AN ARTICLE III RENAISSANCE IN ADMINISTRATIVE LAW: A RETURN TO THE JUDICIAL PAST?

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Modern American administrative law recognizes the broad role administrative agencies play in carrying out federal law. A key feature of current administrative law is judicial deference to agency interpretation of U.S. law. This deference, known as the Chevron doctrine, stems from the Supreme Court's holding in Chevron v. NRDC (1984). Chevron held that courts should defer to agency actions that fill in gaps in statutory texts. Two years ago, in Waterkeeper Alliance v. EPA (2017), the D.C. Circuit of Appeals held that the EPA went too far with a rule that exempted farms from complying with reporting requirements regarding air releases from animal wastes. In a concurring opinion, Circuit Judge Janice Rogers Brown questioned the Chevron doctrine and argued that it was inconsistent with the Marbury v. Madison principle that it is a court's duty to declare what the law is. Judge Brown claimed that: "An Article III renaissance is emerging against the judicial abdication performed in Chevron's name." In support of her call for a renaissance, Judge Brown quoted Justice Neil Gorsuch. Just one year before his 2017 elevation to Supreme Court, Judge Gorsuch wrote: "For whatever the agency may be doing under Chevron, the problem remains that courts are not fulfilling their duty to interpret the law." Gutierrez-Brizuela v. Lynch (10th Cir. 2016) (Gorsuch J., concurring). This paper is a preliminary examination of what an Article III renaissance might mean and where it might lead—particularly with respect to judicial review in modern administrative law and, perhaps, beyond.

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I. INTRODUCTION

Just three years ago, Janice Rogers Brown, United States D.C. Circuit Court of Appeals Judge, claimed that: "An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name."[1] This begs the question of whether Judge Brown's proclamation is, in fact, a clarion call for a modern-day revolution in American administrative law or mere rhetorical flourish. This paper is an initial review of just what might be in store for American administrative law under a "renaissance." Judge Brown's use of the term "renaissance" could be the key to understanding what may be on the horizon. While "renaissance" can invoke images of a movement toward a new intellectual activity, another definition is that a renaissance is a "rebirth, revival."[2]

A brief exploration of the development of administrative law and the role of judges in reviewing administrative actions is a necessary starting point for evaluating Judge Brown's call. The next step for our review includes a close look at the existing support for change in how the judiciary reviews agency actions as well as what Judge Brown actually means by a renaissance. These steps will lead us to a comparison of past developments in judicial review. Finally, this paper concludes with a bit of speculation as to where any Article III renaissance may take us and how we might get there.

II. ADMINISTRATIVE LAW AND ADMINISTRATIVE AGENCIES: A LOOK BACK[3]

A simple definition of administrative law is that it is "a body of law . . . developed to control and regulate [the] behavior and

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[1] Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring).

[2] Merriam-Webster Online offers three definitions for renaissance. *Renaissance*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/renaissance (last updated Nov. 18, 2019). The first definition refers to the Renaissance Period, the second definition refers to the capitalized use of the work ("a movement or period of vigorous artistic and intellectual activity"), and the third definition is: "rebirth, revival[.]" *Id.*

[3] JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 4–6 (1978); Michael Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 J. POL. 747, 747 (1982); *see generally* Ronald L. Nelson, Agency Discretion, Judicial Deference, and the APA: New Directions? (Apr. 12, 2017) (unpublished manuscript) (on file with author) (presented at the 2017 annual meeting of the Southwest Political Science Association, Austin, Texas).

function"[4] of administrative agencies; in other words, the laws related to "the powers, limitations, and procedures of administrative agencies."[5] Perhaps, more on point, Kenneth Culp Davis' classic textbook offers the following definitions:

> Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action. An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudicati[ng], rulemaking, investigating, prosecuting, negotiating, settling, or informally acting.[6]

While not even specifically mentioned in the U.S. Constitution, administrative agencies have become an essential player in formulating and implementing governmental policies in contemporary America. In his classic work, *A History of American Law*, historian Lawrence Friedman called the agency a "child of necessity."[7] The development of administrative law in the United States reflects the general changes in the nation that have taken place over the last 230-plus years.[8] The national government under President George Washington consisted of a surprisingly small number of administrative agencies with limited powers and activities. Washington had only three executive departments—War, Treasury, and State—plus an Attorney General and a

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[4] DANIEL E. HALL, ADMINISTRATIVE LAW: BUREAUCRACY IN A DEMOCRACY 2 (6th ed. 2015).

[5] *Id.* Additionally, a number of common administrative law-related terms will be prominent in this paper. Judicial review refers to the basic principle of the American legal system "that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary." Krystyna Blockhina, *Judicial Review*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/judicial_review (last updated June 10, 2019). "Stare decisis is a legal doctrine that obligates courts to follow historical cases when making a ruling on a similar case. . . . Simply put, it binds courts to follow legal precedents set by previous decisions." *Stare Decisis Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/s/stare_decisis.asp (last updated May 9, 2019) (emphasis added). Delegation "occurs when a government branch [such as Congress] in which authority is placed imparts such authority to another branch or to an [a]dministrative [a]gency." *Delegation*, FREE DICTIONARY, https://legal-dictionary.thefreedictionary.com/delegation (last visited Dec. 1, 2019). Lastly, "[j]udicial deference is the condition of a court yielding or submitting its judgment to that of another legitimate party[.]" *Judicial Deference*, FREE DICTIONARY, https://encyclopedia.thefreedictionary.com/JUDICIAL+deference (last visited Dec. 1, 2019).

