employers might now owe them significant backpay.<sup>73</sup>

Sensing this potential unfairness, the Court restated the limitations upon, and indeed further constricted, the scope of *Auer* deference.<sup>74</sup> Citing *Auer*, Justice Alito’s majority opinion noted that deference is “unwarranted when . . . the agency’s interpretation ‘does not reflect the agency’s fair and considered judgment on the matter in question.’”<sup>75</sup> This might occur, as *Auer* itself mentioned, when the interpretation is simply “a ‘post hoc rationalizatio[n]’ advanced . . . to defend past agency action against attack.”<sup>76</sup> Reasoning from other cases, he also suggested deference was unwarranted when an “agency’s interpretation conflicts with a prior interpretation,” or when it appears to be “nothing more than a ‘convenient

66. *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

67. See, e.g., Pojanowski, *supra* note 30, at 89, 89 nn.10–11. Indeed, much ink has been spilled in attempt to reconstruct Justice Scalia’s motivations for penning the decision he later dramatically disowned. *Id.* at 89–90.

68. Knudsen & Wildermuth, *supra* note 45, at 653–54.

69. 567 U.S. 142, 155–57 (2012).

70. *Id.* at 147.

71. *Id.* at 153–54.

72. *Id.* at 154.

73. *Id.* at 155–56.

74. *Id.* at 155, 159.

75. *Id.* at 155 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

76. *Id.* (quoting *Auer*, 519 U.S. at 462).

litigating position.”<sup>77</sup> To these qualifications, Justice Alito added another: deference was unwarranted if the interpretation engendered “unfair surprise” or unfairly retroactive penalties that regulated entities had “little reason to suspect.”<sup>78</sup> Given both the agency’s shifting position on its interpretation and the “potentially massive liability” the DOL’s new interpretation threatened to retroactively impose upon private industry, the majority declined to defer under *Auer*.<sup>79</sup>

If *Christopher* suggested that cracks were accumulating in the *Auer* edifice, *Kisor* represented the doctrine on the brink of implosion. *Kisor* grew out of petitioner James Kisor’s application to the Department of Veterans Affairs (VA) for disability benefits.<sup>80</sup> Kisor, a Vietnam veteran, first applied for benefits in 1982, “alleging that he had developed post-traumatic stress disorder (PTSD) as a result of his participation” in combat.<sup>81</sup> The VA denied Kisor benefits after its psychiatrist concluded he “d[id] not suffer from PTSD.”<sup>82</sup> In 2006, Kisor “moved to reopen his claim.”<sup>83</sup> The VA reversed its position, concluding that Kisor *did* suffer from PTSD, but refused to retroactively compensate Kisor back to 1982.<sup>84</sup> The Board of Veterans’ Appeals (the Board) upheld this denial, finding that it could only award benefits retroactively under VA regulations if it had failed to consider “relevant official service department records’ . . . in its initial denial.”<sup>85</sup> Kisor had produced “two new service records . . . confirming his participation” in combat,<sup>86</sup> yet the Board considered these irrelevant because the reason for the initial denial was not that he had not participated in combat, but that he did not have PTSD.<sup>87</sup>

In subsequent litigation over the denial, Kisor and the VA disputed each other’s interpretations of “relevant” evidence.<sup>88</sup> In Kisor’s view, “relevant” evidence need not squarely rebut the basis of the prior denial; it was sufficient for such evidence to bear on the claim generally.<sup>89</sup> In the government’s view, the evidence would have been “relevant” only if it rebutted the basis of the prior denial.<sup>90</sup> Recognizing the ambiguity in the regulation, the Federal Circuit deferred to the government’s interpretation.<sup>91</sup> Citing *Seminole Rock*, it found the agency’s stance neither “plainly erroneous [n]or inconsistent with the VA’s regulatory framework,” and thus it deferred.<sup>92</sup> In his petition for certiorari, Kisor asked the

77. *Id.* (first citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); then quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)).

78. *Id.* at 156–57 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007); *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 158 (1991); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)).

79. *Id.* at 155, 159.

80. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2409 (2019).

