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**The FCC (and Administrative Law) at the Supreme Court,
October Term 2018**

by

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I. Introduction and Summary

The October Term 2018 was a busy one for administrative law at the Supreme Court, but not for the Federal Communications Commission (FCC), at least in terms of the agency's direct involvement. In *Kisor v. Wilkie*, the Court preserved *Auer* deference to agency regulatory interpretations, yet reworked it in substantial ways. In *Gundy v. United States*, the Court rejected 5-3 yet another nondelegation doctrine challenge, but this time four Justices expressed interest, in the appropriate case, in revitalizing the doctrine, under which in its current incarnation even the Communications Act's vague "public interest" standard has been approved.

And in *Department of Commerce v. New York*, the Court rejected the government's attempt to add a citizenship question to the 2020 census, finding that the agency action would be permissible under the Administrative Procedure Act (APA) but for the fact that the agency's proffered reason was pretextual and thus impermissible. Surprisingly, the FCC's 2015 Open Internet Order, imposing public utility-like mandates on Internet service providers, made a cameo appearance in one of the census case opinions.

The FCC was not a party to any case this Term, but the fourth main administrative law decision of the Term, *PDR Network v. Carlton & Harris Chiropractic*, involved whether, in an enforcement proceeding, a party could challenge a decade-old FCC order that interpreted the Telephone Consumer Protection Act. The *PDR Network* case involves the Hobbs Act, under which review of many FCC orders are sought, so it has important implications for the agency.

This FSF *Perspectives* essay explores these four main administrative law cases from the Court’s October 2018 Term – all of which, in one way or another, implicate the FCC and its decisionmaking. And, as you will see, *Kisor*, *Gundy*, and *PDR Network* all involve separation-of-powers principles that undergird the proper relationship among courts, Congress, and the agencies, including the so-called independent agencies like the FCC.

II. Non-FCC Administrative Law Cases: *Auer* Deference and Nondelegation

This Term the Supreme Court considered two cases that had the potential to fundamentally change administrative law and the separation-of-powers doctrine. Yet both arguably fell short, at least for now.

A. *Kisor v. Wilkie* and *Auer* Deference

First, in *Kisor v. Wilkie*,¹ the Court considered whether to eliminate *Auer* deference (a.k.a. *Seminole Rock* deference) – the doctrine that commands courts to defer to a federal agency’s interpretation of its own regulation unless the agency’s interpretation is “plainly erroneous or inconsistent with the regulation.”²

In a 5-4 decision with Chief Justice Roberts casting the deciding vote on *stare decisis* grounds, the Court decided not to overrule *Auer* and *Seminole Rock*. Justice Kagan wrote the principal opinion. Although her opinion concludes that *Auer* deference remains the law of the land, Kagan’s articulation of *Auer* deference in Part II.B is much, much narrower than *Auer* deference conventionally had been understood.

Indeed, gone is the blunt, bright-line rule, first articulated in the Court’s 1945 decision in *Seminole Rock*, that a court must defer to any agency regulatory interpretation unless it is “plainly erroneous or inconsistent with the regulation.”³ Enter a new, five-step inquiry that in some ways, if taken literally, seems more searching than *Chevron* deference⁴:

¹ *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). This discussion of *Kisor* draws substantially from Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019), <http://yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/>.

² *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997).

³ *Seminole Rock*, 325 U.S. at 414.

⁴ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (commanding courts to defer to an agency’s interpretation of a statute the agency administers if (1) the statute is ambiguous and (2) the

1. The regulatory provision must be “genuinely ambiguous” after applying all of the traditional tools of interpretation (*Chevron* step one).
2. The agency’s regulatory interpretation must be “reasonable,” and “[t]hat is a requirement an agency can fail” (*Chevron* step two).
3. The agency’s regulatory interpretation must be the agency’s “authoritative” or “official position,” which means it must “at the least emanate from [the agency head or equivalent final policymaking] actors, using those vehicles, understood to make authoritative policy in the relevant context” (some version of the *Mead* doctrine/*Chevron* step zero⁵).
4. The agency’s regulatory interpretation must implicate the agency’s substantive expertise (some version of *Skidmore* deference,⁶ plus the *Gonzales v. Oregon* anti-parroting canon⁷).
5. The agency’s regulatory interpretation must reflect “fair and considered judgment” – not an *ad hoc* litigating position or otherwise an interpretation that causes regulated entities unfair surprise (existing *Christopher* exception to *Auer* deference⁸).