[6] KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 1 (3d ed. 1972).

[7] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 440 (2d ed. 1985).

[8] KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 35–38 (5th ed. 2011).

Postmaster General.[9] This limited administration was based on the general views of the early American society favoring limited government.[10] This is not to say that there was no administrative law in the early days. For example, in the first half of the 19th century, the business of state and local governments was often accomplished by administrative bodies, such as commissions, which oversaw construction and other public improvement projects.[11]

As America entered the late 1800s, the view of government and regulation began to change. The Age of Industrialization brought change, rapid growth and, in some cases, free market abuses. American citizens became much more receptive to governmental involvement in their daily lives. With the creation of the Interstate Commerce Commission (ICC) in 1887, a march toward a change in the American governmental system began.[12] This change involved an ever-increasing reliance on regulatory administrative agencies to which Congress had delegated authority to carry out the functions of government.[13] Today, the Executive Branch consists of fifteen cabinet level departments, a very large array of independent agencies, and a staffed White House.[14] This growth of an American regulatory state has raised significant issues in administrative law. In particular, these issues include questions regarding delegation, the limits of agency authority, and the role of the courts in reviewing agency actions, which includes the issue of judicial deference to policy choices.[15]

A number of reasons have been offered to explain this pattern of administrative growth in the United States. Perhaps foremost is the need to address the problems faced by a growing, developing society.[16] For example, the ICC was originally created to regulate rate abuses

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[9] *Id.* at 36.

[10] *Id.*

[11] *See* Ronald L. Nelson, *State High Courts and the Development of Administrative Agencies During the Jacksonian Decade*, 29 INT'L J. PUB. ADMIN. 1363, 1363–64 (2006).

[12] *See* WARREN, *supra* note 8, at 36, 41–42.

[13] *See* Field v. Clark, 143 U.S. 649, 692 (1892) (This reliance has called into question a principle known as the delegation doctrine (or sometimes referred to as the nondelegation doctrine), which asserts "[t]hat [C]ongress cannot delegate legislative power . . . ."). For a discussion of the application of the doctrine, see *infra* Parts IV, VII.B.iii.

[14] *See* WARREN, *supra* note 8, at 36.

[15] *See infra* VIII.B.

[16] *See generally* DONALD D. BARRY & HOWARD R. WHITCOMB, THE LEGAL FOUNDATIONS OF PUBLIC ADMINISTRATION 19 (2d ed. 1987).

in the railroad industry under the Commerce Clause authority delegated by Congress.[17] As industrialization brought new problems, new agencies were created to address them. Each new societal concern frequently lead to calls for a specialized governmental response.[18] And as American society expanded and became more complex, a battle arose between the interests of the public and the interests of the owners of property, who resisted governmental regulation. This battle was particularly hard fought in the courts during the Depression and New Deal period as the proponents of government intervention and the proponents of laissez-faire economics clashed.[19] Over time, the Supreme Court adopted a broad view of the definition of commerce and accepted the use of agency expertise to address social problems. This opened the door to the dominance of agency action in government today.[20] Following the New Deal, the expansive delegation of the Commerce Clause "broadened significantly the scope of federal administrative authority. . . ."[21]

III. DELEGATION, JUDICIAL DEFERENCE AND AGENCY DISCRETION

The post-New Deal Court's broad Commerce Clause and congressional delegation interpretations led to a broad view of agency discretion and judicial deference with regard to judicial review of the actions of the administrative agencies. The key case in the area of judicial deference is *Chevron, USA, Inc. v. National Resources Defense Council, Inc.*, which involved an Environmental Protection Agency (EPA) regulation regarding air pollution.[22] In a unanimous 6-0 decision,

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[17] *Id.*; *see generally* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920 at 138–60 (1982).

[18] *See* WARREN, *supra* note 8, at 41–42.

[19] *See generally* PAUL KENS, LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL (1998); RONALD M. LABBE & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (abr. ed. 2005); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942).

[20] WARREN, *supra* note 8, at 43. Professor Warren points to a number of cases regarding this development: NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Switchmen's Union v. Nat'l Mediation Bd., 320 U.S. 297 (1943); and NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944).

[21] WARREN, *supra* note 8, at 43. Cases such as Wickard v. Filburn, 317 U.S. 111 (1942) and Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964) exemplify increased federal regulation based on a Commerce Clause rationale.

