COMMENTS

DELEGATION AND INTERPRETIVE DISCRETION: *GUNDY*, *KISOR*, AND THE FORMATION AND FUTURE OF ADMINISTRATIVE LAW

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Congress is supposed to write laws. So much seems apparent from the constitutional design, which in no uncertain terms vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States"[1] and forces Congress to exercise those "Powers" through an elaborate process of enacting the same legal text in two legislative chambers and presenting the passed bill to the President for approval.[2] But in the modern state, and for quite some time, Congress has delegated authority to write rules and regulations with the status of laws to administrative agencies situated within the executive branch.[3] In turn, those agencies have written rules and regulations affecting the private lives of citizens, and litigants have sometimes challenged in court an agency's authority to promulgate, and to interpret, a rule. Two critical issues that arise out of this arrangement are the limits, if any, on Congress's power to delegate such rulemaking authority to agencies and the interpretive methodology that courts ought to apply when a private party disagrees with the executive branch's interpretation of one of those rules.

This past Term, two cases appeared poised to break substantial new ground on these two issues. *Gundy v. United States*[4] addressed the question whether the Sex Offender Registration and Notification Act's[5] (SORNA) conferral of authority on the Attorney General to apply its registration requirement retroactively violated the limits that Article I's vesting of "legislative Power" in Congress places on Congress's ability to delegate elsewhere.[6] The Supreme Court has often declared that Congress cannot validly delegate its "legislative Power" to the executive

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[1] U.S. CONST. art. I, § 1.

[2] *Id.* art. I, § 7 (requiring bicameralism and presentment); *see, e.g.*, Loving v. United States, 517 U.S. 748, 757–58 (1996); INS v. Chadha, 462 U.S. 919, 946–51 (1983).

[3] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255–56 (2001) (describing Congress's broad delegations of legislative authority to agencies since the beginning of the twentieth century).

[4] 139 S. Ct. 2116 (2019).

[5] 34 U.S.C. §§ 20901–20962 (Supp. V 2017).

[6] *Gundy*, 139 S. Ct. at 2121 (plurality opinion).

branch,[7] but (save for two exceptions, both of which occurred in 1935[8]) has not used the nondelegation doctrine to find a statute unconstitutional.

Kisor v. Wilkie[9] addressed the proper interpretive method that courts should use to construe *rules* promulgated by agencies pursuant to their delegated authority.[10] Since its famous 1984 opinion establishing the doctrine now known as "*Chevron*[11] deference," the Supreme Court has generally addressed the question of *statutory* interpretation by asking whether Congress, in the enacted legal text, "directly spoke[] to the precise question at issue"[12] — and if Congress did not, by deferring to an administrative agency's "reasonable" construction in the face of statutory silence or ambiguity.[13] But the seeming simplicity of this two-step test has been destabilized in recent years, as the Court has modified and qualified the parameters of *Chevron*'s applicability.[14] Where *Chevron* does not apply in statutory interpretation cases, the Court defaults to "*Skidmore*[15] deference," named after another precedent that parcels out "deference" to administrative agencies based on a multifactor, rather than two-step, approach.[16] Were that not enough complication, the Court has developed, in parallel, an entirely separate doctrine to address the weight that courts must give to agency interpretation of agency *regulations*, sometimes named "*Seminole Rock*[17] deference" after a 1945 precedent and sometimes named "*Auer*[18] deference" after a 1999 elaboration.[19] After Justices in recent opinions began to question *Seminole*

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[7] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 371–72 (1989) ("[W]e long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting Field v. Clark, 143 U.S. 649, 692 (1892))).

[8] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935).

[9] 139 S. Ct. 2400 (2019).

[10] *Id.* at 2408.

[11] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[12] *Id.* at 842.

[13] *Id.* at 844; *see id.* at 842–44.

[14] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015); United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

[15] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[16] *Id.* at 140.

[17] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

[18] Auer v. Robbins, 519 U.S. 452 (1997).

[19] It is questionable whether *Seminole Rock* in 1945 and *Auer* in 1997 articulated precisely the same principle. *See, e.g.*, Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 12, 2016) (arguing that "*Seminole Rock* was about 'deferring' to an agency's contemporaneous or settled construction of its own regulation"), http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/ [https://perma.cc/73DB-TJJD]; *see also Auer*, 519 U.S. at 462 (deferring to an interpretation advanced in a legal brief because the circumstances indicated that it reflected the agency's "fair and considered judgment" rather than a "'post hoc' rationalization" (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988))).

Rock and *Auer*,[20] the Court in *Kisor* granted certiorari limited to a single question: whether the doctrine announced in these two cases ought to be abandoned.[21]

In both *Gundy* and *Kisor*, the Court fractured, producing plurality opinions that ensure the questions the Court addressed in both cases will remain live ones for years to come. In *Gundy*, a plurality opinion authored by Justice Kagan and an opinion concurring in the judgment from Justice Alito combined to hold that the relevant provision of SORNA did not violate the nondelegation doctrine.[22] In *Kisor*, an opinion authored by Justice Kagan that was joined in part by Chief Justice Roberts retained *Auer* deference, albeit in a circumscribed form.[23]

Notwithstanding the *Gundy* and *Kisor* opinions' fractured quality, setting the two cases side by side highlights the interrelated nature of administrative law doctrines, as well as the current Court's understanding of administrative law's two foundational codes, the Constitution and the Administrative Procedure Act[24] (APA). First, *Gundy* and *Kisor* illustrate the deep connections in the development of two seemingly compartmentalized doctrines. *Gundy* — nominally a case about nondelegation — turned largely on the plurality's narrowing construction of a statutory scheme to avoid a constitutional nondelegation problem. By comparison, the principles of deference at issue in *Kisor* give leeway to agency administrators to interpret the scope of a legal text's delegation

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[20] *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 620–21 (2013) (Scalia, J., concurring in part and dissenting in part) (describing *Auer* deference as "a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation," *id.* at 621); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (indicating his willingness to reconsider *Auer* deference altogether, in an appropriate case). In 2012, based in part on concerns that *Auer* encouraged manipulative agency behavior, the Court cabined the doctrine, introducing many of the limits that the *Kisor* plurality reiterated this past Term. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012) (questioning the application of *Auer* deference when the agency interpretation in question "would result in . . . 'unfair surprise'" (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007))).

[21] Kisor v. Wilkie, 139 S. Ct. 657, 657 (2018) (mem.); *see also Kisor*, 139 S. Ct. at 2408 ("The only question presented here is whether we should overrule [*Auer* and *Seminole Rock*], discarding the deference they give to agencies. We answer that question no.").

[22] In *Gundy*, Justice Kavanaugh did not participate, leaving eight Justices to decide the case. Justice Kagan's plurality opinion was joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Alito's opinion concurring in the judgment provided the fifth vote for the case's outcome, with Chief Justice Roberts and Justice Thomas joining Justice Gorsuch's dissent.

[23] Chief Justice Roberts joined only those portions of Justice Kagan's opinion that delineated the limits that the plurality placed on *Auer* deference and those portions that described the stare decisis weight that ought to be given the Court's precedents. Justices Ginsburg, Breyer, and Sotomayor joined Justice Kagan's opinion in full. Justice Gorsuch's opinion concurring in the judgment — joined in full by Justice Thomas and in part by Justices Alito and Kavanaugh — disagreed with the plurality's decision to retain *Auer* deference. Justice Kavanaugh also filed a separate opinion concurring in the judgment, in which Justice Alito joined.

[24] 5 U.S.C. §§ 551, 553–559, 701–706 (2012).

broadly, so long as they do so reasonably. The interaction between these two seemingly contradictory legal impulses may form the basis for much judicial review of agency action in the years to come.

Second, *Gundy* addressed a fundamental disagreement between plurality and dissent on how to operationalize nondelegation as a matter of constitutional doctrine. All of the Justices agreed that Article I prohibited the delegation of "legislative Power" to administrative agencies, but they disagreed on where to draw the line. The plurality understood the constitutional standard to be whether a law articulates an "intelligible principle,"[25] and it understood its own role in applying the constitutional standard as highly deferential.[26] By comparison, Justice Gorsuch's dissent sought to derive a set of more formalized rules to identify those cases that pose nondelegation problems — a set of formal rules that, upon close inspection, connect to other doctrines in administrative law, such as the distinction between "rights" and "privileges" and the distinction between administrative "factfinding" and "lawmaking."

Third, *Kisor* addressed the appropriate legal methodology for interpreting regulations. Here, the Court's focus shifted from constitutional law to the APA, with the Justices disagreeing on the meaning of the Act's standard-of-review provision and its distinction between "interpretive rules" and "legislative rules." The plurality retained, but narrowed, "*Auer* deference"; the concurring justices advocated replacing "*Auer* deference" with "*Skidmore* deference." But despite the depth with which both addressed the topic, the practical application of the principles that the plurality embraced seem obscure. *Kisor* leaves open many questions about legal ambiguity (and when the doctrine applies), about the meaning of the APA, and about whether the choice between "*Auer*" and "*Skidmore*" deference is terminological, rather than substantive.

Despite the seemingly nuanced and technical nature of these issues, the stakes in these cases, according to the Justices, were high. In *Gundy*, Justice Kagan argued that, if the statute at issue in the case were "unconstitutional, then most of Government is unconstitutional — dependent as Congress is on the need to give discretion to executive officials to implement its programs."[27] It is hard not to view *Gundy* and *Kisor* as proxies for larger battles about the nature of stare decisis and the place of the administrative state in American society. Hard, yes, but not impossible. For at their core, *Gundy* and *Kisor* are ultimately cases about the proper rules for interpreting the Constitution and statutes, including a particular statute — the APA — enacted in 1946. Discerning the plain meaning of these legal texts is difficult, to be sure, but a close analysis of language, structure, and history reveals patterns that may form the basis for administrative law in the years to come. In that spirit, this

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[25] *Gundy*, 139 S. Ct. at 2123 (plurality opinion).
[26] *Id.* at 2129–30.
[27] *Id.* at 2130.

Comment seeks to assess whether the *Gundy* and *Kisor* opinions get the questions that they address right and what the opinions tell us about the future.

Part I addresses *Gundy* and the nondelegation doctrine, starting with the Court's approach to interpreting statutes before moving on to the plurality's and dissent's competing understandings of the scope of the nondelegation doctrine. Part II addresses *Kisor* and deference to agency interpretation of agency rules, starting first with the question whether the choice between abandoning or retaining *Auer* deference is likely to make any substantive difference in interpretive outcomes. Part II then addresses whether a plurality of the Court correctly concluded that deference to agency interpretation is consistent with the APA.

I. *GUNDY* AND THE NONDELEGATION DOCTRINE

Both Justice Kagan's plurality opinion and Justice Gorsuch's dissent in *Gundy* started from the shared premise that Article I of the Constitution bars Congress from delegating "legislative Power" to another branch of Government, which in turn prohibits Congress from enacting laws with insufficient instructions to cabin executive discretion.[28] But the plurality and the dissent parted ways on whether the specific provision at issue in the case — § 20913(d) of SORNA — violated this principle. That disagreement depended in part on their differing interpretations of SORNA and in part on their differing approaches to analyzing the nondelegation doctrine. Consider the two issues in turn.