In sum, we now have an official *Chevron*-ization of *Auer* deference with a step one (ambiguity) and step two (reasonableness) – both of which, Kagan claims, should be searching. The Roberts Court’s narrowing of both steps in *Chevron* should now apply to *Auer*. We also have two new(ish) requirements, in addition to *Christopher*’s substantial “unfair surprise” narrowing: (1) that the agency must be exercising substantive expertise (some version of *Skidmore* that is not required under *Chevron*), and (2) that the interpretation must be “authoritative” (some version of *Mead*).

This new *Kisor* five-step deference doctrine is a dramatic departure from *Auer*’s and *Seminole Rock*’s original command. And it will no doubt make a substantial difference in how courts implement these five independent deference-disqualifying steps. It will be

agency’s interpretation is reasonable). This five-factor *Kisor* deference doctrine is explored in greater detail in Walker, *supra* note 1.

⁵ United States v. Mead Corp., 533 U.S. 218, 221 (2001) (holding that *Chevron* deference only applies when there is an “indication that Congress intended such a ruling to carry the force of law”).

⁶ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (according weight to an agency statutory interpretation based on “the thoroughness evident in [the agency’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”).

⁷ *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (refusing to afford *Auer* deference where “the underlying regulation does little more than restate the terms of the statute itself”).

⁸ *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (rejecting *Auer* deference “when there is reason to suspect that the agency’s interpretation does not reflect the agency’s fair and considered judgment on the matter in question,” such as “when the agency’s interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a convenient litigating position, or a post hoc rationalization advanced by an agency seeking to defend past agency action against attack” (internal quotation marks and citations omitted)).

interesting to see how the lower courts further develop and apply this new *Kisor* deference doctrine, including what the Federal Circuit does on remand in *Kisor*.

B. *Gundy v. United States* and Nondelegation

Second, in *Gundy v. United States*, the Court once again considered whether a statutory grant of authority to a federal agency or executive branch official (here, the Attorney General) violates the nondelegation doctrine.⁹ Article I of the Constitution commands that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.”¹⁰ The Court has long interpreted Article I as prohibiting Congress from delegating legislative powers to the other branches of government (or anyone else).¹¹ It has also held, however, that Congress can delegate discretion to federal agencies to implement legislation if the legislation provides an “intelligible principle”¹² – “clearly delineat[ing] the general policy, the public agency which is to apply it, and the boundaries of that delegated authority.”¹³ And, once again, in *Gundy*, a majority of the Court rejected the constitutional challenge, with the plurality concluding that the statutory “delegation easily passes constitutional muster.”¹⁴

Gundy, however, is also noteworthy because only four Justices were willing to continue to embrace a toothless nondelegation doctrine. Justice Alito cast the fifth and decisive vote because “it would be freakish to single out the provision at issue here for special treatment.” He made clear, however, that “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”¹⁵

Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented, arguing that the statute at issue did not pass the intelligible principle test and, moreover, the current, “mutated version of the ‘intelligible principle’ remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.”¹⁶ Although Justice Kavanaugh did not participate in the case, scholars are already predicting that “perhaps we will not need to wait another twenty years for that next case raising the nondelegation doctrine.”¹⁷

If and when the Court does decide to reconsider the nondelegation doctrine, the Communications Act’s “public interest” standard, under which so much of the FCC’s

⁹ *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

¹⁰ U.S. CONST. art. I, § 1.

¹¹ *See, e.g.,* *Mistretta v. U.S.*, 488 U.S. 361, 371–72 (1989).

¹² *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹³ *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

¹⁴ *Gundy*, 139 S. Ct. at 2121 (plurality per Kagan, J.).

¹⁵ *Id.* at 2131 (Alito, J., concurring in judgment).

¹⁶ *Id.* at 2139 (Gorsuch, J., dissenting).