81. *Id.*

82. *Id.* (alteration in original).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*; see also *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017) (citing the *Seminole Rock*

Court to directly overrule the doctrines of *Auer* and *Seminole Rock*—the apparent basis for his loss below.<sup>93</sup>

Before she weighed in on that request, Justice Kagan’s opinion for the Court spent considerable energy restating, and in reality, further reconfiguring, the contours of *Seminole Rock* deference.<sup>94</sup> In a section she casually referred to as “just background”<sup>95</sup>—a section a majority of the Court joined<sup>96</sup>—Justice Kagan introduced crucial new threshold questions designed to further constrict *Seminole Rock*.<sup>97</sup> First was a modification of the ambiguity required in a regulation to invoke deference.<sup>98</sup> The Court previously had been far from exacting in defining this ambiguity trigger, at one point suggesting jurists “need not tarry” over regulations’ language before invoking *Seminole Rock*.<sup>99</sup> By contrast, Justice Kagan indicated that deference is now inappropriate “unless the regulation is genuinely ambiguous.”<sup>100</sup> Further, courts should now assess “genuine ambiguity” with footnote 9 of *Chevron*,<sup>101</sup> under which deference is appropriate only after “all the ‘traditional tools’ of construction” have failed to reveal a regulation’s meaning, leaving it intractably ambiguous.<sup>102</sup> In his brief concurrence in the judgment, Justice Kavanaugh pointed out that if this new ambiguity trigger were to be “taken seriously,” it represents such a high bar that *Seminole Rock* deference should become relatively rare.<sup>103</sup>

Second, Justice Kagan decisively rejected *Seminole Rock*’s formulation that courts must defer unless an agency’s interpretation of its own rule is “plainly erroneous.”<sup>104</sup> Furthering the *Chevron-Seminole Rock* merger, she spurned the longstanding assumption that the plainly erroneous standard mandates greater deference than *Chevron*’s reasonableness standard.<sup>105</sup> Though she argued that this assumption was an invention of the lower courts—citing a 2017 Sixth Circuit case as representative<sup>106</sup>—the Sixth Circuit had done no more than follow the Court’s own 1965 opinion in *Udall*, to the effect that deference to agency interpretations of agency regulations is “even more clearly in order” than deference to agency interpretations of statutes.<sup>107</sup> Overruling *Udall sub silentio*, Justice Kagan dictated

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dictum).

93. *Kisor*, 139 S. Ct. at 2408.

94. *Id.* at 2410–18.

95. *Id.* at 2410.

96. *Id.* at 2407 (explaining that a majority of the Court joined Part II-B of Justice Kagan’s opinion).

97. *Id.* at 2415–16.

98. *Id.* at 2415 (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

99. *United States v. Larionoff*, 431 U.S. 864, 872 (1977).

100. *Kisor*, 139 S. Ct. at 2415.

101. 467 U.S. 837, 843 n.9 (1984).

102. *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron*, 467 U.S. at 843 n.9).

103. *Id.* at 2448 (Kavanaugh, J., concurring) (“Formally rejecting *Auer* would have been a more direct approach, but rigorously applying footnote 9 should lead in most cases to the same general destination.”).

104. *Id.* at 2415–16 (majority opinion).

105. *Id.* at 2416.

106. *Id.* (citing *Ohio Dep’t of Medicaid v. Price*, 864 F.3d 469, 477 (6th Cir. 2017)).

107. *E.g.*, *United States v. Midwest Suspension & Brake*, 49 F.3d 1197, 1203 (6th Cir. 1995).

that the inquiry under *Seminole Rock* should now match that under *Chevron*: whether the agency's interpretation of its own ambiguous rule is within the range of permissible interpretations created by the ambiguity.<sup>108</sup>

