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The Roberts Court and Administrative Law

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GILLIAN E. METZGER

THE ROBERTS COURT
AND ADMINISTRATIVE LAW

Administrative law today is marked by the legal equivalent of mortal combat, where foundational principles are fiercely disputed and basic doctrines are offered up for “execution.”¹ Several factors have led to administrative law’s currently fraught status. Increasingly bold presidential assertions of executive power are one, with President Trump and President Obama before him using presidential control over administration to advance controversial policies that failed to get congressional sanction.² In the process, they have deeply enmeshed administrative agencies in political battles—indeed, for President Trump, administrative agencies *are* the political battle, as his administration has waged an all-out war on parts of the national bureaucracy.³ These bold assertions of administrative authority stem in part from Congress’s

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¹ *Kisor v Wilkie*, 139 S Ct 2400, 2425 (2019).

² For examples of “bold attempts to accrete executive power” in both the Obama and Trump administrations, see Jerry L. Mashaw and David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 Yale J Reg 549, 550 (2018).

³ See Evan Osnos, *Trump vs. the “Deep State,”* New Yorker (May 14, 2018), at <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state>.

inability to address pressing problems, with political polarization, intense partisanship, and near parity between the main parties often leading to legislative gridlock.⁴ The contemporary political climate also means that fights over administrative actions have become fierce and unrelenting. Moreover, the combination of these two developments—aggressive administrative advancement of presidential agendas in a deeply partisan and polarized world—has spurred a significant uptick in politically charged administrative law litigation, epitomized by the dramatic expansion in red state and blue state lawsuits challenging executive branch actions they oppose.⁵ In addition, conservative groups have put sustained efforts into fostering academic attacks on core features of administrative government, efforts that have provided the intellectual scaffolding for today’s doctrinal disputes.⁶ And, finally, there is the Trump administration’s emphasis on selecting judges who are receptive to these conservative attacks on administrative governance in court.⁷

A particularly important contributor to administrative law’s contested status is the Roberts Court. The replacement of Chief Justice Rehnquist and Justice O’Connor with Chief Justice Roberts and Justice Alito brought a new skepticism about administrative government to the Supreme Court. Meanwhile, Justice Scalia and Justice Thomas did 180 degree turns in their approaches to administrative law, penning attacks on administrative law decisions they themselves had authored just a few years earlier.⁸ Justice Gorsuch’s elevation to

⁴ See Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 Colum L Rev 1739, 1748–49, 1757–58 (2015); see also Jody Freeman and David B. Spence, *Old Statutes, New Problems*, 163 U Pa L Rev 1, 17–63 (2014) (providing detailed examples of how congressional gridlock may prompt agencies to use their authority under preexisting statutes to address newly emerging regulatory challenges).

⁵ See *Lawsuits*, State Energy & Environmental Impact Center (July 31, 2019), at <https://www.law.nyu.edu/centers/state-impact/ag-actions/active-lawsuits> (listing 63 active law suits against the Trump administration, with 34 filed or joined by California and 26 by New York); Neena Satija, *Texas vs. the Feds—a Look at the Lawsuits*, Texas Tribune (Jan 17, 2017), at <https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/> (highlighting that the state of Texas sued the Obama administration 48 times during his two Terms).

⁶ See, for example, Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* 2–10 (Doubleday, 2016) (describing Charles and David Koch’s extensive funding of anti-administrative political organizations).

⁷ See Jason Zengerie, *How the Trump Administration Is Remaking the Courts*, NY Times Mag (Aug 22, 2018), at <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html> (describing the judicial appointment process under Trump and the role played by the Federalist Society).

⁸ Compare *Michigan v EPA*, 135 S Ct 2699, 2712 (2015) (Thomas, J, concurring) (*Chevron* deference unconstitutionally requires courts to defer to agencies’ interpretations of ambiguous

the Court added another strident administrative skeptic to the mix,⁹ and by his final Term on the Court even Justice Kennedy had joined the ranks of administrative law's critics.¹⁰

This judicial skepticism of administrative government, which I have elsewhere labeled anti-administrativism, is heavily constitutional, marked by a formalist and originalist approach to the separation of powers, a deep distrust of bureaucracy, and a strong turn to the courts to protect individuals against administrative excess and restore the original constitutional order.¹¹ Several opinions demonstrated these traits in the lead-up to the 2018 Term, from the Court's decision in *Free Enterprise Fund v PCAOB* striking down double-for-cause removal protection, to Justice Thomas's concurrence in *Department of Transportation v Association of American Railroads* attacking modern delegation, to Chief Justice Roberts's dissent in *City of Arlington v FCC* rejecting deference to agency jurisdictional determinations, to the many concurrences in *Perez v Mortgage Bankers Association* calling deference to agency regulatory interpretations into question.¹² But perhaps the clearest example is the ongoing debate over *Chevron* deference, or the doctrine that a court should defer to a reasonable interpretation of an ambiguous statutory provision offered by the agency charged with its implementation.¹³ The most cited administrative law decision for decades, *Chevron* has been under full-blown assault at the Supreme Court since 2015, when Justice Thomas condemned the practice of courts

statutes) with *National Cable & Telecommunications Association v Brand X Internet Services*, 545 US 967, 982–83 (2005) (Thomas, J) (requiring courts to defer to reasonable agency interpretations of ambiguous statutes, even if the court has already interpreted the statute differently). For Justice Scalia's changed view on his *Auer* opinion, see text accompanying notes 30–33.

⁹ *Gutierrez-Brizuela v Lynch*, 834 F3d 1142, 1158 (10th Cir 2016) (Gorsuch, J, concurring) (arguing that *Chevron* deference is unconstitutional).

¹⁰ *Pereira v Sessions*, 138 S Ct 2105, 2120 (2018) (Kennedy, J, concurring) (finding the "reflexive deference" exhibited in certain applications of *Chevron* deference "troubling").

¹¹ Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv L Rev 1, 3–4, 33–46 (2017).

¹² *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 495–99 (2010); *Department of Transportation v American Railroads*, 135 S Ct 1225, 1246, 1251 (2015) (Thomas, J, concurring in the judgment); *City of Arlington v FCC*, 569 US 290, 314–16 (2013) (Roberts, CJ, dissenting); *Perez v Mortgage Bankers Association*, 135 S Ct 1199, 1210–25 (2015) (concurrences by Alito, Scalia, and Thomas, JJ).

¹³ *Chevron v Natural Resources Defense Council, Inc.*, 467 US 837, 842–43 (1984). See also *United States v Mead*, 533 US 218, 226–27 (2001) (limiting *Chevron* deference in addition to instances where the agency has the power to issue rules with the force of law and exercised that authority in issuing the interpretation in question).

deferring to agency statutory interpretations as violating Article III and creating unconstitutional delegations.¹⁴ Although Thomas made his argument in an opinion concurring in the judgment that no one else joined, by *Pereira v Sessions* three years later there appeared to be at least four Justices who considered *Chevron* deference to be constitutionally problematic,¹⁵ and the Court itself has not relied on *Chevron* deference since 2014.¹⁶

Still, a striking feature of the Roberts Court's anti-administrativism before the 2018 Term was its largely rhetorical character. Although several Justices waxed expansively about an out-of-control national bureaucracy, the most dramatic attacks on the administrative state's constitutionality and administrative law were largely restricted to concurrences and dissents. The occasional majority opinions invalidating administrative arrangements on constitutional grounds were notably narrow, cabining their analysis with carve-outs and remedial minimalism.¹⁷ And the Court was adept in its avoidance tactics, for example, repeatedly determining that statutes were unambiguous and thereby sidestepping the need to take on the debate over *Chevron's* constitutionality.¹⁸ In short, for all of its alarmism about bureaucrats running amok and assertions that the contemporary administrative state violates the constitutional order, the Roberts Court hadn't yet pulled back significantly on administrative governance in practice.

Thus, the increasingly burning question was whether the Roberts Court was willing to put its might where its mouth was on administrative law, even at the cost of destabilizing long-standing governance regimes. Or would its anti-administrativism continue to live mainly at the margins, tamping down perceived administrative law excesses

¹⁴ *Michigan*, 135 S Ct at 2712 (2015) (Thomas, J, concurring).

¹⁵ 138 S Ct at 2120–21 (Kennedy, J, concurring), *id* at 2129 (Alito, J, dissenting) (both voicing concerns with the Court's treatment of *Chevron*); *Gutierrez-Brizuela*, 834 F3d at 1154–56 (Gorsuch, J, concurring) (questioning whether *Chevron* violates separation of powers).

¹⁶ See *Cuozzo Speed Technologies, LLC v Lee*, 136 S Ct 2131, 2142 (2016) (applying *Chevron* deference to validate Patent and Trademark Office rules for *inter partes* review).

¹⁷ See Metzger, 131 Harv L Rev at 47–48 & n 278 (cited in note 11).

¹⁸ See, for example, *Wisconsin Central Ltd. v United States*, 138 S Ct 2067, 2074 (2018); *Epic Systems Corp. v Lewis*, 138 S Ct 1612, 1630 (2018); see also *Pereira*, 138 S Ct at 2121 (Alito, J, dissenting) (“Here, a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*”).

without forcing radical changes in administrative law doctrines or received wisdom about the structural constitution? Justice Kavanaugh's track record on the D.C. Circuit—the nation's leading administrative law court—suggested that he would be amenable to further narrowing and retraction in core administrative law doctrines of deference and delegation.¹⁹ Moreover, the Court granted certiorari in several cases that raised pointed challenges to basic administrative law precepts, suggesting that it was finally willing to put its anti-administrativism into action.²⁰

Yet administrative law's denouement did not come. After a Term rife with important administrative law decisions, established administrative law remains in force, albeit narrowed. Thus, in *Kisor v Wilkie*,²¹ the Court did not overturn the *Auer* doctrine of deference to agency regulatory interpretations, although it tempered such deference in significant ways. Similarly, in *Department of Commerce v New York*,²² the Court ultimately reaffirmed and arguably expanded administrative law's core requirement of reasoned decision making to include a prohibition on pretextual explanations of agency decisions. In several other cases, the Court hewed to existing administrative law frameworks. The case in which the anti-administrativist view gained the most traction was *Gundy v United States*,²³ where four Justices signaled sympathy for a full-bore assault on the constitutionality of broad delegations. Even so, a plurality upheld the measure in question applying the Court's well-established doctrine on delegation, and as of this writing it remains unclear (and in my view unlikely) whether a majority will materialize for a major doctrinal recalibration on delegation that would call the constitutionality of the administrative state into question.

The 2018 Term cases demonstrate that the Roberts Court is deeply divided on administrative law. These divisions track clear ideological

¹⁹ Christopher J. Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBlog (July 26, 2018), at <https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers> (summarizing Justice Kavanaugh's D.C. Circuit opinions on separation of powers and agency deference).

²⁰ See Petition for Writ of Certiorari, *Kisor v Wilkie*, 18-15, *i (US filed June 29, 2018); Petition for Writ of Certiorari, *Gundy v United States*, 17-6086, *i (US filed Sept 20, 2017).

²¹ 139 S Ct 2400 (2019).

²² 139 S Ct 2551 (2019).

²³ 139 S Ct 2116 (2019).

lines. Justice Gorsuch emerged as the voice of the four more conservative Justices this Term, intent on overturning established administrative law doctrines and pulling back on administrative government. Meanwhile Justice Kagan led the four liberal Justices in a defensive effort, seeking to deter or at least mitigate the conservative assault. In the middle was Chief Justice Roberts, sharing the conservatives' suspicion of government and bureaucracy yet resistant to the dramatic disruption and potential institutional costs to the Court that Gorsuch's approach might yield. The cases, particularly *Kisor* and *Department of Commerce*, also illuminate several core analytic themes and tensions in the Roberts Court's administrative law jurisprudence. These include recently reemerged philosophical disputes over the distinction between law and policy as well as more longstanding constitutional disagreements about separation-of-powers formalism, functionalism, and minimalism. Another central development is an increased historical focus, a development evident in Roberts Court administrative law opinions from all quarters. This increased historicism surfaced notably in revived debates over the meaning of the 1946 Administrative Procedure Act (APA), with originalist and textualist interpretation of the APA squaring off against a more evolving, common law approach to the statute and administrative law writ large. Although important, these analytic disagreements are unable on their own to explain the direction of Roberts Court administrative law. Among other issues, they map the Court's ideological divides imperfectly, with some trends spanning both camps and inconsistencies on both sides.

Taking a further step back, two contrasting frames emerge from the Roberts Court's administrative law opinions from the 2018 Term, building on these analytic tensions. The first is formalist in the extreme, insisting on sharp demarcations among the branches and between law and policy. It is also insistently originalist, condemning contemporary judicial review doctrines as at odds with traditional understandings of the judicial power and the meaning of the APA. With its categorical and uncompromising stance, commitment to limited government and aggressive judicial review, this approach has the potential to radically transform American governance. That seems in part its purpose, as this radical frame is accompanied by deep skepticism about administrative government.

The second frame encompasses Justices with a broader range of views about constitutional structure and administrative government.

Most are functionalist and accepting of constitutional evolution, but at least the Chief Justice (a sometime adherent) is more formalist and originalist. They also disagree on the extent to which administrative government poses a serious problem at all, and if it does whether the concern is the potential for arbitrary agency action or a politically unaccountable bureaucracy. But what unites them is that they are unwilling to radically disrupt existing governance regimes, at least not all at once. Instead, they share a commitment to addressing whatever problems exist with administrative government by gradually fine-tuning doctrine. The central characteristic of this approach is therefore its incremental, common law character. The impact of this incrementalist approach is harder to discern, given both the variation within its ranks and the longer time horizon needed to assess incremental change. It also leaves lower courts greater room to apply administrative law as they see fit, which could yield more pullback in administrative law or its continued preservation, depending on the orientations of lower court judges. Like its radical cousin, this incrementalist frame could result in a substantial pullback in administrative power, but it would have this effect through a more subconstitutional and statutory interpretation guise and over a longer period of time.

In assessing the future impact of Roberts Court administrative law, the most important factor may be this tension between radicalism and incrementalism. Which of these analytic frames will ultimately prevail still remains an open question, but incrementalism was plainly the victor in the 2018 Term's administrative law decisions. That is significant, but should also not obscure that there was unity across the Court in urging greater judicial scrutiny of administrative action. Moreover, despite invocations of the importance of bureaucratic expertise, these decisions share the concerns with unaccountable, aggrandized, and arbitrary administrative power that characterize the Roberts Court's administrative jurisprudence more widely.

That administrative power is expansive is indisputable, as is the possibility that such power can be abused. Yet the Roberts Court's portrayal of administrative government is strikingly incomplete. Notably lacking is reference to the ways that the administrative state operates to constrain power, render it accountable, and advance individual liberty. The lack of such an affirmative account reinforces the sense that the goal of Roberts Court administrative law may be to pull back on government for its own sake, rather than to better achieve constitutional values. Absent a more balanced view of the

administrative state, the Roberts Court is unlikely to develop a coherent approach to administrative law.

Part I of what follows discusses the 2018 Term's administrative law cases, looking in detail at the two decisions addressing judicial review of agency decision making, *Kisor v Wilkie* and *Department of Commerce v New York*. Part II then elucidates several key analytic tensions underlying these decisions and the Roberts Court's administrative law jurisprudence writ large, while Part III assesses what the 2018 Term decisions portend for the future of administrative law.

I. ADMINISTRATIVE LAW IN THE 2018 TERM

Administrative law took center stage in the 2018 Term. A range of cases presented the Court with opportunities to remake doctrine, opportunities that the Court for the most part declined. In some instances, the Court took a minimalist approach, invoking established doctrine to resolve relatively noncontroversial issues and punting the difficult questions back to the lower courts.²⁴ In others, the Court engaged more forthrightly with contentious administrative law issues, albeit ultimately sidestepping dramatic changes.²⁵

Two administrative law decisions deserve special attention: *Kisor v Wilkie* and *Department of Commerce v New York*. Both were prominent cases that centered on the core and much disputed issue of judicial deference to administrative determinations. Both also involved a majority affirming the principle of deference as well as existing deference doctrines, and thus they too are instances in which the Court

²⁴ See *Weyerhaeuser Co. v Fish & Wildlife Service*, 139 S Ct 361, 369, 371–72 (2018) (remanding question of whether property requiring some modification to support a species can count as habitat and whether the Secretary had acted arbitrarily in assessing the costs and benefits of designing property not currently occupied by frog species as habitat); see also *PDR Network v Carlton & Harris Chiropractic*, 139 S Ct 2051, 2055–56 (2019) (remanding for court of appeals to determine whether the FCC order at issue was a legislative or interpretive rule and whether the petitioner had a “prior” and “adequate” opportunity to obtain judicial review of the order).

²⁵ *Gundy v United States*, 139 S Ct 2116 (2019), is a prime example. There, Justice Kagan, id at 2129–30 (Kagan, J) (plurality), and Justice Gorsuch, id at 2133–37, 2143–45 (Gorsuch, J, dissenting), battled directly over the constitutionality of congressional delegations of policy-making authority to administrative agencies. The radical potential of the case lies in the fact that Chief Justice Roberts and Justice Thomas joined Gorsuch's dissent and Justice Alito penned a concurrence indicating his willingness to reconsider nondelegation doctrine, id at 2130 (Alito, J, concurring in the judgment). But these were, in the end, a dissent and a concurrence, and a majority upheld the specific delegation challenged there under the existing intelligible-principle test.

avoided dramatic change. Together, these two cases offer an illuminating window on recurring themes and tensions in the Roberts Court's approach to administrative law.

A. KISOR V WILKIE

Factually, *Kisor* arose from a veteran's repeated efforts to get disability benefits from the Department of Veterans Affairs. Jurisprudentially, the background to *Kisor* lay in a 2011 concurrence by Justice Scalia, where he criticized the practice of giving deference to agency interpretations of their own regulations.²⁶ Known as either *Seminole Rock* deference (after a 1945 decision setting out the doctrine²⁷) or more recently as *Auer* deference (after a 1997 decision reaffirming the doctrine²⁸), this doctrine provides that courts should defer to an agency's interpretation of its own regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation" or there is some other "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."²⁹ Despite having authored *Auer* for a unanimous Court fourteen years earlier, Justice Scalia argued in 2011 that "it seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well" and expressed concern "that deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases."³⁰ A majority of the Court cited Justice Scalia's concerns the next year in *Christopher v SmithKline Beecham Corporation*, when it refused to grant *Auer* deference to the Department of Labor's (DOL) new interpretation of Fair Labor Standards Act regulations, an interpretation DOL had offered in amicus briefs without prior notice to regulated parties.³¹

Justice Scalia reiterated and expanded his criticism of the doctrine in 2013 in *Decker v Northwest Environmental Defense Center*, where he picked up two additional votes (Chief Justice Roberts and Justice Alito)

²⁶ *Talk America Inc. v Michigan Bell Co.*, 564 US 50, 67–68 (2011) (Scalia, J, concurring).

²⁷ *Bowles v Seminole Rock & Sand Co.*, 325 US 410, 413–14 (1945).

²⁸ *Auer v Robbins*, 519 US 452 (1997).

²⁹ *Id.* at 461–62.

³⁰ *Talk America*, 564 US at 68 (Scalia, J, concurring).

³¹ 567 US 142, 159–61 (2012).

for his call to reconsider *Auer* deference.³² And in 2015, in *Perez v Mortgage Bankers Association*, Justice Scalia further argued that *Auer* deference also violated the Administrative Procedure Act.³³ Justice Thomas, now fully on board, wrote an even longer opinion arguing that *Auer* was unconstitutional because it “represents a transfer of judicial power to the Executive Branch, and . . . amounts to an erosion of the judicial obligation to serve as a ‘check’ on the political branches.”³⁴ Justice Alito also signaled his sympathy with these views, describing them as “offer[ing] substantial reasons why the *Seminole Rock* doctrine may be incorrect.”³⁵ But the focus of *Perez* was on invalidating, as “contrary to the clear text of the [APA],” the D.C. Circuit’s requirement that agencies undertake notice-and-comment rulemaking before significantly changing a definitive interpretation of a rule.³⁶ The *Perez* majority was content to relegate the *Auer* issue to a footnote, responding simply that “[e]ven in cases where an agency’s interpretation receives *Auer* deference, . . . it is the court that ultimately decides whether a given regulation means what the agency says. Moreover, *Auer* deference is not an inexorable command in all cases.”³⁷

Perez sparked concerted efforts by business groups and conservative organizations to get a case seeking to overrule *Auer* before the Court.³⁸ In one such case, involving the Department of Education’s interpretation of its rules to require public schools to allow transsexual students to use the gender bathroom of their choice, certiorari was granted but ultimately dismissed when the Trump administration rescinded the interpretation.³⁹ Finally, however, with *Kisor* they scored the legal vehicle of their dreams. *Kisor* involved about as sympathetic a plaintiff as one could find: a former Marine, still suffering from his

³² 568 US 597, 615 (2013) (Scalia, J, concurring in part and dissenting in part).

