THE FUTURE OF ADMINISTRATIVE LAW

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ABSTRACT

With the confirmation of two new justices, commentators predicted Chief Justice Roberts would lead a reliably conservative court. These predictions, however, foundered on statistics from the first term, which show Justices Gorsuch and Kavanaugh disagreeing at an astounding rate. If areas of the law are to shift, it will be in those areas in which the two new justices agree with each other and with the Chief Justice. Administrative law is just such an area, and it is an area of critical importance to agriculture.

Administrative agencies wield vast power over ordinary American life. From cleaning out irrigation ditches to accessing contraceptives, agencies write,

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enforce, and adjudicate legal standards. This Article places the administrative state in constitutional context, explaining the Framers' understanding of separated powers as necessary to preserve individual liberty, and exploring the tensions created by administrative agencies that consolidate federal power under one roof. The Article also highlights the breadth and depth of agency action and how pervasive agency regulation is today. Thirdly, this Article analyzes the views of the Chief Justice, and Justices Kavanaugh and Gorsuch, to explain why administrative law may soon experience a reformation. Next, this Article analyzes two cases from the Supreme Court's most recent term arguing that, although those cases did not themselves reform administrative law, when one looks closely at the various opinions in those cases, they suggest that five justices are very open to making major changes to administrative law. Finally, this Article sketches out why these changes to administrative law will matter to agriculture.

I. INTRODUCTION

Administrative law is an area of great importance to agriculture and poised to be even more so. At its most basic, the administrative state is in tension with the three branches described in the Constitution. It is unclear which branch administrative agencies fit within and the agencies often consolidate government power under one roof: They promulgate regulations with the force and effect of law, they interpret those regulations, and they enforce them.

Further, the power of administrative agencies today cannot be overstated. Agency regulation governs every nook and cranny of our daily lives—impacting countless decisions made by farmers, ranchers, and agribusinessmen and women every day. In fact, agencies are much more active in promulgating substantive rules of conduct than is Congress.

Moreover, with the confirmation of two new United States Supreme Court Justices, who are both skeptical of certain aspects of the administrative state, administrative law may be one of the most dynamic areas of the law going forward. The writings of these justices and of the Chief Justice suggest that administrative law may be the area of law most impacted by the new Jurists.

Bearing this prediction out, two cases from the Court's most recent term lay the framework for a transformation in American administrative law. The way the Court shapes or reshapes administrative law in the years to come will have a significant impact on agriculture.

II. ADMINISTRATIVE LAW AND THE CONSTITUTION

There is no mention of a "Fourth Branch" of government anywhere in the United States Constitution. The Constitution instead delineates three branches of government and divides governmental powers between them.

Article I defines the powers and prerogatives of Congress. Article I, Section 1 provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[1] Article I thus establishes a bicameral government which requires agreement between two separately instituted bodies, elected by different constituencies, for the creation of law.

Article II establishes the Executive Branch. Article II, Section 1 provides, "The executive Power shall be vested in a President of the United States of America."[2] Under Article II, the President has the authority to execute and enforce federal law.

Article III vests the Supreme Court, and the lower federal courts established by Congress, with judicial power. The first sentence provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[3]

The three vesting clauses contained in Articles I through III are generally thought to grant exclusive power. That is, each of the separate branches are thought to own separate and distinct powers and are barred from exercising the power given by the Constitution to other branches. For James Madison, the consolidation of government power was indefensible: "It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."[4] This was because the federal government had limited, enumerated powers.[5]

The text of the Constitution supports this view of the vesting clauses. Article I vests "*All* legislative Powers" in Congress.[6] Because of this text, the Supreme Court has held neither the President nor the courts can exercise law-making authority.[7] As John Locke wrote in 1690, the People may not be

1. U.S. CONST. art. I, § 1.
2. U.S. CONST. art. II, § 1.
3. U.S. CONST. art. III, § 1.
4. THE FEDERALIST NO. 48 (James Madison).
5. *Id.*
6. U.S. CONST. art. I, § 1 (emphasis added).
7. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952).

governed by laws enacted by anyone other than their elected representatives.[8]

"The Legislative," he continued, "cannot transfer the power of making laws to any other hands . . . ."[9] That is, in order to preserve liberty, the Framers "divide[d] the legislature into different branches,"[10] and required agreement between these differently constituted branches. Similarly, the Constitution allocates to the President "[t]he executive Power,"[11] and to the judiciary "[t]he judicial Power."[12] As a result, Congress may not adjudicate cases,[13] nor may the judiciary legislate.[14]

The Founders believed that the separation of powers, first between the federal and state governments, and second, among the branches of the federal government, was "essential to the preservation of liberty."[15] Articles I through III allocate federal authority among three co-equal branches of government. This division of power was intended to protect individual liberty by making it more difficult to exercise, and thus, more difficult to abuse governmental power.

In dividing up governmental power, the Framers were influenced by the work of 18th century political philosopher Baron de Montesquieu. Montesquieu advocated for separate realms of government authority—in order to slow government down.[16] He argued that dividing powers among co-equal branches formed a natural state of "repose or inaction."[17] This was crucial for the preservation of liberty, Montesquieu believed, because it required all three branches to act in concert before the government might constrain individual liberty.[18]

The Federalist Papers echo this commitment to separated powers. In Federalist 48, James Madison argued that the branches of government must remain

8. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 362 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

9. *Id.* at 380.

10. THE FEDERALIST NO. 51 (James Madison).

11. U.S. CONST. art. II, § 1.

12. U.S. CONST. art. III, § 1.

13. United States v. Klein, 80 U.S. 128, 147 (1871).

14. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984). The Founders recognized that there would be some "play in the joints." It is not always easy to determine, for example, the line between legislation and enforcement.

15. THE FEDERALIST NO. 51, *supra* note 10.

16. CHARLES DE SECONDAT, THE SPIRIT OF LAWS 160 (Thomas Nugent trans., The Colonial Press rev. ed. 1899) (1777).

17. *Id.*

18. *Id.*

distinct.[19] Madison continued his refrain in Federalist 51, in which he argued that separated powers are "essential to the preservation of liberty."[20] Madison worried about "a gradual concentration of the several powers in the same department," and believed that such "usurpations" would be guarded against by separated powers.[21] In Federalist Number 51, he explained more fully the benefits of divided governmental power:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [state and federal], and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[22]

Despite this constitutional text and history, perhaps the most distinctive feature about the modern administrative state is its consolidation of all three of the constitutional governmental functions into a single agency. Administrative agencies, by design, are often authorized to make regulations with the force and effect of law, enforce those regulations, and hold adjudicative proceedings.[23] As scholars sympathetic to the modern administrative state recognize, "Virtually every part of the government Congress has created—the Department of Agriculture as well as the Securities and Exchange Commission—exercises *all three* of the governmental functions the Constitution so carefully allocated among Congress, President, and Court."[24] This consolidation of government power creates tension with the Constitution. As James Madison put it, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny."[25]

It is no accident that agencies combine all three of the governmental functions. The Progressives who designed the administrative state believed in a different kind of government, unconstrained by separation of powers principles.[26] For example, in 1914, influential Progressive author Herbert Croly presciently described "a fourth department of the government" that "does not fit into the

19. THE FEDERALIST NO. 48, *supra* note 4.

20. THE FEDERALIST NO. 51, *supra* note 10.

21. *Id.*

22. *Id.*

23. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987).

24. *Id.* (emphasis in original).

25. THE FEDERALIST NO. 47 (James Madison).

26. HERBERT CROLY, PROGRESSIVE DEMOCRACY 364 (1914).

traditional classification of governmental powers."[27] This fourth department would "exercise[] an authority which is in part executive, in part legislative, and in part judicial . . . ."[28] Croly was forthright: this newly designed branch was "a convenient means of consolidating the divided activities of the government for certain practical social purposes."[29]

To summarize briefly, the Framers of the Constitution designed a government that would be divided into three separate branches. Importantly, these three separate branches would exercise separate and distinct spheres of governmental authority. They were not to share or delegate their constitutional authority. This division was necessary, the Founders believed, to safeguard individual liberty. Yet the current administrative state looks nothing like this. Indeed, a wholly new "branch of government" has been created. This so-called Fourth Branch of government, the administrative state, often exercises all three of the separate governmental functions—it legislates, adjudicates, and executes. Meanwhile, the three constitutional branches of government often have little, if any, authority over agency action.