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[28] *Id.* at 2123 (arguing that "[a]ccompanying [Article I's] assignment of [legislative] power to Congress is a bar on its further delegation" and noting that, if a statute gave executive officers "'unguided' and 'unchecked' authority," the Court would "face a nondelegation question" (first quoting Brief for Petitioner at 37, *Gundy*, 139 S. Ct. 2116 (No. 17-6086); and then quoting *id.* at 45)); *id.* at 2145 (Gorsuch, J., dissenting) ("Most everyone, the plurality included, concedes that if SORNA allows the Attorney General as much authority as we have outlined, it would present 'a nondelegation question.'" (quoting *id.* at 2123 (plurality opinion))). None of the opinions in *Gundy* embraced the argument — advocated by some scholars — that Article I merely prohibits Congress and its members from "delegat[ing] to anyone else the authority to vote on federal statutes or to exercise other *de jure* powers of federal legislators." Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002). According to Professors Eric Posner and Adrian Vermeule, "[a] statutory grant of authority to the executive branch or other agents can *never* amount to a delegation of legislative power." *Id.* On this view, a statute that purported to delegate to an executive agency the authority to vote on federal legislation would presumably violate Article I's Vesting Clause, but no statute conferring discretion on executive actors — no matter how broad or how unbounded — would pose a constitutional violation. *Compare* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1299 (2003) (critiquing Posner and Vermeule's premise and urging that if "delegation of legislative power is impermissible (for whatever reason), one must have in mind a prohibition akin to the conventional nondelegation doctrine"), *with* Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331, 1331 (2003) (rejecting Professors Larry Alexander and Saikrishna Prakash's critique, citing lack of constitutional, originalist, or precedential support for nondelegation doctrine).

A. Constitutional Avoidance, the Nondelegation Doctrine, and Statutory Interpretation

In the short term, the most influential aspect of *Gundy* may well be the plurality's approach to interpreting SORNA. In an effort to ensure the statute's constitutionality, the plurality construed the Attorney General's discretion under SORNA more narrowly than the plain terms of the statute suggest. The plurality's interpretation of SORNA might be a permissible one — though, as discussed below, it is not the most plausible one, much less compelled by the statutory text. The plurality's method of interpreting SORNA is an aggressive, albeit implicit, application of the principle that the Court can address nondelegation challenges by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[29] The tension between that approach and judicial doctrines of deference to executive interpretation has uncertain implications for the interpretive methodology that lower courts will follow when confronting nondelegation questions in the future.

1. SORNA and Statutory Interpretation. — To understand why *Gundy* creates a tension in the Court's interpretive methodology, begin with the relevant statutory provisions in SORNA.[30] SORNA requires a "sex offender" — which the statute defines as "an individual who was convicted of" certain specified criminal offenses[31] — to register in every state where he resides, works, or studies.[32] One of SORNA's provisions further provides that, in general, an offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement"[33] or, in the case of an offender not sentenced to prison, "not later than [three] business days after being sentenced."[34] But for those offenders who cannot comply with this registration requirement — because they were sentenced before SORNA's enactment — the statute authorizes the Attorney General "to specify the applicability of the requirements of this subchapter to sex offenders

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[29] Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

[30] *See Gundy*, 139 S. Ct. at 2123 (plurality opinion) (contending that "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation," because the answer to the constitutional question "requires construing the challenged statute to figure out what task it delegates and what instructions it provides").

[31] 34 U.S.C. § 20911(1) (Supp. V 2017); *see id.* § 20911(5)(A), (7) (specifying that the offenses must involve "a sexual act or sexual contact," *id.* § 20911(5)(A)(i), or be "against a minor," *id.* § 20911(5)(A)(ii)).

[32] *Id.* §§ 20913(a), 20914; *see also id.* §§ 20915, 20918 (requiring sex offenders to keep registration current and periodically report in person to a law enforcement office for a period of time ranging from fifteen years and life, depending on the severity of the crime and the offender's history of recidivism).

[33] *Id.* § 20913(b)(1).

[34] *Id.* § 20913(b)(2).

convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with" SORNA's general registration requirement.[35]

This latter provision was at the heart of Gundy's nondelegation challenge. As a "sex offender" convicted before SORNA's enactment who did not satisfy SORNA's general registration provision,[36] Gundy was required by § 20913(d) to register if (and only if) the Attorney General made applicable SORNA's "requirements . . . to sex offenders convicted before [SORNA's] enactment."[37] As it happens, the Attorney General elected by regulation to apply SORNA's general registration requirements in full to "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."[38] And as it happens, Gundy failed to comply with this registration requirement.[39] That failure prompted a criminal prosecution for violating SORNA, at which point Gundy argued that § 20913(d) "unconstitutionally delegated legislative Power" by allowing "the Attorney General to 'specify the applicability' of SORNA's registration requirements" to offenders convicted before SORNA's passage.[40]

The crux of the matter was that, read in isolation, § 20913(d) appeared to grant the Attorney General uncabined discretion to make retroactive SORNA's registration requirements, thereby triggering potential criminal penalties for those sex offenders who failed to comply with the regulation.[41] For that reason, Justice Kagan's plurality opinion strove to provide some guiding principle that might cabin the Attorney General's discretion to apply SORNA retroactively. The principle the plurality settled on: § 20913(d) "require[s] the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible."[42] Although the phrase "as soon as feasible" appears nowhere in SORNA, the linchpin

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[35] *Id.* § 20913(d).

[36] *Gundy*, 139 S. Ct. at 2122 (plurality opinion).

[37] 34 U.S.C. § 20913(d).

[38] 28 C.F.R. § 72.3 (2018). The Attorney General promulgated this requirement in an interim rule issued in 2007 and a final rule issued in 2010. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72) (specifying that SORNA's "requirements . . . apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act"); Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849 (Dec. 29, 2010) (codified at 28 C.F.R. pt. 72) (finalizing requirement).

[39] *Gundy*, 139 S. Ct. at 2122 (plurality opinion).

[40] *Id.* (quoting 34 U.S.C. § 20913(d)); *see* 18 U.S.C. § 2250 (Supp. IV 2016) (providing that a sex offender who knowingly fails to register under SORNA may be imprisoned for up to ten years).

[41] *See Gundy*, 139 S. Ct. at 2126 (plurality opinion) (characterizing Gundy's argument as being that the Attorney General, under § 20913(d), "may make [all pre-SORNA offenders] register immediately or he may exempt them from registration forever (or he may do anything in between)").

[42] *Id.* at 2123 (citing Reynolds v. United States, 565 U.S. 432, 442–43 (2012)).

of Justice Kagan's statutory analysis was that the words could be read into the statute because "statutory interpretation [is] a 'holistic endeavor' which determines meaning by looking not to isolated words, but to text in context, along with purpose and history."[43]

The plurality derived an "as soon as feasible" test from the Court's precedents, implications from statutory context, and SORNA's legislative history. For starters, the plurality contended that the Court had reached this conclusion seven years earlier in *Reynolds v. United States*,[44] which had "effectively resolved" the question of statutory interpretation at issue in *Gundy*.[45] The plurality claimed that this conclusion was also correct as a matter of first impression. For one thing, the plurality claimed that SORNA's "[d]eclaration of purpose" announced

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[43] *Id.* at 2126 (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

[44] 565 U.S. 432.

[45] *Gundy*, 139 S. Ct. at 2124 (plurality opinion) ("Everything in *Reynolds* started from the premise that Congress meant for SORNA's registration requirements to apply to pre-Act offenders."). In *Reynolds*, the Court addressed whether a pre-SORNA sex offender was required to register during the period after SORNA's enactment but before the Attorney General's promulgation of a valid rule specifying the statute's applicability to pre-SORNA offenders. *See* 565 U.S. at 437. The Court held that SORNA's registration requirements did not apply to sex offenders convicted of crimes before the statute's enactment "until the Attorney General specifies that they do apply." *Id.* at 435. Justice Scalia (joined by Justice Ginsburg) dissented, reasoning that SORNA's registration provisions "apply of their own force [to pre-Act offenders], without action by the Attorney General." *Id.* at 448 (Scalia, J., dissenting). Justice Scalia reasoned that § 20913(d) "is best understood as conferring on the Attorney General an authority to make exceptions to the otherwise applicable registration requirements." *Id.* In other words, in Justice Scalia's view, SORNA presumptively applied to pre-Act offenders unless the Attorney General decided otherwise. In holding that the Act did not apply to pre-Act offenders until the Attorney General so specified, the Court speculated that Congress might have delegated such authority to the Attorney General because the effort to register pre-SORNA offenders "could prove expensive" and "might not prove feasible to do . . . immediately." *Id.* at 440 (majority opinion). That statement in *Reynolds* arguably suggests that the Attorney General *must* apply the statute retroactively if doing so is feasible. On the other hand, *Reynolds* observed that Congress might have wanted "different federal registration treatment of different categories of pre-Act offenders," *id.* at 440–41, thus allowing the Attorney General to "apply the new registration requirements accordingly," *id.* at 441. That statement arguably suggests that the Attorney General has discretion not to apply SORNA retroactively even if it would be "feasible" to do so. As these statements from *Reynolds* indicate, at least in my view, that case did not resolve the statutory question at issue in *Gundy*. *Cf. id.* (expressing "no view on Reynolds' related constitutional claim" under the nondelegation doctrine). At the very least, it is clear that the Department of Justice's view at the time of *Reynolds* was that SORNA "does not require the Attorney General" to impose registration requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require him to act at all." Brief for the United States at 23, *Reynolds*, 565 U.S. 432 (No. 10-6549). Likewise, Justice Scalia believed that the Court's rejection of his construction of § 20913(d) meant that the statute left "it up to the Attorney General whether the registration requirement would *ever* apply to pre-Act offenders," *Reynolds*, 565 U.S. at 449 (Scalia, J., dissenting), and posed nondelegation concerns because the statute (under the majority's view) lacked a "statutory standard" governing the Attorney General's discretion, *id.* at 450 ("[I]t is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide — with no statutory standard whatever governing his discretion — whether a criminal statute will or will not apply to certain individuals.").

that the statute created "'a comprehensive national system for the registration' of 'sex offenders and offenders against children.'"[46] The term "comprehensive," according to the plurality, "could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders."[47] For another, the plurality argued that SORNA's definition of "sex offender" — "an individual who was convicted of a sex offense"[48] — indicated, by using the past tense "was," that SORNA "was not merely forward-looking," but rather applied to "persons previously found guilty of a sex offense."[49] In addition, the plurality determined that SORNA's legislative history demonstrated that the importance of registering pre-SORNA offenders "was front and center in Congress's thinking."[50] The plurality thus contended that § 20913(d)'s focus on the "practical problem[]" of registering pre-SORNA offenders revealed that the section directed the Attorney General to "'specify *how* to apply SORNA' . . . if transitional difficulties require some delay" as opposed to "'specify *whether* to apply SORNA' to pre-Act offenders at all."[51]

But there are good reasons to believe, as Justice Gorsuch put it in his dissent, that "the feasibility standard is a figment of the government's (very recent) imagination."[52] As an initial matter, § 20913(d) "says *nothing*[ ]about feasibility" even though "[n]o one doubts that Congress knows exactly how to write a feasibility standard into law

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[46] *Gundy*, 139 S. Ct. at 2126 (plurality opinion) (alteration in original) (quoting 34 U.S.C. § 20901 (Supp. V 2017)).

[47] *Id.* at 2127 (relying in part on dictionary definitions indicating that the word "comprehensive" means "covering a matter under consideration completely or nearly completely" and "complete; including all or nearly all elements or aspects of something" (first quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 467 (Philip Babcock Gove et al. eds., 2002); and then quoting THE NEW OXFORD AMERICAN DICTIONARY 350 (Erin McKean et al. eds., 2d ed. 2005))). Gundy had argued that the Court should ignore § 20901 because it was located separately from, and not tied to, § 20913(d). *See id.* The plurality — in my view, correctly — rejected that argument because SORNA should be read as a whole, including its prefatory statement of purpose. *See id.* More problematic for the plurality, as explained below, is the fact that SORNA could fairly be described as "comprehensive" even if it excluded coverage of certain individuals — as indicated by the very dictionary definitions on which the plurality relied.