³³ 135 S Ct 1199, 1211–12 (2015) (Scalia, J, concurring in the judgment).

³⁴ Id at 1217 (Thomas, J, concurring in the judgment).

³⁵ Id at 1210 (Alito, J, concurring in part and concurring in the judgment).

³⁶ Id at 1206.

³⁷ *Perez*, 135 S Ct at 1208 n 4.

³⁸ See Brief Amici Curiae of the Chamber of Commerce of the United States of America, *Garco Construction Inc. v Secretary of the Army*, No 17-225, *2–3 (US filed Sept 11, 2017) (cert denied) (requesting the Court to reconsider *Auer*); Brief Amici Curiae of American Action Forum et al, *United States Aid Inc. v Bible*, No 15-861, *3 (US filed Feb 3, 2016) (cert denied) (calling for the overruling of *Auer*); Brief Amici Curiae of Cato Institute et al, *Gloucester County School Board v GG*, No 16-273, *4 (US filed Sept 27, 2016) (case resolved on other grounds) (taking no position on the merits but urging the Court to overrule *Auer*).

³⁹ *Gloucester County School Board v GG*, 137 S Ct 1239 (2017) (mem).

service in Vietnam, wrongly denied disability benefits when he first applied in 1982 and then subsequently unable to recoup benefits retroactively because the agency deemed the new service records he supplied not “relevant” for purposes of a VA regulation governing when the agency could reconsider an earlier benefits denial.⁴⁰ Moreover, the Court granted certiorari solely on the question of whether *Auer* deference should be overruled.⁴¹ The general consensus from both *Auer*’s critics and its defenders was that the Court was poised to overrule the doctrine.⁴²

But that didn’t happen. Instead, the Court, by a 5–4 vote, declined to overrule *Auer*. Justice Kagan’s majority opinion defending *Auer* deference was joined in full by the three other liberal Justices, but Chief Justice Roberts—who provided the crucial fifth vote—joined only in part. Meanwhile Justice Gorsuch, concurring only in the judgment and joined by the three other conservative Justices, assumed the role of *Auer*’s prime attacker, complaining that “[i]t should have been easy for the Court to say goodbye to *Auer*.”⁴³ Justice Kavanaugh, joined by Justice Alito, also wrote separately.

1. *Justice Kagan and the limits on Auer deference.* At first glance, Justice Kagan’s opinion has a slightly schizophrenic air. She led with *Auer*’s virtues, emphasizing several reasons why it makes sense to presume that Congress, having delegated power to an agency to implement a statute through rulemaking, would also intend to delegate power to resolve ambiguities in those rules. “In part, that is because the agency that promulgated a rule is in the ‘better position to reconstruct’ its original meaning”;⁴⁴ in part, it is because agencies are more expert and politically accountable than courts; and in part, it is

⁴⁰ 38 CFR § 3.156(c)(1).

⁴¹ *Kisor*, 139 S Ct at 2408–09.

⁴² See, for example, Gillian Metzger, *The Puzzling and Troubling Grant in Kisor*, SCOTUSblog (Jan 30, 2019), at <https://www.scotusblog.com/2019/01/symposium-the-puzzling-and-troubling-grant-in-kisor/> (describing the grant in *Kisor* as part of a conservative effort to overrule *Auer* and “troubling for what the case may portend about how the Roberts Court, with its newly cemented conservative majority, views the administrative state”); Kimberly Hermann, *The Supreme Court and the Forgotten “Three Ring Government,”* SCOTUSblog (Jan 29, 2019), at <https://www.scotusblog.com/2019/01/symposium-the-supreme-court-and-the-forgotten-three-ring-government/> (stating that “[t]he Supreme Court granted certiorari to decide whether it should overrule *Auer* and *Seminole Rock*” and that “[a] number of Supreme Court opinions . . . suggest that the court will answer that question with a ‘yes’”).

⁴³ *Kisor*, 139 S Ct at 2425 (Gorsuch, J, concurring in the judgment).

⁴⁴ Id at 2412 (plurality) (quoting *Martin v Occupational Safety & Health Review Commission*, 499 US 144, 152 (1991) (internal additions omitted)).

because deferring to agency interpretations yields greater uniformity and consistency in interpretations than having courts exercising independent judgment.⁴⁵ But her most central point—what Kagan termed “the core theory of *Auer* deference”⁴⁶—was that “sometimes the law runs out and policy-laden choice is what is left over.”⁴⁷ And “Congress . . . is attuned to the comparative advantages of agencies over courts in making such policy judgments.”⁴⁸ Moreover, she emphasized that ambiguity in regulations is inevitable; although at times the result of “careless drafting,” ambiguity often instead “reflects the well-known limits of expression or knowledge.”⁴⁹

Justice Kagan then ended her opinion by rebutting at length the many attacks made against *Auer* deference. One such attack, raised by *Kisor* and by Justice Gorsuch in dissent, was that judicial deference to agency regulatory interpretations violates § 706 of the APA, which provides that “the reviewing court shall decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action.”⁵⁰ Kagan argued that courts comply with § 706 even when they grant *Auer* deference, both because they apply extensive independent review before deciding to defer and because courts are determining the meaning of a rule by deferring when they conclude that Congress delegated authority to interpret the rule to the agency which promulgated it.⁵¹ She further defended *Auer*’s constitutionality by insisting that courts still “retain a firm grip on the interpretive function,” agencies exercise executive power rather than judicial power when they interpret, and the combination of legislative, judicial, and executive functions in agencies had long been upheld.⁵² She also dismissed the claim that *Auer* deference creates poor agency incentives “to issue vague and open-ended regulations,” maintaining that it

⁴⁵ Id at 2410–14 (Kagan, J) (plurality).

⁴⁶ Id at 2415 (Kagan, J) (plurality).

⁴⁷ *Kisor*, 239 S Ct at 2415 (Kagan, J) (plurality).

⁴⁸ Id at 2413 (Kagan, J) (plurality).

⁴⁹ Id at 2410 (Kagan, J) (plurality).

⁵⁰ 5 USC § 706.

⁵¹ *Kisor*, 139 S Ct at 2419–20 (Kagan, J) (plurality). She further insisted that deference does not give an interpretive rule the binding effect that the APA limits to legislative rules for which § 553 demands notice-and-comment procedures, emphasizing again the independent review that courts undertake before deciding to defer and the restriction of *Auer* deference to “an agency’s authoritative and considered judgments” served § 553 values. Id at 2420–21 (Kagan, J) (plurality).

⁵² Id at 2421–22 (Kagan, J) (plurality).

“does not survive an encounter with reality.”⁵³ Finally, Kagan argued strongly for retaining *Auer* deference on stare decisis grounds.⁵⁴

In between these powerful defenses of *Auer* deference, however, Justice Kagan elaborated a multitude of limits that significantly constrain when *Auer* deference applies. First, *Auer* deference is only triggered in cases of “genuin[e] ambigu[ity],” which means not just surface ambiguity but the type of ambiguity that remains after a court has rigorously applied the traditional tools of statutory interpretation. In addition, the agency must offer a reasonable interpretation, and the interpretation must be one that represents the agency’s “authoritative” view, “implicates its substantive expertise,” reflects its “fair and considered judgment,” and does not “create unfair surprise to regulated parties.”⁵⁵ This long list closely parallels the “significant limits” on *Auer* deference that the Solicitor General advocated in his *Kisor* brief.⁵⁶ And it led Justice Gorsuch, in concurring in the judgment, to chastise the majority for retaining *Auer* deference only in a “maimed,” “enfeebled,” and “zombified” form.⁵⁷ That may go too far, but Chief Justice Roberts and Justice Kavanaugh have a point in claiming that the distance between Justice Kagan’s opinion retaining *Auer* and Justice Gorsuch’s dispensing with it “is not as great as it may initially appear.”⁵⁸ Certainly that was true in the case at hand, for Kagan ultimately concluded that the lower court “jumped the gun in declaring the [VA’s] regulation ambiguous” and suggested that the nonprecedential agency interpretation at issue—one of 80,000 issued by 100 judges sitting singly each year—might well not be the type of considered, authoritative interpretation needed for *Auer* deference to apply.

A reader is left wondering whether *Auer* deference is really as beneficial as Justice Kagan makes it out to be—and if it is, why on earth the majority doesn’t let it have broader sway. One obvious

⁵³ Id at 2421 (Kagan, J) (plurality) (noting not only the lack of empirical evidence to support this claim, but also that agencies have all sorts of practical incentives to be clear).

⁵⁴ Id at 2422 (Kagan, J) (plurality).

⁵⁵ *Kisor*, 139 S Ct at 2414–18 (internal quotations and citations omitted).

⁵⁶ Brief for the Respondent in Opposition, *Kisor v Wilkie*, No 18-15, *12 (US filed Feb 25, 2019).

⁵⁷ *Kisor*, 139 S Ct at 2425 (Gorsuch, J, concurring in the judgment).

⁵⁸ Id at 2424 (Roberts, CJ, concurring in part); see also id at 2448 (Kavanaugh, J, concurring in the judgment).

explanation for this tension in Justice Kagan's opinion is Chief Justice Roberts. He concurred only in the parts of Kagan's opinion setting out *Auer*'s limits, arguing that *Auer* deference should be retained on stare decisis grounds, and reversing for reconsideration of whether *Auer* deference should be applied here. Put differently, only four Justices were willing to state that *Auer* deference yields benefits or conforms to Congress's expectations and the APA. Why Roberts was unwilling to join more of Kagan's opinion is difficult to explain, given that he had previously argued that the courts' law-declaring role under the Constitution and the APA can be compatible with deference to agency legal interpretations.⁵⁹ But in light of his stance, the limits *Kisor* imposed on *Auer* deference appear to be the necessary price to have *Auer* retained by a majority at all.

Although the need to secure Roberts's vote no doubt played an important role in shaping the majority opinion, it would be a mistake to view Kagan's cabining of *Auer* as simply strategic. To begin with, Kagan herself offered a different account, arguing that the limits are prerequisites for securing the benefits of *Auer* deference and not impediments to that goal. As she put it, the presumption that Congress would want a court to defer to an agency's interpretation would not be justified absent ambiguity or "when a court concludes that an interpretation does not reflect an agency's authoritative, expertise-based, fair or considered judgment."⁶⁰ In addition, Kagan contended that these limits were ones that the Court had already recognized in its prior *Auer* jurisprudence. Moreover, as a legal academic Justice Kagan had argued strongly in favor of limiting deference to interpretations meaningfully reviewed and personally offered by the agency official to whom Congress had delegated authority over the relevant administrative action.⁶¹ Kagan wrote there about *Chevron* deference, but an obvious linkage exists to her argument here that *Auer* deference should be limited to "authoritative" and "considered" agency regulatory interpretations. Indeed, in many ways *Kisor* represents the importation of *Chevron/Mead* analysis into the *Auer* context: The *Kisor* limits add a

⁵⁹ See *City of Arlington*, 569 US at 316–17 (Roberts, CJ, dissenting) (arguing that deference is compatible with the court's law-declaring role provided Congress had delegated interpretive authority to agencies).

⁶⁰ *Kisor*, 139 S Ct at 2414 (Kagan, J) (plurality) (internal additions and citations omitted).

⁶¹ David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Supreme Court Review 201, 235, 238–39 (2001).

Mead Step Zero, identifying certain contexts in which *Auer* deference is not even potentially available, and also a rigorous *Chevron* Step One inquiry, in which a court must determine if sufficient ambiguity exists to trigger *Auer* deference.⁶²

These defenses of *Kisor*'s limits are only partially successful. It is true that the Court already had "cabined *Auer*'s scope in varied and critical ways,"⁶³ but the Court certainly expanded on these limits in *Kisor*. More importantly, Kagan papered over the evident tensions between the limits she articulated and the justifications she offered for *Auer* deference. Take, for example, Kagan's argument that agencies are more expert and politically accountable than courts, and thus Congress would likely consider agencies better positioned to make the policy judgments that resolving regulatory ambiguity requires.⁶⁴ Surely this institutional competency argument for deference also extends to instances in which agencies change their interpretations, even at the cost of unfair surprise, provided agencies provide a reasoned explanation for the change. Yet Kagan rejected deference in such circumstances. And while a good case can be made that Congress would not intend deference when the text of a rule is clear, it is hardly obvious that Congress would want courts to work hard to resolve seeming ambiguities on their own, rather than to defer to agencies once some ambiguity becomes apparent. After all, agencies' greater expertise and knowledge of the rule likely makes them better positioned to determine when ambiguity actually exists, as well as to resolve that ambiguity once identified. Kagan also downplayed the costs that *Auer*'s limits may carry, in particular the way that a more case-by-case assessment of relevant factors increases uncertainty for regulated parties and agencies alike. Gorsuch underscored this point,⁶⁵ and it is

⁶² *Kisor*, 139 S Ct at 2414–18 (listing limits and noting the parallel to *Chevron/Mead*); see Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin L Rev 807, 812–19 (2002) (outlining the *Chevron/Mead* framework and describing the multiple factors *Mead* identified as relevant in determining if deference applies); see also Kristin E. Hickman and Mark R. Thomson, *The Chevronization of Auer*, 103 Minn L Rev Headnotes 103, 107 (2019) (arguing, pre-*Kisor*, that "[a] multi-step *Auer* doctrine is emerging . . . that mirrors the several steps and complexity of . . . *Chevron* deference").

⁶³ *Kisor*, 139 S Ct at 2418. Along with other administrative law professors, I made this point in a brief to the Court in *Kisor*. See Brief of Administrative Law Scholars in Support of Affirmance, *Kisor v Wilkie*, No 18-15, *11–13 (US filed Mar 4, 2019).

⁶⁴ *Kisor*, 139 S Ct at 2413 (Kagan, J) (plurality).

⁶⁵ *Id* at 2445 (Gorsuch, J, concurring in the judgment).

one that Kagan had previously acknowledged,⁶⁶ yet she largely ignored it here.

This is not to say that the limits Justice Kagan imposed on *Auer* deference are indefensible, but rather that their underlying rationale does not and cannot lie solely in congressional intent. Instead, these limits stem from normative and functional concerns—in particular, fairness to regulated parties, the need for a check on agency power, ensuring expert decision making, and encouraging political accountability. In her past life as an academic, Kagan was open about how deference doctrines “arise from and reflect candid policy judgments . . . about the allocation of interpretive authority.”⁶⁷ But in *Kisor* she avoided forthright engagement with the conflicting concerns at work in constructing deference doctrines. Take again the example of changed agency interpretations: Such interpretations often reflect transformations in administrative policy stemming from change in political control of the executive branch, yet they risk undercutting legitimate reliance. In *Kisor*, Justice Kagan plainly prioritized reliance over electoral accountability, but we are left to wonder why.⁶⁸

2. *Justice Gorsuch’s contrasting vision.* Justice Gorsuch provided a very different take on *Auer* deference, recounting in detail what had become the standard litany of *Auer*’s sins. He maintained that *Auer* deference was a historical aberration plainly at odds with the APA’s judicial review and procedural requirements. In his view, § 706’s “unqualified command requires the court to determine legal questions—including questions about a regulation’s meaning—by its own lights.” Hence, a “court that, in deference to an agency, adopts something other than the best reading of a regulation . . . is abdicating the duty Congress assigned to it.”⁶⁹ And *Auer* “effectively nullifies the distinction” Congress drew between notice-and-comment rules that carry the force of law and interpretive rules that do not.⁷⁰ In the face

⁶⁶ Barron and Kagan, 2001 Supreme Court Review at 225–27 (cited in note 61) (emphasizing burdens that a case-by-case approach to *Chevron* deference impose on agencies).

⁶⁷ *Id.* at 203.

⁶⁸ One possible reason is that agencies can still achieve policy change; they simply must change the underlying legislative rule through notice-and-comment rulemaking to do so. Justice Gorsuch offered this argument. See *Kisor*, 139 S Ct at 2442 (Gorsuch, J, concurring in the judgment). But Kagan rejected such a procedural requirement on the ground (also articulated in *Perez*) that the APA does not impose notice-and-comment rulemaking requirements on interpretive rules. *Id.* at 2420 (Kagan, J) (plurality).

⁶⁹ *Id.* at 2432 (Gorsuch, J, concurring in the judgment).

⁷⁰ *Id.* at 2434 (Gorsuch, J, concurring in the judgment).

of such “clear statutory commands,” he argued, it made no sense to presume that Congress “really, secretly, wanted courts to treat agency interpretations as binding.”⁷¹ He argued equally forcefully that *Auer* violates Article III and the separation of powers “by coopt[ing] the judicial power,” and uniting “the powers of making, enforcing and interpreting the laws . . . in the same hands,” thereby compromising “a cornerstone of the rule of law.”⁷² Underlying these statutory and constitutional arguments was Gorsuch’s rejection of Kagan’s equation of law and policy. Such an equation “contradicts a basic premise of our legal order: that we are governed not by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable.”⁷³ Left out of this portrayal is the possibility that the alternative to agency deference might actually be governance by the shifting whims of life-tenured federal judges, as they struggle to give meaning to complicated and indeterminate laws.

A particularly notable contrast lies in the two opinions’ views of agencies. For Justice Kagan, agencies are expert bodies assigned public responsibilities by Congress and inevitably confronted with regulatory ambiguity.⁷⁴ For Justice Gorsuch, they are biased actors who are no different than self-interested private parties and will exploit ambiguity to their own advantage.⁷⁵ For Kagan, agencies’ political aspect is a positive feature, helping to ensure that the administrative state remains accountable; for Gorsuch, it means that *Auer* deference threatens the constitutional structure by elevating “raw political executive power” over the Constitution’s promise of an independent and impartial judiciary.⁷⁶ These divergent views suggest very different understandings of the administrative state. Implicit in Kagan’s opinion is a positive account of administrative government and the benefits of expert and accountable regulation; the image she repeatedly referred to was of the FDA and its expertise when it comes

⁷¹ *Id.* at 2435 (Gorsuch, J, concurring in the judgment).

⁷² *Kisor*, 139 S Ct at 2439–40 (Gorsuch, J, concurring in the judgment) (emphasis omitted).

⁷³ *Id.*

⁷⁴ *Id.* at 2410, 2413, 2421 (Kagan, J) (plurality).

⁷⁵ Compare *id.* at 2425–26; see also *id.* 2442–43 (Gorsuch, J, concurring in the judgment) (noting agency expertise as a basis for taking agency views seriously, but not for deference because agencies may be wrong).

⁷⁶ Compare *Kisor*, 139 S Ct at 2413 (Kagan, J) (plurality), with *id.* at 2439–40 (Gorsuch, J, concurring in the judgment).

to identifying active moieties.⁷⁷ Justice Gorsuch explicitly articulates a darker vision, one under which the “explosive growth of the administrative state [and regulations] over the last half-century” means that the “mischief” and “cost” of *Auer* deference have “increased dramatically.”⁷⁸

In addition, where Justice Kagan’s defense of *Auer* is qualified and cabined, Justice Gorsuch’s attack on the doctrine is uncompromising and absolute. Yet at times Gorsuch’s arguments seem overdone. From his opinion it is hard to understand how the Court could ever have been so benighted to adopt *Auer* deference in the first place, let alone adhere to it for decades and preserve it for the future. Or take Gorsuch’s attack on “the majority’s attempt to remodel *Auer*’s rule into a multi-step, multifactor inquiry [that] guarantees more uncertainty and much litigation.”⁷⁹ Although the uncertainty generated by *Kisor* is a valid point, Gorsuch insisted in the same breath that the better approach would be to apply the notoriously fuzzy doctrine of *Skidmore* deference—under which the weight given an agency’s interpretation of a regulation would depend on the factors that give it “power to persuade.”⁸⁰ On a clarity and certainty scale, *Kisor*’s domesticated version of *Auer* and *Skidmore* deference are hardly worlds apart.

Ultimately, Gorsuch insisted that *Kisor*’s affirmance of *Auer* is “more a stay of execution than a pardon,” all but inviting future challenges until the Court “find[s] the nerve . . . [to] inter *Auer* at last.”⁸¹ By thus vowing continued resistance, Gorsuch may have done more to guarantee ongoing uncertainty and dispute than the majority’s new limits did. And with the disruptive stakes of efforts to

⁷⁷ Id at 2410, 2413 (plurality). Under an FDA regulation, pharmaceutical companies receive exclusive rights to drug products if they contain “no active moiety that has been approved by FDA in any other” new drug application. 21 CFR § 314.108(a) (2010). Kagan emphasized the difficult questions that interpreting this regulation entails, such as whether “[a company has] created a new ‘active moiety’ by joining a previously approved moiety to lysine through a non-ester covalent bond.” *Kisor*, 139 S Ct at 2410 (Kagan, J) (plurality). Speaking with conviction, she added that “[i]f you are a judge, you probably have no idea of what the FDA’s rule means.” Id at 2413 (Kagan, J) (plurality).

⁷⁸ *Kisor*, 139 S Ct at 2446–47 (Gorsuch, J, concurring in the judgment).