[22] 467 U.S. 837 (1984); *see, e.g.*, HALL, *supra* note 4, at 287.

the Court upheld the agency regulations and declared that the expertise of the EPA was entitled to deference,[23] declaring that "[j]udges are not experts in the field . . . ."[24] Based on this reasoning and the affirmative ruling of the Court in *Chevron*, courts now frequently defer to agency choices regarding agency interpretations of statutes.[25] In fact, Professor Michael Herz views the *Chevron* decision as the likely candidate for "the central case of modern administrative law."[26] *Chevron* deference to administrative agency expertise has limited judicial review of agency decisions, which in turn has greatly expanded the power of the administrative state in America.[27]

An important aspect of the development of administrative agencies and administrative law has been the call for specialized experts. According to John Kenneth Galbraith, this trend has occurred in industry as well as government.[28] Daniel Hall suggests that part of the growth of administrative agencies is that "the job of government has become too large for Congress, the Courts, and the executive branch [the President] to handle."[29] The number and diversity of issues to be addressed by government are, in fact, overwhelming. Given the specialization offered by specific agencies, issues are now addressed with technical knowledge and expertise. Considering this knowledge

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[23] *Chevron*, 467 U.S. at 865–66.

[24] *Id.* at 865.

[25] The basic test set out by Justice Stevens for applying judicial deference under *Chevron* is:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842–43.

[26] Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. 187, 187 (1992).

[27] In addition to the benefit of expertise, a recent examination of the over 1,600 federal circuit court *Chevron*-related cases suggests that applying the doctrine "has a powerful constraining effect on partisanship in judicial decisionmaking." Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1463, 1524 (2018).

[28] *See generally* JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (4th ed. 1985).

[29] HALL, *supra* note 4, at 7.

and expertise, many would argue that with respect to Congress, "agencies are in a better, more informed, position to make many decisions."[30] Not surprisingly, Congress has taken to delegating the specifics of governing to this agency expertise.

IV. CHALLENGES TO ADMINISTRATIVE LAW AND *CHEVRON* DEFERENCE

On the other hand, some seriously question whether the administrative law that has evolved over the years has a legitimate place in the American system of government. In fact, several sources say "No." Professor Philip Hamburger of Columbia Law School argued in his controversial book, *Is Administrative Law Unlawful?*, that "administrative law [is] 'extralegal, supralegal, and consolidated, and thus a version of absolute power'" and is therefore "unconstitutional."[31] Others point to the difficulty of rationalizing a system that sanctions governmental actions based on decisions of unelected bureaucratic officials, raising—in essence—a question of governmental accountability.[32] And, in particular, the *Chevron* doctrine of deference by the judiciary has itself come under considerable attack. Various commentators and judges have viewed the doctrine with disfavor and even called for its demise.[33] This debate about the role of the contemporary administrative system and *Chevron* deference under Article III appears to be a key component to Judge Brown's claim of judicial abdication and call for a renaissance.

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[30] *Id.*; see *Chevron*, 467 U.S. at 864–65, for Justice Stevens' rationale for deference.

[31] PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 12 (2014).

[32] HALL, *supra* note 4, at 17.

[33] *See, e.g.*, Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Herz, *supra* note 26; Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015); Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007); Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141 (2012). See Jeffrey S. Lubbers, *Is the U.S. Supreme Court Becoming Hostile to the Administrative State?* (2015), *available at* https://ssrn.com/abstract=2645036, for a general survey of the debate; *see also* Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103 (2018).

V. THE RENAISSANCE

A. Judge Janice Rogers Brown

The writings of Judge Janice Rogers Brown of the D.C. Circuit Court of Appeals offer a logical starting point for any effort to understand her call for a renaissance. This is particularly true of her judicial opinions. For example, the 2012 case of *Hettinga v. United States* involved a constitutional challenge to the Milk Regulatory Equity Act of 2005 (MREA).[34] The plaintiffs, owners of large dairy operations, claimed that the elimination of certain marketing exemptions by the Secretary of Agriculture and the subsequent codification of the elimination in the MREA constituted a Bill of Attainder and a violation of the Equal Protection Clause.[35] In a *per curium* decision, the D.C. Circuit affirmed the District Court's dismissal of the complaint for failure to state a valid claim.[36]

Judge Brown filed a concurring opinion in the case.[37] The concurrence, joined by Judge David Sentelle,[38] sheds light on Judge Brown's view of the past and its relationship with an Article III renaissance. After recognizing that the court's *per curium* opinion appropriately followed precedent, Judge Brown claimed that the case

> reveals an ugly truth: America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.[39]

Judge Brown's opinion further defined this "ugly truth" with an outline of the specifics of the surrender and with a castigation of the results: the regulation of property via state and local police powers for the benefit of public, the relegation of economic interests with limited constitutional protections, and the abdication by the Supreme

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[34] 677 F.3d 471 (2012) (discussing the constitutionality of Pub. L. No. 109-215, 120 Stat. 328 (2006) (codified at 7 U.S.C. § 608c)).

[35] *Id.* at 474.

[36] *Id.* at 474, 476.

[37] *Id.* at 474.

[38] Interestingly, Judge Sentelle is an old mentor of Justice Neil Gorsuch as Gorsuch clerked for Judge Sentelle immediately after graduating from Harvard Law School in 1991. *See* White House Press Release, PRESIDENT TRUMP'S NOMINEE FOR THE SUPREME COURT NEIL M. GORSUCH (Jan. 31, 2017), https://www.whitehouse.gov/nominee-gorsuch.