III. THE POWER OF ADMINISTRATIVE AGENCIES TODAY

Across the country, middle school civics students learn that Congress makes the law; the judiciary interprets the law; and the President executes the law. But the civics books are underinclusive. While this is how our government is supposed to function, it is not actually Congress that passes the bulk of provisions that have the force and effect of law. Rather, administrative agencies issue about twelve times as many substantive rules as Congress does substantive statutes each year.[30] As Justice Souter once put it, the administrative state "with its reams of regulations would leave [the Framers] rubbing their eyes."[31] In 2015 and 2016, for example, federal agencies promulgated more than 7,000 final rules filling more than 60,000 pages in the Federal Register.[32] During that same time, Congress enacted just 329

27. *Id.*

28. *Id.*

29. *Id.*

30. Agency administrators issue approximately 4,500 regulations per year, about one-third of which substantively affecting the way citizens order their affairs. MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 1 (2019), https://perma.cc/WGL2-EZ4P. By contrast, Congress enacts approximately 125 substantive statutes per year. *See* Clyde Wayne Crews Jr., *How Many Rules And Regulations Do Federal Agencies Issue?*, FORBES (Aug. 15, 2017), https://perma.cc/Y5P7-NSPT.

31. Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

32. Christopher Walker, *Judge Kavanaugh on administrative law and separation of powers (Corrected)*, SCOTUSBLOG (July 26, 2018), https://perma.cc/X3NX-5TA7.

public laws filling about 3,000 pages in the Statutes at Large.[33] Whatever one thinks of how the administrative state fits within the constitutional structure, there is no question that the so-called Fourth Branch exercises robust power today.

A. Nondelegation and the Power of Administrative Agencies to Make Law

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. The doctrine is based upon separation of powers principles which prohibit one branch from exercising the powers vested in a separate branch of government. As discussed above, Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[34] Thus, in 1825, for example, the Supreme Court explained that Congress may not transfer to another branch "powers which are strictly and exclusively legislative."[35] As a result, separation of powers principles theoretically bar Congress from delegating to another branch the ability to "make law."[36]

The Supreme Court enforces these separation of powers principles through the nondelegation doctrine. The nondelegation doctrine was most famously applied in *A.L.A. Schechter Poultry Corp. v. United States*, otherwise known as the sick chicken case.[37] The statute at issue in that case, The National Industrial Recovery Act (NIRA), provided that trades and industries could develop codes of fair competition for slaughterhouses and related industries which might be approved by the President and become law under the Federal Trade Commission Act.[38] The President could also come up with codes of fair competition on his own.[39] A violation of one of these codes was punishable under the NIRA as a federal crime.[40]

The text of the NIRA purported to give the President the power to "approve 'codes of fair competition,'" but did not define "fair competition" or provide meaningful guidance as to what the codes should contain.[41] Under this statute, the President "adopted a lengthy fair competition code written by a group of (possibly self-serving) New York poultry butchers."[42] One of the provisions mandated

33. *Id.*
34. U.S. CONST. art. I, § 1.
35. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).
36. *See id.* at 42-43.
37. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
38. *Id.* at 521-23.
39. *Id.*
40. *Id.*
41. *Id.* at 534.
42. Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

"straight killing"—the selection of the first bird that touched the customer's hand and made it a federal crime for poultry butchers to allow customers instead to select the chicken they wished to purchase.[43] The Schechters, and other Kosher butchers, had a hard time following this mandate because Jewish kashrut required the inspection of individual chickens to make sure they were disease free and of sufficient quality to qualify as kosher animals.[44]

The Schechters were eventually indicted on over sixty charges, including the violation of the code requiring straight killing.[45] The Schechters challenged the NIRA arguing that Congress could not delegate to the President the authority to write codes of criminal conduct.[46]

The Supreme Court struck down the NIRA finding the code-making authority to be an unconstitutional delegation of legislative power.[47] Because Article I of the Constitution vested "[a]ll legislative powers" with Congress, the Court held that body was not permitted to abdicate or transfer its essential legislative functions.[48] The unanimous Court found that Congress could not delegate to the President the power to make whatever laws he thought necessary for the rehabilitation of a trade and industry.[49] In memorable language, Justice Cardozo's concurrence explained that the NIRA's delegation to the President the power to write a code of fair competition was "delegation running riot."[50]

The years following *Schechter Poultry*, however, have seen the hollowing out of the nondelegation doctrine. The Court has sanctioned a delegation to the Price Administrator to fix commodity prices at a level that "will be generally fair and equitable,"[51] and upheld a grant to the Federal Communications Commission (FCC) to write regulations that advance the "public interest."[52] All the Court typically requires is that Congress lay out an "intelligible principle."[53] And it has gone so far as to say that the nondelegation doctrine is transgressed only if "there is an absence of standards" for guiding the agency.[54]

43. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 527.
44. *Gundy*, 139 S. Ct. at 2137-38 (Gorsuch, J., dissenting).
45. United States v. A.L.A. Schechter Poultry Corp., 76 F.2d 617, 618 (2d. Cir.), *rev'd*, 295 U.S. 495 (1935).
46. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 519.
47. *Id.* at 542.
48. *Id.* at 529.
49. *Id.* at 537-38.
50. *Id.* at 553 (Cardozo, J., concurring).
51. Yakus v. United States, 321 U.S. 414, 420-27 (1944).
52. FCC v. NBC, 319 U.S. 239, 243 (1943).
53. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
54. *Yakus*, 321 U.S. at 426.

Given the low bar that is currently required for congressional statutes to pass the nondelegation doctrine, many policy making decisions are left up to administrative agencies. To take the Affordable Care Act (ACA) as an example, that statute left many important questions—such as what forms of contraception insurance plans would be required to cover, and whether religious liberty exemptions would exist—to the Health and Human Services Agency (HHS).[55]

The Court has been open about the pragmatism animating its neutering of the nondelegation doctrine. In *Mistretta v. United States*, for instance, the Court explained the doctrine was "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[56]

B. Chevron and Administrative Power to Interpret Law

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court shifted a great deal of statutory interpretation from the Judicial Branch to the Executive Branch.[57] Under the *Chevron* doctrine, the Supreme Court requires Article III federal courts to defer to an agency's interpretation of law rather than interpret that statute in the first instance.[58] That is, when confronted with an agency regulation, the federal courts do not ask whether the regulation is the most sensible or the best interpretation of a statute, but merely whether the regulation is a permissible interpretation.[59] This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.[60] *Chevron* deference thus *assumes* that when a statute is *silent* on a particular issue, Congress intended to delegate the issue to the agency.[61] That is why Professor Cass Sunstein calls *Chevron* a "counter-*Marbury*," because under the *Chevron* doctrine, it is for the agencies in the first instance, not federal courts, to say what the law is.[62]

In short, under current Supreme Court precedent, there is little check on what Congress may constitutionally delegate. As long as Congress provides in a statute

55. *See* 42 U.S.C. § 300gg-13 (2018) (noting this is the preventive care statute cited later when discussing the ACA).

56. Mistretta v. United States, 488 U.S. 361, 372 (1989).

57. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

58. *Id.* at 844.

59. *Id.*

60. *Id.* at 843-44.

61. *Id.*

62. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006).

an "intelligible principle"—the federal courts will permit a delegation of even core policy-making authority to administrative agencies.

Further, if Congress writes an open-ended statute, the Court will assume Congress meant for the agency to fill in the gaps and thus require federal courts to defer to the agency's interpretation of the statute, rather than interpret the statute in the first instance. In combination, these administrative law doctrines leave much of the business of legislating and interpreting to federal agencies.

C. Agency Authority over the Conduct of Individuals and Businesses

The "reams" of regulations issued by administrative agencies have serious effects on individuals and businesses.[63] Consider the recent case involving the Little Sisters of the Poor, an international ministry of nuns in over thirty countries that offers the elderly poor of every race and religion a home where they will be cared for as a family until their death.[64] The Little Sisters nevertheless got crossways with HHS, which insisted they violate their conscience rights by providing every Food and Drug Administration (FDA)-approved contraceptive to employees.[65] If they refused, HHS threatened to fine them $75 million per year under the ACA.[66]

Yet the ACA itself says *nothing* about contraceptive coverage, much less require religious employers to provide all approved contraceptives even if doing so violates deeply held religious beliefs.[67] Those requirements were promulgated at the administrative level. It was HHS that defined the statutory term "preventive care" to include all FDA-approved contraceptive methods.[68] The agency also instituted an extremely narrow exemption for churches and religious affiliates.[69] The Tenth Circuit held the Little Sisters must comply or pay the fine.[70] The Supreme Court, however, unanimously overturned the Tenth Circuit and held

63. Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

64. *Mission Statement*, LITTLE SISTERS POOR, https://perma.cc/W5U5-R2MR (archived Feb. 12, 2020).