[48] 34 U.S.C. § 20911(1).

[49] *Gundy*, 139 S. Ct. at 2127 (plurality opinion).

[50] *Id.* The plurality contended that various members of Congress, who had sought to have SORNA apply to pre-SORNA offenders, would have been "surpris[ed]" by "Gundy's view that [Congress] had authorized the Attorney General to exempt the missing 'predators' from registering at all." *Id.* at 2128 (quoting 152 CONG. REC. 13,050 (2006) (statement of Sen. Frist)).

[51] *Id.* at 2128.

[52] *Id.* at 2145 (Gorsuch, J., dissenting). Indeed, in *Reynolds v. United States*, the government had argued that § 20913(d) "gives the Attorney General the power *not* to specify anything." 565 U.S. 432, 440 (2012). The Court did not appear to dispute that the Attorney General could elect not to specify anything, but it brushed aside the concern by claiming that "[t]here is no reason to believe that Congress feared that the Attorney General would refuse to apply the new requirements to pre-Act offenders." *Id.* at 444–45.

when it wishes."[53] Nor had the Department of Justice set forth a "feasibility" standard during its rulemakings.[54] As for the other statutory clues on which the plurality relied: Even if it were relevant, the word "comprehensive" does not necessarily imply "to the maximum extent feasible."[55] Instead, "comprehensive" can mean "'having the attribute of comprising or including much; of large content or scope,' '[i]nclusive of; embracing,' or '[c]ontaining much in small compass; compendious.'"[56] A statute can be "comprehensive," even if it does not apply to everyone.[57] Nor does the use of the past tense to define "sex offender" — "an individual who was convicted of a sex offense"[58] — have any bearing on the Attorney General's discretion. To be sure, pre-Act offenders are indeed "sex offenders" under SORNA, but the Act requires such offenders to register only if the Attorney General makes applicable the registration requirement. Finally, while the legislative history contains snippets from individual legislators indicating a desire that SORNA apply to pre-Act offenders, the fact of the matter is that Congress did not apply the statute to those offenders, but allowed the Attorney General to specify whether the statute should apply retroactively. All in all, it seems hard to avoid the conclusion that, under the most plausible interpretation of the statute, "SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them."[59]

Setting aside the specifics of SORNA's statutory framework, the critical point is this: the plurality's method of interpreting § 20913(d) ultimately gives the Attorney General less discretion than the breadth of the statute might otherwise suggest, precisely to avoid the nondelegation question that

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[53] *Gundy*, 139 S. Ct. at 2146 (Gorsuch, J., dissenting).

[54] *See id.* (observing that the "feasibility" standard "escaped notice at the Department of Justice during the Attorney General's many rulemakings," in which the Attorney General "repeatedly admitted that the statute affords him the authority to 'balance' the burdens on sex offenders with 'public safety interests' as and how he sees fit" (quoting Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849, 81,851–52 (Dec. 29, 2010) (codified at 28 C.F.R. pt. 72))).

[55] *Id.*

[56] *Id.* (alterations in original) (quoting 3 THE OXFORD ENGLISH DICTIONARY 632 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (emphasis omitted)); *cf. Reynolds*, 565 U.S. at 443 (concluding that the government's argument that "comprehensive" requires the inclusion of pre-SORNA offenders "overstates the need for *instantaneous* registration" and conceding that, while the Court's interpretation "involves implementation delay," the "delay can be justified by the need to accommodate other Act-related interests").

[57] Indeed, SORNA contains exceptions for certain post-Act offenders. *See, e.g.*, 34 U.S.C. §§ 20911(7)(A)–(B), (8), 20915(a), (b)(1) (Supp. V 2017). Yet the statute remains "comprehensive" as to those offenders.

[58] *Id.* § 20911(1).

[59] *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting). Justice Gorsuch also argued that the Attorney General was "free to change his mind at any point or over the course of different political administrations." *Id.*

the Court would have faced absent the narrower construction.[60] By doing so, the plurality's interpretation of SORNA necessarily takes some of the Attorney General's policy options off the table. For example, consider the consequences if the Attorney General were to determine that application of the registration requirement to pre-SORNA offenders was "feasible" but nevertheless undesirable as a matter of policy — perhaps motivated by a belief that it would be unfair to apply the registration requirement to pre-Act offenders. The plurality's interpretation of SORNA forbids the Attorney General from taking the course of greater leniency.[61]

2. Constitutional Avoidance and the Nondelegation Doctrine. — The *Gundy* plurality's narrowing construction of SORNA to avoid a constitutional nondelegation question reflects one strand of the Court's jurisprudence. But in the years preceding *Gundy*, that strand appeared disfavored as nondelegation withered as a doctrine.[62] Construing a statute narrowly because of nondelegation concerns seems unnecessary where the doctrine itself has no bite. Moreover, such a narrowing construction is in considerable tension with another strand of the Court's jurisprudence — the notion that administrative agencies receive deference if they seek to interpret their statutory authority broadly, yet permissibly.[63] *Gundy* breathes new life into the constitutional avoidance approach, with uncertain implications for the future.

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[60] To be sure, Justice Kagan did not expressly invoke the canon of constitutional avoidance. But she relied on two cases where the Court "define[d] the scope of delegated authority" by looking "to the text in 'context' and in light of the statutory 'purpose'" — against the backdrop of a nondelegation challenge. *See id.* at 2126 (plurality opinion) (first quoting NBC v. United States, 319 U.S. 190, 216 (1943) (quotation marks omitted); then quoting *id.* at 214 (quotation marks omitted); and then citing Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946)) ("[T]he delegation at issue [in *American Power*] 'derive[d] much meaningful content from the purpose of the Act, its factual background and the statutory context.'" (alteration in original) (quoting *Am. Power*, 329 U.S. at 104)). Thus, despite Justice Kagan's decision not to rely expressly on constitutional avoidance, it seems clear that the *Gundy* plurality's statutory analysis rests on this consideration. In addition, Justice Kagan adopted this interpretation at the Solicitor General's urging. *See id.* at 2128–29 ("[A]t oral argument here, the Solicitor General's office . . . acknowledged that § 20913(d) does not allow the Attorney General to excuse a pre-Act offender from registering, except for reasons of 'feasibility.'" (quoting Transcript of Oral Argument at 41, *Gundy*, 139 S. Ct. 2116 (No. 17-6068))); Transcript of Oral Argument, *supra*, at 41–42. But nothing in the plurality's statutory analysis indicates that its approach would have been any different had the government's position been different. Everything about the plurality's opinion indicates that it was announcing the correct interpretation of SORNA, as opposed to a plausible interpretation that the Solicitor General had advocated — and to which the plurality was deferring.

[61] *See Gundy*, 139 S. Ct. at 2125 (plurality opinion) (contending that the Attorney General was required "to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so").

[62] *See, e.g.*, Larry Alexander & Saikrishna Prakash, Essay, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1036, 1038 (2007) ("The so-called nondelegation doctrine . . . is more aptly styled as the delegation 'non-doctrine.'" *Id.* at 1036. "[The] nondelegation doctrine is on life support." *Id.* at 1038.); *see also* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 329 (2002).

[63] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

The two strands of pre-*Gundy* jurisprudence can be illustrated by comparing the Court's opinions in *Industrial Union Department v. American Petroleum Institute*[64] and *Whitman v. American Trucking Ass'ns*.[65] In the first of the two cases — often referred to as the "*Benzene Case*" — a plurality of the Court construed a statute narrowly to avoid nondelegation concerns.[66] As the Court later explained in a passing footnote in *Mistretta v. United States*,[67] in the post–World War II era, "application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[68] But when the D.C. Circuit in *American Trucking Ass'ns v. EPA*[69] applied this principle to narrow the scope of the Clean Air Act,[70] the Supreme Court unanimously rejected the narrowing construction.[71]

Two criticisms can be lodged against construing statutes narrowly to avoid a nondelegation problem. The first is a criticism of the canon of constitutional avoidance writ large. Narrowing a statute by rewriting it in light of "an imputed background purpose," in Dean John Manning's words, "threatens to unsettle the legislative choice implicit in adopting a broadly worded statute."[72] Consider SORNA itself. At the time of SORNA's enactment, perhaps some legislators sought to give the Attorney General broad discretion to decide whether or not to apply SORNA retroactively, precisely because they hoped that a future Attorney General would be lenient to some class of pre-SORNA offenders. If that is the case, it may be that the *Gundy* plurality's interpretation of an open-ended statute in light of its purpose unsettled the bargain struck between those legislators who sought retroactive application and those who did not. This problem is not unique to the application of the

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64 (*Benzene Case*), 448 U.S. 607 (1980).

65 531 U.S. 457 (2001).

66 *Benzene Case*, 448 U.S. at 646 (plurality opinion).

67 488 U.S. 361 (1989).

68 *Id.* at 373 n.7 (first citing *Benzene Case*, 448 U.S. at 646 (plurality opinion); and then citing Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974)); *see also* Kent v. Dulles, 357 U.S. 116, 129–30 (1958).

69 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *aff'd in part, rev'd in part sub nom. Whitman*, 531 U.S. 457.

70 *Id.* at 7–8.

71 *Whitman*, 531 U.S. at 481.

72 John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228. As an example of a case that invokes the "nondelegation doctrine as a canon of avoidance," *id.* at 223, Manning discusses *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), Manning, *supra*, at 224–37. In that case, as Manning notes, the Court narrowly construed agency statutory authority, albeit without expressly invoking the nondelegation authority, in light of concerns that Congress would not have expected the agency to have power over a certain industry. *See id.* at 227 ("Although the Court did not explicitly invoke the nondelegation doctrine as such, portions of its opinion clearly reflect significant nondelegation concerns.").

canon of constitutional avoidance in the nondelegation context. It runs through the entirety of constitutional avoidance jurisprudence, where the Court's analysis might be thought to drift from statutory interpretation to statutory rewriting.

The second criticism is premised on the tension between constitutional avoidance and the *Chevron* doctrine. *Chevron* itself reasoned that Congress may enact open-ended statutes on the assumption that agencies "with great expertise and charged with responsibility for administering the provision would be in a better position to" interpret those statutes.[73] At least part of the justification for the *Chevron* Court's approach has been that Congress's broad delegations in the modern administrative state justify a presumption in favor of deference to administrative agencies. A contrary doctrine — the nondelegation canon — requiring narrowing interpretations to fix broad delegations appears to cut in precisely the opposite direction.[74]

As a practical matter, therefore, *Gundy* raises the question of how *Chevron* and the nondelegation doctrine interact. And specifically, one might ask how *Chevron* and the canon of constitutional avoidance should be ordered.[75] How should courts proceed when an agency seeks deference for a broad interpretation of a statute and the canon of constitutional avoidance supports a narrowing interpretation?[76] That question turns on the nature of the legal ambiguity that underlies the entirety of the *Chevron* and *Auer* doctrines — a topic discussed in more detail below.

B. The Contours of the Nondelegation Doctrine

If statutes are to be construed narrowly in light of constitutional nondelegation concerns, the question naturally arises: When are such concerns present? Justice Kagan's opinion for the *Gundy* plurality gave one answer to this question: The constitutionality of delegations to administrative agencies depends on whether Congress has articulated an "intelligible principle" to guide administrators' actions. Further, that assessment must be made deferentially and with an appreciation that Congress is in a better position to determine the propriety of a

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[73] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[74] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316, 330 (2000) ("Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.").

[75] Jonathan D. Urick, Note, Chevron *and Constitutional Doubt*, 99 VA. L. REV. 375, 376 (2013) (outlining the "unsettled" conflict between *Chevron* and constitutional avoidance).