[39] *Hettinga*, 677 F.3d at 480 (Brown, J., concurring).

Court of its duty to protect economic interests.[40] With respect to judicial review, Judge Brown rejected the judiciary's reluctance to intervene with a more robust review. Instead, she argued that the use of the rational basis test in the area of economic interests was a flawed "minimalist review of economic regulations," that,

> allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions. . . . Rational basis means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.[41]

In April of 2017, Judge Brown filed another revealing concurring opinion. In *Waterkeeper Alliance v. EPA*, a number of environmental groups challenged an EPA rule that exempted farms from certain air release reporting requirements regarding animal waste products.[42] The majority opinion reviewed the exemption rule for reasonableness under the *Chevron* standard and found that this EPA rule was not a reasonable interpretation of the law.[43] In her concurring opinion, Judge Brown, while agreeing in results, objected to the majority's method of review.[44] She cited Frank Sinatra's tune *Luck be a Lady*: "It isn't fair. It isn't nice," and argued that the majority's application of a deferential standard of review amounted to an injudicious deference to the agency by "[t]runcating the *Chevron* two-step into a [deferential] one-step 'reasonableness' inquiry [which] lets the judiciary leave its statutory escort to blow on an agency's dice."[45] Judge Brown declared that the court's lack of a real review and avoidance of the question of the actual meaning of the statute amounts to a basic "fear of commitment" on the part of the judiciary.[46] This conclusion led

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[40] *Id.* at 480–81.

[41] *Id.* at 481–83. Judge Brown supports her pronouncements with negative references to an earlier time—the Lochner-New Deal Era—and caselaw that upheld legislative policy choices from the 1930s, e.g., Nebbia v. New York, 291 U.S. 502, 516 (1934) (Supreme Court allows milk rate regulation) and United States v. Carolene Products Co., 304 U.S. 144, 152–153 (1838) (Supreme Court offers only minimal review over property rights restrictions). She also makes positive reference to more modern commentary such as the work of Professor Randy Barnett. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 260 (2004).

[42] 833 F.3d 527, 531 (D.C. Cir. 2017).

[43] *Id.* at 534, 537–38.

[44] *Id.* at 539 (Brown, J., concurring).

[45] *Id.*

[46] *Id.*

directly to Judge Brown's call for the Article III renaissance.[47] It is noteworthy that she supported this call with a reference to the words of now Justice Neil Gorsuch:

> An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name. If a court could purport fealty to *Chevron* while subjugating statutory clarity to agency "reasonableness," textualism will be trivialized. "For whatever the *agency* may be doing under *Chevron*, the problem remains that *courts* are not fulfilling their duty to interpret the law."[48]

In addition to her written opinions, Judge Brown, who retired from the bench August 31, 2017, delivered a number of speeches regarding her views on the American legal system and the role of judges.[49] One of her speeches, entitled, "'A Whiter Shade of Pale': Sense and Nonsense—The Pursuit of Perfection in Law and Politics," delivered in April of 2000 to the Federalist Society, is particularly relevant to the renaissance question.[50] Judge Brown's comments, which might be described as a tirade against the New Deal, decried the rise of collectivism and socialism in American society. This rise, according to Judge Brown, occurred under the guise of social justice.[51] In particular, she declared that "the security of property — a security our Constitution sought to ensure — had to be devalued in order for collectivism to come of age."[52] With respect to her call for a renaissance, Judge Brown's description of the developments of the *Lochner*-New Deal Era[53] are revealing:

> What started in the 1920's; became manifest in 1937; was consolidated in the 1960's; is now either building to a crescendo or getting ready to end with a whimper. At this moment, it seems likely [the] leviathan will continue to lumber along, picking up ballast and momentum, crushing everything in its path. . . . I have argued that collectivism was (and is) fundamentally incompatible with the vision that undergirded this country's

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[47] *Id.*

[48] *Id.* (quoting Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152–53 (10th Cir. 2016) (Gorsuch, J., concurring)).

[49] *Brown, Janice Rogers*, FED. JUD. CTR., https://www.fjc.gov/history/judges/brown-janice-rogers (last visited Dec. 1, 2019).

[50] Janice Rogers Brown, Associate Justice, California Supreme Court, Address to the Federalist Society at the University of Chicago: "A Whiter Shade of Pale": Sense and Nonsense—The Pursuit of Perfection in Law and Politics (Apr. 20, 2000, 12:15 PM), http://ejournalofpoliticalscience.org/janicerogersbrown.html [hereinafter *Address*].

[51] *Id.*

[52] *Id.*

[53] For the purposes of this paper, the term "*Lochner*-New Deal Era" covers the period from the 1870s to the end of the 1930s.