65. Emma Green, *The Little Sisters of the Poor Are Headed to the Supreme Court*, ATLANTIC: POL. (Nov. 6, 2015), https://perma.cc/NR7C-F3VB.

66. *Id.*

67. *See* 42 U.S.C. § 300gg-13 (2018).

68. *See* 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2020); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2019); 45 C.F.R. § 147.130(a)(1)(iv) (2019).

69. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621-01, 46623 (Aug. 3, 2011).

70. Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1205 (10th Cir. 2015), *vacated*, *remanded sub. nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

the government could not fine the Little Sisters for following their conscience rights.[71]

Businesses and individuals are routinely governed by agency regulation. To take an example closer to the heart of agricultural law, the Sackett family of Priest Lake, Idaho, purchased a lot intending to build a home.[72] But once the Sacketts leveled their lot, the Environmental Protection Agency (EPA) intervened, issuing a so-called Administrative Compliance Order, which ordered the Sacketts to stop construction and restore the land to its previous condition—at their own expense.[73] The penalty for failing to comply with the order: civil penalties of up to $75,000 a day.[74]

The Sacketts' lot was several lots removed from any body of water, and they did not believe it qualified as a "water of the United States" as required by the Clean Water Act (CWA) for the EPA to assert jurisdiction.[75] The Sacketts thus requested a hearing in order to dispute that their property was a water of the United States.[76] The EPA not only denied their request for a hearing but stated that the Sacketts were not entitled to *any* review of the Administrative Compliance Order.[77] In the EPA's view, the Sacketts' only option was to comply, or if they chose not to comply, to do so at pain of large civil penalties.

As with the provision of the ACA at issue in the Little Sisters' case, the text of the CWA had very little to do with the EPA's assertion of jurisdiction over the Sacketts' residential lot. That statute speaks of "waters of the United States"—it does not mention wetlands at all.[78] It was the EPA that extended the statutes' reach to include wetlands, tributaries, and the like.

Despite the fact Congress said nothing about requiring faith-based ministries to provide contraceptives irrespective of their religious beliefs in the ACA nor indicated that the CWA would reach to wetlands, the Little Sisters and the Sacketts faced dramatic legal consequences. These examples show in stark relief that regulations promulgated by various agencies have the same effect on businesses and individuals as would legislation, especially when they are enforced by large civil fines.

71. Zubik v. Burwell, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J. & Ginsburg, J., concurring).

72. Sackett v. EPA, 566 U.S. 120, 124 (2012).

73. *Id.* at 124-25.

74. *Id.* at 123.

75. *Id.* at 124-25.

76. *Id.* at 125.

77. *Id.*

78. 33 U.S.C. § 1362 (2018).

In short, administrative agencies have much to say about the way ordinary Americans live their lives. As Chief Justice Roberts recently put it, the administrative state "wields vast power and touches almost every aspect of daily life."[79] Given this vast power, the way agencies regulate, the ways courts interpret those regulations, and the amount of policy making authority ceded to administrative agencies are some of the most important questions of law today.

IV. ADMINISTRATIVE LAW 2020 AND BEYOND

The constitutional tensions surrounding the administrative state and its ever-expanding size have been around for decades. During this time period, the academy and the judiciary have by and large made peace with the size and influence of the administrative state. The academic consensus is that the administrative state is a necessary consequence of living with the size of government we currently do in America.[80] As for the judiciary, the Supreme Court upheld the controversial independent counsel statute in *Mistretta*, explaining that the hands-off-administrative-law approach adopted by the federal courts was "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[81]

Given the academic consensus and judicial acquiescence to broad administrative power, one might think administrative law would be the least likely area to undergo a revolution. So, why is administrative law poised to become a dynamic area of the law? The short answer: the confirmation of Justices Kavanaugh and Gorsuch.[82]

The media frenzy surrounding the Kavanaugh confirmation hearings was due in part to the belief that replacing Justice Kennedy with the (supposedly more conservative) Justice Kavanaugh would radically remake the United States Supreme Court. The New York Times, for instance, predicted that the replacement of Justice Kennedy with Justice Kavanaugh would lead to a "significant change," with Chief Justice Roberts thereafter leading "a solid five-member conservative majority."[83]

79. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010).

80. *See* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017).

81. Mistretta v. United States, 488 U.S. 361, 372 (1989).

82. Ironically, it is the replacement of Justice Scalia with Justice Gorsuch and not Justice Kennedy with Justice Kavanaugh that may be the game changer in administrative law.

83. Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES (Sept. 2, 2018), https://perma.cc/H6KE-V4GQ. Confirmation of Judge Kavanaugh would lead to "a solid five-member conservative majority that would most likely restrict

The first term with both of the newest Justices, however, did not bear out the media's prediction of a solidly conservative five-Justice Supreme Court. In fact, the so-called liberal Justices were in the majority in more five-four decisions than the so-called conservatives by a solid margin—ten to seven.[84] Even more shocking, when you take out unanimous cases, Justices Kavanaugh and Gorsuch agreed only 51% of the time.[85] Overall, the two agreed about 70% of the time.[86]

The data is clear: According to ScotusBlog, no two justices appointed by the same president have disagreed more in their first term together since the 1960s.[87] The two justices appointed by President Obama, Justices Sotomayor and Kagan, "agreed more than 96% of the time in their first term."[88] Similarly, Chief Justice Roberts and Justice Alito, both appointed by George W. Bush, agreed "more than 90% of the time."[89] Only Justices Thomas and Souter (both appointed by President Reagan) come close to the level of initial disagreement between Justices Kavanaugh and Gorsuch, agreeing 77% of the time during their first term.[90]

As these numbers suggest, Justice Kavanaugh and Justice Gorsuch have disagreed on an array of cases across different areas of law. They have parted ways in cases involving Native American rights,[91] criminal law,[92] business law,[93] the death penalty,[94] and abortion.[95]

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access to abortion, limit the use of race-conscious decisions in areas like college admissions, uphold voting restrictions, expand gun rights, strike down campaign finance regulations and give religion a greater role in public life." *Id.*

84. Adam Feldman, *Final Stat Pack for October Term 2018 19*, SCOTUSBLOG, (June 28, 2019), https://perma.cc/RV2W-8M4D. In contrast to this term, where liberals prevailed in ten out of seventeen closely divided cases, the preceding term, which was Justice Kennedy's last, liberals prevailed in just three of nineteen closely divided cases.

85. *Id.* at 24.

86. *Id.* at 23.

87. Feldman*, supra* note 84.

88. Tucker Higgins, *Trump's Two Supreme Court Justices Kavanaugh and Gorsuch Split in First Term Together*, CNBC: POL. (June 29, 2019), https://perma.cc/FM6T-NSNL.

89. *Id.*

90. *Id.* These numbers could in part be explained by the statistics showing that new justices tend not to court too much controversy their first term and thus tend to vote in alignment with the middle of the Court their first term. *Id.* That Justice Kavanaugh was in the majority 91% of the time, suggests this tendency could be at work. *Id.* Nevertheless, the level of disagreement between the two new Justices has not been matched since the 1960s.

91. *See* Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

92. *See* United States v. Haymond, 139 S. Ct. 2369 (2019).

93. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).

94. Flowers v. Mississippi, 139 S. Ct. 2228 (2019).

95. *See* Andersen v. Planned Parenthood of Kan. & Mid-Mo., 139 S. Ct. 638, *denying cert.* 882 F.3d 1205 (10th Cir. 2018); Gee v. Planned Parenthood of Gulf Coast, 139 S. Ct.

At a minimum, the predictions about a solidly conservative Court were overstated. The broad level of disagreement shown by the two newest Justices leads us to the present question: In which area(s) of law do Justices Kavanaugh and Gorsuch agree with one another, and with Chief Justice Roberts? For it is those areas of the law that are most likely to see change. And that leads us to administrative law.

The following section will first outline briefly the positions of the Chief Justice, Justice Kavanaugh, and Justice Gorsuch on important issues of administrative law—as those three votes will be necessary to move any area of law in a different direction. The section will then dive into cases from the October 2018 Supreme Court term to determine where the Supreme Court may be headed on administrative law.

A. Chief Justice Roberts' Views on Administrative Law

Separation of powers principles are important to the Chief Justice, especially when they involve the responsibilities of Article III. He is fond of quoting *Marbury v. Madison* for the point that it is "emphatically the province and duty of the judicial department to say what the law is."[96]

The Chief Justice laid some of his cards on the table in *King v. Burwell*, the second ACA case.[97] In that case, the Supreme Court upheld the ACA finding that "established by a State" meant "established by the State *or the Federal Government*."[98] But when one looks at the case closely, the most remarkable thing about the Court's opinion was not its result but the way in which the majority reached that result.