Third, to qualify for deference, Justice Kagan indicated that the agency's interpretation must satisfy a "character and context" inquiry into whether it deserves "controlling weight."<sup>109</sup> Within this rubric, Justice Kagan blended familiar threshold questions—for instance, the *Christopher* factors—with other novel inquiries into whether application of deference in specific contexts would satisfy the doctrine's purposes.<sup>110</sup> Under the "'authoritative' or 'official position'" inquiry, the agency's interpretation must have some degree of authority and formality behind it to receive deference.<sup>111</sup> Somewhat opaquely, Justice Kagan suggested that "[t]he interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context."<sup>112</sup> Thus, staff memoranda might qualify for deference, but an informal memorandum recounting a conversation might not.<sup>113</sup> Further, under the "implicate[s] . . . substantive expertise" inquiry, the agency's interpretation deserves deference only for those questions on which the agency might have some specialized insight.<sup>114</sup> Referring to an example often invoked during the litigation, deference would be appropriate on such technical questions as whether a company creates "a new 'active moiety' by joining a previously approved moiety to lysine through a non-ester covalent bond."<sup>115</sup> By contrast, deference would now be inappropriate where the "interpretive issues . . . fall . . . into a judge's bailiwick," such as "a simple common-law property term,"<sup>116</sup> or presumably, as in *Kisor* itself, whether evidence is relevant.<sup>117</sup> Finally, bolted onto this superstructure were the factors compiled and restated in *Christopher*: whether the agency interpretation is a post hoc rationalization, whether it is simply a convenient litigating position, whether it conflicts with prior interpretations, and whether it would engender unfair surprise or retroactivity.<sup>118</sup>

After this euphemistically framed "background" section, Justice Kagan turned to her arguments about stare decisis. One pillar of her argument was that *Kisor* had asked the Court to overturn not merely "a single case, but a 'long line of precedents'—each one reaffirming the rest and going back 75 years or more."<sup>119</sup>

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(citing *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965)). More specifically, it cited back to the Sixth Circuit's line of cases that had adopted the *Udall* principle. *Id.*

108. *Kisor*, 139 S. Ct. at 2415–16.

109. *Id.* at 2416.

110. *Id.* at 2416–18.

111. *Id.* at 2416 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 257–59, 258 n.6 (2001) (Scalia, J., dissenting)).

112. *Id.*

113. *Id.* (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566–67 nn.9–10 (1980)).

114. *Id.* at 2417.

115. *Id.* at 2410, 2417.

116. *Id.* at 2417.

117. *See id.* at 2417, 2423–24.

118. *Id.* at 2417–18; *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–156 (2012).

119. *Kisor*, 139 S. Ct. at 2422 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798

Her apparent view was that the deference regime she had sketched out in the preceding portions of her opinion bore an unbroken lineage back to *Seminole Rock*.<sup>120</sup> Framed in that light, Kisor's request to abandon the regime was radical, and thus, "*stare decisis* cut[] strongly against [his] position."<sup>121</sup> Those assertions notwithstanding, Part II explores why Justice Kagan's arguments about *stare decisis* were weaker than they might first appear.

## II. STARE DECISIS AND THE IDENTITY-OVER-TIME PROBLEM

Whether the Constitution mandates *stare decisis* is controversial.<sup>122</sup> Though Article III contains no explicit instruction that courts should abide by their own prior decisions, there are at least compelling prudential reasons to avoid precedential churn. To adjudicate whether these reasons—such as stability, reliance, and getting the law right—are compelling in individual cases, the Court has compiled a list of factors over the years to evaluate a precedent's *stare decisis* weight.<sup>123</sup> Those factors particularly relevant to the identity-over-time problem include: (1) the precedent's age (its so-called "antiquity"); (2) the quality of the precedent's reasoning; (3) the number of times the precedent has been reaffirmed; and (4) its workability.<sup>124</sup>

Though the Court's opinions have phrased each of these considerations as discrete factors, they are all intertwined. The driving assumption is that if a precedent has persisted over a long period, it must be meritorious; were it not, the Court would have seen fit to change or discard it in an intervening examination.<sup>125</sup> Relatedly, an ancient precedent that has not been abandoned is presumably well-reasoned; otherwise, some revision eventually would have supplanted the precedent's original logic.<sup>126</sup> Regarding workability, that the Court has not seen fit to revise a precedent over the years is probative that it has not engendered practical problems.<sup>127</sup> Finally, the number of times a precedent has been reaffirmed is often closely tied to both the quality of its reasoning—presumably, it was reaffirmed because it made sense—as well as its age.<sup>128</sup> The precedent could not have grown old had an intervening reexamination cast it aside.

Each of these factors rests on a crucial implicit premise: that the Court, upon later reexaminations of precedent, is referring to the *same* precedent as was handed down at Time One. For example, it is obviously unjustified at Time Four

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(2014)).