> founding. The New Deal, however, inoculated the federal Constitution with a kind of underground collectivist mentality. The Constitution itself was transmuted into a significantly different document. In his famous, all too famous, dissent in Lochner, Justice Holmes wrote that the "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." Yes, one of the greatest (certainly one of the most quotable) jurists this nation has ever produced; but in this case, he was simply wrong.[54]

Judge Brown concluded this speech with a revealing view of what she foresaw in her call for a renaissance regarding potential future developments in the law. Citing some cases that offered more protections to property owners under the Takings Clause of the Constitution, Judge Brown commented on the possibility of what might be called a *Lochner*-lite renaissance in a trio of property cases:

> Those cases offered a principled but pragmatic means-end standard of scrutiny under the takings clause. But there are even deeper movements afoot. Tectonic plates are shifting and the resulting cataclysm may make 1937 look tame. . . . The arcs of history, culture, philosophy, and science all seem to be converging on this temporal instant. Familiar arrangements are coming apart; valuable things are torn from our hands, snatched away by the decompression of our fragile ark of culture. But, it is too soon to despair. The collapse of the old system may be the crucible of a new vision. We must get a grip on what we can and hold on. Hold on with all the energy and imagination and ferocity we possess. Hold on even while we accept the darkness. We know not what miracles may happen; what heroic possibilities exist. We may be only moments away from a new dawn.[55]

B. Judge/Justice Neil M. Gorsuch

As noted, *supra*, Judge Brown's call for an Article III renaissance came in her concurrence in the *Waterkeeper Alliance* case, which involved the application of the *Chevron* doctrine. In this concurrence, Judge Brown pointed to now Justice Neil Gorsuch (then Circuit Judge) as a guide for her Article III renaissance.[56] While predicting the positions to be taken by any new Justice on the Supreme Court is perhaps risky,[57] a look at some of the views expressed by Judge

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[54] *Address*, *supra* note 50.

[55] *Id.* In this quote, Judge Brown is referring to the cases of Dolan v. City of Tigard, 512 U.S. 374 (1994), Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992), and Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[56] Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017).

[57] The Congressional Research Service (CRS) cautions that "attempting to predict how Supreme Court nominees may approach their work on the High Court is fraught with

Gorsuch can serve as a basis for reasoned speculation on what the future of any renaissance may hold with the Court and now Justice Gorsuch.

Judge Brown's call for a renaissance specifically referred to the concurring opinion written by the future Justice Gorsuch in the *Gutierrez-Brizuela* decision.[58] Judge Gorsuch's concurring opinion calls for a close examination. In fact, some look upon this concurrence as the Manifesto for an Article III renaissance.[59] Judge Gorsuch began the concurrence with a descriptive image:

> There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* 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. Maybe the time has come to face the behemoth.[60]

More specifically, Judge Gorsuch cited *Chevron* deference as a vehicle to raise issues of judicial review, due process, and equal protection:

> Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions. Under *Chevron* the people aren't just charged with awareness of and the duty to conform

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uncertainty." *See* ANDREW NOLAN ET AL., CONG. RESEARCH SERV., R44778, JUDGE NEIL M. GORSUCH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 2 (2017). Justice Gorsuch's actual administrative law experience has been mostly with immigration cases, which make up a relatively narrow area of administrative law. *See* Eric Citron, *The Roots and Limits of Gorsuch's Views on Chevron Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), http://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/.

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

[59] *See, e.g.*, Billy Corriher, *Counterpoint: Gorsuch Could Make It Harder to Address Climate Change*, INSIDESOURCES (Feb. 18, 2017), https://www.insidesources.com/counterpoint-gorsuch-climate-change/ (referring to Justice Gorsuch's views on the *Chevron* doctrine in his concurring opinion in *Gutierrez-Brizuela v. Lynch* as a manifesto for increasing the judiciary's non-deferential review of agency actions).

[60] *Gutierrez-Brizuela*, 834 F.3d at 1149. Note that the reference to *Brand X* is directed to a case that adds a corollary to the Chevron Doctrine. In Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), the Supreme Court held that under *Chevron*, an agency determination can overrule a circuit court determination unless the court's determination also includes a determination that the statute in question is unambiguous. Judge Gorsuch viewed the results of the *Brand X* holding as allowing the agency to act "like some sort of super court of appeals." *Gutierrez-Brizuela*, 834 F.3d at 1150.

> their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*, required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." . . . Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail.[61]

Judge Gorsuch continued the concurrence with a counter to the common arguments frequently offered to support agency discretion. He claimed that agencies are not really interpreting the law, but rather they are, in reality, implementing "their own preferences about optimal public policy when a statute is ambiguous[,]"[62] and claiming that ambiguity should be "read [] . . . as signaling a legislative 'intention' to 'delegate' to [themselves] the executive [] job of making any reasonable 'legislative' policy choices it thinks wise."[63] In rejecting these developments in administrative law, Judge Gorsuch repudiated judicial abdication and pointed out that the proper role of judges and their duty under the principle of judicial review was to interpret the law: "the problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them."[64]

Regarding the duty of judges under judicial review and the intentions of Congress, Judge Gorsuch specifically called attention to § 706 of the Administrative Procedure Act, which expressly charges the federal courts with statutory interpretation responsibilities and a duty to overturn inconsistent agency actions.[65] Judge Gorsuch declared that: "The fact is, *Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that."[66]

Next, Judge Gorsuch raised the delegation question: "*can* Congress really delegate its legislative authority—its power to write new rules

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[61] *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1153.