¹⁷ Kristin E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REG. REV. (July 8, 2019), <https://www.theregreview.org/2019/07/08/hickman-nondelegation/>; accord Mila Sohoni, *Opinion Analysis: Court Refuses To Resurrect Nondelegation Doctrine*, SCOTUSBLOG (Jun. 20, 2019) (“For the nondelegation doctrine, the significance of *Gundy* lies not in what the Supreme Court did today, but in what the dissent and the concurrence portend for tomorrow.”), <https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect-nondelegation-doctrine/>.

regulatory activity takes place, likely will be a candidate for scrutiny. As FSF President Randolph May argued in a May 2001 law review article, the standard is “so vague it can mean whatever three FCC Commissioners say it means on any given day.”¹⁸ May concluded, even in 2001, that without waiting for a court to decide that the public interest standard is unconstitutional under the nondelegation doctrine, “Congress should take it upon itself to revise the 1934 Act to replace the indeterminate public interest standard with more specific fundamental policy guidance tailored to the new competitive communications environment.”¹⁹

III. The FCC’s Cameo in the Census Case, *Department of Commerce v. New York*

In *Department of Commerce v. New York*, the Court considered an APA challenge to the Commerce’s decision to include a citizenship question on the 2020 census questionnaire. The Court, in a 5-4 decision, ultimately agreed with the district court that the Secretary’s reason for his decision was pretextual and thus a remand to the agency for reconsideration would be appropriate.²⁰

Chief Justice Roberts penned the principal opinion, which upheld at least some plaintiffs’ standing to bring the lawsuit, the availability of judicial review under the APA, and the Secretary’s constitutional and statutory authority to include the citizenship question. Roberts, writing for one majority of the Court, also found that the administrative record supported the Secretary’s decision, just not his reasoning (more on that below).²¹

But in Part V of Roberts’s opinion, which part was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, the Court invalidates the Secretary’s decision to add the citizenship question. Although these are “unusual circumstances” as Roberts notes, it seems like the Court embraces what I’ve coined “harder look” review into agency motives under the APA.²²

¹⁸ Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?* 53 *FEDERAL COMM. L.J.* 427, 453 (2001).

¹⁹ *Id.* at 455; see also Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 *FEDERAL COMM. L.J.* 103 (2006).

²⁰ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019). This discussion of the census case draws substantially from Christopher J. Walker, *What the Census Case Means for Administrative Law: Harder Look Review?*, *YALE J. ON REG.: NOTICE & COMMENT* (June 27, 2019), <http://yalejreg.com/nc/what-the-census-case-means-for-administrative-law-harder-look-review/>.

²¹ Part IV.B of the opinion, in which Roberts finds that the Secretary’s decision “was supported by the evidence” under APA arbitrary-and-capricious review, seems to depart from *State Farm* “hard look” review under *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), and embrace some version of “thin rationality” review. See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 *MICH. L. REV.* 1355 (2016). Among other things, Roberts cites *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 105 (1983), and emphasizes how “the choice between reasonable policy alternatives in the face of uncertainty was the Secretary’s to make” and the importance of “[w]eighing that uncertainty against the value of obtaining more complete and accurate citizenship data.” *Dep’t of Commerce*, 139 S. Ct. at 2569–70 (2019).

²² Walker, *supra* note 20.

Based on the expanded record in this case, the Court agrees with the district court that the Secretary's reasoning was pretextual. Roberts concludes:

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

What emerges from this analysis, to my eye, is not the “narrow exception” to inquire into agency extra-record intentions contemplated in *Overton Park*,²³ but a roadmap for a much more searching inquiry into the “genuine justifications for important [agency] decisions.” In particular, I anticipate the following language from the opinion to be quoted by litigants challenging administrative actions for decades to come:

The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

Justice Thomas's separate opinion, joined by Justices Gorsuch and Kavanaugh, seems to agree this is a harder look doctrine and “reflects an unprecedented departure from our deferential review of discretionary agency decisions.” Indeed, Thomas similarly concludes that “[o]pponents of future executive actions can be expected to make full use of the Court's new approach” and will “have strong incentives to craft narratives that would derail them.” In an extraordinary move, Thomas even provides an example where this doctrine could make a difference: the FCC's 2015 net-neutrality regulation:

The 2015 “Open Internet Order” provides a case in point. In 2015, the Federal Communications Commission (FCC) adopted a controversial order reclassifying broadband Internet access service as a “telecommunications service” subject to regulation under Title II of the Communications Act. According to a dissenting Commissioner [Pai], the FCC “flip-flopped” on its previous policy not because of a change in facts or legal understanding, but based on “one reason and one reason alone. President Obama told us to do so.” His view was supported by a 2016 congressional Report in which Republican Senate staff concluded that “the FCC bent to the political pressure of the White House” and “failed to live up to standards of transparency.” The Report cited evidence strikingly similar to that relied upon by the Court here—including agency-initiated “meetings with certain outside groups to

²³ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (holding that “there must be a strong showing of bad faith or improper behavior before such inquiry [into the mental processes of agency officials] may be made”), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

support” the new result, “apparent concern from the career staff that there was insufficient notice to the public and affected stakeholders,” and “regular communication” between the FCC Chairman and “presidential advisors.”²⁴

Perhaps Thomas’s hope will be realized that Roberts’s approach in the census case “comes to be understood as an aberration – a ticket good for this day and this train only.” But if *State Farm* hard look review and *Chevron’s* “major questions” doctrine are indicative, I bet litigants will utilize the census decision to push for an even harder look into administrative motives for years to come.

IV. *PDR Network v. Carlton & Harris Chiropractic*

In *PDR Network v. Carlton & Harris Chiropractic*, the Court considered whether the Hobbs Act strips district courts of jurisdiction to reconsider the validity of an agency’s legal interpretation of certain statutes.²⁵ The Hobbs Act requires an aggrieved party to seek judicial review of the agency’s final order within 60 days of its entry in a circuit court of appeals, and vests the circuit court with “exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.”²⁶

At issue was the FCC’s 2006 legal interpretation of the Telephone Consumer Protection Act (TCPA). The TCPA defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”²⁷ In 2013, the publisher of the Physicians’ Desk Reference (PDR) sent a fax to healthcare professionals to announce the launch of a digital version of the PDR. The PDR is a compilation of manufacturers’ prescribing information on prescription drugs, which is available free of charge to healthcare professionals. In dismissing the complaint, the district court concluded that the PDR fax did not fit the statutory definition: The PDR is neither bought nor sold. The publisher does not sell any of the drugs detailed in the free reference book. The ad thus lacks a “commercial aim,” which the court interpreted the TCPA to require.

²⁴ *Dep’t of Commerce*, 139 S. Ct. at 2583 (Thomas, J., dissenting) (internal quotation marks, alterations, and citations omitted).

²⁵ *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019). This discussion of *PDR Network* draws substantially from the author’s coverage of the case for SCOTUSblog. See Christopher Walker, *Opinion Analysis: Court Dodges Question (For Now) Whether the Hobbs Act Is Ordinary or Extraordinary Administrative Law*, SCOTUSBLOG (June 21, 2019), <https://www.scotusblog.com/2019/06/opinion-analysis-court-dodges-question-for-now-whether-the-hobbs-act-is-ordinary-or-extraordinary-administrative-law/>; Christopher Walker, *Argument Analysis: Justices Struggle with Whether the Hobbs Act Is Ordinary or Extraordinary Administrative Law*, SCOTUSBLOG (Mar. 26, 2019), <https://www.scotusblog.com/2019/03/argument-analysis-justices-struggle-with-whether-the-hobbs-act-is-ordinary-or-extraordinary-administrative-law/>; Christopher Walker, *Argument Preview: The Hobbs Act as Ordinary or Extraordinary Administrative Law*, SCOTUSBLOG (Mar. 18, 2019), <https://www.scotusblog.com/2019/03/argument-preview-the-hobbs-act-as-ordinary-or-extraordinary-administrative-law/>.

²⁶ 28 U.S.C. §§ 2342, 2349.

²⁷ 42 U.S.C. § 227.