The majority began the statutory analysis with the *Chevron* doctrine. Under *Chevron* Step One, the majority concluded that the statutory provision at issue—"established by the State"—was ambiguous.[99] The Court could countenance multiple readings of the provision. The "most natural" reading of the term limited its reach to state exchanges, the majority wrote, but it was also "possible" the

408 (2018), *denying cert.* 862 F.3d 445 (5th Cir. 2017) (Thomas, J., dissenting) (demonstrating Justice Gorsuch joining in the dissent, while Justice Kavanaugh did not).

96. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019); City of Arlington v. FCC, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting); *see* Kisor v. Wilkie, 139 S. Ct. 2400, 2437 (2019) (Roberts, C.J., concurring); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 129 (2015) (Roberts, C.J., concurring); *see generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

97. King v. Burwell, 135 S. Ct. 2480 (2015).

98. *Id.* at 2496 (emphasis added).

99. *Id.* at 2489.

phrase referred to all Exchanges—both State and Federal.[100]

Once ambiguity was established, the next step under well-established administrative law was clear. Under *Chevron* Step Two, the federal courts are required to defer to the agency's, here the Treasury Department's, interpretation of the statute.[101] The application of this doctrine in *King* was obvious: Supreme Court deference to the Treasury's interpretation of the ACA provision to apply to both federal and state exchanges. But the majority did not apply *Chevron* Step Two. It did not defer to the Treasury's interpretation.[102] Rather, the Supreme Court dispensed with *Chevron* in one short paragraph:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[103]

In looking at the policy question at issue in the assumed delegation, the Chief Justice resurrected the major questions doctrine—a doctrine which posits that in certain unusual cases, the Court can reject the very premise of *Chevron* and find the policy question at issue is too important to apply the assumption Congress intended to delegate the question to an administrative agency.[104] In referencing "extraordinary cases," the Supreme Court cited *FDA v. Brown & Williamson Tobacco Corp.*, a case in which the Court concluded that Congress had not delegated to the FDA the power to regulate the tobacco industry.[105]

In applying the major questions doctrine to the ACA, the majority concluded that questions regarding the exchanges were of "deep 'economic and political significance.'"[106] As a result, the question was "too important" to be delegated to an agency.[107] Further the IRS had no subject matter expertise, thus the question

100. *Id.* at 2490-91.

101. *Id.* at 2492-93.

102. *Id.*

103. *Id.* at 2488-89 (citations omitted) (quoting FDA v. Brant Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

104. *See King*, 135 S. Ct. at 2489.

105. *See Brant Williamson Tobacco*, 529 U.S. at 159.

106. *King*, 135 S. Ct. at 2489 (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

107. *Id.* at 2488-89.

was not one for the agency.[108]

The majority's abandonment of *Chevron* Step Two was an astounding break with administrative law. Under *Chevron*, the Court held that when a statute is silent on an issue, deference is required because a gap in the statute means that Congress intended for the agency (and not courts) to fill in the gap.[109] *King* reversed that presumption—at least for certain, important questions.[110]

King is hardly the only case in which the Chief Justice has expressed skepticism over the power of the administrative state and concern with various administrative law doctrines. In his dissent in *City of Arlington v. FCC*, the Chief Justice expressed his frustration with the administrative law status quo.[111] In that case, the majority held that agencies should get deference to their interpretation of a statute, even when that statute sets the boundaries of the agency's own jurisdiction.[112]

In his dissent, the Chief made clear his discomfort with the contours of the current administrative state. He accused federal agencies of poking into "every nook and cranny of daily life."[113] And went on to note that, while modern administrative agencies fit best within the Executive Branch, "as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules."[114] In the Chief's view, citizens could reasonably believe that regulations promulgated by agencies under broad statutes could "be excused for thinking that it is the agency really doing the legislating."[115]

The Chief wrote the Framers divided government powers "for the purpose of safeguarding liberty,"[116] which made the consolidation of these powers within a single agency difficult to reconcile with the Founders' vision.[117] The Chief

108. *Id.*

109. Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

110. *King*, 135 S. Ct. at 2488-89 (2015).

111. City of Arlington v. FCC, 569 U.S. 290, 312-28 (2013) (Roberts, C.J., dissenting).

112. *Id.* at 305-07 (majority opinion).

113. *Id.* at 315 (Roberts, C.J., dissenting).

114. *Id.* at 312-13.

115. *Id.* at 315.

116. *Id.*

117. *Id.* at 312 (quoting THE FEDERALIST NO. 47, *supra* note 25) ("One of the principal authors of the Constitution famously wrote that the 'accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.'").

Justice further noted the centrality of the administrative state to American government: "The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government."[118]

B. Justice Kavanaugh's Stated Views on Administrative Law

As a judge on the D.C. Circuit, Judge Kavanaugh authored more than 300 opinions, approximately one-third of which dealt with administrative law.[119] His opinions dealing with administrative law reveal a Jurist who is serious about separation of powers principles and is likely to vote to impose some limitations on the administrative state.

On the D.C. Circuit, for example, Judge Kavanaugh endorsed a broad reading of the major questions doctrine, finding that certain issues were not delegated to the FCC because they involved important policy questions.[120] *United States Telecom Ass'n v. FCC* concerned the FCC's 2015 Open Internet Order that reclassified broadband service as a "common carrier" and "telecommunications service," thereby subjecting it to greater regulation for net neutrality and other purposes.[121] Several internet service providers filed suit challenging the 2015 Order arguing that the FCC did not have the authority to reclassify broadband as a telecommunications service.[122] The D.C. Circuit rejected this argument finding that the Order was a permissible interpretation of an ambiguous statute.[123]

In dissent from en banc review, Judge Kavanaugh argued that the major questions doctrine, requiring clear Congressional authorization to an agency for important policy questions, applied instead of *Chevron* deference.[124] According to Kavanaugh, the major questions doctrine was an important check on the administrative state: it "helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority."[125] He explained that the major questions doctrine derived from two presumptions: "(i) a separation of powers-based presumption against the delegation of major

118. *Id.* at 313.

119. Walker, *supra* note 32. When discussing rulings of Justices from before their appointment, Justices will be referred to as judges.

120. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417-18 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

121. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).

122. *Id.* at 702.

123. *Id.* (citing Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989 (2005)), *reh'g denied en banc*, 855 F.3d 381 (D.C. Cir. 2017).

124. *U.S. Telecom Ass'n*, 855 F.3d at 419. (Kavanaugh, J., dissenting).

125. *Id.* at 417.

lawmaking authority from Congress to the Executive Branch . . . and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[126]

Judge Kavanaugh believed the major questions doctrine applied to the 2015 net neutrality rule because it was "one of the most consequential regulations ever issued by an executive or independent agency."[127] According to Judge Kavanaugh, "the net neutrality rule fundamentally transforms the Internet" by imposing common carrier obligations on internet service providers and would "affect every Internet service provider, every Internet content provider, and every Internet consumer."[128] Additionally, the financial impact of the rule was likely "staggering," and the issue of net neutrality garnered close attention from Congress, the public, and President Obama.[129]

Having found the major questions doctrine to apply to the net neutrality rule, Judge Kavanaugh found the rule unlawful because the 1934 Communications Act does "not supply *clear* congressional authorization for the FCC to impose common-carrier regulation on Internet service providers."[130] In reaching this conclusion, he pointed to the FCC's prior regulation of broadband as an information service rather than a telecommunications service—a fact which established that "[a]t most, the Act is ambiguous about whether Internet service is an information service or a telecommunications service."[131]

The lack of clear congressional authorization mattered because in recent cases "the Supreme Court has required *clear* congressional authorization for major agency rules of this kind."[132] As the Court had written, "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[133]

In contrast to his broad reading of the major questions doctrine, and consistent with his view that it is generally for the federal courts to interpret provisions of law, Justice Kavanaugh has written about the level of clarity needed for a court to find a regulation ambiguous at *Chevron*'s Step One. In this context, he applies "a 65-35 rule": "if the interpretation is at least 65-35 clear, then [he] will

126. *Id.* at 419 (citation omitted).
127. *Id.* at 417.
128. *Id.* at 423.
129. *Id.* at 423-24.
130. *Id.* at 417 (emphasis in original).
131. *Id.* at 423-24.
132. *Id.* at 417 (emphasis in original).
133. *Id.* (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

call it clear . . . ."[134] By comparison, Justice Kavanaugh considered some judges to apply a stricter 90-10 rule, and other judges, such as the late Justice Antonin Scalia, to apply a more lenient 55-45 rule.[135] The upshot of Justice Kavanaugh's approach is that he will defer to the agency's interpretation under *Chevron* less often than judges applying a 90-10 rule, but more often than judges applying a 55-45 rule.