[65] *Id.* at 1151.

[66] *Id.* at 1153.

of general applicability—to executive agencies?"[67] While recognizing that the Court has allowed for delegation as long as Congress provides intelligible principles as guidance for agency actions, Judge Gorsuch cited the 1935 *Lochner*-New Deal Era *Schechter Poultry*[68] case and wondered "how is it that *Chevron*—a rule that invests agencies with pretty unfettered power to regulate a lot more than chicken—can evade the chopping block."[69] Judge Gorsuch found that such delegation, which places vast power in a single branch, also raises deference and separation of powers concerns. He observed that:

> After all, *Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). Add to this the fact that today many administrative agencies "wield[] vast power" and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix. Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more.[70]

Judge Gorsuch concluded the concurring opinion in the *Gutierrez-Brizuela* case by pointing out that *Chevron* deference is not a necessity and that we can get by very well without it—particularly if courts exercise their own judgment and do their own jobs:

> All of which raises this question: what would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law *is*. . . . We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change—except perhaps the most important things.[71]

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[67] *Id.*

[68] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[69] *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J., concurring).

[70] *Id.* (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010)).

[71] *Id.* at 1158.

Most recently, Justice Gorsuch issued his first major opinion from the Supreme Court bench. In the case of *Epic Systems Corp. v. Lewis*, decided May 14, 2018, Justice Gorsuch, writing for a 5-4 majority, overruled the National Labor Relations Board's (NLRB) position regarding the availability of class action litigation to employees in disputes over wage losses when an arbitration clause is in place.[72] Rejecting *Chevron* deference to the NLRB, the Gorsuch opinion held that the Court's interpretation applied, rather than the agency's view, in the case regarding a question of the interaction of two statutes—the 1925 Federal Arbitration Act (FAA) and the 1935 National Labor Relations Act (NLRA).[73]

More specifically, the *Epic Systems* decision involved three consolidated cases in which employees who had signed employment agreements containing an arbitration clause sought to raise claims of lost wages in federal courts.[74] As summarized by Justice Gorsuch, the case asks: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[75] Justice Gorsuch answered: "As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear."[76] In a 25 page opinion that echoes his earlier call in *Gutierrez-Brizuela* for "a "world without *Chevron*"[77] and for judges to reject deference and do their "duty to exercise their independent judgment" in interpreting the law,[78] Justice Gorsuch held that the language of the NLRA regarding protections for employees' "concerted activities" did not address the FFA requirement that arbitration agreements be enforced.[79] In looking at the times of the adoption of the 1925 Arbitration Act, Justice Gorsuch argued that Congress was acting in

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[72] 138 S. Ct. 1612 (2018).

[73] *Id.* at 1630–32.

[74] *Id.* at 1619–21.

[75] *Id.* at 1619.

[76] *Id.*

[77] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (Gorsuch, J., concurring).

[78] *Id.*

[79] *Epic Sys. Corp.*, 138 S. Ct. at 1617.

response to the view that the "courts were unduly hostile to arbitration"[80] and that the NLRA was not intended to displace the FAA.[81] His analysis rested, to a large degree, on textual and contextual clues as well as his own view of history.[82]

Justice Ruth Bader Ginsburg wrote a 30 page dissent to the majority opinion in the *Epic Systems* case.[83] In her opinion, joined by Justices Breyer, Kagan and Sotomayor, Justice Ginsburg argued that the context of legislation matters.[84] In particular, she argued that the purpose of the NLRA and its predecessor, the Norris-LaGuardia Act (NLGA) was to protect workers' rights—particularly the right to engage in concerted activities.[85] The NLRB was created by Congress to implement these protections.[86] This dissent also referred to the debates of the *Lochner* Era and the rise of the New Deal and declared that the Gorsuch opinion "paints an ahistorical picture"[87] that seems to ignore the "tumultuous era in the history of our Nation's labor relations."[88] Citing the Congressional Record from 1932, Justice Ginsburg reminded the majority that "[u]nder economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated"[89] and declared that "[t]he Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees 'to band together in confronting an employer.'"[90] Justice Ginsburg concluded that in the FAA, Congress did not dictate these limits on workers' protection and that the limits stem from judicial interpretation rather than legislative choices.[91]

Responding to Justice Ginsburg's claim that he had returned "to the *Lochner* Era when this Court regularly overrode legislative policy

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[80] *Id.* at 1621.

[81] *Id.* at 1624.

[82] *See id.* at 1627.

[83] *Id.* at 1633 (Ginsburg, J., dissenting).

[84] *See id.* at 1648.

[85] *Id.* at 1635–36.

[86] *Id.* at 1635.

[87] *Id.* at 1640.

[88] *Id.* at 1634.

[89] *Id.* (citing 75 CONG. REC. 4,502 (1932)).

[90] *Id.* at 1633 (citing NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984)).