[76] Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 357 (2007) (book review).

delegation's scope.[77] As the plurality put it, the standards for the nondelegation doctrine "are not demanding" because the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[78]

Justice Gorsuch, however, sought to adopt a more categorical approach that created a set of formal rules to identify those cases that pose a nondelegation problem. This section analyzes those formal rules: the distinctions between rights and privileges, factfinding and policymaking, and "filling up the details" and exercising the "legislative Power." These different dimensions offer varying ways to approach the nondelegation doctrine. Even where courts do not declare a statute unconstitutional under the nondelegation doctrine, application of the avoidance principle would occur against the backdrop of these dimensions. A set of formal rules helps to identify those cases where a nondelegation problem will not be present — "off-ramps" for the nondelegation doctrine — and, hence, where a court need not construe a statute unduly narrowly.

1. "Administrative Crimes" and the Distinction Between Rights and Privileges. — By authorizing the Attorney General to decide whether pre-SORNA offenders had committed crimes for failing to satisfy the statute's registration requirements, § 20913(d) created what has come to be known as an "administrative crime."[79] The statute, in effect, made the existence of a crime depend on the Attorney General's promulgation

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[77] *Gundy*, 139 S. Ct. at 2123 (plurality opinion). The plurality cited a series of cases applying this principle, including *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *NBC v. United States*, 319 U.S. 190, 216 (1943) — which held that a statute conferring authority to act in the "public interest" did not violate the nondelegation doctrine, *id.* — *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24–25 (1932); *Yakus v. United States*, 321 U.S. 414, 422–23 (1944); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 600–01, 621 (1944); and *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001). *Gundy*, 139 S. Ct. at 2129 (plurality opinion). The plurality observed that "[o]nly twice in this country's history (and that in a single year) have we found a delegation excessive." *Id.*; *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935). Like the plurality opinion, Justice Alito's opinion concurring in the judgment noted that the Court's modern cases had "uniformly rejected nondelegation arguments," *Gundy*, 139 S. Ct. at 2130 (Alito, J., concurring in the judgment), and "upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards," *id.* at 2130–31. His opinion expressed a willingness to "reconsider the approach we have taken for the past 84 years" "[i]f a majority of this Court were willing." *Id.* at 2131. But, without a majority, Justice Alito argued that "it would be freakish to single out the provision at issue [in SORNA] for special treatment." *Id.*

[78] *Gundy*, 139 S. Ct. at 2129 (plurality opinion) (quoting *Whitman*, 531 U.S. at 474–75). The plurality said that, under this standard, "the delegation in SORNA easily passes muster." *Id.*

[79] An "administrative crime" is typically understood to be a crime with an element defined by administrative regulations, rather than solely by statute or the common law. *See generally* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 109–15 (1965); Walter Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 WASH. U. L.Q. 265, 265–68; Edmund H. Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51 (1943).

of a regulation.[80] The jurisprudence in this area may be relevant to a reformulated nondelegation doctrine because it highlights one possible distinction that would allow for a revitalized, but cabined, approach to that doctrine. Nondelegation might apply in a more rigorous fashion where private "rights" are at issue and more deferentially where "privileges" are at stake. Embracing a similar, though by no means identical, distinction, Justice Gorsuch argued that "Congress may assign the executive and judicial branches certain non-legislative responsibilities" where "Congress's legislative authority . . . overlaps with authority the Constitution separately vests in another branch."[81] As with a distinction between "rights" and "privileges," Justice Gorsuch's distinction would permit broader delegations in certain substantive areas, while policing the nondelegation doctrine robustly in others.

For many years, the key precedent on administrative crimes was *United States v. Grimaud*.[82] In that case, the Court addressed a statute that authorized the Secretary of the Interior to "make such rules and regulations and establish such service as will insure the objects of" forest reservations and made the "violation of the provisions of this [a]ct or

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[80] Neither the plurality nor Justice Gorsuch analyzed the Court's precedents on administrative crimes in much detail, and, indeed, the term "administrative crime" made no appearance in the opinions.

[81] *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting); *see also id.* at 2144 ("Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers."); Loving v. United States, 517 U.S. 748, 772 (1996) (contending that a "delegated duty" related to overseeing courts-martial "is interlinked with duties already assigned to the President by express terms of the Constitution" under the Commander-in-Chief Clause and that "the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter'" (quoting United States v. Mazurie, 419 U.S. 544, 556–57 (1975))). For a treatment connecting the nondelegation doctrine to the framework of "rights" and "privileges," see Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 594–96 (2007). *See also* Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 271 (2001) (arguing that the nondelegation doctrine does not apply "[i]n areas where executives have traditionally received broad delegations" and where limiting delegation would not "promote the structure of the Constitution" and maintaining, as a result, that "the nondelegation doctrine probably does not apply to . . . foreign and military affairs, foreign commerce, rules governing the internal operations of the judiciary and the executive, and the management of governmental real estate").

[82] 220 U.S. 506 (1911). For an insightful discussion of *Grimaud*, see Logan Sawyer, *Grazing,* Grimaud*, and Gifford Pinchot: How the Forest Service Overcame the Classical Nondelegation Doctrine to Establish Administrative Crimes*, 24 J.L. & POL. 169, 195–99 (2008). To be sure, later cases citing *Grimaud* have not adopted the distinction between "rights" and "privileges" that I stress here. *See, e.g.*, *Loving*, 517 U.S. at 768 (discussing *Grimaud* without referring to "rights" and "privileges"). Nevertheless, the distinction is still worthy of consideration, given that it maps closely onto the framework that Justice Gorsuch elaborated, connects that framework to other aspects of administrative law, and reflects many commonly held intuitions about how delegation ought to operate across substantive domains.

such rules and regulations" punishable by fine or imprisonment.[83] Under this authority, the Secretary had promulgated a regulation requiring, with exceptions not relevant here, persons grazing stock on forest reserves to secure a permit.[84] When Pierre Grimaud was convicted of grazing sheep on the Sierra Forest Reserve without a permit,[85] he argued that the statute criminalizing the violation of the Secretary's rules and regulations impermissibly delegated legislative power to an administrative officer.[86]

The Court first heard argument in *United States v. Grimaud*[87] in 1910, at which point an equally divided Court affirmed the judgment of the district court, holding that the statute violated the nondelegation doctrine.[88] Following the appointment of a series of new Justices,[89] however, the Court ordered a rehearing and reversed the lower court in a decision by one of the new Justices, Justice Joseph Rucker Lamar.[90] Had then-President William Howard Taft appointed new Justices who believed that the Forest Act violated the nondelegation doctrine, the Court would have held that the statute violated the Constitution — and we would have spoken today not merely of *A.L.A. Schechter Poultry Corp. v. United States*[91] and *Panama Refining Co. v. Ryan*,[92] but also of *Grimaud*.

Justice Lamar's opinion observed that pasturing sheep in some natural areas without restraint might "interfere seriously" with the purposes of forest reservations, but "[t]he determination of such questions . . . was a matter of administrative detail."[93] According to *Grimaud*, "it was impracticable for Congress to provide general regulations for these various

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[83] Act of June 4, 1897, ch. 2, 30 Stat. 11, 35; *see* Act of June 4, 1888, ch. 340, 25 Stat. 166 (providing for criminal penalties for violations of regulations). The statute further provided that the Secretary should "regulate [forests'] occupancy and use and . . . preserve the forests thereon from destruction." 30 Stat. at 35.

[84] *Grimaud*, 220 U.S. at 509 (quoting the regulation).

[85] *Id.* at 510–11.

[86] *See id.* at 514.

[87] 216 U.S. 614 (1910) (per curiam).

[88] *Id.* at 615. The division in the Court mirrored a division in the lower courts. *See Grimaud*, 220 U.S. at 515 (collecting authorities). Several courts had concluded that allowing administrative agencies to define crimes ran afoul of the principle announced in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), which held that Congress, rather than federal courts, must define crimes, thereby rejecting so-called "common law crimes." *Id.* at 34 ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."); *see* Sawyer, *supra* note 82, at 185–86 (observing that lower courts found that the forest regulations violated the nondelegation doctrine under *Hudson*).

[89] *See* JONATHAN LURIE, WILLIAM HOWARD TAFT: THE TRAVAILS OF A PROGRESSIVE CONSERVATIVE 120–29 (2012); 1 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 534–36 (1939).

[90] JAFFE, *supra* note 79, at 57.

[91] 295 U.S. 495 (1935).

[92] 293 U.S. 388 (1935).

[93] *Grimaud*, 220 U.S. at 516.

and varying details of management," because each forest reservation "had its peculiar and special features."[94] As the Court put it, by allowing the Secretary to create regulations, "Congress was merely conferring administrative functions upon an agent"[95] — the "power to fill up the details"[96] — "and not delegating to him legislative power."[97] And in a by-now-familiar refrain, the Court admitted the difficulty of "defin[ing] the line which separates legislative power to make laws, from administrative authority to make regulations."[98]

So far, so familiar. But in a separate part of the opinion, the Court observed that the statute criminalizing violations of the Secretary's regulations "declare[d] that the *privilege* of using reserves for 'all proper and lawful purposes' is subject to the proviso that the person so using them shall comply" with those regulations.[99] Thus, the Court concluded, "the *implied license* under which the United States had suffered its public domain to be used as a pasture for sheep and cattle . . . was curtailed and qualified by Congress, to the extent that such *privilege* should not be exercised in contravention of the rules and regulations."[100]

This aspect of the Court's reasoning suggested that a distinction between "rights" and "privileges" was relevant to the nondelegation doctrine.[101] Two additional factors from *Grimaud* highlight this distinction.

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94 *Id.*

95 *Id.*

96 *Id.* at 517.

97 *Id.* at 516. The Court analogized the authority given to the Secretary to an aspect of state and local government law; namely, the authority "granted to municipalities by virtue of which they make by-laws, ordinances and regulations for the government of towns and cities." *Id.* The Court reasoned that "[s]uch ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes nor fix penalties therefor." *Id.* The analogy was a revealing one, because it is far from clear that, outside of the federal territories and the seat of the government, Congress may constitutionally delegate to a municipality the authority to make criminal law. *Cf.* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 67 & n.7 (2001) (explaining the 1802 incorporation of the City of Washington, D.C., and suggesting that "this statute demonstrate[d] that Congress perceived no difficulty in delegating much of its power of 'exclusive legislation' to a local government"); *id.* at 313 (recounting a later debate about delegating authority within D.C.). *But see* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 278 (Philadelphia, William Young Birch & Abraham Small 1803) (contending that it was "highly questionable" that "a power to exercise exclusive legislation . . . comprehends an authority to delegate that power to another subordinate body").

98 *Grimaud*, 220 U.S. at 517.

99 *Id.* at 521 (emphasis added) (quoting Act of June 4, 1897, ch. 2, 30 Stat. 11, 35).

100 *Id.* (emphasis added).

101 The Court's opinion reflected the reasoning of an opinion of the Solicitor General on a similar question just over a decade earlier. *See* Forest Reservations — Statutory Construction, 22 Op. Att'y Gen. 266, 268 (1898) (rejecting a nondelegation argument against the enforcement of a regulation limiting the use of timber on forest land and noting that the regulation "restrains no one in the enjoyment of any natural or legal right").