⁷⁹ Id at 2447 (Gorsuch, J, concurring in the judgment).

⁸⁰ Id at 2447–48 (Gorsuch, J, concurring in the judgment); *Skidmore v Swift & Co.*, 323 US 134, 140 (1944) (listing relevant factors for extending deference); Richard W. Murphy, *A New Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 Admin L Rev 1, 41 (2004) (describing the “fuzzy” nature of *Skidmore* analysis).

⁸¹ *Kisor*, 139 S Ct at 2425–26 (Gorsuch, J, concurring in the judgment).

overturn *Auer* thus clarified, it is not surprising that stare decisis became the decisive issue in the case.

3. *Stare decisis, Auer deference, and Chevron.* *Kisor* was one of many cases in the 2018 Term in which stare decisis emerged as a central point of contention among the Justices.⁸² What made *Kisor* unusual is that stare decisis concerns carried the day here—and even more, did so over the contention that stare decisis was categorically inapplicable to deference doctrines.

Both Justice Kagan and Justice Gorsuch offered standard stare decisis arguments. Kagan’s main stare decisis claim was that overruling *Auer* deference would cause great disruption because the doctrine represents a “long line of precedents . . . going back 75 years or more” and “pervades the whole corpus of administrative law. . . . It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.”⁸³ Kagan’s argument on this score was helped by the fact that both *Kisor*’s attorney and the Solicitor General had acknowledged that overturning *Auer* would open up many precedents for reconsideration.⁸⁴ She also emphasized that Congress was free to overrule *Auer* but had not done so, suggesting that *Auer* deference should enjoy the same high level of stare decisis accorded statutory constructions.⁸⁵ Gorsuch, for his part, drew on a litany of established grounds for rejecting stare decisis, insisting that *Auer* deference was accidental, never justified, unworkable, at odds with norms of legal interpretation, and not a doctrine on which private parties had relied.⁸⁶

But their main bone of contention centered on how *Auer* deference should be viewed. Justice Kagan framed *Auer* deference as a substantive doctrine and inseparable (at least categorically) from the results reached in specific cases where it is applied.⁸⁷ Justice Gorsuch did not seriously dispute the disruptive impact of overruling *Auer* if

⁸² Stare decisis to Supreme Court precedent was discussed in five cases in the 2018 Term, including *Kisor*. See *Knick v Township of Scott*, 139 S Ct 2162 (2019); *Franchise Tax Board v Hyatt*, 139 S Ct 148 (2019); *Gamble v United States*, 139 S Ct 1960 (2019); *Stokeling v United States*, 139 S Ct 544 (2019).

⁸³ *Kisor*, 139 S Ct at 2422.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2445–47 (Gorsuch, J, concurring in the judgment).

⁸⁷ *Id.* at 2410–14 (Kagan, J) (plurality).

viewed in substantive terms. But he rejected this framing, arguing that the better analogy is to see *Auer* as an interpretive methodology, like the “proper weight to afford to historical practice in constitutional cases or legislative history in statutory cases,” which the Court does not regard as “binding future Justices with the full force of horizontal *stare decisis*.”⁸⁸ Gorsuch based this claim on the fact that *Auer* does not “purport to settle the meaning of a single statute or resolve a particular case” but instead claims “to prescribe an interpretive methodology governing every future dispute.”⁸⁹

Neither Justice Kagan’s nor Justice Gorsuch’s arguments on this front are fully satisfying. As Randy Kozel has maintained, deference doctrines fall somewhere in between decisions addressing specific substantive interpretations and interpretive methodologies.⁹⁰ It is analytically possible, if smacking of *ipse dixit*, to overrule *Auer* while still according *stare decisis* effect to specific decisions reached in reliance on *Auer*. In addition, Gorsuch has a point in arguing that *Auer*’s breadth of application means that applying *stare decisis* here has a greater constraining effect on judges than granting *stare decisis* to specific interpretations.⁹¹ On the other hand, Gorsuch’s further suggestion that congressional efforts to tell courts how to review agency interpretations may unconstitutionally intrude on judicial independence is a more radical proposition than he acknowledged and unsupported by current case law.⁹² It would call much of § 706 of the APA into question, for example, as that provision consists entirely of congressional instructions to courts on how to review agency action.⁹³

⁸⁸ Id at 2444 (Gorsuch, J, concurring in the judgment). Whether interpretive methodologies are as optional as Gorsuch claims is debatable; Gorsuch himself suggests that one reason to get rid of *Auer* is that the doctrine is at odds with currently governing norms of interpretation that give little weight to congressional intent. Id at 2442 (Gorsuch, J, concurring in the judgment). Whether they should be optional is debatable as well. Compare Abbe Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L J 1750 (2010), with Evan J. Criddle and Glen Staszewski, *Against Methodological Stare Decisis*, 102 Georgetown L J 1573 (2014).

⁸⁹ *Kisor*, 139 S Ct at 2444 (Gorsuch, J, concurring in the judgment).

⁹⁰ Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex L Rev 1125, 1128 (2019).

⁹¹ *Kisor*, 139 S Ct at 2444 (Gorsuch, J, concurring in the judgment) (claiming that *stare decisis* in the *Auer* context would dictate “the interpretive inferences that future Justices must draw in construing statutes and regulations that the Court has never engaged”).

⁹² Id at 2439–40 (Gorsuch, J, concurring in the judgment).

⁹³ See 5 USC § 706; Merrill, 54 Admin L Rev at 823 (cited in note 62) (explaining that the Court’s precedents in *Christensen v Harris County*, 529 US 576 (2000), and *United States v*

On the whole, Kagan's identification of *Auer* as a substantive doctrine is more persuasive than Gorsuch's effort to analogize it to a method of interpretation. To begin with, Gorsuch's effort to equate *Auer* with an interpretive methodology is hard to square with the Court's practice of treating deference doctrines as mandatory. Prior to the current attack on *Auer* and *Chevron*, the Court did not debate whether or not those frameworks governed its review of agency regulatory and statutory interpretations; instead, the Justices' disagreements centered on questions internal to the frameworks, such as whether the relevant regulatory or statutory texts were ambiguous.⁹⁴ And while vertical stare decisis raises issues about the Supreme Court's superintendence of lower federal courts that are absent from horizontal stare decisis, it merits note that the Court does not portray deference doctrines as optional for lower courts to follow. To the contrary, the Court has reversed lower courts for mistakes in their application of these doctrines.⁹⁵ Of course, that an approach represents the Court's current practice does not immunize it from criticism and change, but current practice should carry particular weight in stare decisis assessments.

In addition, Gorsuch's suggestion that transsubstantive doctrines should not trigger stare decisis would have a dramatic impact on administrative law. Administrative law is transsubstantive to its core. Although many of its transsubstantive doctrines are ultimately rooted in the APA or another statute, they frequently represent substantial judicial development from that statutory basis.⁹⁶ As a result, rejecting stare decisis for transsubstantive doctrines could open up the field to fundamental transformation. That links Gorsuch's rejection of stare

Mead, 533 US 218 (2001), "make it clear that Congress has the authority to turn *Chevron* deference on and off"). For an argument that Congress lacks power to enact mandatory rules of statutory interpretation, see Larry Alexander and Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 Const Comm 97, 99–100 (2003).

⁹⁴ See, for example, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 US 218 (1994), where the majority and dissent disagreed over whether the phrase "modify any requirement" was sufficiently ambiguous to warrant *Chevron* deference.

⁹⁵ *Decker*, 568 US 597 (2013) (reversing the Ninth Circuit for failing to apply *Auer* deference to an agency interpretation of a rule); *Entergy Corp. v. Riverkeeper Inc.*, 556 US 208 (2009) (reversing the Second Circuit for failing to grant *Chevron* deference to the EPA's choice to use cost-benefit analysis).

⁹⁶ Gillian E. Metzger, *Embracing Administrative Common Law*, 80 Geo Wash L Rev 1293, 1295–97 (2012).

decisis to the rest of his opinion and its broad invocation of constitutional first principles to oppose *Auer* deference. It also supports Kagan's insistence that rejection of *Auer* deference would be profoundly disruptive; the arguments for overturning *Auer* are not easily cabined to the context of agency regulatory interpretations but would extend to other deference contexts and other instances in which agencies combine legislative, executive, and adjudicatory functions.

The potential implications of *Kisor* for other administrative law doctrines was driven home by Chief Justice Roberts and Justice Kavanaugh, both of whom insisted in their concurrences that the decision in *Kisor* did not resolve the propriety of *Chevron* deference to agency statutory interpretations.⁹⁷ These statements are puzzling. Stare decisis should be at least as much of a concern for *Chevron* deference, if not more so, given *Chevron's* greater centrality to administrative law.⁹⁸ Moreover, it is hard to see why the formalist argument that granting agencies interpretive power unconstitutionally intrudes on the judicial power would be any different between *Auer* and *Chevron*. Indeed, Justice Thomas and then-Judge Gorsuch have penned opinions castigating *Chevron* deference in exactly the same terms.⁹⁹ Given that this argument failed to obtain majority support in *Kisor*, logically it should also fail to get majority support in a case addressing *Chevron*. Further reinforcing the parallels between the two deference doctrines, the Court already has curtailed *Chevron* deference in ways similar to the limits imposed on *Auer* deference in *Kisor*, such as requiring more evidence that an interpretation is authorized and more judicial probing before concluding that ambiguity exists.¹⁰⁰

Perhaps Roberts and Kavanaugh simply did not want to be read as answering the question of *Chevron's* status in a case addressing *Auer*,

⁹⁷ *Kisor*, 139 S Ct at 2425 (Roberts, CJ, concurring in part); *id* at 2449 (Kavanaugh, J, concurring in the judgment).

⁹⁸ Indeed, in *Perez*, 135 S Ct at 1212–13 (Scalia, J, concurring in the judgment). Justice Scalia argued that stare decisis counted more strongly for retaining *Chevron* deference than *Auer* deference.

⁹⁹ See *Michigan v EPA*, 135 S Ct 2699, 1712–14 (2015) (Thomas, J, concurring); *Gutierrez-Brizuela v Lynch*, 834 F3d 1142, 1149–52 (10th Cir 2016) (Gorsuch, J, concurring).

¹⁰⁰ See, for example, *Mead*, 533 US at 226–27 (emphasizing limits on *Chevron's* applicability, in particular that “Congress [have] delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”) and *Wisconsin Central Ltd. v United States*, 138 S Ct 2067, 2074 (2018) (concluding that the statutory text in question was “clear enough . . . , leaving no ambiguity for the agency to fill”). Indeed, Justice Kagan noted this similarity. See *Kisor*, 139 S Ct at 2414 (Kagan, J) (plurality) (citing *Mead*, 533 US at 229–31).

but were not signaling they would reach a different result. Alternatively, they may have wanted to preserve room to pull back further on *Chevron's* across-the-board presumption of implied congressional delegation of authority to agencies to fill gaps and resolve ambiguities in the statutes they administer. This would fit their prior jurisprudence; in particular, Roberts has argued that questions addressing jurisdiction or matters of “deep economic and political significance” should not receive *Chevron* deference, and Kavanaugh has rejected *Chevron* deference for agency authority to issue major rules.¹⁰¹ If so, they might continue to support *Chevron* deference to agency interpretations when expressly authorized by Congress or when they view statutory terms as plainly granting deference. Another possible reason for their statements is that, unlike *Auer*, *Chevron* deference grants an agency interpretive authority over Congress’s handiwork and not the agency’s own regulations. Although Justice Scalia viewed this feature as making *Auer* deference more suspect because it allowed agencies to self-delegate power,¹⁰² one could argue that the opposite is true. On this view, *Chevron* is the greater threat to the constitutional order because it elevates agencies over Congress and in the process removes statutes as critical external checks on agencies’ claims to power. If adopted, this argument would most strongly call *Chevron* deference into question, but for that reason it is hardest to square with both Justices’ willingness to grant *Chevron* deference in the past.

B. DEPARTMENT OF COMMERCE V NEW YORK

Judicial deference to agency decision making was also at the heart of *Department of Commerce*. But that was where the parallels between these two cases ended. *Department of Commerce* lacked a Supreme Court jurisprudential lead-up akin to that in *Kisor*. Similarly lacking were calls for a fundamental reconsideration of existing doctrine; to the contrary, the different opinions in *Department of Commerce* sought to outdo each other with their adherence to governing frameworks.

¹⁰¹ See *King v Burwell*, 135 S Ct 2480, 2489 (2015) (refusing to apply *Chevron* deference to a question of deep economic and political significance absent express indication from Congress that it wanted the agency to have such interpretive authority); *United States Telecom Association v FCC*, 855 F3d 381, 417–18 (DC Cir 2017) (Kavanaugh, J, dissenting from denial of rehearing en banc) (arguing that there must be clear congressional authorization for major agency rules).

¹⁰² See *Decker*, 568 US at 619–21 (Scalia, J, concurring and dissenting in part).

Most striking, however, was the changed position of the different Justices, with the Justices who urged overturning *Auer* here arguing for substantial deference to agency policy choices, and those who defended *Auer* here advocating subjecting agency decision making to greater scrutiny.

At issue in *Department of Commerce* was Commerce Secretary Wilbur Ross's decision in March 2018 to add a question about citizenship to the 2020 census. Doing so went against the strong advice of the Census Bureau in the Department of Commerce. Ever since 1950, the bureau has argued against adding a citizenship question to the census form that went to most households, out of concern that the question would lower response rates and generate false claims of citizenship that would undercut the census's accuracy. Moreover, bureau officials maintained that better citizenship data were available from other administrative records, including the American Community Survey, which the bureau sends every year to a small percentage of U.S. households on a rotating basis.¹⁰³ Ross ultimately opted for an approach that would include a citizenship question on the census as well as draw on administrative records. In explaining his decision to add the question—and in testifying to Congress—Ross repeatedly emphasized that the Department of Justice (DOJ) needed census-block citizenship data to enforce the Voting Rights Act and had submitted a letter asking for the question's inclusion.¹⁰⁴

Litigation immediately followed, with two of the lawsuits being consolidated in federal district court in New York City. The case was unusual from the start. It quickly became evident that the initial administrative record submitted to the court was, to put it kindly, sparse. On its own initiative, the government supplemented the record with a brief memo from Ross indicating not only that Ross had sought to include a citizenship question well before DOJ's request, but also that DOJ had only made the request at Commerce's prodding. These revelations caused the district court to order the government to complete the administrative record, which led to over 12,000 pages of new

¹⁰³ *Department of Commerce*, 139 S Ct at 2562; Joint Appendix Volume I, *Department of Commerce v New York*, No 18-966, *104-06 (US filed Mar 6, 2019) (Memo of John M. Abowd); Brief of Former Census Bureau Directors, *Department of Commerce v New York*, No 18-966, *2-4 (US filed Apr 1, 2019).

¹⁰⁴ Joint Appendix Volume III, *Department of Commerce v New York*, No 18-966, *956 (US filed Apr 1, 2019) (Ross testimony to Congress); Joint Appendix Volume I, *Department of Commerce v New York*, No 18-966, *546 (US filed Mar 6, 2019).

material being added.¹⁰⁵ In addition, the district court granted the plaintiffs' motion for extra-record discovery and depositions, including of Secretary Ross, after concluding that the new record material strongly suggested that the plaintiffs would find evidence showing that Ross acted in bad faith.¹⁰⁶ These discovery disputes were the basis for the case's first appearance at the Supreme Court in October 2018, where the Court stayed Ross's deposition but let the rest of the extra-record development go forward, over a dissent by Justices Gorsuch and Thomas.¹⁰⁷ The district court proceeded to issue a mammoth 178-page opinion just three months later, enjoining addition of the citizenship question on the grounds that Secretary Ross's decision violated the Census Act and was arbitrary and capricious, and further that the Secretary's explanation for why he had added the question was pretextual.¹⁰⁸ The Supreme Court immediately jumped back in, taking the uncommon step of granting the government's request for certiorari before the court of appeals heard the case and making the case a late addition to the 2018 Term.¹⁰⁹

Much of this speed and early Supreme Court involvement can be put down to fast-approaching deadlines for printing the census, but also reflected the case's high-profile status and clear political ramifications. The states and localities challenging the decision to add a citizenship question were blue jurisdictions with substantial noncitizen populations that stood to lose representation and funds from undercounting minorities. Those supporting the administration were red jurisdictions that would gain from an undercount elsewhere.¹¹⁰ In addition, adding the citizenship question echoed strongly with the Trump administration's harsh stance on unlawful immigration and

¹⁰⁵ *Department of Commerce*, 139 S Ct at 2564; Appendix to Petition for Writ of Certiorari, *Department of Commerce v New York*, No 18-966, *546a (US filed Jan 25, 2019).

¹⁰⁶ See *New York v Department of Commerce*, 333 F Supp 3d 282, 285–86 (SDNY 2018); *New York v Department of Commerce*, 2018 WL 5260467 *2 (SDNY 2018).

¹⁰⁷ *In re Department of Commerce*, 139 S Ct 16 (Oct 22, 2018).

¹⁰⁸ *New York v Department of Commerce*, 351 F Supp 3d 502, 515–16 (SDNY 2019).

¹⁰⁹ For a discussion of the Solicitor General's recent efforts to get cases to the Supreme Court extremely quickly, including in *Department of Commerce*, see Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv L Rev 123 (2019).

¹¹⁰ Brief Amici Curiae of the State of California, *Department of Commerce v New York*, No 18-966, *2–3 (US filed Apr 1, 2019) (arguing for the Court to uphold the district court decision); Brief Amici Curiae of Oklahoma et al, *Department of Commerce v New York*, No 18-966, *1–4 (US filed Mar 6, 2019) (urging the Court to reverse the district court decision).

with Republican efforts to draw electoral districts based on citizenship voting age population—a move that a leading Republican redistricting strategist described as “advantageous to Republicans and Non-Hispanic Whites” and argued “would clearly be a disadvantage for the Democrats.”¹¹¹ Fittingly, the drama surrounding the case reached an even greater pitch once it was revealed after oral argument that this same strategist had urged Ross to add the question and ghostwritten the DOJ letter. That the strategist’s involvement emerged only because his estranged daughter happened to find the documents in his files after his death was just icing on the cake.¹¹²

1. *Chief Justice Roberts’s split opinion.* Chief Justice Roberts was again the pivotal vote in the case but here wrote the majority opinion. Like Kagan’s opinion in *Kisor*, Roberts’s majority opinion has a split personality. Roberts was joined by four Justices—Thomas, Alito, Gorsuch, and Kavanaugh—in concluding that Secretary Ross’s decision to add the question was not arbitrary and capricious and did not violate the Census Act. And he was also joined by four Justices, but a different four—Ginsburg, Breyer, Sotomayor, and Kagan—in concluding that the decision nonetheless had to be remanded because the explanation Ross provided was pretextual.¹¹³

The split character of Roberts’s opinion shows even more in his tone and reasoning. Most of the opinion treated Ross’s decision as a perfectly reasonable and historically grounded policy choice. Roberts began with a brief description of the role and history of the census, emphasizing that “[e]very census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth.”¹¹⁴ Roberts proceeded to give Secretary Ross every possible benefit of the doubt and then some. For example,

¹¹¹ Letter of Respondents New York Immigration Coalition et al Notifying Court of New Proceedings in the District Court, *Department of Commerce v New York*, No 18-966 (US filed May 30, 2019); The Use of Citizen Voting Age Population in Redistricting, *New York v Department of Commerce*, No 1:18-cv-02921-JMF, Exhibit D *6, 9 (SDNY filed May 30, 2019) (Hofeller Letter), https://www.commoncause.org/wp-content/uploads/2019/05/2019-05-30-Letter-Motion-dckt-587_1.pdf. See also Justin Levitt, *Citizenship and the Census*, 119 Colum L Rev 1355 (2019).

¹¹² Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, NY Times (May 30, 2019), at <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html>. See also *La Union Del Pueblo Entero v Ross*, 771 F Appx 323 (4th Cir 2019) (remanding to the district court for further proceedings in light of the Hofeller Letter).

¹¹³ *Department of Commerce*, 139 S Ct at 2555.

¹¹⁴ *Id* at 2561.

where the district court and Justice Breyer's partial dissent criticized Ross for failing to take into account the Census Bureau's assessment that adding a citizenship question would harm the accuracy of the census, Roberts underscored uncertainties in the bureau's analysis. Roberts even went so far as to suggest that it was "inconclusive" whether adding the question would depress census response rates at all, despite the Census Bureau's own conclusions to the contrary. This framing allowed Roberts to portray Ross's decision as a paradigmatic example of the type of "value-laden decision making and the weighing of incommensurables under conditions of uncertainty" to which courts owe deference.¹¹⁵ Not only was "the choice between reasonable policy alternatives in the face of uncertainty . . . the Secretary's to make," but also Ross's choice was "reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census."¹¹⁶

Then in the final Part V of his opinion, Roberts dramatically changed his tune. Here Roberts took the evidentiary record at face value and rejected the government's entreaties to exclude the extra-record material, concluding that ultimately the district court was justified in adding it. Far from being a reasonable decision maker in the face of uncertainty, Ross was now portrayed as having a closed mind from the get-go: "Th[e] evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office . . . [and] instructed his staff to make it happen."¹¹⁷ Worse, that evidence showed that Ross's "VRA enforcement rationale—the sole stated reason [for adding the citizenship question]—seems to have been contrived,"¹¹⁸ was "incongruent with . . . the record,"¹¹⁹ and simply "a distraction."¹²⁰ Or, put with less finesse, the record showed that Ross had lied. By definition, that meant he had acted unreasonably, for "[a]ccepting contrived reasons would defeat the purpose" of courts requiring agencies to provide reasoned explanations for their actions.¹²¹

¹¹⁵ Id at 2571.