Because Justice Kavanaugh is concerned about the federal courts' role under the APA, and because judges have different views as to what counts as ambiguous and thus any sort of uniformity is "hard to achieve" under *Chevron*, Justice Kavanaugh has suggested a new approach to *Chevron* deference.[136] Under Kavanaugh's approach, courts would still defer to agency interpretations when statutes use broad or open-ended language.[137] However, when a court interprets a specific term or phrase, "courts should determine whether the agency's interpretation is the *best* reading of the statutory text."[138] Under this formulation, federal courts retain more authority to say what the law is.

C. Justice Gorsuch's Stated Views on Administrative Law

The second-to-newest justice is also on record as a skeptic of the administrative state's broad powers. Given his concern for the structural Constitution, it is no surprise that an originalist like Justice Gorsuch has expressed concern over various administrative law doctrines. As a judge on the Tenth Circuit Court of Appeals, Judge Gorsuch took the unusual step of concurring in his own majority opinion to explain why judicial deference to administrative interpretations of statutes is in serious tension with separation of powers principles.[139]

Gutierrez-Brizuela v. Lynch was an immigration case involving two contradictory provisions of federal law: 8 U.S.C. §§ 1255(i)(2)(A) and 1182(a)(9)(C)(i)(I).[140] The former "grants the Attorney General discretion to 'adjust the status' of those who have entered the country illegally and afford them lawful residency."[141] The latter provides that certain persons "are categorically

134. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

135. *Id.* at 2137-38.

136. *Id.* at 2150.

137. *Id.* at 2154.

138. *Id.* (emphasis added).

139. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

140. *Id.* at 1144.

141. De Niz Robles v. Lynch, 803 F.3d 1165, 1167 (10th Cir. 2015); *see* 8 U.S.C. § 1255(i)(1)–(2) (2018).

prohibited from winning lawful residency . . . unless they first serve a ten-year waiting period outside our borders."[142] In 2005, the Tenth Circuit resolved the tension in favor of "the Attorney General's discretion to afford relief without insisting on a decade-long waiting period."[143]

In 2007, the other shoe dropped and the Board of Immigration Appeals (BIA) reached the opposite conclusion, holding that adjustment of status was unavailable.[144] The Tenth Circuit subsequently held that the BIA's decision in *In re Briones*[145] was entitled to *Chevron* deference as an application of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[146] and overruled its previous decision in *Padilla-Caldera v. Holder I*.[147]

Meanwhile, in 2009, before the Tenth Circuit's ruling in *Padilla-Caldera II*, but after the BIA's ruling in *Briones*, Hugo Gutierrez-Brizuela sought adjusted status from the Attorney General.[148] In 2013, an immigration judge denied his application and the BIA dismissed his appeal, finding their decision in *Briones* made Mr. Gutierrez-Brizuela ineligible for adjusted status.[149]

The Tenth Circuit reversed the BIA. The court held that *Padilla-Caldera I* was controlling law when the 2009 application for adjusted status was filed.[150] Further, the BIA's decision in *Briones* was equivalent to the exercise of legislative power and a presumption against retroactive application.[151] Moreover, while *Briones* was entitled to deference under *Brand X*, that decision did not "take legal effect" until 2011 when the Tenth Circuit handed down *Padilla-Caldera II*.[152] Until then, *Padilla-Caldera I* remained on the books "as binding precedent" and litigants like Mr. Gutierrez-Brizuela were entitled to rely on it.[153]

Further, Justice Gorsuch argued that if the Tenth Circuit were to find *Briones*

142. *Robles*, 803 F.3d at 1167; *see* 8 U.S.C. § 1182(a)(9)(C) (2018).

143. *Gutierrez-Brizuela*, 834 F.3d at 1144 (citing Padilla-Caldera v. Gonzales, 426 F.3d 1294, 1301 (10th Cir. 2005) (Padilla-Caldera I)).

144. In re Briones, 24 I. & N. Dec. 355, 370 (2007).

145. *Id.*

146. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989 (2005).

147. Padilla-Caldera v. Holder, 637 F.3d 1140, 1153 (10th Cir. 2011) (Padilla-Calder II).

148. In re Gutierrez-Brizuela, No. AXXX XX3 099, 2014 WL 5966418 (BIA), at *1 (Aug. 27, 2014).

149. *Id*. at 1-2.

150. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1144-45 (10th Cir. 2016).

151. *Id.* (citing De Niz Robles v. Lynch, 803 F.3d 1165, 1172-74 (10th Cir. 2015)).

152. *Id.* at 1144-48.

153. *Id.*

had retroactive application, this would raise due process and fairness concerns.[154] "[L]egislation," he explained, "is presumptively prospective in its operation because the retroactive application of new penalties to past conduct that affected persons cannot now change denies them fair notice of the law and risks endowing a decisionmaker expressly influenced by majoritarian politics with the power to single out disfavored individuals for mistreatment."[155] Similarly, in 2009, Mr. Gutierrez-Brizuela had the option of filing for an adjustment of status under binding precedent, and the BIA could not retroactively change the rules on him.[156] Indeed, "if the agency were free to change the law retroactively based on shifting political winds, it could use that power to punish politically disfavored groups or individuals for conduct they can no longer alter."[157]

After holding that Gutierrez-Brizuela was entitled to rely on *Padilla-Caldera I* and seek adjustment of status, Judge Gorsuch penned a concurrence focusing on what he perceived to be broader problems with administrative deference.[158] According to Judge Gorsuch, *Chevron* and follow-on cases "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power . . . [which] seems more than a little difficult to square with the Constitution of the framers' design."[159]

Judge Gorsuch was particularly frustrated with the outer edges of the *Chevron* doctrine as articulated in *Brand X*. The *Brand X* decision allows agencies to overturn previous judicial rulings, because it requires federal courts to defer to a later agency interpretation, even when a federal court (including the Supreme Court) has previously said the statute means something different.[160] As applied to *Gutierrez-Brizuela*, Judge Gorsuch explained that "after this court declared the statutes' meaning and issued a final decision, an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals."[161] "If that doesn't qualify as an unconstitutional revision," he continued, "of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we've forgotten what might."[162]

Judge Gorsuch had two particular concerns with *Chevron*'s deference

154. *Id.* at 1146.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 1149 (Gorsuch, J., concurring).
159. *Id.*
160. *Id.* at 1150.
161. *Id.*
162. *Id.*

requirement—one statutory and one constitutional.

From a statutory standpoint, Gorsuch argued that *Chevron* was inconsistent with the Administrative Procedure Act (APA). In Judge Gorsuch's view, *Chevron* could not be squared with the APA because it required the federal courts to defer to an agency's interpretation of a statute, rather than "interpret" the relevant statutory provision for itself in the first instance.[163] The APA provides a cause of action for litigants to challenge agency action as, among other things, arbitrary and capricious or contrary to law.[164] The APA requires federal courts to "interpret . . . statutory provisions," and to overturn agency action inconsistent with its interpretation of the statute.[165] Judge Gorsuch chafed at the fact that "rather than completing the task expressly assigned to [the judiciary], rather than 'interpret[ing] . . . statutory provisions,'" *Chevron* tells us "we must allow an executive agency to resolve the meaning of any ambiguous statutory provision."[166] Viewed this way, "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."[167]

Judge Gorsuch also suggested *Chevron* might be inconsistent with Article III's command that federal courts interpret the law.[168] Judge Gorsuch argued the Constitution does not contemplate Article III courts delegating their power "to say what the law is" to the Executive Branch vis-à-vis administrative agencies.[169] Rather, one of the main points of separated powers was to ensure the branch that enforces the law is distinct from the one that interprets it.[170] This interpretive authority is how Article III courts act as a check on the other constitutional branches.[171]

Judge Gorsuch also expressed concern over *Chevron*'s underlying premise: By enacting ambiguous legislation, Congress meant "to 'delegate' to the executive the job of making reasonable 'legislative' policy choices."[172] Normally an agency does not have any authority unless Congress has conferred power upon it, but *Chevron* upends all of that, suggesting silence is itself a vesting of authority.[173]

163. *Id.* at 1151-52.
164. 5 U.S.C. § 706 (2018).
165. *Id.*
166. *Gutierrez-Brizuela*, 834 F.3d at 1151-52 (Gorsuch, J., concurring) (alterations in original).
167. *Id.* at 1152.
168. *Id.* at 1156.
169. *Id.*
170. *Id.* at 1151.
171. *Id.* at 1152.
172. *Id.* at 1152.
173. *Id.* at 1153.