First, *Grimaud*'s characterization of private grazing on public lands as a "privilege" under a "license" accorded with the Court's then-prevailing precedents, upon which *Grimaud* itself relied.[102] For example, *Grimaud* quoted *Butte City Water Co. v. Baker*,[103] in which the Court had rejected a nondelegation challenge to a statute incorporating state laws governing the use of government lands into federal law to the extent the two were not inconsistent.[104] The Court reasoned that the "[n]ation is an owner" of these lands and "has made Congress the principal agent to dispose of its property."[105] Just "as an owner may delegate to his principal agent the right to employ subordinates," the Court reasoned, "so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters."[106] Second, *Grimaud*'s characterization of the use of forest land as a "privilege" was consistent with the brief the Solicitor General submitted in the case.[107]

The distinction between "rights" and "privileges" may seem unusual in the context of the nondelegation doctrine. But it is a familiar distinction in other areas of administrative law. When determining whether a court must adjudicate a claim under Article III — or whether an administrative agency may do so instead — the Supreme Court distinguishes between "public rights" and "private rights."[108] Scholars have argued that this distinction maps onto the right/privilege distinction.[109] And, in the past, the Court itself distinguished between rights and privileges in applying the Due Process Clause.[110]

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[102] *See Grimaud*, 220 U.S. at 511, 521 (citing Buford v. Houtz, 133 U.S. 320, 326, 329 (1890) (holding that "the privileges accorded by the United States for grazing upon . . . public lands are subject alone to their control," *id.* at 329, and describing grazing as occurring under "an implied license," *id.* at 326)).

[103] 196 U.S. 119 (1905).

[104] *Id.* at 126–28; *Grimaud*, 220 U.S. at 512.

[105] *Butte City*, 196 U.S. at 126 (citing U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.")).

[106] *Id.*; *see also Grimaud*, 220 U.S. at 521 (finding that the defendants were "making an unlawful use of the Government's property").

[107] Brief for the United States at 34, *Grimaud*, 220 U.S. 506 (No. 490) ("The United States, as owner of the land, can refuse to others the privilege of using it.").

[108] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) (quoting Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2171 (2014)).

[109] *See, e.g.*, Nelson, *supra* note 81, at 559–65.

[110] *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439–45 (1968); *see also* Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 71–75 (1982). The famous case shifting the Court's jurisprudence on rights and privileges under the Due Process Clause is, of course, *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Goldberg* found that a due process challenge to the termination of welfare benefits without an evidentiary hearing "cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right."'" *Id.* at 262 (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

A distinction between rights and privileges might explain several laws enacted in early Congresses that delegated authority to the executive branch to license and regulate trade with Indian tribes,[111] to issue patents,[112] to regulate military disability pay,[113] and to engage in war.[114] Such a distinction also might explain an anomaly in the relationship between the holding in *Grimaud* and the question whether courts should defer to agency interpretations of statutes that carry criminal penalties. Several Justices have argued that courts should not defer to agencies in criminal matters, yet observed that *Grimaud* allows agencies to define crimes.[115] Cabining *Grimaud* to the privilege context alone would harmonize these two parts of the doctrine.[116]

2. Delegation of "Factfinding" Versus Policymaking. — Justice Gorsuch's dissent in *Gundy* characterized a series of earlier nondelegation precedents as turning on whether Congress could delegate "factfinding" authority to executive branch officials.[117] The notion that Congress may delegate such "factfinding," but not legislative authority, to other branches of government is at the heart of several of the Court's early nondelegation cases — and is therefore an idea worthy of sustained attention.

Consider one of the Court's foundational cases, *The Cargo of the Brig Aurora v. United States*.[118] During the Napoleonic Wars, the Court

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111 Act of July 22, 1790, ch. 33, 1 Stat. 137.

112 Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (repealed 1793).

113 Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121 (repealed 1795).

114 Act of Feb. 6, 1802, ch. 4, §§ 1–3, 2 Stat. 129, 129–30 (authorizing the President to employ "such of the armed vessels of the United States as may be judged requisite" to protect commerce on the Atlantic and in the Mediterranean, *id.* § 1, 2 Stat. at 130, and to take "all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require," *id.* § 2, 2 Stat. at 130); *see also* CURRIE, *supra* note 97, at 125 & n.15 (justifying this statute on the basis that "the Constitution itself makes the President Commander in Chief and . . . the unpredictable course of hostilities makes it imperative that that officer enjoy great flexibility in deploying his forces once war has been declared," *id.* at 125 n.15).

115 *See* Whitman v. United States, 135 S. Ct. 352, 353–54 (2014) (Scalia, J., statement respecting the denial of certiorari); *see also* Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 729–36 (6th Cir. 2013) (Sutton, J., concurring).

116 I have discussed in the text whether *Grimaud* can be read as hinging on the right/privilege distinction. A further question is whether, if it can be read that way, the distinction is normatively desirable. In my view, the answer is yes. Delegations that affect *private* rights — like the criminal prohibitions at issue in SORNA — ought to be written with more specificity than those that affect privileges alone. In the latter context — where *public* interests are more at issue — it makes sense to give administrators a broader range of possible discretion.

117 *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) ("[O]nce Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.").

118 11 U.S. (7 Cranch) 382 (1813). To be sure, *The Cargo of the Brig Aurora* involved a "foreign-affairs-related statute" and may therefore have fallen on the "privilege" side of the line discussed above. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (arguing that delegation may be particularly appropriate because "many foreign affairs powers are constitutionally vested in the president under Article II"). But the case was not decided on that ground, and so I analyze it here.

confronted a statute that imposed a trade embargo against either Great Britain or France, depending on which of the two countries stopped interfering with American trade.[119] As Congress anticipated the cessation of interference in the future, it made the embargo conditional on a presidential factfinding about the other countries' actions.[120] The Court held that it could "see no sufficient reason, why the legislature should not exercise its discretion [to impose an embargo], either expressly or *conditionally*, as [its] judgment should direct."[121]

In *Field v. Clark*,[122] the Court similarly upheld a tariff act that allowed the President to issue a proclamation suspending the free importation of sugar or other goods from other nations, for as long as he deemed just, any time that he found that an importing country had placed tariffs on American agricultural goods that were "reciprocally unequal and unreasonable."[123] As it had in *The Cargo of the Brig Aurora*, the Court held that the President was merely making a factual determination, which was not an exercise of unconstitutionally delegated legislative power.[124]

Both *The Cargo of the Brig Aurora* and *Field v. Clark* reflected an approach to nondelegation that members of Congress had previously articulated. For example, during an 1808 debate, Representative George W. Campbell of Tennessee sought to authorize the President to suspend the then-existing embargo against Great Britain during the congressional recess — but only if the President found that the seas were safe for American commerce.[125] Following objections from several representatives that the statute unconstitutionally delegated legislative power to the President, defenders of the law argued that the statute sought only to allow the President to find facts during the execution of congressional policy.[126] Even objectors to the embargo policy, such as Representative Philip Key of Maryland, conceded that a statute could grant the President the "power to suspend our intercourse with any port or country in the case of contagion."[127]

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[119] Act of Mar. 1, 1809, ch. 24, 2 Stat. 528 (expired June 28, 1809).

[120] *Id.* at 530–31; Act of May 1, 1810, ch. 39, § 4, 2 Stat. 605, 606.

[121] *The Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 388 (emphasis added).

[122] 143 U.S. 649 (1892).

[123] *Id.* at 680 (quoting Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 567, 612).

[124] *Id.* at 693.

[125] 18 ANNALS OF CONG. 2065–66 (1808).

[126] The episode is recounted in CURRIE, *supra* note 97, at 148–55. For relevant statements, see *id.* at 148 (citing 18 ANNALS OF CONG. 2065–66, 2084–85, 2092–94, 2210–25, 2140–45, 2228–37 (1808)).

[127] 18 ANNALS OF CONG. 2215 (1808); *see also id.* at 2237 (statement of Rep. Rowan) ("The Legislature declares that there shall be no intercourse with contagious cities. They may say that, after a certain confirmation to the Executive, the epidemic has ceased, he shall proclaim the fact, and the restriction shall cease.").

There is a challenge to this approach, however. It requires a theory that distinguishes between presidential "factfinding" and presidential "policymaking." In *The Cargo of the Brig Aurora* and *Field v. Clark*, it seems readily apparent that the finding that the statute called on the President to make — whether another nation was interfering with trade — was an ascertainable and objective fact about the state of the world. But consider a statute like SORNA, as revised to include expressly the proviso implied by the plurality, that requires the executive branch to act "as soon as feasible."[128] One might wonder whether the "feasibility" of action is a "fact" about the world or a policymaking judgment. In passing, Justice Gorsuch's dissent concluded that SORNA could not "be described as an example of conditional legislation subject to executive fact-finding."[129]

To the extent that the Court relies on this distinction, which lies at the core of Justice Gorsuch's dissent, in the future, some further theory of "factfinding" and "policymaking" will be necessary. And as it happens, the Court has used a comparable approach in the context of judicial review of agency action. There, too, the standard of review can change depending on whether a court characterizes agency action as "factfinding," "law-interpretation," or "policymaking."[130] In that regard,

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[128] *Gundy*, 139 S. Ct. at 2121, 2123, 2125, 2128, 2129 (plurality opinion).

[129] *Id.* at 2143 (Gorsuch, J., dissenting). Justice Gorsuch, however, acknowledged that "Congress could have easily written this law in that way" by requiring "pre-Act offenders to register, but then giv[ing] the Attorney General the authority to make case-by-case exceptions for offenders who do not present an 'imminent hazard to the public safety' comparable to that posed by newly released post-Act offenders." *Id.* (quoting Touby v. United States, 500 U.S. 160, 166 (1991)). This acknowledgement could be based on one of two considerations. First, one might argue that the "imminent hazard to the public safety" standard requires factfinding (not policymaking) in a way different from "to the extent feasible." Second, one might argue that presumptive application of the law, with delegated authority to make exceptions, does not pose a nondelegation problem. Many statutes adopt a different default rule than SORNA, which made the registration requirements inapplicable to pre-Act offenders until the Attorney General acted. Those statutes make a statute applicable to a certain class of regulated parties, unless the government authorizes an exemption. *See, e.g.*, 7 U.S.C. § 1637b(b)(2)(D) (2012) (reporting requirements for small dairy producers); 15 U.S.C. § 78j-1(m)(3)(C) (2012) (audit-committee independence requirements); *id.* § 78u-5(g) (various securities-law requirements); *id.* § 5711(a)(5)(B) (requirements for pay-per-call services); 16 U.S.C. § 823a(b) (2012) (requirements for hydroelectric facilities); 29 U.S.C. § 1112(e) (2012) (bonding requirements for employee-benefit plans); 46 U.S.C. § 4305 (2012) (recreational-vessel requirements); 49 U.S.C. §§ 20306, 47528(b) (2012) (railroad-equipment and aircraft-noise-control requirements). Justice Gorsuch's acknowledgment appears to say that the authority to make case-by-case exceptions does not pose nondelegation problems in the same fashion as does the authority to apply the law selectively. *Cf.* Reynolds v. United States, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting) (observing that "giv[ing] the Attorney General the power to *reduce* congressionally imposed requirements" would not pose a nondelegation question because "such a power is little more than a formalized version of the time-honored practice of prosecutorial discretion").

[130] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 959–62, 971–73, 984, 993–94 (2017); *see also* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 50–55, 312 (Russell & Russell,

the doctrine of judicial review may have the potential to inform the doctrine of nondelegation in ways that clarify the latter.