¹¹⁶ Id.

¹¹⁷ *Department of Commerce*, 139 S Ct at 2574.

¹¹⁸ Id at 2575.

¹¹⁹ Id.

¹²⁰ Id at 2576.

¹²¹ Id.

Roberts's invalidation of Ross's decision as pretextual stands in sharp contrast to his majority opinion just a year before in *Trump v Hawaii*.¹²² There, Roberts wrote for a 5–4 Court sustaining a ban on travel to the United States from a number of countries, almost all of which were majority Muslim, despite substantial evidence suggesting the ban was animated by anti-Muslim bias. This evidence included the proverbial smoking gun—numerous statements by President Trump and his advisors demonstrating such bias and arguing for a Muslim ban or identifying the travel ban as a Muslim ban—as well as a process used in issuing the initial version of the ban that deviated substantially from usual practice.¹²³ Yet other than recounting this history, Roberts limited his analysis to the face of the ban and the process used to produce the version of the ban that was before the Court.¹²⁴ In *Hawaii*, Roberts emphasized that the travel ban implicated national security matters over which courts owed the President particular deference, and the absence of such matters in *Department of Commerce* may help explain his greater scrutiny here. Yet as both Justices Thomas and Alito argued, the census is also a context in which the executive branch enjoys substantial discretion, but that did not preclude Roberts from invalidating on pretext grounds.

On the other hand, the split character of Roberts's opinion in *Department of Commerce* brings to mind another Roberts opinion, the one he wrote in 2012 in *NFIB v Sebelius*. There, too, Roberts alternated between his conservative and liberal colleagues, agreeing with the former that the individual mandate of the Affordable Care Act (ACA) fell outside the constitutional scope of Congress's commerce or necessary and proper powers but joining with the latter to hold that the ACA nonetheless was a constitutional tax.¹²⁵ And the same institutional legitimacy concerns that motivated Roberts in *NFIB*¹²⁶ appear to have played a role here, as signaled by Roberts's statement that the Court did not have to “exhibit a naivete from which ordinary citizens are free” in concluding that Ross's claimed rationale

¹²² 138 S Ct 2392 (2018).

¹²³ Id at 2435–40 (Sotomayor, J, dissenting).

¹²⁴ Id at 2420–23.

¹²⁵ *National Federation of Independent Business v Sebelius*, 567 US 519 (2012).

¹²⁶ Joan Biskupic, *The Chief: The Life and Turbulent Times of Chief Justice John Roberts* 248 (Basic Books, 2019) (claiming that concerns for the institutional legitimacy of the Court helped persuade Roberts to switch his vote).

of wanting to support VRA enforcement was pretextual.¹²⁷ To sanction Ross's decision in the face of such evident deception and partisanship risked the Court being viewed as simply a political institution, much the way invalidating the signal Democratic political achievement in a generation might have done.¹²⁸ Reports that Roberts changed his stance on pretext after oral argument, while the drama surrounding the case was growing outside the Court, adds support to the conclusion that institutional legitimacy concerns animated his position.¹²⁹

Yet this legitimacy account does not really explain the split character of Roberts's opinion. Why risk having the Court appear political by defending the Trump administration's decision to add a citizenship question, only to conclude that this decision was pretextual and therefore invalid? If Roberts's goal was to give each side something to mute criticism of the Court, he was no more successful here than in *NFIB*; in both cases his opinions sparked strong partial dissents and critical public response.¹³⁰ An alternative explanation for Roberts's split opinion is that he believed the pretextual problem with Ross's decision was curable. This explanation fits with Roberts's decision to remand and his emphasis that the Court was "not hold[ing] that the agency decision here was substantively invalid."¹³¹ But it is harder to square with Roberts's conclusion that the only reason Ross had offered for adding the question—enhanced VRA enforcement—was not an actual reason for his decision. That conclusion, pivotal to Roberts's determination that Ross's explanation was pretextual, made it very hard to see how the pretext problem could be cured without undertaking an entirely new decision-making process.¹³² But the

¹²⁷ *Department of Commerce*, 139 S Ct at 2575 (quoting *United States v Stanchich*, 550 F2d 1294, 1300 (2d Cir 1977) (Friendly, J)).

¹²⁸ Biskupic, *The Chief* at 233 (cited in note 126) (noting that Roberts disliked the initial partisan lineup to strike down the ACA).

¹²⁹ See Joan Biskupic, *How John Roberts Killed the Census Citizenship Question*, CNN (Sept 12, 2019), at <https://www.cnn.com/2019/09/12/politics/john-roberts-census-citizenship-supreme-court/index.html>.

¹³⁰ Both opinions prompted conservative calls for his impeachment. See Tim Mak, *Blog Chatter: Impeach Roberts*, Politico (June 28, 2012), at <https://www.politico.com/story/2012/06/bloggers-say-impeach-roberts-077947> (noting calls for Chief Justice Roberts's impeachment post-*NFIB*); Josh Gerstein, *Conservatives Blast Roberts as Turncoat*, Politico (June 27, 2019), at <https://www.politico.com/story/2019/06/27/conservatives-blast-roberts-1386124> (highlighting identical demands post-*Department of Commerce*).

¹³¹ *Department of Commerce*, 139 S Ct at 2576.

¹³² *Id* at 2575–76; *SEC v Chenery*, 332 US 194, 196 (1947) (“[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or

Solicitor General had long maintained that the census form had to be finalized by the end of June to meet the deadlines for conducting the census in 2020, which would not allow leeway for anything more than a pro forma stamp on remand.¹³³ Not only would such a pro forma approach fail to cure the pretext the Court had identified, but upholding such a pro forma process after remand would make the Court look worse than if it had just upheld the decision initially. As a result, the pretext ruling meant the end of the Trump administration's effort to add a citizenship question to the 2020 census, as DOJ attorneys soon concluded and ultimately so did the Attorney General and the President.

2. *The administrative record, pretext, and arbitrary and capriciousness review.* Reflecting the split nature of Roberts's opinion, there were strong partial dissents from the other Justices on each side, as well as from Justice Alito, who argued that judicial review was inappropriate because the content of the census was "committed to agency discretion by law."¹³⁴ Put together, the *Department of Commerce* opinions represent an administrative law smorgasbord, addressing a range of difficult questions concerning pretext in administrative contexts, the nature of the administrative record, the scope of arbitrary and capriciousness review, and the proper balance of politics and expertise in administrative contexts. Yet, strikingly, none of the opinions acknowledged the difficulty of the issues addressed and instead treated the answers they gave as dictated by existing precedent and indisputable.

Justice Thomas, joined by Justices Gorsuch and Kavanaugh, condemned the Court's invalidation of Ross's decision on pretext grounds as "unprecedented" and a dangerous "departure from our deferential review of discretionary agency decisions."¹³⁵ He insisted that pretext was simply not a relevant inquiry under arbitrary and capriciousness review and that the record did not establish pretext in any event. Thomas also chastised the Court for "proceeding beyond the administrative record," warning that the effect of doing so was to provide a

judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

¹³³ See Petition for Writ of Certiorari, *Department of Commerce v New York*, No 18-966, *13–14 (US filed Jan 25, 2019).

¹³⁴ 5 USC § 701(a)(2); *Department of Commerce*, 139 S Ct at 2598 (Alito, J, concurring in part and dissenting in part).

¹³⁵ Id at 2576 (Thomas, J, concurring in part and dissenting in part).

new “avenue of attack” for opponents of executive branch actions, which would “allow partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction.”¹³⁶

Thomas’s concerns about courts going outside the record resonate in existing case law. A venerable line of administrative law jurisprudence emphasizes that “the focal point of judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”¹³⁷ After initially allowing court supplementation in instances when more formal findings were lacking, the Court’s past case law had quickly moved to the view that when a reviewing court considers the agency record to be inadequate in some way, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation of explanation.”¹³⁸ Thomas’s sudden solicitude for effective governance is surprising, given the extent to which he has dismissed similar functionality concerns in his recent administrative law opinions.¹³⁹ Still, his point on this score is well taken. In an era in which litigation is the prime means by which partisans on both sides seek to derail executive branch actions they oppose, allowing extra-record supplementation risks further hampering of effective government administration.

Yet the issue of the district court’s extra-record supplementation was largely a sideshow here. Neither the discovery nor the depositions that the district court ordered in *Department of Commerce* ended up mattering all that much.¹⁴⁰ Instead, what was pivotal was the material the government supplied to complete the administrative record per a stipulation with the plaintiffs. The district court found that this material alone demonstrated that Ross’s decision was arbitrary and capricious and pretextual.¹⁴¹ Although Roberts invoked the wider universe of both completed-record and extra-record material, he too

¹³⁶ *Id.* at 2580, 2583 (Thomas, J, concurring in part and dissenting in part).

¹³⁷ *Camp v Pitts*, 411 US 138, 142 (1973); accord, *Florida Power & Light v Lorion*, 470 US 729, 743–44 (1985); *Citizens to Protect Overton Park v Volpe*, 401 US 402, 421 (1971).

¹³⁸ Compare *Florida Power & Light*, 470 US at 744, with *Overton Park*, 401 US at 421.

¹³⁹ *Department of Transportation*, 135 S Ct at 1247–48 (Thomas, J, concurring in the judgment) (arguing that the President cannot exercise explicit “policy discretion,” which would represent an impermissible delegation of legislative power).

¹⁴⁰ This extra-record evidence was most discussed by Justice Breyer, who quoted in passing from the deposition of the DOJ official who wrote the DOJ letter. *Department of Commerce*, 139 S Ct at 2595 (Breyer, J, concurring in part and dissenting in part).

¹⁴¹ *New York*, 351 F Supp 3d at 660–61.

emphasized that the completed-record material on its own created the “strong showing of bad faith or improper behavior” sufficient to justify extra-record supplementation under the Court’s restrictive precedents.¹⁴²

Notably, neither Roberts’s majority opinion nor Thomas’s partial dissent address the question of what should be included in the administrative record in the first place. The proper answer to this question is not clear in informal proceedings such as the decision making here, where agencies are not limited to considering materials in a formal record.¹⁴³ The APA states that judicial review should be undertaken based on the “whole record” without defining what counts as the record: Is it the record provided to the court, the record that the agency considered or relied upon in making its decision, or the record of all the material before the agency? Lower courts take different approaches to this question.¹⁴⁴ Moreover, practical and functional concerns point in different directions. Limiting judicial review to the record provided to a court or that the agency relied on risks giving agencies incentives to include and consider only materials supporting their decisions, but including all the material before the agency or all the material the agency considered risks producing a massive record that is highly burdensome to generate, overwhelms courts, and obscures the main bases of the agency’s decision making.¹⁴⁵ Roberts avoided this issue by relying on the fact that the government had not challenged the district court’s conclusion that the administrative record was incomplete and stipulated to the addition of substantial new

¹⁴² *Department of Commerce*, 139 S Ct at 2574–76.

¹⁴³ The requirement of on-the-record decision making means that identifying the record is not an issue with respect to formal proceedings. See 5 USC § 556(e); Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 287–302 (ABA, 5th ed 2012).

¹⁴⁴ See Travis O. Brandon, *Reforming the Extra-Record Evidence Rule in Arbitrary and Capricious Review of Informal Agency Actions: A New Procedural Approach*, 21 Lewis & Clark L Rev 981, 997–98, 1000–01, 1008–09 (2017); Aram A. Gavoor and Steven A. Platt, *Administrative Records and the Courts*, 67 Kansas L Rev 1, 62–69 (2018). In 2013, the Administrative Conference of the United States issued a report and recommendations on best practices for the compilation, preservation, and certification of administrative records and also guidance on when courts can seek supplementation. See Recommendation 2013–14—Administrative Record in Informal Rulemaking, 78 Fed Reg 41352, 41358 (July 10, 2013), at <https://www.acus.gov/research-projects/administrative-record-informal-rulemaking>.

¹⁴⁵ See Brandon, 21 Lewis & Clark L Rev at 1012–17 (cited in note 144) (arguing in favor of supplementing the record provided “the plaintiff provides reasonable proof that the agency considered the evidence” as “practical and workable”); Gavoor and Platt, 67 Kansas L Rev at 69–75 (cited in note 144) (listing negative consequences to allowing supplementation with other evidence considered by the agency).

material.¹⁴⁶ Yet the result in *Department of Commerce* may make the government less willing to do so in the future.

Justice Thomas's insistence that pretext inquiries are strangers to administrative law is also only partially correct. It's true that arbitrary and capriciousness review does not usually speak in terms of pretext and the Supreme Court had not previously held agency action arbitrary and capricious on pretext grounds.¹⁴⁷ But Thomas downplays the way that arbitrary and capriciousness review serves to identify pretextual decision making without calling it such. Take, for instance, *Motor Vehicle Association v State Farm Mutual Automobile Insurance*, the case that set out the modern arbitrary and capriciousness standard. There, the National Highway Traffic and Safety Administration had justified rescinding its automotive passive restraint rule entirely on the grounds that the rule would not achieve predicted safety benefits. In overturning that rescission, the Court emphasized obvious regulatory alternatives that should have been explored if the agency really were trying to advance safety, as the governing statute required.¹⁴⁸ The Court did not put its holding in terms of pretext, instead concluding that the agency was not acting reasonably to achieve its safety goals. However, an implicit corollary of concluding that an agency's policy undercuts its stated goals is that those goals probably weren't really motivating the agency in the first place. Chief Justice Rehnquist's partial dissent in *State Farm* highlighted this point, accusing the majority of going too far in overturning the agency out of a concern that the agency's decision was actually driven by political considerations.¹⁴⁹ Moreover, approaching pretext as part of a general

¹⁴⁶ *Department of Commerce*, 139 S Ct at 2574.

¹⁴⁷ Lower courts had, albeit rarely. See, for example, *Texas v United States*, 809 F3d 134, 171–76 (5th Cir 2015) (upholding the district court's determination that justification given for Department of Homeland Security's Deferred Action for Parents of Americans and Lawful Permanent Residents was "pretext"); *James Madison Ltd. v Ludwig*, 82 F3d 1085, 1096 (DC Cir 1996) (bad faith is "material to determining whether the Government acted arbitrarily"); *Tummino v Hamburg*, 936 F Supp 2d 162, 188, 194–97 (EDNY 2013) (concluding FDA denial of citizen petition was arbitrary and capricious because agency acted in bad faith and provided pretextual explanation).

¹⁴⁸ *Motor Vehicle Association v State Farm Mutual Mobile Insurance*, 463 US 29, 46–47 (1983) (stating that the agency could not abandon the mandatory passive-restraint requirement without first considering an airbag-only requirement).

¹⁴⁹ *Id* at 59 (Rehnquist, CJ, concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party."). Jennifer Nou notes that pretext, in the form of "rationales masking the genuine motivations for decisions," especially political motivations, are common in administrative

arbitrary and capriciousness review has the advantage of forestalling the need for an extra-record investigation into a decision maker's subjective motivations, thereby addressing Thomas's concerns about such inquiries. It similarly avoids the need for courts to specify the extent to which political considerations can legitimately affect agency action, a notoriously difficult line to draw and one courts have long evaded.¹⁵⁰

Of course, approaching pretext as part of general arbitrary and capriciousness review will fail to police against pretextual rationales in contexts where the agency's action is otherwise well supported.¹⁵¹ Yet that seems a worthwhile trade-off; at least absent allegations that the undisclosed rationale is invidious, the burdens of extra-record investigation into pretext are harder to defend when the agency action is independently supportable. The real risk in this context is that this independent support will turn out to be manufactured or insubstantial. But that risk can be mitigated by subjecting stated agency rationales to more skeptical and probing scrutiny in the face of evidence of pretextual decision making.

Hence, this surrogate role of arbitrary and capriciousness review highlights again the oddity of Chief Justice Roberts's split opinion, combining highly deferential review of the substantive basis for adding the citizenship question with invalidation of the decision on pretextual grounds. Justice Breyer's partial dissent provided the skeptical scrutiny that Roberts's opinion lacked, closely examining evidence in the record about the impact of the question on different groups. He concluded that the administrative record established that adding the question would only impose costs and yield no benefits; it would "diminish the accuracy of the enumeration of population" while at the same time "produce citizenship data that is *less* accurate, not more."¹⁵²

contexts. See Jennifer Nou, *Census Symposium: A Place for Pretext in Administrative Law?*, SCOTUSBlog (June 28, 2019), at <https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law/>.

¹⁵⁰ Nou, *A Place for Pretext* (cited in note 149); *Sierra Club v Costle*, 697 F2d 298, 407 (DC Cir 1981) (refusing to require disclosure of White House ex parte communications relating to informal rulemaking, noting that to survive judicial review the rule "must have the requisite factual support in the rulemaking record").

¹⁵¹ See *Sierra Club*, 697 F2d at 408 (acknowledging and accepting the risk that "undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement").

¹⁵² *Department of Commerce*, 139 S Ct at 2584 (Breyer, J, concurring in part and dissenting in part).

And he rejected the Secretary's use of uncertainty as a basis for discounting the Census Bureau's estimates of harmful effects, arguing that uncertainty is endemic in regulatory contexts and does not excuse an agency from not at least explaining why it decided to "tak[e] action without 'engaging in a search for further evidence.'"¹⁵³

Despite their very different applications of arbitrary and capriciousness review, both Roberts and Breyer, as well as Thomas and Alito, invoked *State Farm* as guiding their analyses. Whether *State Farm* and the Court's arbitrary and capriciousness precedents require searching scrutiny is a matter of scholarly dispute,¹⁵⁴ and there are many decisions in which courts stress uncertainty and take a more forgiving stance, as the Supreme Court did here.¹⁵⁵ The broader point is that arbitrary and capriciousness scrutiny is malleable, with judges able to dial their scrutiny up and down based on their assessments of contextual factors in a particular case. For his part, Breyer underscored this malleability, insisting that "[c]ourts do not apply these principles of administrative law mechanically. Rather, they take into account . . . the nature and importance of the particular decision, the relevance and importance of missing information, and the inadequacies of a particular explanation in light of their importance."¹⁵⁶

3. *Politics, deference, and discretion.* What then led some Justices in *Department of Commerce* to dial down their scrutiny of the substantive reasonableness of Ross's decision making and others to dial it up? Several factors appeared to be in play, most centrally politics and discretion.

Politics surfaced most prosaically in Justice Thomas's opinion, with Thomas repeatedly accusing the district court of invalidating the citizenship question out of bias against the Trump administration. Thomas insisted that only bias could explain the district court's

¹⁵³ Id at 2590 (quoting *State Farm*, 463 US at 52).

¹⁵⁴ Jacob Gersen and Adrian Vermeule, *Thin Rationality Review*, 114 Mich L Rev 1355, 1358–59 (2016) (arguing that the Supreme Court overwhelmingly applies a much less searching scrutiny under arbitrary and capriciousness review than is generally acknowledged).

¹⁵⁵ See Adrian Vermeule, *Law's Abnegation* 158 (Harvard, 2016) (identifying *FCC v Fox*, 566 US 502 (2009) and *Baltimore Gas & Electric Co. v Natural Resource Defense Council, Inc.*, 462 US 87 (1983) as instances when the Court applied lenient review); see generally Gersen and Vermeule, 114 Mich L Rev at 1355 (cited in note 154) (arguing that the claim that courts apply hard-look review is a myth).