120. *See id.*

121. *Id.*

122. *See, e.g.,* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 120 (2001) (discussing competing views but concluding that the historical evidence for an Article III *stare decisis* requirement is weak).

123. Justin W. Aimonetti, *Second Guessing Double Jeopardy: The Stare Decisis Factors as Proxy Tools for Original Correctness*, 61 WM. & MARY L. REV. ONLINE 35, 39–40 (2020).

124. *Id.* at 51–52.

125. *Id.* at 52.

126. *Id.*

127. *Id.*

128. *Id.*

to claim a precedent boasts an ancient lineage to Time One if the relevant principles actually originated at Times Two or Three. Nor, at Time Four, can the Court claim to be reaffirming the Time One precedent if the principles affirmed did not originate at Time One. Nor, at Time Four, can the Court say the Time One precedent has been twice “reaffirmed” if interim examinations at Times Two and Three fundamentally altered the Time One precedent.

If one grants those basic premises, it becomes clear that the majority’s claim that *Kisor* asked the court to overrule “a ‘long line of precedents’—each one reaffirming the rest and going back 75 years or more”<sup>129</sup> is indefensible. Imagine how the relevant history of *Seminole Rock* deference, discussed in Part I, would fit into a time sequence like that outlined in the Introduction:

*Time One: “Strong” Seminole Rock Deference*

- (1) *Seminole Rock*, 1945: The Court announces that “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>130</sup> The Court provides no explicit qualifications on this deferential standard.
  - a. *Udall*, 1965: The Court reaffirms and arguably amplifies this standard, stating that deference to agency interpretations of their own regulations “is even more clearly in order” than deference to agency interpretations of statutes.<sup>131</sup>

*Time Two: Reaffirmation with a Caveat*

- (1) *Auer*, 1997: The Court labels administrative interpretations as, “under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’”<sup>132</sup> The *Seminole Rock* formulation survives. The Court considers “[t]hat deferential standard” “easily met” on the facts before it.<sup>133</sup>
  - a. However, the Court indicates that such deference may be inappropriate where the agency interpretation is a “*post hoc* rationalizatio[n].”<sup>134</sup>

*Time Three: Cracks in the Edifice*

- (1) *Christopher*, 2012: The Court indicates that “[a]lthough *Auer* ordinarily calls for deference to an agency’s interpretation of its own ambiguous regulation,” it explains that “this general rule does not apply in all cases.”<sup>135</sup>
  - a. Though deference is “undoubtedly inappropriate . . . when the agency’s interpretation is ‘plainly erroneous or inconsistent with the

129. *Kisor*, 139 S. Ct. at 2422 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)).

130. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

131. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

132. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

133. *Id.*

134. *Id.* at 462 (alteration in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

135. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

regulation,” that the interpretation is not plainly erroneous or inconsistent no longer leads to automatic deference.<sup>136</sup>

- i. Rather, the agency’s interpretation only qualifies for deference if:
  1. The interpretation reflects “the agency’s fair and considered judgment on the matter in question”;<sup>137</sup>
  2. The interpretation is not simply a post hoc rationalization “advanced . . . to defend past agency action against attack”;<sup>138</sup>
  3. The interpretation does not conflict with prior interpretations;<sup>139</sup>
  4. The interpretation is not simply a “convenient litigating position”;<sup>140</sup> and
  5. The interpretation does not engender unfair surprise or unfair retroactivity.<sup>141</sup>

*Time Four: A New Regime Emerges*

- (1) *Kisor*, 2019: The Court abandons *Seminole Rock*’s formulation that the precedent receives “controlling weight” unless “plainly erroneous or inconsistent with the regulation.”<sup>142</sup> Instead, the inquiry merges with *Chevron*. Reviewing courts now ask whether the agency’s interpretation was “reasonable”—that is, whether it was within the range of permissible interpretations created by the regulation’s ambiguity.<sup>143</sup> As the Court acknowledges, “reasonableness” is a different inquiry than “plainly erroneous.”<sup>144</sup>
  - a. To initiate the deference inquiry, the regulation must exhibit “genuine ambiguity.”<sup>145</sup> That is, deference is potentially applicable only after judges have “exhaust[ed] all the ‘traditional tools’ of construction” and still find the ambiguity intractable.<sup>146</sup>
    - i. Even assuming the regulation is intractably ambiguous and the agency’s interpretation falls within the range of permissible interpretations, deference is appropriate only if the agency’s interpretation satisfies the “character and context” inquiry.<sup>147</sup> To that end, an agency seeking deference must show:

136. *Id.* (citing *Auer*, 519 U.S. at 461).