3. The Significance and Breadth of Delegation. — Finally, in those cases that involve private "rights" and do not involve delegated "fact-finding," the plurality and dissenting opinions purport to apply different tests. The plurality applied a deferential version of the "intelligible principle" test.[131] Justice Gorsuch, however, jettisoned the "intelligible principle" test as too lax, replacing it with a test allowing Congress to delegate authority to another branch to "fill up the details" in a statutory scheme.[132]

Set side by side in this manner, the two approaches appear to converge in their fundamental analyses. Both approaches call for an assessment of the importance of the issue that Congress is delegating to an agency, as well as the boundaries that Congress has imposed to cabin executive discretion.[133] To be sure, the articulation of a standard — "filling up the details" versus "intelligible principle" — can affect outcomes in the application of that standard. But the two approaches are not analytically different. They both require consideration of the same set of factors. Depending on the standard of review used in applying them, it may be that the daylight between these two articulations is marginal.[134]

At least as to *this* dimension, then, the real difference between Justice Kagan's plurality opinion and Justice Gorsuch's dissent lies in the application of the standard of review for constitutional questions: How robustly should the Court apply the requirement, agreed upon by all, that Congress be responsible for wielding the "legislative Power" by making the laws that govern the nation?[135]

Inc. 1955) (1927); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 365–67 (1986).

131 *Gundy*, 139 S. Ct. at 2129 (plurality opinion).

132 *Id.* at 2136 (Gorsuch, J., dissenting) (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 31, 43 (1825)).

133 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001) (addressing these two dimensions).

134 *See Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting) (acknowledging that "what qualifies as a detail can sometimes be difficult to discern"). For a similar argument, see Lawson, *supra* note 62, at 368 ("Methodologically, there need not be an unbridgeable gap between saying that lawful delegations require an 'intelligible principle' and saying that Congress must deal with 'important subjects,' leaving matters of 'less interest' to executive and judicial agents. Both formulations focus, in the normal run of cases, on the degree of discretion that statutes grant to executive and judicial actors.").

135 A matter not addressed in *Gundy* but sure to arise is the propriety of delegations outside the federal government, which can include delegations to state governments, territorial governments, and private parties. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1228 (2015); CURRIE, *supra* note 97, at 111–12 (recounting a debate over the statute establishing the territories of Orleans and Louisiana, during which members of Congress objected that the bill impermissibly delegated legislative power to the President). The legality of delegating rulemaking authority to

II. *KISOR* AND INTERPRETIVE DISCRETION

If *Gundy* was a case about the extent to which Congress may delegate rulemaking authority to administrative agencies, *Kisor* is a case about what happens next. Once an agency promulgates a rule pursuant to authority delegated from Congress, questions naturally arise about the rule's proper interpretation. For many years, the approach to interpreting such texts was governed by the Court's decisions in *Seminole Rock* and *Auer*. As conventionally understood, *Seminole Rock* and *Auer* allowed administrative agencies to fill in the gaps in the regulations they had promulgated.[136] In recent years, however, a series of concurring and dissenting opinions by Justices of the Court attacked those precedents, claiming that they violated the separation of powers and the APA.[137] *Kisor* addressed the continued viability of this interpretive approach, with a majority of the Court electing to retain the form of deference announced in those two cases but reducing some of their preexisting bite.

A. Ambiguity and Tiers of Deference

Before assessing whether *Kisor* correctly retained the forms of deference announced in *Seminole Rock* and *Auer*, it is necessary to try to understand what *Kisor* actually held. One of the puzzling aspects of the *Kisor* majority opinion, as well as Justice Gorsuch's concurrence, is the importance that both place on the Court's ultimate decision to maintain "*Auer*" or "*Seminole Rock*" deference. But labels ought not to be relevant. It is the content of the interpretive methodology that counts.

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private parties also arose in the *Schechter Poultry* litigation, though scholars disagree as to whether it was central to the Court's holding that the statute violated the nondelegation doctrine. *See* James M. Rice, Note, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 547 (2017). One year after *Schechter Poultry*, the Court described "delegation . . . to private persons whose interests may be and often are adverse to the interests of others in the same business" as "legislative delegation in its most obnoxious form" and declared unconstitutional the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, *invalidated by* Carter v. Carter Coal Co., 298 U.S. 238 (1936). *Carter*, 298 U.S. at 311; *see also* Rice, *supra*, at 540–42, 547–48.

136 *See, e.g.*, Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 945–52 (2017).

137 *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) ("The APA does not remotely contemplate [*Auer* deference]."); *id.* at 1217 (Thomas, J., concurring in the judgment) (claiming that *Seminole Rock* and its progeny are "deviations from" the separation of powers doctrine and that the Court "has an obligation to guard against [such] deviations"); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing that *Auer* and *Seminole Rock* deference both "violate a fundamental principle of separation of powers"); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring) ("It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."). Although earlier opinions had contended that *Auer* deference was constitutionally suspect, the *Kisor* opinions focused on the doctrine's consistency with the APA. Like the Justices, I will focus on the APA and bracket questions of constitutionality for another day. *Cf.* Bamzai, *supra* note 130, at 947–58, 959 n.215.

Whether the interpretive methodology is labeled "*Auer*," "*Seminole Rock*," or "*Skidmore*" is decidedly less important than what the interpretive methodology is.[138] Determining the content of the interpretive methodology embraced in *Kisor*, however, is surprisingly tricky.

1. The Meaning of Ambiguity. — Start with the majority's holding on when *Auer* deference applies. According to the majority, "the possibility of deference can arise only if a regulation is genuinely ambiguous . . . even after a court has resorted to all the standard tools of interpretation."[139] But the Court did not define what it meant by "genuine ambiguity." On the one hand, that term could mean that a reviewing court must adopt the best interpretation available to it, after applying the tools of statutory construction. On the other hand, the term could mean that there is some leeway — a gray area — where a reviewing court can adopt a permissible interpretation, even if it is not the "best" interpretation available to it.[140]

If ambiguity is understood in the first sense, one wonders why we need doctrines of deference like *Auer* at all. It would make sense to say, quite simply, that a legal text does not speak to an issue, which would mean that any questions left unresolved by the text were questions of policy, not legal interpretation.[141] All of the complications and permutations built on cases like *Chevron* and *Auer* seem unnecessary if ambiguity is understood in this sense. If, however, ambiguity is understood in the second sense, then *Auer* has additional (and important) bite: it still requires a reviewing court to abandon the "best" interpretation, given

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[138] To be clear, the Court's choice of labels is important to the extent — and only to the extent — that it promotes doctrinal coherence and clarity. If two interpretive methodologies are functionally different, then the Court should give them different names. The use of two different names is needlessly confusing if they both describe the same methodological approach (or even if the daylight between the two approaches is vanishingly small).

[139] *Kisor*, 139 S. Ct. at 2414. For this proposition, the Court cited *Christensen v. Harris County*, 529 U.S. 576, 588 (2000), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *Kisor*, 139 S. Ct. at 2415. But while these two cases reiterate the "genuine ambiguity" point, they do not define the phrase.

[140] The question of how to identify "ambiguity" is a long-running one in both administrative law and elsewhere. For recent treatments, see Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. (forthcoming 2019), and Ryan Doerfler, *Going "Clear"* (Univ. of Chi. Pub. Law & Legal Theory Paper Series, No. 720, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326550 [https://perma.cc/K62K-FTW5]. *See also* Michael Herz, Essay, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1892–94 (2015); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1752–54 (2010).

[141] Under the APA, agency policymaking would be subject to "arbitrary and capricious" review. 5 U.S.C. § 706 ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."); *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–16 (2009); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983).

ordinary tools of statutory construction, for an agency's different, albeit reasonable, interpretation.

Different parts of the *Kisor* opinion point in different directions on this issue. The Court said that "[i]f uncertainty does not exist, there is no plausible reason for deference," because "[t]he regulation then just means what it means — and the court must give it effect, as the court would any law."[142] Or, as the Court put it: "[S]ometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer . . . then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense."[143] And the Court instructed that, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction."[144] Finally, the Court said "only when th[e] legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'"[145] These statements suggest that *Auer* deference is a doctrine that applies only under circumstances where there is no single, best interpretation of a regulation.[146] And if that is the right understanding of *Kisor*, then the doctrine is not wrong, but merely contentless and confusing. If ambiguity were understood in this sense, the American system of judicial review would operate exactly the same as if we jettisoned *Auer* deference and its accompanying permutations.[147]

Other parts of *Kisor*, however, suggest a different reading. For example, *Kisor* said that "[w]hen it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean."[148] Moreover, in a part of the plurality opinion that Chief Justice Roberts did not join, Justice Kagan explained that "[t]here can be no thought of deference

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

143 *Id.* (citation omitted).

144 *Id.* (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)). The Court said that it had "adopt[ed] the same approach for ambiguous statutes" in *Chevron*. *Id.*

145 *Id.* (alteration in original) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1990)).

146 In his concurring opinion, Justice Kavanaugh appeared to expressly embrace this understanding of the majority opinion's treatment of ambiguity: "If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation. In other words, . . . courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations." *Id.* at 2448 (Kavanaugh, J., concurring in the judgment).

147 As Justice Kavanaugh explained in his concurrence, "some cases involve regulations that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.' Those kinds of terms afford agencies broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule. But that is more *State Farm*[ ]than *Auer*." *Id.* at 2448–49 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).

148 *Id.* at 2418 (majority opinion).

unless, after performing that thoroughgoing review, the regulation remains genuinely susceptible to multiple reasonable meanings and the agency's interpretation lines up with one of them."[149] And, in another part of the plurality opinion (again, not joined by Chief Justice Roberts), Justice Kagan spoke of a "zone of ambiguity" in which an "agency's reading" may "fall[]."[150] These statements may suggest that a court can abandon the best interpretation for a permissible one under *Kisor*.

This tension in the meaning of ambiguity has existed ever since the Court crystallized doctrines of deference following the 1984 decision in *Chevron*.[151] But it seems fair to say that the prevailing approach in the courts is to understand *Chevron* as applicable where there might be a better interpretation but the agency's view is at least permissible.[152] With its emphatic language about the meaning of ambiguity, the *Kisor* majority could potentially have an effect on how courts apply this first step — the entryway to *Auer* deference.

The significance of *Kisor*'s imprecision about the very meaning of legal ambiguity becomes apparent when one considers that other canons of statutory interpretation *also* seek to solve the problem with which the *Kisor* Court was grappling. Consider the canon of constitutional avoidance and the narrowing construction given to SORNA in *Gundy*. Like *Auer*, constitutional avoidance *also* applies under circumstances of legal ambiguity and *also* provides a default interpretation — a narrowing construction in nondelegation avoidance cases. If *Kisor* requires application of such canons of construction before *Auer* deference even kicks in, the domain of cases in which the doctrine applies is not merely small, but almost nonexistent. Any "gap" in regulatory or statutory text would be "filled" by other ambiguity-resolving doctrines.

2. Tiers of Deference. — If ambiguity — however defined — exists, *Kisor* makes clear that *Auer* deference remains in place to govern the

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149 *Id.* at 2419 (opinion of Kagan, J.).

150 *Id.* at 2420.

151 *See* Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 521 ("In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a 'strict constructionist' of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.").