¹⁵⁶ *Department of Commerce*, 139 S Ct at 2585 (Breyer, J, concurring in part and dissenting in part) (concluding that the importance of this topic to the functioning of a democratic society warranted searching review).

detailed record review and findings of pretext: “I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts [from the record] on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web.”¹⁵⁷ That three Supreme Court Justices signed onto such a pointed attack on the impartiality of a lower court judge is extraordinary, all the more so given that five of their colleagues agreed with the district court’s analysis, at least in part. It is also deeply ironic, for by launching this attack these Justices were themselves embedding a partisan message in the pages of the U.S. Reports. After all, the prime expositor of the claim that lower court judges who rule against the Trump administration’s actions are doing so out of bias is President Trump himself.¹⁵⁸

But politics also appeared in a more principled form, in differing views of the relationship between political accountability and deference to agency policy-making. For Roberts, such deference rests fundamentally on principles of political accountability. Provided the policy choices of an agency’s political leaders are at least plausible, they should be respected. Contrary views of career bureaucrats should get little weight, if not be viewed with outright suspicion. As he put it, “the Census Act authorizes the Secretary, not the [Census] Bureau, to make policy choices within the range of reasonable options.”¹⁵⁹ Indeed, a desire to reaffirm the importance of judicial deference to the policy choices of agencies’ political leadership seems the best explanation of Roberts’s decision that adding the citizenship question *per se* was not arbitrary and capricious, even as he invalidated Ross’s decision as pretextual. Roberts also made a point of underscoring the legitimacy of political influence in his discussion of pretext, insisting that “a court may not set aside an agency’s policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration’s priorities.”¹⁶⁰ One benefit

¹⁵⁷ *Id.* at 2582 (Thomas, J, concurring in part and dissenting in part); see also *id.* at 2576 (Thomas, J, concurring in part and dissenting in part) (“[T]he decision of the district court . . . was transparently based on the application of an administration-specific standard. . . . The law requires a more impartial approach.”).

¹⁵⁸ Adam Liptak, *Trump Takes Aim at Appeals Court, Calling It a “Disgrace,”* NY Times (Nov 20, 2018), at <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html?module=inline>.

¹⁵⁹ *Department of Commerce*, 139 S Ct at 2571 (claiming that Breyer “subordinat[ed] the Secretary’s policymaking discretion to the Bureau’s technocratic expertise”).

¹⁶⁰ *Id.* at 2573.

of Roberts's split vote is that it allowed him to reinforce this structural principle of political control of policy while still protecting the Court from sanctioning blatant manipulations and falsehoods.

Justice Breyer, by contrast, tied deference for discretionary agency decisions closely to expertise and carefully reasoned explanation. He treated the fact that Ross deviated from the recommendations of the agency's in-house experts, the Census Bureau, as grounds for a probing judicial reception.¹⁶¹ Breyer did not deny that an agency head's "policy choice between two reasonable but uncertain options" would deserve deference.¹⁶² But he argued that the Census Bureau's memos showed that the option of adding the question was not reasonable and the extent of uncertainty was exaggerated.¹⁶³ Indeed, far from viewing political accountability as compelling deference here, Breyer argued that letting Ross's decision stand risked "undermining public confidence in the integrity of our democratic system itself," given the importance of an accurate census for political representation.¹⁶⁴ Interestingly, Justice Breyer and the liberal Justices concurring with him appeared far more amenable to connecting politics and deference in *Kisor*. There, they joined Kagan's opinion tying deference to authoritative interpretations by agency heads and identifying political accountability as a basis for deference. This divergence is potentially explainable on the grounds that *Kisor* did not involve a conflict between political accountability and expertise, but unfortunately the contrast was never addressed by Breyer—leaving the impression that opposition to adding the citizenship question may have animated his more stringent scrutiny here.

Similarly, the conservative Justices' emphasis on political accountability as grounds for deference seems in tension with Justice Gorsuch's identification of the political nature of agency decision making as counting strongly against deference in *Kisor*. Justice Thomas explained the difference between the two cases as lying in the nature of the agency decision at issue: a discretionary policy choice versus an interpretation of law.¹⁶⁵ Whereas deference to agency legal

¹⁶¹ Id at 2589–92 (Breyer, J, concurring in part and dissenting in part).

¹⁶² Id at 2593 (Breyer, J, concurring in part and dissenting in part).

¹⁶³ *Department of Commerce*, 139 S Ct at 2592–93 (Breyer, J, concurring in part and dissenting in part).

¹⁶⁴ Id at 2585 (Breyer, J, concurring in part and dissenting in part).

¹⁶⁵ Id at 2578 n 3 (Thomas, J, concurring in part and dissenting in part).

interpretations violated Article III, deference to agency discretionary decisions reflected “a ‘presumption of regularity’” for the Executive out of “respect for a coordinate branch of government whose officers not only take an oath to support the Constitution, as we do, . . . but also are charged with faithfully executing our laws.”¹⁶⁶ Justice Alito went even further, arguing that the broad discretion Congress gave the Secretary of Commerce over the content of the census meant that courts had no jurisdiction to review the Secretary’s decision making at all.¹⁶⁷

Although this emphasis on discretion helped align the conservative Justices’ stances in *Department of Commerce* and *Kisor*, it highlighted a conflict between *Department of Commerce* and *Gundy*. In *Gundy*, Justice Gorsuch’s dissent—joined by Chief Justice Roberts and Justice Thomas—argued strongly that broad congressional delegations of authority to the executive branch were unconstitutional: Congress can delegate to the executive power to “fill up the details” once “Congress had announced the controlling general policy”; Congress can also delegate fact-finding responsibilities and assign “wide discretion” over matters in which the executive independently enjoys broad authority, such as foreign affairs.¹⁶⁸ But what Congress cannot do is delegate to the executive power to “make the policy judgments” incorporated in “generally applicable rules of conduct governing future actions by private persons.”¹⁶⁹ Plainly, the responsibilities delegated to the Secretary under the Census Act are far more policy laden than just fact-finding, and decades of dispute over including a question on citizenship make clear that adding it cannot be seen as just filling up the details of the census either. Responsibility for the census is constitutionally assigned to Congress and not an area of inherent executive authority. Moreover, private persons are required to fill out the census, and the fact that not responding to the census is considered a misdemeanor¹⁷⁰ creates another parallel to *Gundy*, though the criminal consequences of violating the statute at issue there were far

¹⁶⁶ Id at 2579–80 (Thomas, J, concurring in part and dissenting in part) (internal quotations omitted). See also *Michigan*, 135 S Ct at 2712 (Thomas, J, concurring) (arguing that deference on legal questions violates Article III).

¹⁶⁷ Id at 2597 (Alito, J, concurring in part and dissenting in part).

¹⁶⁸ *Gundy*, 139 S Ct at 2136–37 (Gorsuch, J, dissenting).

¹⁶⁹ Id at 2133, 2141 (Gorsuch, J, dissenting).

¹⁷⁰ 13 USC § 221.

more severe. In short, the breadth of discretion given to the Secretary that the conservative Justices relied on to justify deference in *Department of Commerce* appears to be precisely the kind of delegation that several of them would have held unconstitutional in *Gundy*.¹⁷¹ Yet they never acknowledged, let alone explained, this inconsistency.

II. THE MANY ISMS OF ROBERTS COURT ADMINISTRATIVE LAW

The Roberts Court is clearly conflicted when it comes to administrative law. *Kisor* and *Department of Commerce* showcase a Court divided on administrative law substance and methodology, with the Justices diverging notably even when they ostensibly agree on the governing legal framework. Moreover, these divides frequently map the growing ideological and partisan divides on the Court: The 2018 Term found Justice Kagan often leading the liberal Democratic-appointed Justices in defending established administrative law, while Justice Gorsuch was often at the forefront of the conservative Republican-appointed Justices in attacking existing doctrine and Chief Justice Roberts stood squarely in the middle.¹⁷² Given that administrative law cases frequently carry high political stakes, such a stark ideological and partisan divide should be particularly troubling for those worried about the Court being seen as a politicized actor.¹⁷³ The Justices' flipped stances on deference between these two cases reinforce that politicized appearance.

Drill further down, and several analytic tensions become apparent. These are familiar analytic divides from public law more broadly, but their appearance in the administrative law context is more recent. These tensions—between formalism and anti-formalism, originalism and more general historicism, textualism and common law development—provide the intellectual underpinnings for today's battles over administrative law. Yet it is hard to see these divisions as driving

¹⁷¹ Justice Alito did not join Gorsuch's opinion in *Gundy*, and Justice Kavanaugh did not participate in the case.

¹⁷² On the growing ideological and partisan divide, see generally Neal Devins and Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Supreme Court Review 301 (2016).

¹⁷³ See Claire Brockway and Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, Pew Research Center (Aug 7, 2019) (“[T]hree-quarters of Republicans and Republican-leaning independents have a favorable opinion of the Supreme Court, compared with only about half (49%) of Democrats and Democratic leaners.”).

Roberts Court administrative law. In particular, these analytic tensions do not consistently map onto the Justices' line-ups in administrative law cases or the ideological divisions on the Court.

A. FORMALISM AND NONFORMALISM

The first clearly evident conceptual divide centers on formalism. One group of Justices is deeply formalist in approach across a range of administrative law issues, while another is resolutely nonformalist. Nonformalism on the Roberts Court is hard to define specifically; it encompasses a range of approaches from legal realism, to pragmatism, functionalism, and minimalism. The 2018 Term decisions suggest that while formalism has a greater presence on the Court now than for many decades, it has yet to secure a committed majority.

1. *Legal realism versus legal formalism.* Underlying current disputes over deference to administrative determinations lies a fundamental disagreement on the nature of legal interpretation and the relationship of law and policy.¹⁷⁴ This is clearest in *Kisor*. There, Justice Gorsuch portrayed law as fixed, determinate, and categorically distinct from policy.¹⁷⁵ This categorical distinction between law and policy, and correspondingly between legal interpretation and policy choice, was essential for his argument that deference to agency regulatory interpretations violates Article III. That argument hinged on the *Marbury* claim that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”¹⁷⁶ along with an insistence that courts must exercise independent judgment in order to adequately perform this law-declaring function.¹⁷⁷ But if regulatory interpretation constitutes policy choice to a significant degree, such interpretation appears less the type of law-declaring activity that on

¹⁷⁴ See Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 Harv L Rev 852, 861–84 (2020).

¹⁷⁵ See text accompanying note 73.

¹⁷⁶ *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

¹⁷⁷ *Kisor*, 139 S Ct at 2437–38 (Kagan, J) (plurality). Whether declaring the law necessarily entails exercising independent judgment is much disputed. Justice Kagan argued in *Kisor* that judges also can declare the meaning of law by determining that the law assigns primary interpretive responsibility to another institution of government. But the Court has come to read *Marbury* as standing for a requirement of independent judgment and judicial supremacy in constitutional interpretation. See *Cooper v Aaron*, 358 US 1, 18 (1958); Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum L Rev 1, 9–10 (1983).

Gorsuch's account is constitutionally assigned to the courts' independent purview and into which the political branches may not intrude.¹⁷⁸

Justice Kagan's statement in *Kisor* that "sometimes . . . law runs out," leaving "policy-laden choice,"¹⁷⁹ might at first suggest a similar view of law and policy as distinct entities. But her argument was actually the opposite. Her insistence that regulatory ambiguity is inevitable, and that law is incomplete and cannot resolve all legal disputes, painted law and legal interpretation as intrinsically linked to policy choice. And she moved from arguing that legal interpretation in the context of regulatory ambiguity involves policy choice to the claim that in many instances Congress would likely want that policy choice to rest in the hands of an expert, experienced agency. From there, *Auer* deference followed.

The classical image of law as fixed, determinate, and categorically distinct from policy is highly formalist, whereas the view of law as indeterminate and inevitably entailing policy choice typifies legal realism.¹⁸⁰ The terms of this debate are thus familiar, but its surfacing today is more surprising. The legal realist view of law has dominated administrative law ever since the cementing of the administrative state in the 1940s.¹⁸¹ Adrian Vermeule has described the ensuing years as a time of law's ever-growing abnegation, with law pushed to the margins as more and more decisions appeared in a policy guise better fit for agencies than courts.¹⁸² Even when formalism made a comeback in related public law fields, as occurred with the advent of textualism in statutory interpretation in the 1980s,¹⁸³ ordinary administrative law retained its realist orientation. After all, it was in 1984 that

¹⁷⁸ Not surprisingly, therefore, Justice Thomas has articulated a similarly firm divide between law and policy in his opinions arguing that deference to agency statutory and regulatory interpretations is unconstitutional. See *Michigan v EPA*, 135 S Ct 2699, 2712 (2015) (Thomas, J, concurring).

¹⁷⁹ *Kisor*, 139 S Ct at 2415 (Kagan, J) (plurality).

¹⁸⁰ See Frederick Schauer, *Formalism*, 97 Yale L J 509, 510–15 (1988); see also Frederick Schauer, *Legal Realism Untamed*, 91 Tex L Rev 749, 754–56 (2013); see also Brian Z. Tamanaha, *Understanding Legal Realism*, 87 Tex L Rev 731, 732 (2009).

¹⁸¹ See Cass R. Sunstein, Essay, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 Yale L J 2580, 2593–95, 2598 (2006); see also Richard Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 Supreme Court Review 1, 21–30 (describing movement between institutional realism and institutional formalism in administrative law); Pojanowski, 133 Harv L Rev at 857 (cited in note 174) (noting "the working, moderate legal realism that characterizes much mainstream administrative law").

¹⁸² Vermeule, *Law's Abnegation* at 10 (cited in note 155).

¹⁸³ William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L Rev 621, 646–47 (1989).

the *Chevron* Court justified deference to reasonable agency interpretations of ambiguous statutory provisions, arguing that in those contexts interpretation entails a policy choice implicitly delegated to the agency.¹⁸⁴

In its current incarnation in Roberts Court administrative law, legal realism surfaces in a domesticated legal process guise.¹⁸⁵ Law is not portrayed as entirely or necessarily indeterminate; even realist-inclined Justices often conclude that agency statutory interpretations fail *Chevron* and are not deserving of deference.¹⁸⁶ Moreover, Justice Kagan's arguments for deference in *Kisor* echo legal process's focus on a rational Congress and the institutional capacities of courts and agencies. Critically, moreover, Kagan ties deference not to abstract institutional features, but instead to judicial determinations of whether particular decisions reflect agencies' comparative institutional advantages.¹⁸⁷ Richard Pildes has used the term "institutional realism" to capture this sensitivity to "how these institutions actually function in, and over, time."¹⁸⁸ Justice Breyer's opinion in *Department of Commerce* is to the same effect: Deference turns on whether a specific agency decision shows expertise and informed, thorough consideration; it does not follow automatically from the fact that the decision represents a policy question or was made by a politically accountable actor.¹⁸⁹

By contrast, legal formalism in Roberts Court administrative law takes a categorical approach to policy questions as well as legal questions. Two distinct formalist approaches to policy are evident in this Term's decisions. On the one hand, there is Justice Gorsuch's separation-of-powers formalism in *Gundy*, which classifies broad policy determinations as categorically legislative and constitutionally excluded from agencies' ambit. On the other, there is Justice Thomas's

¹⁸⁴ *Chevron v National Resources Defense Council*, 467 US 837, 843–45, 865–86 (1984).

¹⁸⁵ See William N. Eskridge, Jr. and Philip P. Frickey, *The Making of the Legal Process*, 107 Harv L Rev 2031, 2042–45 (1994) (arguing that legal process was a synthesis of legal realism and other pre-World War II intellectual traditions, and describing legal process's core intellectual commitments as "the reasoned elaboration of purposive law," "law as an institutional system," and "the centrality of process") (capitalization omitted).

¹⁸⁶ See, for example, *Sturgeon v Frost*, 139 S Ct 1066, 1080 n 3 (2019) (Kagan, J) ("Because we see . . . no ambiguity as to Section 103(c)'s meaning, we cannot give deference to the Park Service's contrary construction" under *Chevron*).

¹⁸⁷ *Kisor*, 139 S Ct at 2416 (Kagan, J) (plurality).

¹⁸⁸ Pildes, 2013 Supreme Court Review at 2 (cited in note 181).

¹⁸⁹ *Department of Commerce*, 139 S Ct at 2595 (Breyer, J, concurring in part and dissenting in part).

effort in *Department of Commerce* to preserve an arena for administrative policy judgments largely immune from judicial review, at the same time as he would banish policy from the world of law. Justice Kavanaugh signaled a similar effort in *Kisor* when he urged courts to “engage in appropriately rigorous scrutiny of an agency’s interpretation of a regulation, and . . . simultaneously be appropriately deferential to an agency’s reasonable policy choices within the discretion allowed by a regulation.”¹⁹⁰ Jeffrey Pojanowski has offered a sustained analytic defense of such a conjoined approach, which he terms neo-classical administrative law. The aim is precisely “to sharpen the line between law and policy in administrative law, with the consequence of increasing judicial responsibility on questions of law while decreasing it on matters [of] policymaking discretion.”¹⁹¹

At first glance, a neoclassical approach might seem to offer a happy compromise of formalism and realism, respecting constitutional lines and also comparative institutional strengths. But combining legal formalism and policy deference in this fashion is unlikely to succeed. Any sharp demarcation between questions of law and questions of policy is implausible—as a practical as well as a conceptual matter. In an increasingly statutory and regulatory world such as ours, policy choices rarely surface in law-free zones. The choices judges will make in construing law will inevitably significantly curtail the space left for policy. Although Kavanaugh argued that “open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible’ or ‘practicable’ . . . afford agencies broad policy discretion,”¹⁹² courts accustomed to definitively resolving interpretive ambiguity on their own may find these terms to have definite legal content as well.¹⁹³ Moreover, the arguments for deference to agencies on fact and policy matters—such as agencies’

¹⁹⁰ *Kisor*, 139 S Ct at 2449 (Kavanaugh, J, concurring in the judgment). See also Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv L Rev 2118, 2153–54 (2016) (“This very important principle sometimes gets lost: a judge can engage in appropriately rigorous scrutiny of an agency’s statutory interpretation and simultaneously be very deferential to an agency’s policy choices within the discretion granted to it by the statute.”).

¹⁹¹ Pojanowski, 133 Harv L Rev at 884 (cited in note 174).

¹⁹² *Kisor*, 139 S Ct at 2448 (Kavanaugh, J, concurring in the judgment).

¹⁹³ See, for example, *Michigan*, 135 S Ct at 2707–08 (reading “appropriate” in provision of the Clean Air Act as requiring EPA to consider costs in making initial decision to regulate); *MetLife v Financial Stability Oversight Council*, 177 F Supp 3d 219, 239–41 (DDC 2016) (statutory provision requiring agency to consider “any other risk-related factor” it deems “appropriate” required agency to consider costs to company of being subject to regulation).

greater political accountability, expertise, or congressional authorization—also push toward deference in law application, which easily spills over into law interpretation.¹⁹⁴ As Vermeule has put it, “[l]ogically, there [is] no necessary contradiction” between courts according deference to agencies on ordinary fact questions and exercising independent judgment on questions of law, but “the deep premises and attitude of each [a]re inconsistent with the deep premises and attitude of the other.”¹⁹⁵ In like vein, Kristin Hickman and Nicholas Bednar contend that recognition of the institutional benefits of agency policy-making make something akin to *Chevron* deference inevitable.¹⁹⁶ Even on a more theoretical plane, legal formalism and broad policy deference to agencies do not easily combine. Legal formalism goes hand in hand with a broader separation-of-powers formalism that, as noted, views agency policy determinations as executive branch usurpation of the legislative power.

2. *Formalism, functionalism, and remedial minimalism in separation-of-powers analysis.* Although legal determinacy formalism was largely absent on the Court until recently, formalism has had a steady presence in separation-of-powers analysis. Separation-of-powers formalism evinces the same commitment to categorical lines, with the relevant lines here being constitutional distinctions among legislative, executive, and judicial power, each of which is viewed as formally vested in one branch of government with intermixing limited to those instances expressly sanctioned in the Constitution. By contrast, a more functionalist analysis views powers as overlapping, emphasizes the overall balance among the branches, and focuses on the benefits of a particular governmental structure and that structure’s impact on a branch’s ability to perform its core functions.¹⁹⁷ As many commentators have argued, formalism and functionalism should not be viewed as opposed approaches in the separation-of-powers context; most decisions have elements of both orientations, and both approaches share

¹⁹⁴ Cass Sunstein argues that pre-*Chevron* decisions granting deference to agency statutory interpretations represented such law application. Cass R. Sunstein, *Chevron as Law*, 107 *Georgetown L.J.* 1613, 1649 (2019); see, for example, *NLRB v. Hearst Publications, Inc.*, 322 *U.S.* 111, 130 (1944); *Gray v. Powell*, 314 *U.S.* 402, 412 (1941).

¹⁹⁵ Vermeule, *Law’s Abnegation* at 28 (cited in note 155).

¹⁹⁶ Nicholas R. Bednar and Kristin Hickman, *Chevron’s Inevitability*, 85 *Geo. Wash. L. Rev.* 1392, 1397–98 (2017).

¹⁹⁷ M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 *U. Pa. L. Rev.* 603, 608–09 (2001); see also John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1950–62 (2011) (discussing formalism and functionalism).

key elements, such as a concern about aggrandized power.¹⁹⁸ Yet still, they represent discrete stances between which the Court alternates in its separation-of-powers jurisprudence.