137. *Id.* (citing *Auer*, 519 U.S. at 462).

138. *Id.*

139. *Id.* (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

140. *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)).

141. *Id.* at 155–56.

142. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–16 (2019) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

143. *Id.* at 2416 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

144. *Id.* at 2415–16.

145. *Id.* at 2415 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

146. *Id.* (quoting *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council Inc.*, 467 U.S. 837, 843 n.9 (1984)).

147. *Id.* at 2416 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

1. The agency has put forward its authoritative or official position, instead of merely informal declarations;<sup>148</sup>
2. The agency's interpretation rests on its technical expertise and does not implicate a legal question susceptible to independent judicial resolution;<sup>149</sup>
3. The interpretation is not simply a post hoc rationalization "advanced . . . to defend past agency action against attack";<sup>150</sup>
4. The interpretation does not conflict with prior interpretations;<sup>151</sup>
5. The interpretation is not simply a "convenient litigating position";<sup>152</sup> and
6. The interpretation does not engender unfair surprise or unfair retroactivity.<sup>153</sup>

As the above sequence indicates, *Kisor* can hardly be said to reaffirm *Seminole Rock*. Justice Kagan's "restatement" of the doctrine was—under a generous interpretation—a mere palimpsest, faintly recalling the Court's wartime dictum while "enfeebl[ing]" it with novel conditions precedent.<sup>154</sup> And even if an agency's interpretation satisfies these new constraints, the end result is not the Court's original "plainly erroneous" standard, but a modified, *Chevron*-style reasonableness review. Unlike the Athenians' dutiful replacement of old planks with fresh facsimiles, *Kisor*'s rejiggering transformed the trireme into a rowboat.

This loss of identity from Time One to Time Four, in turn, exposes the self-contradictory nature of Justice Kagan's invocation of *stare decisis* as a reason to affirm *Seminole Rock*. *Stare decisis* might have compelled retention of *Seminole Rock* if, for instance, the original precedent had been well-reasoned and had not suffered workability problems. Yet *Kisor*'s extensive modifications were a not-so-tacit admission that *Seminole Rock* indeed *had* engendered practical problems and had not rested on sound thinking. *Kisor* itself exposed just one of these problems: the deference regime took the decidedly non-technical question of whether evidence was "relevant" in the context of a veteran's claim for disability benefits out of the hands of an experienced federal judge and placed it into the grasp of a self-interested government agency.<sup>155</sup> As everyone—*Kisor*, the United States, and all nine Justices—agreed, that fact revealed a defect in the regime that necessitated a modification.<sup>156</sup>

Similarly, *stare decisis* would have been compelling had the Court actually reaffirmed *Seminole Rock* a number of times. Though Justice Kagan mentioned

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148. *Id.*

149. *Id.* at 2417.

150. *Id.* (citing *Christopher*, 567 U.S. at 155).

151. *Id.* at 2418 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

152. *Id.* at 2417 (citing *Christopher*, 567 U.S. at 155).

153. *Id.* at 2417–18 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

154. *Id.* at 2425 (Gorsuch, J., concurring).

155. *See id.* at 2409 (majority opinion).

156. *See id.* at 2417, 2423–24.

“dozens of cases” in which the Court *applied Seminole Rock*,<sup>157</sup> the Court did not consider whether to overrule the doctrine in all of them.<sup>158</sup> And even in its purportedly routine applications, the Court had tacked on critical modifications to shore up newly discovered defects.<sup>159</sup> These cases are self-evidently distinct from true reaffirmations of *Seminole Rock*’s basic points. They represent something closer to its gradual abandonment.