Even more fundamentally, there may be a problem, Judge Gorsuch believed in allowing Congress to delegate so much of its legislative authority to the Executive Branch.[174] To house the authority to make law and interpret law within the same branch of government gives short shrift to the separation of powers principles our Founders thought critical to preserving individual liberty.[175] This is a problem, Judge Gorsuch thought, because liberty could be impaired "not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day."[176] In short, *Chevron*'s deference requirements "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[177]

In summary, the two newest Justices have expressed reservations over the scope of the administrative state and judicially-created doctrines that require the federal courts to defer to agency interpretations of statutes. Chief Justice Roberts has long been a critic of the administrative state and its vast power.[178] So too, for Justices Thomas and Alito.[179] Given the justices' views, administrative law may be in for a reformation. The next section of this article analyzes two cases from the October 2018 term (the first term with both Justices Gorsuch and Kavanaugh) which could signal the beginning of a sea change in administrative law.

V. THE ANTICIPATED FIRST TERM: OCTOBER TERM 2018 CASES AND ADMINISTRATIVE LAW

The first term with the two newest justices was by in large a quiet one—typical of a term following a bruising confirmation battle. Yet, the term had the potential to be a blockbuster one for the area of administrative law. Two cases in particular addressed thorny issues of administrative law: whether agencies are entitled to deference to their interpretation of their own regulations (*Auer* deference);[180] and whether a statute appearing to grant broad discretion to the Attorney General in applying a criminal statute to a class of people violated the nondelegation doctrine.[181] Critically, both of those cases had the potential to

174. *Id.* at 1153-54.
175. *Id.* at 1156.
176. *Id.* at 1153.
177. *Id.* at 1149.
178. Gundy v. United States, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting).
179. *Id.*; DOT v. Ass'n of Am. R.R., 575 U.S. 43, 67 (2015) (Thomas, J., concurring).
180. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).
181. *Gundy*, 139 S. Ct. at 2123.

disrupt decades of what had seemed settled law. While, at the end of the day, neither case reshaped administrative law but instead made modest changes to precedent, the seeds of a revolution lay buried within the various opinions in those cases.

A. Gundy v. United States

Gundy v. United States was a surprising grant of certiorari because the very question presented asked the Supreme Court to revive the nondelegation doctrine, long considered dead letter.[182] In fact, there was no circuit split as eleven Courts of Appeals had rejected the argument that the nondelegation doctrine applied to the statute at issue in the case.[183] Yet, at least four Justices voted to hear the case, suggesting they might be interested in revisiting the doctrine.

In 2006, Congress passed the Sex Offender Registration and Notification Act (SORNA) in order to provide a uniform system of registration.[184] Before this time, a patchwork of state laws resulted in various loopholes which permitted about 20% of sex offenders to escape registration.[185] In SORNA, Congress required convicted offenders to register before being released from prison and prescribed criminal penalties for failing to do so.[186]

For pre-Act offenders, however, Congress was unable to agree and the statute merely provides:

> The Attorney General shall have the authority *to specify the applicability of* the requirements of this subchapter to sex offenders 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 subsection (b).[187]

In other words, the text of SORNA appears to give the Attorney General the authority to specify *if* and *how* SORNA's registration requirements should apply to pre-Act offenders. Accordingly, Attorney Generals have taken various

182. *See generally id.* at 2122; *see also* Gundy v. United States of America, No. 17-6086, 2017 WL 8132120, at *17.

183. As Justice Kagan observed, the grant of certiorari was unusual and suggests that certain members of the Court are not happy with the status quo: "The District Court and Court of Appeals for the Second Circuit rejected that claim, see 695 Fed.Appx. 639 (2017), as had every other court (including eleven Courts of Appeals) to consider the issue. We nonetheless granted certiorari." *Gundy*, 139 S. Ct. at 2122 (plurality opinion).

184. *Id.* at 2121.

185. *Id.*

186. *Id.* at 2121-22.

187. *Id.* at 2122 (alteration in original) (emphasis added).

approaches to SORNA's requirements from requiring all pre-Act offenders to register,[188] to requiring States to register only pre-Act offenders who were convicted of a new, post-SORNA felony.[189]

The petitioner, Herman Gundy, was a pre-Act offender who never registered.[190] He was convicted of failing to register, sentenced to ten additional years in prison and argued that SORNA unconstitutionally delegated legislative power to the Attorney General in violation of the nondelegation doctrine.[191]

The Supreme Court released a fractured opinion. Justice Kagan joined by Justices Ginsburg, Breyer, and Sotomayor wrote the plurality opinion.[192] Justice Alito issued an opinion concurring in the judgment only.[193] Justice Gorsuch issued a dissent joined by the Chief Justice and Justice Alito.[194] Justice Kavanaugh had not yet been confirmed when the case was argued in early October of 2018 and thus did not participate in the case.

In something of a surprise, the plurality gave full-throated acknowledgement to the nondelegation doctrine. In the first sentence of the opinion, Justice Kagan wrote, "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[195] The plurality went on to explain that "Article I of the Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.'"[196] "Accompanying that assignment of power to Congress," the plurality continued, "is a bar on its further

188. 28 C.F.R. § 72.3 (2019); Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007).

189. *See* Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (Feb. 28, 2007). For six months after SORNA's enactment, Attorney General Gonzales left past offenders alone. Then the pendulum swung the other direction when the Department of Justice issued an interim rule requiring pre-Act offenders to follow all the same rules as post-Act offenders. 28 C.F.R. § 72.3; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. at 8895. A year later, Attorney General Mukasey issued more new guidelines, this time directing the States to register some but not all past offenders. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38040 (July 2, 2008). Three years after that, Attorney General Holder required the States to register only those pre-Act offenders convicted of a new felony after SORNA's enactment. *See* Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (Jan. 11, 2011).

190. *Gundy*, 139 S. Ct. at 2121 (plurality opinion).

191. *Id.*

192. *Id.* at 2121-30.

193. *Id.* at 2130-31 (Alito, J., concurring).

194. *Id.* at 2131-2148 (Gorsuch, J., dissenting).

195. *Id.* at 2121 (plurality opinion).

196. *Id.* at 2123 (alteration in original) (citing U.S. CONST. art. I, § 1).

delegation."[197] As the Court had explained early on, Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'"[198]

Nevertheless, the plurality upheld SORNA as an application of statutory interpretation.[199] According to the plurality, Congress would be unable to do its job without "an ability to delegate power under broad general directives."[200] In Justice Kagan's view, the Constitution did not deny to Congress the "necessary resources of flexibility and practicality."[201] Thus, Congress had a lot of leeway in delegating discretion to executive agencies "to implement and enforce the laws."[202] All that was required was "an intelligible principle."[203]

In turning to address SORNA, the plurality did not say that a statute giving the Attorney General the power to decide whether and how to apply a criminal statute to a group of people would be constitutional under the nondelegation doctrine. Instead, the Court construed the statute to say something much narrower.[204] In the plurality's view, § 20913(d) "does not give the Attorney General anything like . . . 'unguided' and 'unchecked' authority."[205] Rather, the Court had "already interpreted § 20913(d) to say something different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible."[206] Given that interpretation, the delegation was "within permissible bounds."[207]

The plurality's opinion is important because the Court had to redline the statute in order for it to survive the nondelegation doctrine. The text of SORNA does not itself require the Attorney General to apply the statute to all pre-Act offenders, nor require him to do it as soon as possible. Thus, it was only under the plurality's interpretation of SORNA to impose discernible limits on the Attorney General's discretion, that the Court found the statute to meet nondelegation standards.

197. *Id.*

198. *Id.* (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825)).

199. *Id.* ("A nondelegation inquiry always begins (and often almost ends) with statutory interpretation.").

200. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

201. *Id.* (citing Yakus v. United States, 321 U.S. 414, 425 (1944)).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* (citing Reynolds v. United States, 565 U.S. 432, 442-43 (2012)).

207. *Id.* at 2124.

Justice Alito concurred in the judgment upholding SORNA.[208] In his view, "The Constitution confers on Congress certain 'legislative [p]owers,' Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government."[209] Yet, "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."[210] Justice Alito made clear that he was willing to reconsider the Court's approach to the nondelegation doctrine.[211] Since a majority for such reconsideration did not exist, however, Justice Alito did not believe SORNA to be materially different from other open-ended statutes that Congress had upheld.[212]

The dissent, written by Justice Gorsuch and joined by the Chief Justice and Justice Thomas, detailed a new approach under the nondelegation doctrine. Before turning to his new standard, however, Justice Gorsuch explained why he believed the plurality to have gone awry. According to Justice Gorsuch, "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."[213] Yet SORNA "scrambles that design" because it "purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens."[214] Further, that criminal code was troubling because it restricted the liberty of an unpopular group of persons.[215]

In contrast to the plurality, Justice Gorsuch found the authority conferred on the Attorney General by SORNA to be breathtakingly "vast."[216] According to Gorsuch, the statute plainly allowed the Attorney General to determine whether and how to apply SORNA—and indeed, different Attorney Generals had taken different approaches.[217] SORNA itself did not specify a timeline of application to all pre-Act offenders but instead left open the possibility of no registration at all for such individuals.[218] In Justice Gorsuch's view, "[w]hile Congress can enlist

208. *Id.* at 2130-31 (Alito, J., concurring).