These formalist and functionalist orientations were clearly on display this Term. Justice Gorsuch's opinions in *Gundy* and *Kisor* were paradigms of formalist separation-of-powers analysis, arguing that the Constitution's text draws clear lines between the distinct categories of executive, legislative, and judicial power.¹⁹⁹ Yet he ultimately justified strict enforcement of the Constitution's distribution of powers in teleological terms, in particular as essential to protecting individual liberty and guarding against "arbitrary use of governmental power."²⁰⁰ Kagan barely engaged Gorsuch's lengthy constitutional attack on *Auer*, but her dismissive response was largely functionalist, noting that the Court had long upheld mixing of executive and judicial functions in agencies and emphasizing that judges were able to check agency regulation interpretations under *Auer*.²⁰¹ Functionalism also dominated Kagan's constitutional defense of delegation in *Gundy*, where she offered a vision of separation of powers that stressed flexibility, practicality, and effectiveness before reframing the case as being about statutory interpretation rather than constitutional structure.²⁰² And Chief Justice Roberts elevated realism over formalism in *Department of Commerce*, when he insisted that the Court was not naive and would not fall for Ross's contrived VRA justification.²⁰³

Although in the 2018 Term formalist arguments fell short, at other times the Roberts Court has taken a formalist approach to separation of powers and constitutional structural analysis generally.²⁰⁴

¹⁹⁸ See Magill, 150 U Pa L Rev at 609–11 (cited in note 197); see also Manning, 124 Harv L Rev at 1971–73 (cited in note 197) (arguing that both represent free-floating and purposivist forms of separation-of-powers analysis). For a critique of the formalism-functionalist framing of separation of powers and an argument that it should be recast as a cycling between rules and standards, see Aziz Z. Huq and Jon D. Michaels, *The Cycles in Separation-of-Powers Jurisprudence*, 126 Yale L J 346, 354–56 (2016).

¹⁹⁹ *Gundy*, 139 S Ct at 2133 (Gorsuch, J, dissenting).

²⁰⁰ *Kisor*, 139 S Ct at 2348 (Gorsuch, J, concurring in the judgment); *Gundy*, 139 S Ct at 2133–35, 2142 (Gorsuch, J, dissenting).

²⁰¹ *Kisor*, 139 S Ct at 2421–22 (Kagan, J) (plurality).

²⁰² *Gundy*, 139 S Ct at 2123 (Kagan, J) (plurality).

²⁰³ *Department of Commerce*, 139 S Ct at 2576.

²⁰⁴ See Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 Duke L J 1599, 1607 (2012).

Examples include two leading opinions written by Chief Justice Roberts: *Free Enterprise Fund*, which imposed a categorical prohibition on double-for-cause removal protection; and *Stern v Marshall*, which drew a bright-line distinction between public and private rights for purposes of determining when adjudication outside of the Article III courts is constitutional.²⁰⁵ Yet there have also been notable instances when the Court has taken a more functionalist stance. In *NLRB v Noel Canning*, the Court took a pragmatic approach to interpreting the scope of the Recess Appointments Clause, justifying its reading as necessary to serve the clause's purpose and supported by long-standing practice.²⁰⁶ And in *Wellness International Network v Sharif*, the Court held that consent of the parties can make some forms of non-Article III adjudication constitutional, insisting that analysis of this "question must be decided not by 'formalistic and unbending rules,' but 'with an eye to the practical effect that the' practice 'will have on the constitutionally assigned role of the federal judiciary.'"²⁰⁷ Even the Court's more formalist decisions can have a heavy functionalist component; a key driver of *Free Enterprise*, for example, is "the Court's own functional assessment of how much accountability executive officers properly owe to the President."²⁰⁸

As important, even the Roberts Court's formalistic separation-of-powers decisions are often cabined in ways that suggest concern with minimizing their practical impact. *Free Enterprise Fund* and *Stern* are again good examples of this phenomenon. In *Free Enterprise*, Roberts's majority opinion took a minimalist approach to remedying its finding that double-for-cause removal protection for members of the Public Company Accounting Oversight Board was unconstitutional,

²⁰⁵ *Free Enterprise Fund*, 561 US at 492; *Stern v Marshall*, 564 US 462, 483–84 (2011). Although the Court's formalism often leads to invalidation of the challenged measure, that result is not universal. Recently, in *Oil States Energy Services, LLC v Greene's Energy Group, LLC*, the Court adhered to a formalist distinction between private and public rights, yet nonetheless upheld the non-Article III method of administrative adjudication at issue. 138 S Ct at 1365, 1373 (2018). And on occasion a more functionalist analysis leads to invalidation, as in *Lucia v SEC*, when the Court focused on the specific functions and responsibilities of administrative law judges at the SEC in concluding that they were inferior officers. 138 S Ct at 2044, 2052–54 (2018).

²⁰⁶ 573 US at 513, 532, 540–43 (2014).

²⁰⁷ 135 S Ct at 1932, 1944–45 (2015) (quoting *Commodity Futures Trading Commission v Schor*, 478 US 833, 851 (1986)).

²⁰⁸ See John F. Manning, *The Supreme Court 2013 Term—Foreword: The Means of Constitutional Power*, 128 Harv L Rev 1, 47 (2014).

signaling in the process that it was not calling single-for-cause protection into question. Insisting that the unconstitutional double-for-cause provision could be severed while leaving the Board otherwise intact, the Court rejected greater “blue-pencil[ing]” of Sarbanes-Oxley Act provisions as a job “belong[ing] to the Legislature, not the Judiciary.”²⁰⁹ In a similar vein, Roberts’s majority opinion in *Stern* not only suggested a carve-out for administrative adjudication, but also retained a broad definition of public right and reaffirmed precedents that sanctioned a broad role for non-Article III adjudication.²¹⁰ The question of whether to continue with this minimalist approach to remedying separation-of-powers violations is now before the Court, with the Justices adding a question on severability to their consideration of the constitutionality of the Consumer Financial Protection Bureau’s single-director structure.²¹¹

Such remedial minimalism might seem at first to be functionalist, insofar as it tailors constitutional remedies to limit disruption and preserve as much of Congress’s work as possible. Formalist separation-of-powers decisions are famous for casting aside analogous concerns of convenience, efficiency, and utility in service of upholding separation-of-power principles.²¹² On the other hand, rejection of greater remedial creativity as outside of the judicial role sounds in a formalist register. More significantly, remedial minimalism is likely critical for the success of separation-of-powers formalism in practice. Otherwise, adoption of separation-of-powers formalism might well entail substantial transformation in the national administrative state, as Justice Gorsuch suggested in his *Kisor* and *Gundy* opinions—a result that might make a majority of the Court less willing to sustain formalist arguments. From this perspective, remedial minimalism appears primarily as a strategic device, one that makes separation-of-powers formalism more palatable, even if analytically more aligned with functionalism.

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²⁰⁹ *Free Enterprise Fund*, 561 US at 495–96, 509–10.

²¹⁰ *Stern*, 564 US at 488–93.

²¹¹ See *Seila Law LLC v Consumer Financial Protection Bureau*, No 19-7, 2019 WL 5281290, at *1 (US Oct 18, 2019) (directing the parties to address whether “[i]f the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, can 12 USC § 5491(c)(3) be severed from the Dodd-Frank Act?”).

²¹² See *INS v Chadba*, 462 US 919, 944 (1983).

In short, the Roberts Court is simultaneously formalist and non-formalist in its approach to administrative law. Greater coherence exists within the two ideological camps, with conservatives often taking a more formalist view and the liberals being more nonformalist and specifically functionalist in orientation. Even here, however, there are noteworthy inconsistencies. Several conservative Justices have signed onto opinions stating that deference to agency legal interpretations can be constitutional,²¹³ as well as taken a minimalist or even functionalist approach to separation of powers.²¹⁴ And the same is true of the Roberts Court liberals, who at times have been willing to pull back on deference or adopt formalist approaches to separation of powers.²¹⁵ These inconsistencies in part reflect the fact that anti-administrativist views have been gradually emerging, as well as strategic defensive compromises. But the overall effect is to suggest a court deciding cases on a somewhat ad hoc basis.

B. ORIGINALISM AND HISTORICISM

A second prominent feature of many Roberts Court administrative law opinions is their focus on the past. To some extent, this is simply a manifestation of originalism's increased role in Roberts Court constitutional analysis, combined with the heavy constitutional flavor of attacks on established administrative law.²¹⁶ The historical lens often extends beyond the Founding, however, to include consideration of

²¹³ See, for example, *Pereira*, 138 S Ct at 2121 (Alito, J, dissenting) (criticizing the Court for not adhering to *Chevron*); *City of Arlington*, 569 US at 317–18 (Alito and Kennedy, JJ, joining dissent by Roberts, CJ, arguing that deference to agency legal interpretations is compatible with courts' law-declaring role if Congress has delegated such authority).

²¹⁴ See text accompanying notes 209–12; *Wellness Networks*, 135 S Ct at 1949 (Alito, J, concurring in the judgment in part); *PHH Corp. v Consumer Financial Protection Bureau*, 839 F3d 1, 30–36 (2016) (Kavanaugh, J, dissenting from decision en banc) (making the functionalist argument that an agency headed by a single director with for-cause removal protection lacks the checks on abuse of power of multimember-headed independent agencies and is unconstitutional).

²¹⁵ See, for example, *Kisor*, 139 S Ct at 2414–18 (Kagan, J) (plurality) (limiting *Auer* deference); *Oil States*, 138 S Ct at 1379–80 (Breyer, Ginsburg, and Sotomayor, JJ, concurring in opinion upholding administrative adjudication on purely originalist public rights grounds; Kagan, J, concurred without separate opinion); *Noel Canning*, 573 US at 550 (adopting bright-line rule that “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business”).

²¹⁶ See Larry Solum, *Legal Theory Lexicon 019: Originalism*, Legal Theory Blog (as revised on Aug 11, 2019), at https://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html (originalism on Roberts Court).

judicial precedent and sometimes governmental practice over the nineteenth century. This wider scope reflects broader trends in constitutional interpretation and originalist scholarship, in particular emphasis on political branch practices as constructing constitutional meaning or liquidating constitutional meaning over time.²¹⁷ As Sophia Lee has suggested, this wider historical orientation also reflects anti-administrativists' view of the nation's first century as a period of limited administrative government and judicial ascendancy in enforcing the law.²¹⁸

In prior Terms, Justice Thomas has most consistently and comprehensively developed the originalist attack on modern administrative law. In the 2018 Term, this role fell to Justice Gorsuch. Originalism underlies Gorsuch's formalist account of law and the judicial power in *Kisor*, but especially dominates his *Gundy* dissent, which opens with a lengthy discussion of the Framers' views of constitutional structure, legislative power, and their fear of excessive law-making.²¹⁹ Gorsuch also takes a wider historical lens, however. In *Kisor*, he examined the Court's precedents on deference over the nineteenth and early twentieth centuries to show that *Auer* was a historical aberration.²²⁰ Similarly, in *Gundy* he reviewed the Court's delegation jurisprudence over time to show that, even if the Court upheld delegations, it nonetheless adhered to his account of the narrow bounds of constitutional delegation until the 1940s. Indeed, in both opinions Gorsuch portrays the post-New Deal era of the 1940s as a period of sharp break from long-standing traditions.²²¹

No doubt, Justice Gorsuch's engagement with nineteenth- and early twentieth-century jurisprudence is in part a strategic effort to rebut what on the surface appear to be strong *stare decisis* arguments for retaining current administrative law doctrines. Yet this engage-

²¹⁷ For discussion of these trends in originalist thinking, see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *Notre Dame L Rev* 1, 3–16 (2015). For discussion of constitutional liquidation and its relationship to interpretive approaches that emphasize historical practice, see Willam Baude, *Constitutional Liquidation*, 71 *Stan L Rev* 1 (2019), and Curtis A. Bradley and Neil S. Seigel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, *Va L Rev* (forthcoming 2020), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331588.

²¹⁸ Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 168 *U Pa L Rev* 1699, 1702–03 (2019).

²¹⁹ *Gundy*, 139 S Ct at 2133–36 (Gorsuch, J, dissenting).

²²⁰ *Kisor*, 139 S Ct at 2426–30 (Gorsuch, J, concurring in the judgment).

²²¹ *Gundy*, 139 S Ct at 2137–39 (Gorsuch, J, dissenting); *Kisor*, 139 S Ct at 2426–29 (Gorsuch, J, concurring in the judgment).

ment is also evidence of the limited sway originalism actually has in Roberts Court opinions attacking the administrative state. Indeed, despite its frequent invocation, originalism often has a superficial cast in these opinions, surfacing primarily in claims that administrative government is at odds with the general separation-of-powers principles and concerns of the Framers, rather than in evidence of originalist rejection of specific practices.²²² A prime example is Gorsuch's opinion in *Gundy*, which based its nondelegation arguments on abstract accounts of the Framers' views of constitutional structure and legislative power, rather than focusing on actual delegations from the period.²²³

Interestingly, the historical lens is not limited to administrative law's opponents. Administrative law's judicial defenders often adopt a historicist stance as well. To be sure, they give more weight to recent history than their anti-administrative colleagues, but recent history for these purposes often stretches back eighty to ninety years. Thus, in *Kisor* and *Gundy* Justice Kagan emphasized lines of precedents dating back to the 1940s and before that upheld deference to agencies' regulatory interpretations and broad delegations.²²⁴ Perhaps the starkest historicist defense of established administrative arrangements came in Justice Breyer's 2014 majority opinion in *NLRB v Noel Canning*. In that case, Breyer drew on political branch practices going back to the Founding as well as the post-World War II period to hold that the recess appointment power could be used during an intrasession recess and with respect to vacancies that existed before the recess commenced.²²⁵ Moreover, Breyer expressly justified historical practice as particularly important in separation-of-powers challenges, a marked contrast to his view four years earlier in *Free Enterprise Fund* that historical practices at the time of the Founding did not offer "significant help" in assessing a separation-of-powers challenge to removal protections.²²⁶

²²² See Metzger, 131 Harv L Rev at 45–46 (cited in note 11). An exception is *Oil States*, where both Justice Thomas's majority opinion and Justice Gorsuch's dissent discussed original practices relating to the granting and rescinding of patents in detail. 138 S Ct at 1377; *id* at 1381–83 (Gorsuch, J, dissenting).

²²³ *Gundy*, 139 S Ct at 2133–37; Julian Davis Mortenson and Nicholas Bagley, Delegation at the Founding *20–21 (unpublished manuscript, Dec 2019), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154.

²²⁴ *Kisor*, 139 S Ct at 2411–12 & nn 2–3 (Kagan, J) (plurality); *Gundy*, 139 S Ct at 2129–30 (Kagan, J) (plurality).

²²⁵ *Noel Canning*, 573 US at 524–26, 528–33, 543.

²²⁶ *Free Enterprise Fund*, 561 US at 517.

In short, Justices of all stripes are increasingly looking to past practices and historical precedents in administrative law cases. *Department of Commerce* showcased this trend too. There, both Chief Justice Roberts and Justice Thomas emphasized the long historical practice of including a citizenship question on the census as far back as 1782, with Roberts holding that this “early understanding . . . and long practice” meant that asking about citizenship did not violate the Enumeration Clause.²²⁷ Justice Breyer similarly relied on the history of the census, but the historical account he offered put prime emphasis on transformations in how the census was conducted after 1950, in response to concerns about high undercounting rates.²²⁸

Historical battles also dominate recent administrative law scholarship. Prominent attacks on administrative government by Philip Hamburger, Joseph Postell, and others argue that current national administrative government marks a stark departure from expectations and practices at the Founding through the nineteenth century.²²⁹ Their accounts are disputed by historians offering numerous studies of administrative governance dating back just as far.²³⁰ The extent of judicial deference to administrative legal interpretations is an issue of particular historical dispute. In an article cited by Justice Gorsuch in *Kisor*, Aditya Bamzai contends that before the 1940s the Supreme Court did not have a tradition of deferring to executive interpretations, as Justice Scalia among others had maintained. Instead, the Court “‘respected’ longstanding and contemporaneous *executive* interpretations of law as part of a practice of deferring to longstanding and contemporaneous interpretation *generally*.”²³¹ Disagreeing with Bamzai, Craig Green maintains that the Court’s jurisprudence is more varied and supportive of deference to executive actors, identifying instances in which the Court suggested that “the construction

²²⁷ 139 S Ct at 2567, 2577.

²²⁸ Id at 2585–87 (Breyer, J, concurring in part and dissenting in part).

²²⁹ See generally, for example, Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago, 2014); Joseph Postell, *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government* (Missouri, 2017); see also Richard Epstein, *The Dubious Morality of the Modern Administrative State* (Manhattan Institute, 2019).

²³⁰ See, for example, Brian Balough, *A Government Out of Sight* (Cambridge, 2009); Jerry Mashaw, *Creating the Administrative Constitution* (Yale, 2012); William Novak, *The Myth of the “Weak” American State*, 113 Am Hist Rev 752, 752–53 (2008).

²³¹ Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L J 908, 916, 965 (2017).

given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration.”²³² And Lee argues that early administrative agencies “had the first and often final word on the Constitution’s meaning” such that “reinstating the 19th century constitutional order . . . would all but eliminate judicial review of [agency] actions’ constitutionality.”²³³

This historical scholarship holds important lessons for current debates over administrative law and the administrative state more broadly. The extensive history of administrative agencies operating from the nation’s beginnings to today undercuts efforts to paint contemporary administrative government as a fundamental deviation from the Constitution. To be sure, the extent of administrative authority existing before the twentieth century is disputed. In addition, much of the early national administrative state was developmental and distributional, with many administrative agencies operating in the territories or implementing administrative regimes that involved matters of public right.²³⁴ Still, too many early examples exist of broad administrative discretion, coercive administrative actions targeting private rights, and limited judicial review to justify accounts that portray administrative government and administrative law as twentieth-century aberrations.²³⁵

Moreover, it is unclear why the public right focus and territorial operation of early administrative regimes should limit their historical significance. Those were the primary contexts in which the national

²³² *United States v Moore*, 95 US 760, 763 (1877); Craig Green, *Deconstructing the Administrative State: Constitutional Debates over Chevron and Political Transformation in American Law* 128–34 (Temple University Beasley School of Law Research Paper No 2018-35, Nov 2018), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264482.

²³³ Lee, 168 U Pa L Rev at 1707 (cited in note 218).

²³⁴ Samuel DeCanio, *Democracy and the Origins of the American Regulatory State* 21–22 (Yale, 2015); see also Hamburger, *Is Administrative Law Unlawful?* at 193–203 (cited in note 229) (early administration involved benefits and privileges); Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 Harv L Rev 164, 177–82 (2019) (distinguishing early precedent sustaining broad delegations as relating to public rights).

²³⁵ Some examples from Jerry Mashaw include the 1807–09 embargo, operation of the Land Office, and steamship regulation in the 1850s. Mashaw, *Creating* at 91–143, 192–208, 216–18 (cited in note 230). Ann Woolhandler maintains that the “[u]sing the right/privilege theory to explain older patterns in judicial review is problematic,” noting that “the Court sometimes reviewed government exactions affecting private rights under the deferential res judicata model. At other times, the Court accorded rigorous judicial review in cases seeking remedies for denials of government benefits or largesse.” *Judicial Deference to Administrative Action*, 43 Admin L Rev 197, 231–34 (1991).

government of the time was active, and its actions had tremendous importance for the individuals affected.²³⁶ Although some administrative skeptics view this history as suggesting that administrative power to regulate and adjudicate private rights is limited,²³⁷ an alternative lesson to draw is that the national government has always relied on agencies when it decides to act. And it is possible to understand many forms of contemporary regulation, particularly those involving permits and licenses or that create statutory rights and obligations, as modern-day versions of public rights—indeed, for many decades the Supreme Court has taken just such an approach.²³⁸ Thus, even if this history is viewed as limited to public rights, it would still carry substantial relevance in establishing the historical legitimacy of administrative governance.

Hence, originalism and historicism may turn out to be powerful tools in administrative government's defense. At the same time, framing the defense of administrative law and administrative government in historical terms has the downside of suggesting that the acceptable bounds and forms of administrative action are set by what has been done before. This leads to novelty and innovation being viewed as indications that an administrative arrangement is constitutionally suspect, a position advanced in several Roberts Court opinions.²³⁹ But as the D.C. Circuit recently stated, such a view is at odds with the Court's separation-of-powers jurisprudence, which has often sustained measures that were novel in their day.²⁴⁰ Nor is such a

²³⁶ For a discussion of the importance of the territories to contemporary debates over administrative law and to the lives of many Americans in the nation's early years, see Gregory Ablavsky, *Administrative Constitutionalism in the Northwest Territory*, 167 *U Pa L Rev* 1631, 1633–36 (2019).

²³⁷ See, for example, Hamburger, *Is Administrative Law Unlawful?* at 198–202 (cited in note 229) (acknowledging the historical administrative adjudication of patent rights but distinguishing them from other private rights); Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens*, 2018 *Geo Mason L Rev* 26, 38–50 (describing nineteenth-century cases rejecting the administrative adjudication of land patents and contrasting them with “case law from the past eight decades systematically upholding administrative actions that adjudicate private vested rights”).

²³⁸ See *Stern*, 564 US at 490 (noting “the Court rejected the limitation of the public rights exception to actions involving the Government as a party” but has “limit[ed] the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority”).