152 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (stating that "*Chevron* requires a federal court to accept the agency's construction of a statute, even if the agency's reading differs from what the court believes is the best statutory interpretation" if the statute is ambiguous and the agency's construction is reasonable); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (noting that a judge would "uphold the agency's interpretation even though it is not the best interpretation" if the judge finds the underlying statute ambiguous).

weight given to agencies' interpretations of their own rules. But *Kisor* stresses the limitations on the proper application of *Auer* deference in a manner that all but collapses the inquiry into the Court's fallback option, *Skidmore*. By doing so, *Kisor* raises questions about whether the form of deference now labeled "*Auer*" is different in any meaningful way from the form of deference labeled "*Skidmore*."[153]

The *Kisor* Court held that "not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference"; rather, a court must look to "the character and context of the agency interpretation" to determine whether it deserves weight.[154] The Court then laid out "markers for identifying when *Auer* deference is and is not appropriate."[155] To begin, the Court said that "the regulatory interpretation must be one actually made by the agency," rather than an "*ad ho*c statement not reflecting the agency's views."[156] The agency's interpretation must reflect its "substantive expertise."[157] The interpretation must also reflect the agency's "fair and considered judgment," meaning that it cannot be a "convenient litigating position" or a "*post hoc* rationalization."[158] And a court should "not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties."[159] Such circumstances may arise "when an agency substitutes one view of a rule for another" — meaning that deference is inapplicable when an agency construction conflicts with a prior one — or "without such an explicit interpretive change," such as when an agency construction imposes retroactive liability on parties for longstanding conduct.[160]

These factors are remarkably close to the factors that the Court announced in *Skidmore v. Swift & Co.*, which is precisely the test that Justice Gorsuch wanted to apply in his concurrence.[161] In *Skidmore*, the Court decided that various administrative interpretations were "not

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153 For an argument that the distinction between *Auer* and *Skidmore* is likely nonexistent in practice, see Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 318–19 (2017). For related treatments, see Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1356–60 (2013), and Peter L. Strauss, Essay, *"Deference" Is Too Confusing — Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*," 112 COLUM. L. REV. 1143, 1145–46 (2012).

154 *Kisor*, 139 S. Ct. at 2416. Here, the Court said that it had required "an analogous though not identical inquiry for *Chevron* deference." *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 229–31, 236–37 (2001)).

155 *Id.*

156 *Id.*

157 *Id.* at 2417.

158 *Id.* (alteration omitted) (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

159 *Id.* at 2418 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)); *see id.* at 2417–18.

160 *See id.* at 2418 (first citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994); and then citing *Christopher*, 567 U.S. at 155–56).

161 *See id.* at 2447 (Gorsuch, J., concurring in the judgment) ("Overruling *Auer* would have taken us directly back to *Skidmore*.").

controlling upon the courts by reason of their authority," but did "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[162] The weight a court should give the agency's interpretation, according to *Skidmore*, would "depend upon the thoroughness evident in [the interpretation's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[163]

The natural question post-*Kisor* is whether the judicial mind is able to apply consistently these different gradations of deference.[164] Indeed, in their separate concurring opinions, Chief Justice Roberts and Justice Kavanaugh recognized this issue. Chief Justice Roberts wrote that the "distance between the majority and Justice Gorsuch is not as great as it may initially appear."[165] Chief Justice Roberts compared the "limitations" that *Kisor* placed on *Auer* with the reasons a court might be persuaded to adopt an agency interpretation — "[t]he agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements."[166] "Accounting for variations in verbal formulation," Chief Justice Roberts continued, "those lists have much in common"[167] and indeed "largely overlap."[168] At the same time, Chief Justice Roberts concluded that "*Auer* deference is [not] just the same as the power of persuasion discussed in *Skidmore*," because "there is a difference between holding that a court ought to be persuaded by an agency's interpretation and holding that it should defer to that interpretation under certain conditions."[169] For his part, Justice Kavanaugh (joined by Justice Alito) agreed about the similarity of the two approaches, but concluded "that the *Auer* deference doctrine should be formally retired."[170]

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[162] 323 U.S. 134, 140 (1944).

[163] *Id.*

[164] There are conceptual and empirical reasons to believe that these verbal formulations are effectively equivalent, in my view. To be sure, the latest empirical study suggests that there is a difference among case outcomes under de novo review, *Skidmore* deference, and *Chevron* deference. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 21–27, 30–32, 31 fig.1 (2017) (finding different agency win rates under the standards). But my point is that tightening the *Chevron* (or *Auer*) standard to make it look more like the *Skidmore* standard effectively collapses these cases into each other. One might empirically test my supposition by assessing whether agency win rates post-*Kisor* remain appreciably different under *Skidmore* and *Auer*.

[165] *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring in part).

[166] *Id.*

[167] *Id.*

[168] *Id.* at 2425.

[169] *Id.* at 2424.

[170] *Id.* at 2448 (Kavanaugh, J., concurring in the judgment).

The same basic analytical issue arises in the context of judicial review of agency factfinding. There, the APA itself articulates different standards of review that appear to apply in different circumstances.[171] There, too, the trend in the law has been to collapse slightly different standards of review into one general approach.[172]

At the end of the day, it should go without saying that the labels "*Auer* deference" and "*Skidmore* deference" are irrelevant to evaluating the actual methodology used by courts to assess agency interpretation. What matters is the content of the interpretive methods, not the labels. In this regard, by articulating the concept of *Auer* in a manner that is almost identical to *Skidmore*, *Kisor* necessarily makes one wonder whether the entire game of creating tiers of deference is worth the candle. Rather than these various fine gradations of deference, with marginally different articulations and potentially even more marginally different outcomes in concrete cases, it might make sense to have a single approach with a single label. At some point, tightening up *Auer* collapses the case into *Skidmore*.

B. Kisor*, the APA, and Interpretive Methodology*

If *Kisor* adopted a deferential approach to interpretation that instructs courts to adopt permissible statutory constructions even when a single best one exists, then it poses serious questions of consistency with the APA.[173] Both the APA's standard-of-review provision and its distinction between interpretive and legislative rules suggest that Congress

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[171] *See* 5 U.S.C. § 706(2)(A), (E) (2012) (establishing an "arbitrary and capricious" standard for agency actions, findings, and conclusions, *id.* § 706(2)(A), and a "substantial evidence" standard for what are known as formal proceedings, *id.* § 706(2)(E)).

[172] *See, e.g.*, Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984) (reasoning that "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same"); *see also* Ctr. for Auto Safety v. Fed. Highway Admin., 956 F.2d 309, 314 (D.C. Cir. 1992) ("An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence."); Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 CHI.-KENT L. REV. 487, 540 (2019) ("[*E*]*very one* of the other federal courts of appeals has cited *Data Processing* favorably or has otherwise acknowledged the equivalency of the two review standards."). *But see* Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski, 899 F.2d 151, 164 (2d Cir. 1990) (describing *Data Processing* as "conflating" the arbitrary or capricious and substantial evidence tests for review of factual judgments).

[173] In my discussion, I leave out the argument addressed in the *Kisor* plurality opinion about the "incentives *Auer* creates" — namely, that "*Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer." *Kisor*, 139 S. Ct. at 2421 (opinion of Kagan, J.). In short, I believe the plurality properly concluded that "[n]o real evidence — indeed, scarcely an anecdote — backs up the assertion." *Id.* More significantly, it is not clear to me that rules of interpretation ought to be abandoned on the basis of empirical speculation of this sort. I therefore do not discuss this issue any further.

intended courts to apply a form of de novo review that uses all the ordinary canons of construction.[174]

1. The APA and Statutory Interpretation. — One of Kisor's principal arguments was that a deferential approach to executive branch interpretations of regulations is inconsistent with the APA's standard-of-review provision.[175] That provision, in relevant part, provides that a "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[176] In a part of her opinion joined only by a plurality of the Court,[177] Justice Kagan responded that the language of § 706 could plausibly be read to incorporate, and that the history that led up to the APA's adoption suggested that § 706 *did* in fact incorporate, a deferential standard.[178]

Let's start with the APA's text. The APA provides that courts shall "decide all relevant questions of law" and "interpret constitutional and statutory provisions."[179] It is a fair inference that the statute tries to equate the standards for interpreting constitutional provisions and statutory provisions.[180] The text, however, does not speak of the proper standard for regulatory interpretation. But, much like constitutional and statutory interpretation, interpreting a regulation is also a question of law. It would stand to reason that the same general interpretive approach for "constitutional and statutory provisions" ought to govern regulatory interpretation as well.

In reaching a contrary conclusion, the *Kisor* plurality argued that Congress's instruction that a reviewing court should "determine the meaning" of rules does not "specify the standard of review a court should

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174 As I have previously explained, a form of deference — to "contemporaneous and customary" interpretation by executive officials, Bamzai, *supra* note 130, at 941 — is baked into the American form of de novo review. *See id.* at 941–42. Congress, in enacting the APA in 1946, would naturally have incorporated these traditional canons of construction. *See id.* at 988.

175 Brief for Petitioner at 27, *Kisor*, 139 S. Ct. 2408 (No. 18-15).

176 5 U.S.C. § 706 (2012).

177 Notably, the Chief Justice did not join any of Part III.A of Justice Kagan's opinion, which contains an analysis of the standard-of-review section of the APA. *See Kisor*, 139 S. Ct. at 2408; *id.* at 2418–22 (opinion of Kagan, J.).

178 *See id.* at 2419–20 (opinion of Kagan, J.).

179 5 U.S.C. § 706.

180 This Comment sets aside the anterior question of whether *Chevron* deference is even justifiable given the statute's equivalent treatment of constitutional provisions and statutory provisions. Elsewhere, I have argued that *Chevron* deference cannot be squared with the text of the APA. *See* Bamzai, *supra* note 130, at 988. Notably, both Chief Justice Roberts and Justice Kavanaugh explicitly set aside what *Kisor* might mean for *Chevron* deference. *See Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part) ("Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. I do not regard the Court's decision today to touch upon the latter question." (citation omitted)); *id.* at 2449 (Kavanaugh, J., concurring in the judgment) (agreeing with the Chief Justice).

use" and "[o]ne possibility . . . is to review the agency's reading for reasonableness."[181] True enough — that is possible, but it hardly seems like the most natural reading of § 706, which expressly provides for deferential standards of review for certain kinds of issues. Moreover, the plurality said nothing about the APA's language that a court should "decide all relevant questions of law" and "interpret constitutional and statutory provisions."[182] Assuming that all are agreed that de novo review is the standard for "interpret[ing] constitutional provisions,"[183] the plurality's approach necessarily means that Congress had a different sense of "interpret" in mind for *statutory and regulatory* provisions, even though it used a single word to instruct courts to "interpret constitutional and statutory provisions." That is possible — but, once again, not the most natural reading of the statute.

Consider next the APA's history. The plurality pointed out that the APA was "enacted . . . in 1946 — the year after *Seminole Rock*."[184] The plurality then argued that § 706 should be interpreted in the context of the "practice of judicial review at the time of the APA's enactment,"[185] which "included *Seminole Rock* itself . . . along with prior decisions foretelling that ruling."[186] But that argument depends on the meaning of "*Seminole Rock* itself" and how legal analysts at the time of the decision would have understood its holding. On that front, there is good reason to think that *Seminole Rock* was a narrower decision than the Court has subsequently said it was.[187]

To better understand the APA in its historical context, one might also look to contemporaneous understandings of the standard of review for legal questions. In this regard, a compelling document is the report created by the Attorney General's Committee on Administrative Procedure, under then–Attorney General Robert Jackson. In that report, the Committee had this to say about the standard of review:

> In the language of judicial review sharp differentiation is made between questions of law and questions of fact. The former, it is uniformly said, are subject to full review, but the latter, in the absence of statutory direction to

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[181] *Kisor*, 139 S. Ct. at 2419 (opinion of Kagan, J.) (quoting 5 U.S.C. § 706).

[182] 5 U.S.C. § 706.

[183] *Kisor*, 139 S. Ct. at 2419 (opinion of Kagan, J.).

[184] *Id.* at 2418.

[185] *Id.* at 2419 (relying on the claim that the APA was intended "to 'restate[] the present law as to the scope of judicial review'" (alteration in original) (quoting DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947))).

[186] *Id.* at 2420.

[187] *See* Bamzai, *supra* note 19. The plurality conceded that it was possible the deference regime articulated in *Seminole Rock* and other cases "had not yet fully taken hold," but contended that "[a]t a minimum, nothing in the law of that era required all judicial review of agency interpretations to be *de novo*." *Kisor*, 139 S. Ct. at 2420 (opinion of Kagan, J.). *But see* Bamzai, *supra* note 130, at 986–87.