209. *Id.* at 2130.

210. *Id.* at 2130-31.

211. *Id.* at 2131 ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.").

212. *Id.* ("But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment. Because I cannot say that the statute lacks a discernible standard that is adequate under the approach this Court has taken for many years, I vote to affirm.").

213. *Id.* (Gorsuch, J., dissenting).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 2132.

218. *Id.*

considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code."[219] That would be "delegation running riot."[220]

The sort of delegation at issue in SORNA was problematic because the Framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty."[221] As James Madison had explained, "'[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.'"[222] "Restricting the task of legislating to one branch characterized by difficult and deliberative processes was also designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules."[223] Further, "by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."[224]

After Justice Gorsuch explained why he found SORNA to be an unconstitutional delegation of legislative power, he went on to suggest how he would remake the nondelegation doctrine to focus on the locus of the policy-making authority.[225] Instead of the non-demanding "intelligible principles" test, Justice Gorsuch would ask of a particular statute:

- "Does the statute assign to the executive only the responsibility to make factual findings?"[226]
- "Does it set forth the facts that the executive must consider and the criteria against which to measure them?"[227]
- "And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands."[228]

219. *Id.* at 2148.

220. *Id.* (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935)).

221. *Id.* at 2134 (citing THE FEDERALIST NO. 48, *supra* note 4).

222. *Id.* at 2135 (alteration in original) (quoting THE FEDERALIST NO. 47, *supra* note 25).

223. *Id.* at 2134.

224. *Id.*

225. *Id.* at 2136.

226. *Id.* at 2141.

227. *Id.*

228. *Id.*

Justice Gorsuch's formulation remakes the nondelegation doctrine. The question is not whether Congress provided any discernible guidance, but whether Congress itself made the policy decisions and left only the fact-finding to the agencies. This is an important turn.

While the fractured opinions in *Gundy* left Mr. Gundy without recourse, they collectively suggested, for the first time since 1935, a nondelegation challenge may be viable. Justice Gorsuch, Chief Justice Roberts, and Justice Thomas all signed on to overturn SORNA based on the nondelegation doctrine.[229] Justice Alito said he would be willing to reconsider the nondelegation doctrine.[230] Justice Kavanaugh took no part in the case because he joined the Court after the case was argued in early October, but his views on the separation of powers and administrative law suggest the newest Justice would have voted with the dissent.[231] Going forward, there may well be a five Justice majority which is willing to require more of Congress when it delegates legislative power to administrative agencies.

B. Kisor v. Wilkie

In a much-anticipated case, the Supreme Court confronted the *Auer* doctrine head-on. *Auer* is a follow-on case from *Chevron*, in which the Court decided an agency interpretation of its own regulation was entitled to deference.[232] *Auer* was written by Justice Scalia, who in later years argued the Supreme Court should reconsider the decision.[233]

Auer involves two layers of deference. An agency promulgates a regulation, and later interprets that regulation. Federal courts are required to defer not only to the regulation as an agency interpretation of a statute (*Chevron*), but also to the agency's interpretation of its own regulation (*Auer*). Thus, one can understand Justice Scalia's critique of *Auer* as placing "the power to write a law and the power to interpret it . . . in the same hands."[234]

By way of facts, Mr. Kisor, a Vietnam War veteran and participant in Operation Harvest Moon, applied for disability benefits from the Vietnam War in

229. *Id.* at 2131-2148.

230. *Id.* at 2131 (Alito, J., concurring).

231. *See supra* Section IV. B.

232. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 613 (2013).

233. *Id.* at 619-22 (Scalia, J., concurring in part) (stating *Auer* deference places "the power to write a law and the power to interpret it cannot rest in the same hands" and thus "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation"); *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 112 (2015) (Scalia, J., concurring).

234. *Decker*, 568 U.S. at 619-20.

1982.[235] He was denied disability benefits because the Veterans Administration (VA) psychiatrist found that he did not have Posttraumatic Stress Disorder (PTSD).[236] In 2006, Kisor moved to reopen his claim.[237] Based on a new psychiatric evaluation, the VA concluded that Mr. Kisor suffered from PTSD.[238] The VA, however, interpreted one of its regulations to preclude retroactive benefits and awarded benefits only from 2006, the date of reopening, and not from his initial application.[239] The Federal Circuit upheld the denial of past benefits under the *Auer* doctrine, expressly deferring to the VA's interpretation of its own rule.[240]

In another fractured 5-4 decision, the Supreme Court severely limited, but ultimately refused to overrule, *Auer*.[241] In an unexpected move, Chief Justice Roberts joined in part the four so-called liberal justices in upholding the judicially-created doctrine.[242]

A plurality would have upheld *Auer* deference as consistent with the Constitution.[243] Justice Kagan, writing for herself and Justices Ginsburg, Breyer, and Sotomayor, defended the *Auer* presumption: "We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities."[244] Justice Kagan went on to explain the need for some sort of presumption, as statutory ambiguities are inevitable.[245] Kagan argued that the agency, as the author of the regulation, was in the "better position" to interpret its regulation,[246] held a "comparative advantage[]" over courts "in making such policy judgments,"[247] and "serves to ensure consistency in federal regulatory law."[248]

Despite its lip-service to the justifications for *Auer*, the Court upheld only a limited version, carving out a laundry list of situations in which *Auer* deference

235. Kisor v. Wilkie, 139 S. Ct. 2400, 2409 (2019).
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 2408.
242. *Id.* at 2424-25 (Roberts, C.J., concurring in part).
243. *Id.* at 2422 (plurality opinion).
244. *Id.* at 2412.
245. *Id.*
246. *Id.* (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152 (1991)).
247. *Id.* at 2413.
248. *Id.* at 2414.

does not apply.[249] Under the plurality's test, *Auer* only applies if all of these conditions are met: "The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise."[250]

The Chief did not sign onto the plurality's justifications for *Auer*. Instead, he joined a separate portion of Justice Kagan's opinion relying only on stare decisis.[251]

Justice Gorsuch, writing for himself and Justices Thomas, Alito, and Kavanaugh, dissented.[252] He argued *Auer* was incompatible not only with the APA, which requires the federal courts to interpret laws and regulations, but also sits uneasily with the Constitutional command of Article III, Section 1: "'the duty of interpreting [the laws] and applying them in cases properly brought before the courts.'"[253] Quoting Chief Justice Marshall, Gorsuch argued that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[254] Yet, *Auer* deference seems to require the sharing of the judicial power with the Executive Branch.[255] Justice Gorsuch would have overturned *Auer* and held that requiring judicial deference to agency interpretations of their own regulation is inconsistent with the APA and Article III.[256]

Meanwhile, in a concurrence written by the Chief Justice and signed by Justice Kavanaugh, the Chief took pains to state his view that *Chevron* deference was different. According to the Chief, the "[i]ssues 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."[257] In the Chief's view, the Court's decision did not even "touch upon"

249. *Id.* at 2414-18.

250. *Id.* at 2424 (Roberts, C.J., concurring). The Chief argued the positions of Justice Gorsuch and Justice Kagan were not far apart due to the severe limitations the Court had placed on the application of *Auer* deference. *Id.* Justice Gorsuch also notes that the majority has so severely limited the *Auer* deference that only a mummified version of the doctrine survives. *Id.* at 2425-448 (Gorsuch, J., concurring).

251. *Id.*

252. *Id.*

253. *Id.* at 2437 (quoting Patchak v. Zinke, 138 S. Ct. 897, 904 (2018)).

254. *Id.* (Gorsuch, J., concurring) (alteration in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

255. *Id.* at 2438.

256. *Id.* at 2443.

257. *Id.* at 2425 (Roberts, C.J., concurring) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

the *Chevron* question.[258] The Chief has long been a skeptic of the broad contours of *Chevron*,[259] and while he did not articulate his reasoning as to why *Chevron* was theoretically different from *Auer*, it is clear that he views the issues to be distinct.[260]

Thus, while *Kisor v. Wilkie* may look like a loss for those looking to rein in the administrative state, the *Auer* holding is not much of a deference doctrine given its many limitations. Further, five justices were clear that they would view the case differently were it the more important question of *Chevron* deference involved.