If there were any doubt about that point, contrast *Kisor* with the decision the Court handed down nine days earlier in *Gamble v. United States*.<sup>160</sup> In *Gamble*, the Court truly reaffirmed the 170-year-old dual sovereignty doctrine, permitting successive prosecutions by the federal and state governments for offenses over which both sovereigns have jurisdiction.<sup>161</sup> That doctrine’s core point has persisted since 1847.<sup>162</sup> Absent from Justice Alito’s majority opinion was the invention of new threshold inquiries and standards of review. *That* is a situation in which a precedent’s identity has persisted through “dozens of cases over 170 years,” having survived different Courts, surrounding legal developments, and profound change to the outside world.<sup>163</sup> *That* is a situation in which a precedent, unafflicted by the identity-over-time problem, carries great stare decisis force.

Before turning to the broader jurisprudential significance of this identity-over-time problem, a few words must be said about the potential level-of-generality objection lurking behind this Article’s criticism of the majority’s reasoning. Defenders of Justice Kagan might assert that identity over time becomes an issue only if we assume a “precedent” must be defined at a relatively low level of generality. If we contrast *Kisor* with *Seminole Rock* at the level of precise verbal formulations, perhaps doing so ignores the general notion persisting through each that courts in some instances should defer to agencies’ interpretations of their ambiguous regulations. If framed at that level of abstraction, there might seem to be a more colorable claim of continuity over time.

The response is that to envision a general interpretive principle as a “precedent” deserving stare decisis weight is to mistake the basic nature of a precedent. Precedents necessarily exist at a low level of generality. They are a combination of (1) the result reached; (2) the facts of a particular case; and (3) the reasoning by which the Court reached it. The result’s relevance is obvious; it is the basis for the Court’s investigation into the reliance on and practical effects of its holding.<sup>164</sup> Though commentators once spoke as if the rationale behind those results were irrelevant for purposes of gauging stare decisis weight,<sup>165</sup> that claim is now patently

157. *Id.* at 2422.

158. See, e.g., *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013); see also *id.* at 616–17 (Scalia, J., concurring in part and dissenting in part) (disagreeing with the majority’s refusal to “reconsider *Auer*”).

159. See *supra* Part I.

160. 139 S. Ct. 1960 (2019).

161. *Id.* at 1964.

162. *Id.* at 1966.

163. *Id.* at 1969.

164. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992); Aimonetti, *supra* note 123, at 40–41.

165. Ruggero J. Aldisert, *Precedent: What It Is and What It Isn’t; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 607 (1990) (“[A] case is important only for what it decides . . . .

out of step with the Court's jurisprudence. The Court examines not only a precedent's real-world impact but also "the quality of its reasoning."<sup>166</sup> Indeed, the Court is clear that it will accord prior cases significantly less weight to the extent they are "ill founded"<sup>167</sup> or "poorly reasoned."<sup>168</sup> Moreover, a case's precedential weight necessarily depends upon its specific facts.<sup>169</sup> If a subsequent case presents a factual scenario incongruous with the precedent, as every lawyer knows, it may be distinguished away on those factual grounds. Precedential force, then, arises out of the *specific* combination of a case's facts, its reasoning, and its result.

Yet by the time the majority reached its *stare decisis* arguments in *Kisor*, the Court had already so vigorously shaken the *Seminole Rock* Etch-a-Sketch that much of that original case's specific contours had been lost to history. The deference principle had shifted from the dictate of a discrete case and toward an interpretive default rule from the judicial common law of administrative law.<sup>170</sup> That fact is revealed not only by a historical account of the doctrine's development but also by the Court's implementation of the doctrine in the intervening decades. Indeed, one study of the Court's cases revealed that "none of the Justices" treated *Seminole Rock* "as [a] mandatory precedent[] binding as a matter of *stare decisis*."<sup>171</sup> *Seminole Rock*'s rule had, instead, melted into a "flexible rule[] of thumb or presumption[] deployed by the Justices episodically and not entirely predictably."<sup>172</sup> It had receded from the specific to the general, from the precedential to the prudential, becoming less like a case and more like a canon of construction; a tool in the toolbox rather than a determinate directive subject to *stare decisis*.