> the contrary, are not, except to the extent of ascertaining whether the administrative finding is supported by substantial evidence.[188]

This language clearly distinguishes the standard of review for "questions of law" and "questions of fact," characterizing the first as "full review" and the second as deferential.

2. Legislative and Interpretive Rules. — A second aspect of the APA strongly suggests that the Act requires de novo review of statutory and regulatory text. The APA contains a directive that agencies issue certain kinds of "rules" (often called "legislative" or "substantive") using the notice-and-comment process, while allowing agencies to issue other rules (known as "interpretive" or "interpretative") without following such procedures.[189] These provisions pose a challenge for a robustly deferential *Auer* standard.

Here, again, a close look at the APA's history can give us a sense of what the terms "substantive" and "interpretive" meant at the time of the statute's adoption. Attorney General Jackson's 1941 report on administrative law contained a discussion of the different forms of rulemaking that in many respects parallels § 553 of the APA.[190] The report connected interpretive and legislative rules with their respective standards for judicial review.[191] In speaking of interpretive rules, the report noted that agencies found "it useful from time to time to issue interpretations of the statutes under which they operate," but that these "interpretations [were] ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language."[192] Such interpretive rules were not, the report continued, "binding upon those affected, for, if there [was] disagreement with the agency's view, the question [could] be presented for determination by a court."[193] By contrast, substantive regulations arose because "[m]any statutes contain provisions which become fully operative only after exercise of an agency's rule-making function."[194] As an example, the report pointed to a "privilege . . . made conditional upon regulations," such as "where Congress permits the importation of an article 'upon such rules and regulations as the Secretary of the Treasury may prescribe,' or allows utilization of public forests in accord with regulations

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188 DEP'T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 88 (1941).

189 5 U.S.C. § 553(b)–(c) (2012).

190 *See* DEP'T OF JUSTICE, *supra* note 188, at 25–29.

191 *See id.* at 27.

192 *Id.*

193 *Id.* The report did note that interpretive rules are "of considerable importance" because "they are accepted as determinative by the public at large, and even if they are challenged in judicial proceedings, the courts will be influenced though not concluded by the administrative opinion." *Id.*

194 *Id.*

to be laid down by administrative officers."[195] The bottom line is that the report drew a distinction between interpretive rules (which are not binding on courts) and legislative rules (which are).

The *Kisor* plurality characterized interpretive rules (unlike legislative rules) as lacking "the force and effect of law"[196] and, thereby, being unable "to bind private parties."[197] Instead, "interpretive rules are meant only to 'advise the public' of how the agency understands, and is likely to apply, its binding statutes and legislative rules."[198] So far, so good. But the plurality then claimed that the Court, in *Perez v. Mortgage Bankers Ass'n*,[199] had held that "interpretive rules, even when given *Auer* deference, do *not* have the force of law."[200] And therein lies the conflict with the APA: the plurality's approach would create a class of agency legal interpretations that supposedly "do not have the force of law" but nevertheless are binding on courts through *Auer*.[201]

3. Timing and Authorial Intent. — *Kisor* promises to be a leading case in administrative law for the near (and quite possibly foreseeable) future. It may lead to a host of interpretive questions in the immediate future, one of which turns on *Kisor*'s treatment of authoritativeness and authorial intent.

One of Justice Kagan's arguments in the plurality part of *Kisor* is that an appropriate way to find out the meaning of a legal text is to "[a]sk its author" what the text means.[202] Because the agency promulgated the rule, it "is in the 'better position [to] reconstruct' its original meaning"[203] and "will often have direct insight into what that rule was intended to mean."[204] As the plurality opinion explains, the rationale

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[195] *Id.* It should be apparent that, in this section, the report is referring to the fact patterns of *Field v. Clark* and *United States v. Grimaud* respectively. *See* Field v. Clark, 143 U.S. 649, 695 (1892); United States v. Grimaud, 220 U.S. 506, 508–09 (1911).

[196] *Kisor*, 139 S. Ct. at 2420 (opinion of Kagan, J.) (quoting Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015)).

[197] *Id.*

[198] *Id.* (quoting *Perez*, 135 S. Ct. at 1204).

[199] 135 S. Ct. 1199.

[200] *Kisor*, 139 S. Ct. at 2420 (opinion of Kagan, J.) (citing *Perez*, 135 S. Ct. at 1207–08, 1208 n.4).

[201] The plurality argued that its position was justifiable because "[a]n interpretive rule itself never forms 'the basis for an enforcement action' — since, as just noted, such a rule does not impose any 'legally binding requirements' on private parties." *Id.* (quoting Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014)). According to the plurality, "[a]n enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment." *Id.* But it is unclear precisely what this means. In an enforcement action, under the plurality's approach, the government is likely to seek (and, I presume, to receive) *Auer* deference for its interpretations of its regulations. If so, the "enforcement" versus "non-enforcement" distinction does no analytical work here. The key question is whether it is possible to conceive of an agency document that "do[es] not have the force of law" but nevertheless binds courts.

[202] *Id.* at 2412.

[203] *Id.* (alteration in original) (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152 (1991)).

[204] *Id.* (citing Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs, 484 U.S. 135, 159 (1987)).

for this principle is simple: "Consider that if you don't know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it."[205] For that reason, according to the plurality, *Auer* deference makes sense for a "significant category of 'contemporaneous' readings."[206]

This argument raises all the difficulties of authorial intent that plague the field of statutory interpretation.[207] From one perspective, asking the author can be misguided, because the author's unexpressed views on the meaning of a legal text ought not be relevant to the text's meaning.[208] In addition, the relevant "author" of a legal text is presumably the one who articulated views at the same time as — or "contemporaneous" with — the creation of the text. Where an author's interest changes over time, a later expression of a legal text's meaning may actually corrupt the text's original meaning. Try asking, for example, members of Congress about the meaning of a decades-old statute that currently has a hot-button application.

At the same time, in limiting *Auer* deference to only those positions that are "authoritative" or "official," the Court favorably cited a court of appeals opinion that had declined deference when the agency had "disclaimed the use of regulatory guides as authoritative."[209] The implication appears to be that an agency may invoke *Auer* only when it has alerted the rest of the world that it believes that the legal text it has released deserves deference.

To take an example, a specific version of the "timing" problem may well arise as to the question whether an agency intends that a regulation, or class of regulations, receive deference to begin with. Since 2017, agencies within the executive branch have released a number of memoranda purporting to end the practice of issuing guidance that creates binding standards.[210] For example, in 2017, then–Attorney General Jeff

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[205] *Id.*

[206] *Id.* (quoting Lyng v. Payne, 476 U.S. 926, 939 (1986)).

[207] *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988) (arguing that original intent has supplanted original meaning, greatly increasing the discretion and power of the court); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983) (discussing the considerations that go into construing a statute to begin with instead of declaring it inapplicable in a case); Scalia, *supra* note 151, at 517 (arguing against the existence of true legislative intent).

[208] *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

[209] *Kisor*, 139 S. Ct. at 2416–17 (first citing United States v. Mead Corp., 533 U.S. 218, 257–59, 258 n.6 (2001) (Scalia, J., dissenting); and then citing Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers, 676 F.3d 566, 576–78 (7th Cir. 2012)).

[210] *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-20.100 (2018), https://www.justice.gov/jm/1-20000-limitation-use-guidance-documents-litigation [https://perma.cc/A6GC-FHVH]; Memorandum from the Assoc. Att'y Gen. to Heads of Civil Litigating Components & U.S. Att'ys (Jan. 25, 2018), https://www.justice.gov/opa/press-release/file/1028756/download [https://perma.cc/SP6Y-5A7P]; Memorandum from the Att'y Gen. to all Components (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download [https://perma.cc/6Q7L-R5MD];

Sessions issued a memorandum providing that "guidance may not be used . . . to impose new requirements on entities outside the Executive Branch," nor "create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements."[211] The memorandum indicated that the Department of Justice would "no longer engage" in the practice of issuing guidance "that effectively bind[s] private parties without undergoing the rulemaking process."[212] As a result, Attorney General Sessions directed the Department, in future guidance documents, to "disclaim any force or effect of law" and "clearly state that they . . . have no legally binding effect . . . and may be rescinded or modified in the Department's complete discretion."[213]

On the one hand, these statements could be interpreted as disclaiming *Auer* deference under *Kisor*'s requirement that an agency issuing a regulatory interpretation claim that its guides are "authoritative." On the other hand, the agency might try to argue that the memoranda disclaimed the "force and effect of the law" without disclaiming *Auer* deference for the regulations. Such an argument would look much like Justice Kagan's own argument about how interpretive regulations can both receive deference yet not have the "force and effect of law."[214]

If courts interpret the memoranda as disclaiming deference, then each guidance document issued by the relevant agencies during the existence of these memoranda presumably would not receive deference under *Kisor*. And, even if a different administrator elected to rescind a memorandum disclaiming reliance on guidance, one would assume that (under *Kisor*'s "authorial intent" analysis) the agency's original meaning as to the guidance document's binding status at the time it was issued would control. In other words, there might be good arguments that the rescission of the disclaimer did not retroactively make prior guidance binding, but rather applied only prospectively to new guidance.

Press Release, Bd. of Governors of the Fed. Reserve Sys., Fed. Deposit Ins. Corp., Nat'l Credit Union Admin., Office of the Comptroller of the Currency & Bureau of Consumer Fin. Prot., Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018), https://www.fdic.gov/news/news/press/2018/pr18059a.pdf [https://perma.cc/535J-X94B]; Memorandum from Steven G. Bradbury, Gen. Counsel, Dep't of Transp., to Secretarial Officers & Heads of Operating Admins. (Dec. 20, 2018), https://www.transportation.gov/sites/dot.gov/files/docs/regulations/328566/gen-counsel-mem-guidance-documents-signed-122018.pdf [https://perma.cc/9LY6-MEDT].

211 Memorandum from the Att'y Gen. to all Components, *supra* note 210, at 1.

212 *Id.*

213 *Id.* at 2.

214 *See supra* note 201 and accompanying text.

CONCLUSION

Both *Gundy* and *Kisor* will immediately become a part of the administrative law canon. The two cases highlight the challenge of applying Article I's Legislative Vesting Clause[215] to the operations of the modern administrative state. In *Gundy*, the plurality construed an administrative agency's statutory power narrowly to ensure that it is bounded enough to satisfy the nondelegation doctrine.[216] In *Kisor*, the Court reaffirmed that reviewing courts should defer to an agency's interpretation of its own rules, albeit in a more cabined and nuanced fashion than earlier cases might have suggested. Both cases provide valuable insight into how the present Court construes the Constitution's structural provisions and the APA.

But whatever the two cases resolve, the plurality nature of both decisions signals further development ahead. And that further development is made only more likely by the inherent tension between an opinion that strains to read a statute to save it from nondelegation problems and another opinion, decided days later, that retains a regime of deference to agencies' constructions of their own regulations. Taken together, *Gundy* and *Kisor* add yet another fractured layer to the structure of administrative law, ensuring the questions underpinning these cases will remain live ones in years to come.

Moreover, by privileging the retention of current law over fidelity to text or doctrinal coherence, *Gundy* and *Kisor* retain the sheer analytical fuzziness that the Court's precedents had previously accumulated. But there is an alternative approach: a set of rules derived from text and history, as articulated in this Comment. When the issues addressed in *Gundy* and *Kisor* arise again — as they inevitably will — these rules could provide the legal framework for administrative law's future, just as they once did at the time of administrative law's formation

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[215] U.S. CONST. art. I, § 1.

[216] *See supra* note 60 and accompanying text.