The Fourth Circuit reversed, holding that the Hobbs Act prohibits a defendant in a private enforcement action from challenging the FCC's 2006 legal interpretation of the TCPA. Under the Hobbs Act, the Fourth Circuit held, this challenge was raised in the wrong court and more than a decade too late. It then concluded that the PDR fax is an "unsolicited advertisement" under the FCC order because it "promote[s] goods or services even at no cost."²⁸

The Supreme Court unanimously agreed to vacate and remand the case to the Fourth Circuit as "the answer [to the question presented] may depend upon the resolution of two preliminary issues."²⁹

First, the Court instructs the Fourth Circuit to determine whether the FCC's 2006 order is a legislative or interpretive rule under the APA. Why? Because if it's an interpretive rule, the 2006 FCC order "may not be binding on a district court." "We say 'may,'" Justice Breyer emphasizes, "because we do not definitively resolve these issues here."

Second, the Court instructs the Fourth Circuit to assess whether PDR Network had a "prior" and "adequate" opportunity to seek judicial review of the FCC's 2006 order, as required by Section 703 of the APA. If not, Breyer explains, it may be that PDR Network can challenge the FCC order now – emphasis again on the "may," as the Court does not answer that question either.

But four Justices – Thomas, Alito, Gorsuch and Kavanaugh – were willing and ready to answer the question presented now. Kavanaugh, writing the principal four-justice concurrence in the judgment, sets forth their "straightforward" answer:

The general rule of administrative law is that in an enforcement action, a defendant may argue that an agency's interpretation of a statute is wrong, at least unless Congress has expressly precluded the defendant from advancing such an argument. The Hobbs Act does not expressly preclude judicial review of an agency's statutory interpretation in an enforcement action.³⁰

In this case on remand, then, "the District Court should interpret the TCPA under usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation." Kavanaugh could have stopped there. But he doesn't. Instead, he provides extensive analysis so that it "remains available to the court on remand . . . and to other courts in the future."

Thomas, joined by Gorsuch, penned a separate concurrence in the judgment to underscore the problems with assuming, as the Fourth Circuit did, that "Congress can constitutionally require federal courts to treat agency orders as controlling law, without regard to the text of

²⁸ In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005, 21 F.C.C. Rcd. 3787, 3814 (2006) ("We conclude that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition.").

²⁹ *PDR Network*, 139 S. Ct. at 2053.

³⁰ *Id.* at 2058 (Kavanaugh, J., concurring in judgment).

the governing statute.” That assumption, Thomas continues, also underlies *Chevron* deference to agency statutory interpretations; “[t]his case proves the error of that assumption and emphasizes the need to reconsider it.”³¹

The Court’s decision to dodge the question presented and remand is curious. After all, Breyer justifies the remand because the Fourth Circuit “has not yet addressed the preliminary issues we have described.” Yet he does not address Carlton & Harris Chiropractic’s argument that both issues were forfeited due to PDR Network’s failure to raise them before the Fourth Circuit. The federal government suggested at argument that perhaps the proper course would be to dismiss the case as improvidently granted – a “DIG,” in Supreme Court parlance. That would seem like the ordinary course in a situation like this. So what gives? This law professor wonders whether a remand, as opposed to a DIG, was the price for Chief Justice Roberts’s decisive vote.

Such speculation aside, it will likely only be a matter of time before the Court confronts this question again. Perhaps then we’ll find out if there is a fifth vote for Kavanaugh’s treatment of the Hobbs Act as inapplicable as a roadblock to judicial review in subsequent private enforcement actions.

V. Conclusion

The October Term 2018 produced a number of important administrative law decisions. While none of them involved the FCC as a party, all have implications for the FCC’s regulatory activities and subsequent judicial review. *Auer* deference, involving judicial review of an agency’s interpretations of its own regulations, was substantially narrowed and reframed as a five-step test. The nondelegation doctrine, which at least in theory prohibits Congress from delegating authority without specifying an “intelligible principle” to guide the agency, may see a revival soon. If so, the Communications Act’s public interest standard certainly is a likely target. And courts may now do a “harder look” into agency decisionmaking and agency motives. Finally, the Hobbs Act may end up not applying to preclude judicial review of prior agency statutory interpretations, at least in the context of subsequent enforcement actions, including those of the FCC.

In each case, the lower courts (and litigants) are left to further develop and apply these administrative law doctrines. So, stay tuned!

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³¹ *Id.* at 2057 (Thomas, J., concurring in judgment).