²³⁹ Leah M. Litman, *Debunking Antinovels*, 66 *Duke L J* 1407, 1415–21 (2017).

²⁴⁰ *PHH Corp. v Consumer Financial Protection Bureau*, 881 F3d 75, 102–03 (DC Cir 2018) (en banc) (noting that the independent counsel, the FTC, and the Sentencing Commission all represented new arrangements but were upheld as constitutional).

constraint easily squared with the Constitution's text, which gives Congress broad power to structure government as it sees fit.²⁴¹

A historical lens can also stand in tension with efforts to rethink constitutional and administrative law to better fit current realities.²⁴² This tension is particularly acute when the historical lens is an originalist one, as the worlds of 1789 and 2020 are far apart when it comes to the shape and responsibilities of national government. But even a more limited backward-looking gaze may ill fit efforts to address the governance crises of today. Two of the most salient characteristics of contemporary national government are the deep political polarization that has stymied congressional action on pressing issues and increasingly bold assertions of presidential power that undercut established administrative practices and legal regimes.²⁴³ Although both have surfaced in earlier eras, their combination and intensity today create governance challenges that did not exist even a generation ago, and their resolution may necessitate experimenting with structural arrangements at odds with traditional governmental models.

C. APA TEXTUALISM, APA ORIGINALISM, AND ADMINISTRATIVE COMMON LAW

A third analytic contrast in Roberts Court administrative law concerns the different stances the Justices take toward the APA and other administrative law statutes. The Roberts Court is often described as textualist in its approach to statutory interpretation, including by the Justices themselves.²⁴⁴ Whether this is a wholly accurate description is a matter of debate; the Court has deviated from textualism in several prominent statutory interpretation cases.²⁴⁵ In the administrative

²⁴¹ See Manning, 128 Harv L Rev at 5–7 (cited in note 208).

²⁴² For an effort to rethink administrative government's constitutionality along these lines, emphasizing the constitutional implications of the broad delegations that characterize contemporary government, see Metzger, 131 Harv L Rev at 87–94 (cited in note 11).

²⁴³ Id at 75–76; Sarah Blinder, *The Dysfunctional Congress*, 18 Ann Rev Pol Sci 85, 91–97 (2015).

²⁴⁴ See Manning, 128 Harv L Rev at 22–29 (cited in note 208); Anton Metlisky, *The Roberts Court and the New Textualism*, 38 Cardozo L Rev 671, 672 (2016). Justice Kagan famously stated “we are all textualists now” during a lecture she gave at Harvard Law School. *Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* 8:29 (Harvard Law School, Nov 18, 2015), at <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation>.

²⁴⁵ Compare Metlisky, 38 Cardozo L Rev at 672–74 (cited in note 244), with Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox*

law context, at least, the Roberts Court has equivocated between textualist and common law approaches to major administrative law statutes.

Textualism was supreme in *Perez v Mortgage Bankers Association* in 2015.²⁴⁶ Although the APA expressly exempts interpretive rules from notice-and-comment rulemaking requirements, D.C. Circuit doctrine had held that once an agency issued a definitive interpretation of a regulation, the agency had to use notice-and-comment rulemaking to change that interpretation.²⁴⁷ As noted above, the Roberts Court unanimously reversed, with the majority opinion emphasizing that the D.C. Circuit's approach was "contrary to the clear text of the APA's rulemaking provisions."²⁴⁸ Textualism also dominated the Court's approach to the Freedom of Information Act (FOIA) in *Food Marketing Institute v Argus Leader*, a 2018 Term decision rejecting a widely followed lower court interpretation of FOIA's Exemption 4 as protecting confidential information from disclosure only when disclosure would cause competitive harm. That interpretation, according to Justice Gorsuch's majority opinion for a 6–3 Court, ignored that "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where . . . that examination yields a clear answer, judges must stop."²⁴⁹

Text also featured in *Kisor*, with Justice Kagan and Justice Gorsuch battling over the meaning of § 706. This battle took an originalist cast, focusing on what the APA's text was understood to mean when originally adopted. Gorsuch drew on the APA's legislative history and contemporaneous scholarly accounts to argue that the APA was originally understood to require de novo judicial review of legal questions, while Kagan countered with evidence that the APA's enactors

Lawmaking, 129 Harv L Rev 62, 80–96 (2015). For the interesting suggestion that the Court's turn to purposivism is linked to its move away from *Chevron*, see Note, *The Rise of Purposivism and the Fall of Chevron*, 130 Harv L Rev 1227 (2017).

²⁴⁶ 135 S Ct 1199 (2015).

²⁴⁷ See 5 USC § 553(b)(A); *Paralyzed Veterans of America v DC Arena LP*, 117 F3d 579, 586 (1997).

²⁴⁸ See text accompanying note 36; *Perez*, 135 S Ct at 1206.

²⁴⁹ 139 S Ct 2356, 2364, 2366 (2019). In so holding, the Court echoed an earlier Roberts Court decision interpreting FOIA's Exemption 2, where Justice Kagan's majority opinion denied that its interpretation was at odds with long-standing lower-court doctrine, but added that even if it were in conflict, "we have no warrant to ignore clear statutory language on the ground that other courts have done so." *Milner v Department of the Navy*, 562 US 562, 569–72, 576 (2011).

had intended § 706 to restate the existing common law approach to judicial review.²⁵⁰ Chief Justice Roberts's narrow join left this debate over the APA's meaning in a 4–4 tie. Yet *Kisor* is fundamentally a reaffirmation of administrative common law. Kagan's refinement of *Auer*'s limits for a majority of the Court was the epitome of common law doctrinal elaboration, and upholding the doctrine on *stare decisis* gave ultimate priority to judicial precedent. For all his textualism with respect to § 706, even Justice Gorsuch left room for some judicial development of judicial review doctrine in his embrace of *Skidmore* and his insistence that *Auer* violates § 553's notice-and-comment requirements because of its practical effects, despite the section's express exception for interpretive rules.²⁵¹

Common law development of judicial review doctrine was further on display in *Department of Commerce*. Indeed, administrative common law was a constant baseline in the case, with all the Justices relying on *State Farm* despite that decision's expansion of arbitrary and capriciousness review beyond its original meaning.²⁵² But administrative common law was even more prominent in Chief Justice Roberts's elaboration of a prohibition on pretext for a majority of the Court—a prohibition that, as mentioned above, was implicit in existing case law but not expressly developed.²⁵³ Moreover, despite taking a textual approach to statutory interpretation in other contexts, Roberts never stopped to respond to Justice Thomas's complaint that such a pretext inquiry and adding extra-record materials had no basis in the APA's text.²⁵⁴ Instead, he simply invoked the Court's precedents for going beyond the record if a strong showing of bad faith is made and the APA's requirement of reasoned decision making.²⁵⁵

Viewing the 2018 Term opinions along with earlier precedent, it becomes clear that the Justices' views on textualist versus common

²⁵⁰ *Kisor*, 139 S Ct at 2419–20 (Kagan, J) (plurality); id at 2435–36 (Gorsuch, J, concurring in the judgment).

²⁵¹ 139 S Ct at 2434–35, 2442–43 (Gorsuch, J, concurring in the judgment).

²⁵² See Metzger, 80 Geo Wash L Rev at 1299–1300 (cited in note 96). But see Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 Admin L Rev 807, 847–49 (2018) (arguing that hard-look review fits within the “vague contours” of “arbitrary [and] capricious” as originally understood in the APA).

²⁵³ See text accompanying notes 147–48.

²⁵⁴ See *Department of Commerce*, 139 S Ct at 2578–79 (Thomas, J, concurring in part and dissenting in part).

²⁵⁵ Id at 2574, 2576.

law interpretations of administrative law statutes do not track their ideological divisions or overall stance on administrative government. Instead, many individual Justices oscillate between administrative law textualism and a more common law stance, as does the Court as a whole.²⁵⁶ To some extent, this oscillation may reflect the specific administrative law measures at issue. For example, FOIA's text is far more detailed and more recently amended than the APA, which helps explain the contrast between *Argus Leader*, on the one hand, and *Kisor* and *Department of Commerce* on the other, all decided in the 2018 Term. And the Court's notably greater textualism in *Perez* than *Kisor* and *Department of Commerce* may result from the fact that *Perez* involved the APA's procedural requirements rather than its provisions for judicial review. Not only are the APA's procedural requirements more detailed and specific than its judicial review provisions, but the Court has allowed courts more leeway to develop the latter.²⁵⁷

Significantly, however, such oscillation between APA textualism and administrative common law is not a new phenomenon. For many decades, the Court has periodically rejected administrative common law as being at odds with the APA while simultaneously developing new administrative common law doctrines. Despite this oscillation, the common law approach to the APA has dominated, especially in the area of judicial review.²⁵⁸ The paradigm example is *Chevron*, which never referenced § 706's text at all and justified its two-step approach to deference on a combination of imputed congressional intent, precedent, pragmatic factors, and constitutional structure.²⁵⁹

²⁵⁶ There are exceptions. Justice Breyer fairly consistently adopts a common law approach. See *Argus Leader*, 139 S Ct at 2368–69 (Breyer, J, concurring in part and dissenting in part); *Milner*, 562 US at 585–90 (Breyer, J, dissenting), and Justices Thomas and Gorsuch have been more consistently textualist (see, for example, text accompanying note 254); *Gutierrez-Brizuela v Lynch*, 834 F3d 1142, 1151 (10th Cir 2016) (Gorsuch, J, concurring).

²⁵⁷ Compare *Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council*, 435 US 519, 524, 542–49 (1978) (insisting that “[a]gencies are free to grant additional procedural rights [beyond those in the APA] . . . but reviewing courts are generally not free to impose them”), with *Chevron*, 467 US at 842–43 (setting out a two-step standard for judicial review of agency statutory interpretations without referencing the APA).

²⁵⁸ See Metzger, 80 Geo Wash L Rev at 1298–1310 (cited in note 96). At the same time, courts are “reluctant to be open about their use of common law in the administrative law arena.” Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 Admin L Rev 1, 2–3 (2011).

²⁵⁹ John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex L Rev 113, 189–93 (1999).

A growing number of scholars now argue for APA originalism and critique the common law approach to the APA.²⁶⁰ The arguments against administrative common law range from defenses of textualist statutory interpretation writ large to attacks on the legitimacy of judicial lawmaking to concerns about the harmful effects of specific common-law-developed doctrines.²⁶¹ Notably, these critiques are offered by scholars with a range of views about judicial deference to agencies and administrative government more broadly. In particular, prominent defenders of the administrative state have advocated that courts should follow the APA's original meaning and text.²⁶² Critiques of administrative common law also are not limited to the APA; John Brinkerhoff has defended the Roberts Court's recent FOIA textualism on the grounds that lower courts' common law interpretations of FOIA wrongly downplayed FOIA's pro-disclosure orientation and instead imposed a "strong pro-government gloss over nearly all of FOIA."²⁶³

This growing scholarship underscores the potential pitfalls of administrative common law. But as I have argued elsewhere, it is important to separate out the merits and demerits of particular common law doctrines from the general enterprise of administrative common law.²⁶⁴ I am skeptical of efforts to broadly replace administrative common law with a textual and originalist approach to the APA. The APA's text often supports alternative readings, as made clear by the dueling accounts of § 706 in *Kisor* and the strong and weak forms of arbitrary and capriciousness review in *Department of Commerce*. Moreover, the original meaning of the APA was and remains contested.²⁶⁵ George

²⁶⁰ See, for example, Bernick, 70 Admin L Rev at 809 & n 11 (cited in note 252) (providing examples). John Duffy started this trend, writing the first sustained attack on common law approaches to judicial review under the APA twenty years ago. See Duffy, 77 Tex L Rev at 120 (cited in note 259).

²⁶¹ See, for example, Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv L Rev 1285, 1287–89, 1303–09 (2014) (arguing that the APA's text does not support the presumption of reviewability that the Court has identified and that the presumption illegitimately intrudes on congressional policy choices); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 Ind L J 1207, 1254–60 (2015) (applying superstatute theory to the APA and critiquing administrative common law on public deliberation grounds).

²⁶² See Sunstein, 107 Georgetown L J at 1642–57 (cited in note 194); see also Bagley, 127 Harv L Rev at 1287–89, 1303–09 (cited in note 261) (arguing that APA textualism and originalism lead to greater agency freedom from intrusive judicial review).

²⁶³ John C. Brinkerhoff, Jr., *FOIA's Common Law*, 36 Yale J Reg 575, 578–79 (2019).

²⁶⁴ Metzger, 80 Geo Wash L Rev at 1355 (cited in note 96).

²⁶⁵ For a detailed articulation of this view with respect to § 706, see Sunstein, 107 Georgetown L J at 1642–57 (cited in note 194).

Shepherd has described “the fight over the APA” as “a pitched political battle for the life of the New Deal.” This battle meant that key provisions of the APA were left intentionally ambiguous so that agreement on the APA could be reached. And it meant that the APA’s legislative history was intentionally manipulated by both sides to advance their cause, leaving contradictory sources for future interpreters.²⁶⁶ One clear data point, however, is that the Supreme Court never viewed the APA as overturning administrative common law or its judicial review precedents, other than imposing a more searching version of substantial evidence review.²⁶⁷

As important, administrative common law is an inevitable and legitimate phenomenon in our constitutional separation-of-powers system.²⁶⁸ It is inevitable given the difficulties Congress faces in legislating and the practical impossibility of specifying answers to newly emergent administrative law issues in advance. The result is that courts end up tasked with policing agency actions under statutory constraints that increasingly are out of step with administrative realities. Of course, courts could leave the necessary updating to Congress, and sometimes do. But experience shows that—at least with a capaciously worded statute—courts feel a practical imperative to perform that updating role rather than simply apply administrative constraints ill suited to serving congressional purposes in the face of changed realities.²⁶⁹ Administrative law’s transsubstantive nature, which means that the effects of not gap-filling or updating would mean inadequate administrative controls across a wide range of executive branch activities, reinforces judges’ inclinations for common law development. A similar reinforcing effect comes from administrative law’s focus on the structures and procedures that lie at the heart of the administrative state,

²⁶⁶ George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw U L Rev* 1557, 1560, 1662–63 (1996) (“As the bill’s enactment became imminent, each party to the negotiations over the bill attempted to create legislative history—to create a record that would cause future reviewing courts to interpret the new statute in a manner that would favor the party.”).

²⁶⁷ See Sunstein, 107 *Georgetown L J* at 1653–56 (cited in note 194) (discussing the Court’s adherence to such as *Gray v Powell*, 314 US 402 (1941) and *NLRB v Hearst Publications*, 322 US 111 (1944)); Green, *Deconstructing* at 134–38 (cited in note 232).

²⁶⁸ This paragraph and the next draw on ideas I set out at length in Metzger, 80 *Geo Wash L Rev* at 1320–55 (cited in note 96).

²⁶⁹ A prime example is judicial development and elaboration of judicial review of rulemaking in the face of the explosion of social regulation in the 1960s and 1970s. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan L Rev* 1189, 1301–09 (1986).

such as the court-agency relationship. Not only is this relationship difficult to capture comprehensively in statutes,²⁷⁰ but also courts may view elaboration of judicial review doctrines as especially within their bailiwick.

This structural character of administrative law closely relates to a third feature that underlies the development of administrative common law: the quasi-constitutional character of ordinary administrative law. Administrative law plays a critical role in building out the administrative state, and even more in domesticating the administrative state within the constitutional order. Although rarely judicially acknowledged, the primary means by which courts have addressed constitutional concerns about agencies' powers has been through sub-constitutional administrative law requirements, such as the requirement of reasoned decision making, rather than direct constitutional scrutiny.²⁷¹ Judicial development of administrative common law reflects this use of administrative law to address the constitutional tensions raised by the modern administrative state.

To be sure, that administrative common law may be practically inevitable does not render it legitimate. But unlike earlier instances of federal court lawmaking, administrative common law does not displace state law or alter the primary rules that govern private behavior. Instead, it shares the focus on uniquely federal interests that marks many legitimate forms of federal common law.²⁷² Equally central, most administrative common law has a statutory basis to which it is at least loosely tethered, such as the judicial review provisions of the APA. And, critically, to the extent it serves to implement separation-of-powers concerns, administrative common law is part of the elaboration of constitutional requirements seen as lying at the core of the judicial role today.

²⁷⁰ See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum L Rev 1749, 1772–73 (2009).

²⁷¹ For further development of this argument, see generally Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 Colum L Rev 479 (2010); see also Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 Fla L Rev 1217, 1218–19, 1234–48 (2014) (arguing that “administrative law has evolved into an unwritten constitution that governs the administrative power not contemplated by the U.S. Constitution”). To Justice Gorsuch’s credit, he acknowledged the role that subconstitutional doctrines play in policing discretion in *Gundy*, 139 S Ct at 2141–42 (Gorsuch, J, dissenting) (discussing vagueness and major questions doctrines as surrogates for delegation doctrine).

²⁷² *Texas Industries v Radcliffe Materials, Inc.*, 451 US 630, 640–41 (1981).

III. WHITHER ROBERTS COURT ADMINISTRATIVE LAW?

Focusing simply on these analytic themes and tensions, it is hard to discern a clear direction for the Roberts Court on administrative law. The Court is at times formalist and at times nonformalist; at times textualist and at times more common law in orientation. And while its administrative law opinions have turned consistently more historicist over recent years, that backward focus has encompassed a range of approaches, from originalism to an emphasis on historical practice and precedent. Greater coherence becomes apparent when the Justices are viewed in their overall ideological groupings, and some individual Justices are particularly consistent. But the Court as a whole seems to vacillate in ways that resist principled explanation. Instead, the factor that best explains Roberts Court administrative law seems to be the varied administrative law jurisprudence of Chief Justice Roberts himself.

Taking a step back, two broader frames emerge from the 2018 Terms decisions and the Roberts Court's administrative law jurisprudence writ large. One is radical and could portend dramatic changes in existing doctrine; the other is incrementalist and seemingly more modulated in its reforms. The incrementalist approach dominated the 2018 Term administrative law decisions, and there are reasons to think that may continue. But although these two approaches are analytically distinct, in practice both may result in similar pullbacks on administrative authority. Moreover, both frames are united in one key regard: increasing judicial supervision of administrative government. And both convey the sense that the administrative state must be cabined to guard against unaccountable, aggrandized, and arbitrary administrative power. Notably absent across both is an affirmative argument for the potential benefits of administrative government, other than recognition on the incrementalist side of the value of bureaucratic expertise.

The lack of a more robust defense of the administrative state represents a substantial hole in Roberts Court administrative law jurisprudence. Failure to invoke the full range of potential benefits from administrative government makes Roberts Court administrative law jurisprudence appear increasingly one-sided and political. Moreover, a fuller picture of administrative government is needed if the Roberts Court's interventions are to yield a coherent approach to administrative law.

A. RADICALISM AND INCREMENTALISM IN ROBERTS COURT
ADMINISTRATIVE LAW

Viewing the analytic tensions described above in broader perspective, two methodological frames emerge from the Roberts Court's 2018 administrative law decisions. What stands out in Justice Gorsuch's *Kisor* opinion is the absolutist and categorical nature of his argument. He insists on the need for clear rules and rejects altogether any claims of *stare decisis*.²⁷³ A similar absolutist and categorical character typifies Gorsuch's approach in *Gundy*, with his insistence on reviving direct constitutional barriers to delegation and unwillingness to address delegation concerns through more indirect and subconstitutional means.

This uncompromising commitment to formalism, originalism, and textualism—evident in Justice Thomas's opinions as well—has potential to radically reshape existing doctrine and administrative institutions. It would require overruling *Chevron* and *Auer* deference, as both Justices openly acknowledge, but the implications of this approach would extend well past deference doctrines. Taken categorically, without acceptance of patterns of governance that have emerged over time, a formalist insistence on strict lines dividing legislative, executive, and judicial power calls into question the combination of rulemaking, enforcement, and adjudication that lies at the heart of modern administrative agencies.²⁷⁴ Applying such a division, Gorsuch's and Thomas's prior opinions have suggested they would pull administrative adjudication back to only covering matters of public right, defined in originalist terms.²⁷⁵ Asserting that original understandings so require, they would also deem a broad swath of federal government personnel to be principal or inferior officers, thereby rendering a large

²⁷³ Compare *Kisor*, 139 S Ct at 2443–48 (Gorsuch, J, concurring in the judgment) (arguing that *stare decisis* does not require retention of *Auer*), with *Perez*, 135 S Ct at 1212 (Scalia, J, concurring in the judgment) (acknowledging that *Chevron* may be too established to be overturned).

²⁷⁴ See Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U Chi L Rev 297, 298, 312 (2017).