### III. CONCLUSION

For all *Kisor*'s significance to the administrative state, it is ultimately a classic "low salience" case.<sup>173</sup> Unlike abortions, guns, and gay rights, *Kisor* failed to engender political controversy beyond legal circles,<sup>174</sup> and its broader policy ramifications outside administrative law will likely be similarly muted. Yet a case

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[T]he later court is not bound by the statement of reasons, or *dictis*, set forth in the rationale.").

166. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019); *Janus v. Am. Fed'n State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2479 (2018).

167. *Knick*, 139 S. Ct. at 2178.

168. *Janus*, 138 S. Ct. at 2479.

169. Aldisert, *supra* note 165, at 605.

170. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring) (noting that *Auer* had come to represent an "interpretive methodology" rather than "a precedent that purported to settle the meaning of a single statute").

171. Connor N. Raso & William N. Eskridge, Jr., *Chevron as Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1759 (2010) (emphasis added).

172. *Id.* at 1766.

173. See Isaac Unah & Angie-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 L. & POL'Y 295, 297-98 (2006).

174. See, e.g., Michael Wines, *Why the Supreme Court's Rulings Have Profound Implications for American Politics*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/supreme-court-gerrymandering-census.html> [<https://perma.cc/GLK3-VUBY>]. For instance, a *New York Times* editorial published the day after *Kisor*'s announcement failed to mention the case, focusing instead on gerrymandering decisions. *Id.*

like *Kisor* can elicit seventy-five pages of opinion from four Justices precisely because it is, in part, a proxy war about the stability of those high-salience precedents. This concern has only sharpened among the liberal Justices in light of the Court's recent personnel changes. Justice Kagan has "sound[ed the] alarm on precedent" in the popular sphere,<sup>175</sup> prompting Professor Steve Vladeck to suggest the present low-salience debates over stare decisis presage an "even bigger case where the dispute is front and center."<sup>176</sup>

The subtext of these remarks, particularly in light of the Court's recent agreement to reexamine certain aspects of its abortion jurisprudence, is the vitality of *Roe v. Wade*.<sup>177</sup> Justice Breyer suggested as much in a recent dissent from the Court's opinion overturning a thirty-year-old precedent concerning state sovereign immunity.<sup>178</sup> "Today's decision," he concluded, "can only cause one to wonder which cases the Court will overrule next."<sup>179</sup> This penultimate line of his opinion followed his citation, two sentences before, of *Planned Parenthood v. Casey*.<sup>180</sup> "[C]ould this landmark," his opinion left commentators to speculate, now "be struck down?"<sup>181</sup>

That much is for the Justices to decide. What is certain, however, is that *Kisor's* Kagan-Gorsuch debate exposed yet another hurdle precedents must overcome to survive—the identity-over-time problem. As this Article has argued, modifications to precedents' rules<sup>182</sup> and reasoning<sup>183</sup> are not assets. They are conspicuous liabilities. Such judicial tinkering betrays the original case's failures of workability and the defects latent in its reasoning. And the façade of antiquity will fall away from many supposedly ancient precedents on a more rigorous examination. Their stare decisis weight should wither accordingly.

175. Ariane de Vogue, *Elena Kagan Becomes Latest Liberal Justice to Sound Alarm on Precedent*, CNN (June 21, 2019, 9:22 PM), <https://www.cnn.com/2019/06/21/politics/kagan-supreme-court-precedent-warning/index.html> [https://perma.cc/5936-6D8V].

176. *Id.*

177. *Id.*

178. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

179. *Id.* at 1506 (Breyer, J., dissenting).

180. *Id.*

181. AJ Willingham, *The Supreme Court Has Overturned More than 200 of Its Own Decisions. Here's What It Could Mean for Roe v. Wade*, CNN (May 29, 2019, 7:31 AM), <https://www.cnn.com/2019/05/29/politics/supreme-court-cases-overturned-history-constitution-trnd/index.html> [https://perma.cc/89T5-RJAP].

182. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992) (citing *Roe v. Wade*, 410 U.S. 113, 163–66 (1973)) (overruling *Roe's* "elaborate but rigid" trimester framework as "unnecessary").

183. *Id.* at 876 (overruling *Roe's* application of strict scrutiny in favor of a reduced "undue burden" standard in recognition of the state's "substantial interest in potential life").