In sum, from just last term, it is clear that two administrative law doctrines in particular may be on the chopping block—or at least up for a major haircut. Four justices clearly signaled a willingness to look more closely at broad congressional delegations of policy making authority to administrative agencies under the nondelegation doctrine. It is likely they have a fifth vote in Justice Kavanaugh. Similarly, five justices signaled that they would be open to revisiting the *Chevron* doctrine. They may soon have an opportunity to reconsider *Brand X* as cert petitions raise the issue.[261]

VI. THE IMPACT OF AN ADMINISTRATIVE LAW REVOLUTION ON AGRICULTURAL LAW

The changes to administrative law that may be looming will impact every area of substantive law. The Supreme Court seems poised to require more specificity from Congress when it delegates law-making power and to rollback or limit the judicially created doctrines requiring federal courts to defer to agency interpretations of statutes and regulations. Agriculture law is becoming a more extensively regulated industry, and these changes will matter to farmers, ranchers, and agribusinesses. A few examples are sketched out below.

A. Catskill Mountains Chapter of Trout Unlimited v. EPA

The Catskill Mountain/Delaware River Watershed provides most of the water for New York City. In what is known as a water transfer, the water flows from the Schoharie Reservoir, through the eighteen-mile-long Shandaken Tunnel,

258. *Id.*

259. *See supra* Section IV. B.

260. *Chevron* could be different because it involves an agency interpreting a statute, a core judicial function, or because *Chevron* has been on the books for a shorter period of time than *Auer* and thus is entitled to less stare decisis weight.

261. Petition for a Writ of Certiorari, Baldwin v. United States, 140 S. Ct. 690 (2020) (No. 19-402).

and into the Esopus Creek.[262] The water flows into several more reservoirs, tunnels, and aqueducts, before it arrives in the City's taps.[263]

A "water transfer" is an activity that "conveys or connects waters of the United States without subjecting those waters to any intervening industrial, municipal, or commercial use."[264] Thousands of water transfers bring water to homes, farms, and factories across the United States.[265] The EPA formalized its historical approach to water transfers in the 2008 Water Transfers Rule, which provided that the requirements of the National Pollutant Discharge Elimination System (NPDES) permitting program do not apply to water transfers.[266]

Several groups challenged this rule. In *Catskill Mountain Chapter of Trout Unlimited, Inc. v. EPA*, the district court found *Chevron* deference applied and the applicable provision of the CWA, 33 U.S.C. § 1251, was ambiguous.[267] The district court nevertheless struck down the Water Transfers Rule as an unreasonable interpretation of the CWA under *Chevron* Step Two.[268]

The Second Circuit reversed. That court agreed that the statute was ambiguous for purposes of *Chevron* Step One because "the Clean Water Act does not speak directly to the precise question of whether NPDES permits are required for water transfers."[269] At Step Two, however, the court found "the Water Transfers Rule's interpretation of the Clean Water Act [to be] reasonable."[270] In the court's view, the Water Transfers Rule was "precisely the sort of policymaking decision that the Supreme Court designed the *Chevron* framework to insulate from judicial second- (or third-) guessing."[271] The Second Circuit agreed with the district court that "the Water Transfers Rule's interpretation of the Clean Water Act [might] not [be] the interpretation best designed to achieve the Act's overall goal of restoring and protecting the quality of the nation's waters."[272] But it nonetheless found the rule to be "supported by valid considerations."[273] The

262. Catskill Mountains Chapter of Trout Unlimited v. EPA, 846 F.3d 492, 499 (2d Cir. 2017).

263. *Id.*

264. *Id.* at 500.

265. *Id.* at 503.

266. *Id.* at 504.

267. *Id.* at 506 (citing Catskill Mountains Chapter of Trout Unlimited v. EPA, 8 F. Supp. 3d 500, 532-67 (S.D.N.Y. 2014), *rev'd*, 846 F.3d 492 (2d Cir. 2017)).

268. *Id.* (citing *Catskill Mountains Chapter of Trout Unlimited*, 8 F. Supp. 3d at 532-67).

269. *Id.* at 500.

270. *Id.*

271. *Id.* at 501.

272. *Id.*

273. *Id.*

Second Circuit found *Chevron* to be dispositive: "While we might prefer an interpretation more consistent with what appear to us to be the most prominent goals of the Clean Water Act, *Chevron* tells us that so long as the agency's statutory interpretation is reasonable, what we might prefer is irrelevant."[274]

Looking ahead, if the Chief Justice and Justice Kavanaugh are correct, and *Chevron* deference presents different issues than does *Auer* deference, the judicially-created doctrine of *Chevron* is in for a pruning. In cases like *Catskill Mountain*, this could make all the difference. If federal courts are not required to defer to any permissible agency interpretation, then a lesser form of deference, likely *Skidmore* deference, would apply, which requires courts to defer to agencies only to the extent the interpretation is persuasive.[275] In such circumstances, at least in the Second Circuit's view (query whether the Supreme Court would read the CWA the same way), *Catskill Mountain* comes out differently.

Relatedly, it is conceivable that as water becomes more and more important to large cities and arid parts of the West and Southwest, the question of whether Congress intended to subject water transfers to the EPA could conceivably fall under the major questions doctrine. Water transfers are critical to this country's water infrastructure and will only become more so. They often involve state disputes over water rights, determine the productivity of agricultural operations, and are vital to the welfare of cities. It is quite possible that a court, especially one situated in the arid West, could therefore view the question of water transfers as one of "deep 'economic and political significance.'"[276] If this happened, the court would require more specificity from Congress, before concluding that it had delegated the question to the EPA.

B. 2019 Proposed WOTUS Rule

There is hardly a more controversial topic in agricultural law than the CWA's definition of "navigable waters" as "waters of the United States" (WOTUS).[277] The definition has resulted in reams of regulation, countless court cases, and legal battles all over the United States.

In the most recent installment, the EPA published a final rule repealing the Obama Administration's 2015 Clean Water Rule which restored the prior regulatory text.[278] In the EPA's view, the repeal was necessary in order to

274. *Id.*

275. *See id.* at 541-42; *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

276. *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

277. *See* 33 U.S.C. § 1362(7) (2018).

278. Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (to be codified at 33 C.F.R. § 328).

effectuate the legal limits on the scope of its authority under the CWA, and to avoid interpretations of the CWA "that push the envelope of their constitutional and statutory authority."[279]

The 2019 WOTUS Rule defines waters of the United States more narrowly than the 2015 WOTUS Rule. The new rule limits federal protections to broad categories of "traditional navigable waters" (TNW)—seas, lakes, permanent or intermittent rivers, and wetlands that either feed into or out of these water bodies.[280] The rule also only covers tributaries if they flow into a TNW and only covers wetlands if they have a surface connection to a traditionally navigable water.[281] The rule excludes ephemeral streams, which flow during and shortly after precipitation events, and wetlands without surface connections to TNW.[282] The 2019 Rule also eliminates the "other waters" category from the 2015 Rule, which broadly included "all waters" with "a significant nexus" to a TNW.[283]

The importance of a *Chevron* reformation to the WOTUS Rule(s) cannot be overstated. For nearly 50 years the courts have struggled to interpret the CWA's definition of navigable waters. *Chevron* requires that, when a statute is ambiguous, as the myriad of court cases and conflicting regulatory guidance suggest waters of the United States must be, federal courts must defer to any permissible interpretation by the EPA.[284] If, however, the Court limits *Chevron* or tosses it aside in favor of a lesser form of deference, then the federal courts will decide in the first instance what waters of the United States means.

Whether one thinks less deference is a good or bad idea in this context, highlights the policy-making authority of the federal agency. If one is in favor of a more robust interpretation of the CWA than exists under the 2019 Rule, that person would prefer less deference today. In 2015, however, that same person would have preferred strong deference under *Chevron*. This flip-flopping of positions highlights that it is agencies that are "legislating" on these issues of great importance to agriculture.

VII. CONCLUSION

In short, there are a number of pending and future cases in which administrative law doctrines might come into play. From the sick chicken case, to the 2019 WOTUS rule, administrative law matters. And given the new

279. *Id.* at 56,639.
280. *Id.* at 56,665.
281. *Id.*
282. *Id.* at 56,646-47.
283. *Id.* at 56,638.
284. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

composition of the Court, the area may be quite dynamic in the next few years. Perhaps Justice Gorsuch will be able to persuade his colleagues that "the time has come to face the behemoth."[285]

285. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).