²⁷⁵ See *Oil States Energy Services, LLC v Greene's Energy Group, LLC*, 138 S Ct 1365, 1381–82 (2018) (Gorsuch, J, dissenting) (arguing that system for administrative review of granted patents was unconstitutional because granted patents were not considered matters of public right at the founding); *B&B Hardware, Inc. v Hargis Industries, Inc.*, 135 S Ct 1293, 1316 (2015) (Thomas, J, dissenting) (“Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights.”).

number unconstitutionally appointed.²⁷⁶ Meanwhile, requiring the APA to be applied in accordance with its enacted text and original meaning would not just overturn *Chevron* and *Auer* and entail a pullback in arbitrariness review; it would also throw into doubt long-standing doctrines that developed the procedural requirements of notice-and-comment rulemaking and access to judicial review.²⁷⁷

By contrast, Justice Kagan's *Kisor* opinion is above all else incrementalist. Far from absolute, it instead emphasizes case-by-case analysis and a commitment to developing precedent and existing practice rather than dramatic change. Such contextualized, precedent and practice-based analysis has long characterized Justice Breyer's administrative law opinions.²⁷⁸ And incrementalism was also on display in Justice Kagan's decision in *Lucia v SEC*, which ruled that ALJs at the Securities and Exchange Commission were unconstitutionally appointed inferior officers. In so holding, Kagan wrote about as narrowly as possible, closely following existing precedent and refusing to define inferior officer more broadly or consider the scope of the judges' removal protection.²⁷⁹ Perhaps more importantly given his role as the fulcrum of the Court on administrative law, Chief Justice Roberts's administrative law opinions are often incrementalist as well. Although the Chief Justice has advanced formalist principles with a categorical edge, he has applied them in a minimalist manner that substantially circumscribes their impact.²⁸⁰ Roberts's penchant for minimalism was particularly clear with his limited and selective join in *Kisor*, which left the law versus policy and APA debates in the case unresolved and instead focused on addressing his concerns about *Auer* deference with minimal disruption to existing doctrine.

²⁷⁶ See *Lucia v SEC*, 138 S Ct 2044, 2056 (2018) (Thomas, J, concurring) ("The Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty.") (citation omitted).

²⁷⁷ See note 252 and its accompanying text (discussing arbitrary and capriciousness review); *American Radio Relay League v FCC*, 524 F3d 227, 245–47 (DC Cir 2008) (Kavanaugh, J, concurring) (arguing that current notice-and-comment requirements are not compatible with the APA's text as originally understood).

²⁷⁸ See *Noel Canning*, 573 US 513, 524 (2014) (Breyer, J) (emphasizing that "in interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice"); *Barnhart v Walton*, 535 US 212, 222 (2002) (Breyer, J) (arguing that *Chevron* deference is appropriate based on consideration of multiple factors).

²⁷⁹ *Lucia*, 138 S Ct at 2051 (Kagan, J) ("The *sole question* here is whether the Commission's ALJs are 'Officers of the United States' or simply employees of the Federal Government.") (emphasis added).

²⁸⁰ See text accompanying notes 209–10.

In the contest between radicalism and incrementalism during the 2018 Term, incrementalism was the victor. This could in part be a reflection of the fact that the 2018 Term was a transition year, with Justice Kennedy's resignation and Justice Kavanaugh replacing him to create a solid conservative majority on the Court. Popular criticism of the Court in response may have made Roberts in particular unwilling to adopt more radical positions, and fears that the new majority will overturn contentious precedents fueled the repeated debates over *stare decisis*.²⁸¹ If this pattern continues in future Terms, then the most radical attacks on the constitutionality of administrative governance may not gain majority support.

The counter is *Gundy* and the constitutionality of broad congressional delegations of authority to the executive branch. Despite his incrementalism elsewhere, the Chief Justice signed onto Justice Gorsuch's constitutional attack on broad delegations of authority to the executive branch in *Gundy*—an attack that Justice Kagan described as meaning that “most of Government is unconstitutional.”²⁸² Each of the five conservative Justices has now signaled willingness to reconsider the Court's lenient nondelegation doctrine.²⁸³ Were the Court to support significant constitutional barriers to delegation, that would be a sign of radicalism ascendant in Roberts Court administrative law. However, it remains to be seen how far Roberts, Alito, and Kavanaugh are actually willing to go reviving limits on delegation. Their same-Term endorsement of broad executive branch policy discretion in *Department of Commerce* may signal that they will not go very far. Previously, both Roberts and Kavanaugh have addressed excessive-delegation concerns through a statutory interpretation lens rather than broad-scale constitutional invalidation, and they may opt to continue with such subconstitutional approaches going forward.²⁸⁴

²⁸¹ Cf. Joan Biskupic, *Chief Justice John Roberts Is Exercising the Power He's Craved*, CNN Politics (June 27, 2019), at <https://www.cnn.com/2019/06/27/politics/john-roberts-supreme-court/index.html>.

²⁸² 139 S Ct at 2130 (Kagan, J) (plurality).

²⁸³ See *id.* at 2131 (Gorsuch, J, joined by Roberts, CJ, and Thomas, J, dissenting) (arguing for stricter constitutional limits on delegation); *id.* at 2131 (Alito, J, concurring in the judgment) (signaling support for reconsidering “the approach we have taken [to nondelegation] for the past 84 years”); *Paul v United States*, 140 S Ct 342 (2019) (Kavanaugh, J, statement on denial of certiorari) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine . . . may warrant further consideration in future cases.”).

²⁸⁴ See *King v Burwell*, 135 S Ct 2480, 2483 (2015) (refusing to apply *Chevron* deference on the grounds that “had Congress wished to assign” “a question of deep economic and political

Chief Justice Roberts's past practice of building up to overruling precedents over time rather than in one fell swoop also merits note.²⁸⁵ This might suggest that radical changes in administrative law may yet occur, notwithstanding the 2018 Term's incrementalism. Yet Roberts has had opportunities to push for more radical administrative law outcomes in the past and not pursued them—despite describing administrative government in stark terms that would seem to merit a more dramatic response.²⁸⁶ Put differently, when it comes to bottom-line results, Roberts's anti-administrativism has often lost out to his Burkean and common law instincts.

Crucially, however, even incrementalism can have a significant impact on existing administrative law and administrative institutions. One need look no further than the aftermath of *Kisor* to see this effect. In the four-month period after *Kisor*'s issuance, the courts of appeals directly considered whether to apply *Auer* deference in light of *Kisor* in thirty cases and deferred to the agency's approach in only ten of those. In an additional five cases, the court declined deference but ultimately upheld the agency's interpretation, for an overall rate of the government prevailing 50 percent of the time.²⁸⁷ By comparison, studies of the years leading up to *Kisor* have identified the courts as granting *Auer* deference or the government as prevailing 71 percent of the time.²⁸⁸ Similarly, despite their bottom-line minimalism, the Court's decisions on removal, the status of administrative law judges,

significance” to an agency “it surely would have done so expressly”); *United States Telecommunications Association v FCC*, 855 F3d 381, 419 (Kavanaugh, J, dissenting from denial of en banc review) (arguing that for an agency to have authority to issue a “major agency rule[] of great economic and political significance . . . Congress must clearly authorize the agency to do so”). Kavanaugh has noted that Gorsuch's view would preclude the approach that Kavanaugh had previously articulated, of allowing Congress to delegate authority to an agency “to decide [a] major policy question” if Congress does so “expressly and specifically.” *Paul*, 140 S Ct at *1.

²⁸⁵ For a discussion of Chief Justice Roberts's minimalism in this vein, see generally Jamal Greene, *Maximinimalism*, 38 *Cardozo L Rev* 623 (2016).

²⁸⁶ See Metzger, 131 *Harv L Rev* at 36, 47–48 (cited in note 11).

²⁸⁷ These numbers come from examining court of appeals and district court cases in the Westlaw citing decisions database that cited *Kisor* between June 26, 2019 to October 26, 2019. A total of sixty-two cases cited *Kisor*, but only thirty directly considered whether to apply *Auer* deference.

²⁸⁸ See Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 *Ohio St L J* 813, 825–27 (2015) (studying deference rates in the court of appeals between 2011 to 2014 and finding deference rates fell from 82 percent in 2011–12 to 71 percent in 2013–14); Richard J. Pierce, Jr. and Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 *Admin L Rev* 515, 519–20 (2011) (finding that across 219 cases between 1999 and 2007, district and appellate courts granted *Auer* deference at a 76 percent rate); William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 *Geo L J* 515, 547 (2018) (finding

and the constitutionality of administrative adjudication have sparked a slew of challenges to well-established features of the administrative state.²⁸⁹ And, if widespread, statutory narrowing of delegated authority in response to background delegation concerns could lead to a significant pullback in agency authority. Hence, over time both the radical and incrementalist approaches may yield substantial change to existing administrative law and a significant pullback in administrative governance.

A final important factor determining the shape of administrative law going forward is what happens in the federal appellate courts. That is the level where most administrative law decisions are issued, and where the ultimate impact of the Court's interventions will be determined. *Chevron* is the leading example; more than the decision itself, it was subsequent actions by lower courts and Justice Scalia that made *Chevron* canonical.²⁹⁰ Similarly, it will be how the lower courts apply *Kisor*—whether they continue to treat it as significantly narrowing but preserving *Auer*, or instead as essentially doing away with *Auer* deference or only tweaking *Auer* at the margins—that will establish *Kisor*'s impact on administrative law in practice. The same is true of *Department of Commerce*'s emphasis on weaker arbitrary and capriciousness review of agency decision making. As a result, the Trump administration's efforts to stock the federal courts with anti-administrativist judges may well prove more important than Supreme Court doctrine in transforming the shape of administrative law.

B. CONSTRAINING THE ADMINISTRATIVE STATE

It is also worth highlighting a central feature that, despite their differences, the radical and incrementalist approaches share: Both

that the government prevailed at an overall rate of 74 percent in cases when the court invoked *Auer* in the period 1993 to 2013, but only at a 71 percent rate after 2006).

²⁸⁹ See, for example, *Seila Law LLC v Consumer Protection Bureau*, 2019 WL 5281290 at *1 (US Oct 18, 2019) (asking the parties to address the severability of the CFPB from Dodd-Frank should it be found unconstitutional); *Arthrex, Inc. v Smith & Nephew, Inc.*, 2019 WL 5616010, *1 (Fed Cir 2019) (holding that Administrative Patent Judges were improperly appointed principal officers); *Collins v Mnuchin*, 938 F3d 553, 563 (5th Cir 2019) (en banc) (holding that the FHFA "for cause" removal protection was unconstitutional); *Cochran v SEC*, 2019 WL 1359252, at *1 (ND Tex 2019) (up on appeal before the 5th Circuit) (challenging the constitutionality of the SEC's ALJ's removal protection. The 5th Circuit issued a preliminary injunction on the administrative proceedings until the case is resolved).

²⁹⁰ See Gary Lawson and Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 Admin L Rev 1, 33–73 (2013); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in Peter L. Strauss, ed, *Administrative Law Stories* 399 (Foundation, 2006).

involve an assertion of greater judicial control over the administrative state and justify that greater role for courts on concerns about the dangers of expanding administrative power. Indeed, skepticism about administrative government may well be the consistent driver animating Roberts Court administrative law, albeit given full sway under Justice Gorsuch's radicalism and tamped down under Justice Kagan's incrementalism.

A striking characteristic of many Roberts Court administrative law opinions is their sharp rhetorical attack on the administrative state and bureaucracy. Chief Justice Roberts deserves the top award for the most pointed prose in this regard. His reference in *Free Enterprise* to a "vast and varied federal bureaucracy" that "wields vast power and touches almost every aspect of daily life" is a prime example, and his description in *City of Arlington v FCC* of "hundreds of federal agencies poking into every nook and cranny of daily life" is equally evocative.²⁹¹ Several other Justices have made disparaging remarks about the bureaucracy as well, often quoting Roberts's language in *Free Enterprise*. Justice Gorsuch in particular repeatedly positions judges as the protectors of "the unpopular and vulnerable" against "bureaucrats"²⁹² and "a bureaucrat's caprice."²⁹³ He echoed these sentiments to some extent in *Kisor*, invoking the administrative state's "explosive growth," and "self-interested" bureaucrats with shifting whims.²⁹⁴ But the 2018 Term decisions were relatively tame and balanced on the rhetorical front, with Chief Justice Roberts in particular holding his fire. Perhaps the attacks on the "deep state" that currently dominate the political arena convinced the Justices that similar bureaucracy bashing by the Court would be inappropriate.²⁹⁵

Instead, what surfaced clearly in the 2018 Term opinions was a more principled debate over the relevance of bureaucratic expertise. As noted above, both Justice Kagan in *Kisor* and Justice Breyer in *Department of Commerce* portrayed expertise as a central benefit of administrative government and one that administrative law doctrine

²⁹¹ *Free Enterprise Fund*, 561 US at 499; *City of Arlington*, 569 US at 315.

²⁹² *Oil States*, 138 S Ct at 1381 (Gorsuch, J, dissenting).

²⁹³ *Biestek v Berryhill*, 139 S Ct 1148, 1163 (2019) (Gorsuch, J, dissenting).

²⁹⁴ *Kisor*, 139 S Ct at 2432, 2442, 2446 (Gorsuch, J, dissenting).

²⁹⁵ For a description of that political battle, which has become even more prominent in the impeachment inquiry, see Peter Baker et al, *Trump's War on the "Deep State" Turns Against Him*, NY Times (Oct 23, 2019), at <https://www.nytimes.com/2019/10/23/us/politics/trump-deep-state-impeachment.html>.

should be tailored to foster. Thus, Kagan precluded *Auer* deference from applying to administrative interpretations of regulations that did not “in some way implicate its substantive expertise” while Breyer relied heavily on the contrary and documented views of agency experts in concluding that Ross’s decision was arbitrary and capricious.²⁹⁶ By contrast, Justice Gorsuch elevated judicial expertise over that of bureaucrats, arguing that it was ultimately for courts to weigh “the expert agency’s views” against “competing expert and other evidence supplied in an adversarial setting.”²⁹⁷ And Chief Justice Roberts insisted on the primacy of an agency’s political officials over its experts, emphasizing that agency decisions are legitimately driven by political priorities. This is a point Roberts has made before, most notably arguing in *Free Enterprise* that “[o]ne can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts.”²⁹⁸ Justice Thomas also has voiced skepticism of arguments for deference based on administrative expertise, identifying them as misplaced and historically rooted in the progressives’ “belief that bureaucrats might more effectively govern the country than the American people.”²⁹⁹

Yet these disagreements over bureaucratic expertise should not obscure the similarities in these accounts. All the Justices ended up supporting greater judicial scrutiny of administrative decision making in some form, whether by restricted deference to agency interpretations, heightened scrutiny of agency policy determinations, or both. As significant, they did so invoking the need to guard against the danger of excessive administrative power. Even Justice Kagan in *Kisor* argued “that administrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse.”³⁰⁰ Granted, what the Justices view as the danger posed by expanded administrative government varies in important ways. As I have previously argued, at times Justices stress the danger of aggrandized administrative power threatening individual liberty, and at others the fear is that administrative power is politically

²⁹⁶ *Kisor*, 139 S Ct at 2417 (Kagan, J) (plurality); *Department of Commerce*, 139 S Ct at 2587–93 (Breyer, J, concurring and dissenting in part).

²⁹⁷ *Kisor*, 139 S Ct at 2442–43 (Gorsuch, J, concurring in the judgment).

²⁹⁸ *Free Enterprise Fund*, 561 US at 499.

²⁹⁹ *Perez*, 135 S Ct at 1223 n 6 (Thomas, J, concurring).

³⁰⁰ *Kisor*, 139 S Ct at 2423 (Kagan, J) (plurality).

unaccountable.³⁰¹ In *Department of Commerce* Justice Breyer suggested a different account, implying that the real danger was too much political control of administrative power,³⁰² while the Chief Justice focused on the traditional concern that exercise of administrative power must be reasoned and not arbitrary.³⁰³ And in *Kisor* and *Gundy*, Justice Gorsuch repeatedly portrayed administrative power as biased as well as aggrandized, worsening the threat to individual liberty.³⁰⁴ Despite these differences, the consistent theme is of the potential dangers of administrative government.

Notably lacking from the 2018 Term decisions, and from Roberts Court administrative law generally, is a robust defense of the administrative state. The contribution that bureaucratic expertise makes to better decision making and effective government is a central benefit of administrative agencies.³⁰⁵ But administrative agencies serve other critical functions too. Bureaucracy works to constrain as well as empower government, through close supervision and enforcement of legal controls on government actors. Administrative government is also essential for ensuring political accountability; it is agencies implementing statutes through regulations and enforcement that put democratically adopted policy into operation.³⁰⁶ And administrative agencies are equally important to securing individual liberty, by protecting individuals against abuses of private power and ensuring access to the basic goods (safe food, a clean environment, protection against private exploitation, and so on) needed for a full and free life. The D.C. Circuit underscored this point recently in its en banc majority opinion in *PHH Corporation v CFPB*. There, in rejecting the claim that a single-headed agency with removal protection posed a greater threat to individual liberty than a multimember commission, Judge Pillard emphasized the liberty benefits of financial regulation:

³⁰¹ Metzger, 131 Harv L Rev at 36–38 (cited in note 11).

³⁰² *Department of Commerce*, 139 S Ct at 2589–90, 2592–93, 2595 (Breyer, J, concurring in part and dissenting in part).

³⁰³ Id at 2575–76.

³⁰⁴ *Kisor*, 139 S Ct at 2425, 2432, 2439, 2446–47 (Gorsuch, J, concurring in the judgment); *Gundy*, 139 S Ct at 2131 (Gorsuch, J, dissenting).

³⁰⁵ It is also an administrative feature under increased threat. See Brad Plumer and Coal Davenport, *Science Under Attack: How Trump Is Sidelining Researchers and Their Work*, NY Times (Dec 28, 2019), at <https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html>.

³⁰⁶ Metzger, 131 Harv L Rev at 77–87 (cited in note 11).

It remains unexplained why we would assess the challenged removal restriction with reference to the liberty of financial providers, and not more broadly to the liberty of individuals and families who are their customers. . . . Congress understood that markets' contribution to human liberty derives from freedom of contract, and that such freedom depends on market participants' access to accurate information, and on clear and reliably enforced rules against fraud and coercion.³⁰⁷

For that matter, financial regulation also advances liberty interests of regulated parties, for example by guarding against abusive tactics that can wreak financial havoc or destroy consumer trust in an industry.

What would a fuller defense of administrative government have looked like in the 2018 Term administrative law decisions? In *Department of Commerce*, more emphasis could have been put on how the Census Bureau's actions represented an internal bureaucratic effort to reinforce democracy and the rule of law. Policy setting by top political appointees is certainly an important form of political accountability, as Chief Justice Roberts insisted. But there is surely also a political accountability benefit to resisting actions by political leaders that threaten the basic representative structure of our political system, as well as an important rule-of-law value in ensuring that political leaders do not abuse government power for partisan gain. In *Kisor*, it could have meant more of an argument for interpretive deference precisely because such deference allows agencies to interpret ambiguous regulations in ways that they believe will best advance their regulatory goals. Although for Gorsuch this amounts to self-serving and liberty-threatening bias, that assumes that public agencies are no different than private parties. A more robust defense of administrative government would reject that equation, and instead emphasize how effective implementation of statutes and regulations can be liberty enhancing and in the public interest. The same liberty-enhancing argument could have been developed in defense of broad delegations in *Gundy*; such delegations can enhance liberty by ensuring that government is able to respond quickly and effectively to new private abuses of power as they arise. In fairness, Justice Breyer's and Kagan's opinions hinted at these arguments, with Breyer mentioning the importance of an accurate census to democracy and

³⁰⁷ *PHH Corp. v Consumer Financial Protection Bureau*, 881 F3d 75, 106 (DC Cir 2018) (en banc); see also *id* at 105–06 (arguing in addition that if “a removal restriction leaves the President adequate control of the executive branch’s functions,” courts do not undertake a separate inquiry into the restriction’s impact on liberty).

Kagan underscoring agencies' knowledge and value to Congress.³⁰⁸ But for the most part they emphasized neutral-sounding administrative expertise and did not develop a broader account of how the administrative state reinforces the constitutional order.

Failing to note these potential benefits leads to a one-sided portrayal of the administrative state as inherently a threat to democracy, rule of law, and liberty. And this one-sidedness in turn suggests that the ultimate goal of Roberts Court administrative law may be to pull back on government on ideological and political grounds, rather than because doing so advances constitutional values or some other principled basis. That perception should be a concern even for conservative Justices who are deeply skeptical of administrative government. As important, a more balanced account of agencies' strengths and weaknesses is needed for the Roberts Court to develop a coherent approach to administrative law. Absent a more sophisticated and nuanced understanding of administrative government, the Roberts Court's administrative law decisions are unlikely to rise above the level of ad hoc and occasionally inconsistent interventions.

³⁰⁸ *Department of Commerce*, 139 S Ct at 2584–85, 2595 (Breyer, J, concurring in part and dissenting in part); *Kisor*, 139 S Ct at 2413 (Kagan, J) (plurality); *Gundy*, 139 S Ct at 2130 (Kagan, J) (plurality).