[91] *See id.* at 1648–49.

judgments[,]"[92] Justice Gorsuch responded that "like most apocalyptic warnings, this one proves a false alarm."[93] And, finally, Justice Gorsuch declared that "[t]his Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin."[94]

Justice Gorsuch also recently authored the 5-4 majority opinion in the case of *Wisconsin Central Ltd. v. United States*.[95] *Wisconsin Central*, decided June 21, 2018, involved an 80 year old statute, the Railroad Retirement Tax Act of 1937, that federalized private railroad pension plans.[96] The basic issue at hand in the case was whether the term "compensation" for taxing purposes includes stock option plans.[97] Early Bureau of Revenue (now the Internal Revenue Service, "IRS") interpretations of the Act indicated that the options were not to be taxed.[98] On the other hand, more recent IRS interpretations called for the option plans to be taxable.[99] The Gorsuch opinion primarily relied on a structural analysis and a review of dictionary definitions of the term compensation to hold that stock options are not what Congress intended to be taxed under the Act.[100] Justice Gorsuch gave short shrift to the government's argument that *Chevron* deference should apply to the more recent IRS interpretations. He simply argued that the compensation term is clear, "leaving no ambiguity for the agency to fill."[101]

VI. THE REVIVAL: "*D. . .JA VU,* ALL OVER AGAIN"[102]

A. The Lochner-New Deal Era: Parallels

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[92] *Id.* at 1630.

[93] *Id.*

[94] *Id.* at 1632.

[95] 138 S. Ct. 2067 (2018).

[96] *Id.* at 2070.

[97] *Id.*

[98] *Id.* at 2072.

[99] *Id.* at 2074.

[100] *Id.* at 2074–75.

[101] *Id.* at 2074.

[102] Apologies to Yogi Berra. *See Yogi-isms*, YOGI BERRA MUSEUM & LEARNING CTR., https://yogiberramuseum.org/about-yogi/yogisms/ (last visited Dec. 1, 2019).

One remarkable aspect of the context of Judge Brown's call for a renaissance and the resultant debate is the related repeated references to the *Lochner*-New Deal Era, a period well known for the development of substantive due process jurisprudence.[103] Judge Brown,[104] Judge Gorsuch,[105] and Justice Ginsburg[106] all discussed the period. Additionally, some commentators who have challenged *Chevron* deference rely on "*Lochner*'s version of judicial review" in their arguments.[107]

These frequent references to the *Lochner*-New Deal Era beg the question: What does that period have to tell us about an Article III renaissance and could this call for a renaissance, in fact, be a demand for a revival of the jurisprudence of that Era? In a 95-page Forward published in the Harvard Law Review,[108] Professor Gillian E. Metzger offered a detailed comparison of the *Lochner*–New Deal Era to the present from the perspective of administrative law and the *Chevron* doctrine debate. In *1930s Redux: The Administrative State Under Siege*, Professor Metzger explored the parallels between these two periods. She began her article with a remarkable observation that may be a description of Judge Brown's Article III renaissance: "Eighty years on, we are seeing a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal."[109]

Professor Metzger's study examined what she views as an attack on the contemporary national administrative state from a variety of sources including lawyers, law professors, commentators, politicians and the judiciary itself. She labeled these attacks as a wave of "anti-administrativism."[110] Professor Metzger claimed that within this wave there is a current link between the non-judicial political voices and

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[103] *See generally supra* Part V.

[104] *See supra* notes 37–55 and accompanying text.

[105] *See supra* notes 68–82, 93–102 and accompanying text.

[106] *See supra* notes 83–92 and accompanying text.

[107] For example, proponents from the Federalist Society have referred to *Lochner* as a basis for a textualist-originalist approach to judging. *See* Gillian E. Metzger, *Forward: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 32 (2017); Eric Segall, *Text and History Fed Soc Style*, DORF ON L. (Nov. 20, 2017), http://www.dorfonlaw.org/2017/11/text-and-history-fed-soc-style.html.

[108] Metzger, *supra* note 107, at 1.

[109] *Id.* at 2.

[110] *Id.* at 4.

the judicial anti-administrative voices.[111] Citing Professors Randy Barnett, David Bernstein, and Richard Epstein as examples of this, Professor Metzger argued that some contemporary conservative scholars "have prominently critiqued national regulation for exceeding constitutional bounds and violating individual rights, as part of a broader effort to revive *Lochner* and libertarian constitutionalism."[112] With respect to the current Roberts Court, she argued that Justice Thomas, Chief Justice Roberts, Justice Alito and new Justice Gorsuch have adopted rhetoric "attack[ing] the modern administrative state as a threat to liberty and democracy and suggest[ing] that [it] may be unconstitutional."[113] In particular, Professor Metzger identified a framework for this rhetoric:

> These judicial attacks on administrative governance share several key characteristics: they are strong on rhetorical criticism of administrative government out of proportion to their bottom-line results; they oppose administration and bureaucracy, but not greater presidential power; they advocate a greater role for the courts to defend individual liberty against the ever-expanding national state; and they regularly condemn contemporary national government for being at odds with the constitutional structure the Framers created . . . .[114]

More specifically, with respect to the key characteristic that calls for greater role for courts as defenders of liberty, Professor Metzger saw a parallel to a previous time—the *Lochner*-New Deal Era:

> Although resistance to strong central government has a long legacy in the United States, the real forebears of today's anti-administrative movement are not the Framers but rather the conservative opponents of an expanding national bureaucracy in the 1930s. Like today, the 1930s attack on "agency government" took on a strongly constitutional and legal cast, laced with rhetorical condemnation of bureaucratic tyranny and administrative absolutism. These efforts were plainly political, fueled by business and legal interests deeply opposed to pro-labor regulation and economic planning. The Supreme Court's constitutional opposition to early New Deal measures carried heavy political salience as well, triggering President Franklin Delano Roosevelt's contentious plan to pack the Court. A similar political aspect is inseparable from the contemporary administrative attack, as the nomination process for Justice Gorsuch demonstrated.[115]

Regarding the contemporary administrative attack, Professor Metzger specifically called attention to the *Chevron* doctrine and Justice

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[111] *Id.*

[112] *Id.* at 32.

[113] *Id.* at 3.

[114] *Id.*

[115] *Id.* at 6.

Gorsuch's "strongly anti-administrative position" which "became a centerpiece of Gorsuch's Senate confirmation hearings—surely never before have so many senators spoken at such length about the *Chevron* doctrine of judicial deference to administrative statutory interpretations."[116] As noted, *supra*, a key aspect of Judge Gorsuch's position is the argument that it is the judicial review duty of judges and not bureaucrats to interpret the law.[117] In Professor Metzger's view, this debate over *Chevron* deference and the views of now Justice Neil Gorsuch are a "flashpoint for anti-administrativist attacks"[118] and "serve[] as a stand-in for administrative government, writ large, with overt connections drawn to conservative political campaigns against the administrative state."[119]

As a means to more fully understand these contemporary anti-administrative attacks, Professor Metzger urged that we look to a parallel past: "The period of greatest relevance to contemporary anti-administrativism, however, is the 1930s. . . . [which] bears striking parallels to the current attack and represents an important backdrop against which to assess contemporary anti-administrativism."[120]

As an additional relevant context to the parallels between Judge Brown's call for a renaissance and the past, Professor Metzger pointed out that the debates of the period leading up to the New Deal were not just the province of the judges of the times.[121] Actions of business lawyers, business interests, and think tanks during the period were actions as participants in challenges to the national regulatory state.[122] And, "as was true in the 1930s, [modern] business conservatives' support has been critical to the growing prominence of contemporary anti-administrativism."[123]

As noted, *supra*,[124] the *Lochner*-New Deal Era seems to be a frequent reference point in the discussion of a potential Article III

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[116] *Id.* at 4. Justice Neil Gorsuch appears prominently in Professor Metzger's Forward—in approximately one quarter of the pages of a 95-page article.

[117] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

[118] Metzger, *supra* note 107, at 93.

[119] *Id.* at 70.

[120] *Id.* at 51–52.

[121] *Id.* at 52.

[122] *Id.* at 52–53.

[123] *Id.* at 68.

[124] *See supra* Part V.

renaissance. Certainly, the period is remembered as a time when the rise of administrative agencies and economic regulation collided with substantive judicial review and economic interests. An examination of the developments of this period can offer some insight into how judicial decisions can shape new directions in the law and, perhaps, how old approaches to judicial review might be revived. Of particular interest, beyond the creation of a substantive due process approach to the New Deal policies, is the period before the New Deal and the early development of a judicial review with a non-deferential approach to economic issues. The non-deferential review eventually led to a judicially-created liberty to contract protected by the 14th Amendment. Additionally, the pre-New Deal period offers an example of the development of judicial movement from a deferential judicial review to a non-deferential judicial review. The role of judges, commentators and the Bar in this transformation, in some sense, parallels current extra-judicial support for Judge Brown's Article III renaissance.

B. The Lochner-New Deal Era: Developmental Cases

Our examination of the *Lochner*-New Deal Era of American legal development calls for a review of the cases that led up to the non-deferential *Lochner* Court. Beginning with the *Slaughterhouse Cases*, decided by the Supreme Court in 1873, a number of cases track a significant movement regarding Supreme Court judicial review jurisprudence from a deferential stance to one of judicial independence.[125] The *Slaughterhouse Cases* dealt with a centralized butcher program in the city of New Orleans, Louisiana.[126] Independent butchers in the city claimed that the program, which established a monopoly under a state law, intruded on the right to exercise their chosen trade, in violation of the recently adopted 14th Amendment to the Constitution.[127] Justice Miller's majority opinion in the case rejected the application of the 14th Amendment and specifically deferred to the state legislature's policy decisions.[128] Justice Miller declared that the Court will not put itself in the position of acting as a "perpetual censor" on such legislation.[129] Miller's deference to the state legislature

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[125] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

[126] *Id.* at 39.

[127] *Id.* at 37. For a detailed study of the case, see LABBE & LURIE, *supra* note 19.

[128] *Slaughter-House*, 83 U.S. (16 Wall.) at 77–78.

[129] *Id.* at 78.

"portended a demure role for the Court"[130] in cases involving economic liberty rights—at least for a time.

In their dissent, Justices Field and Bradley rebuffed the *Slaughterhouse* majority's deference to the Louisiana legislature.[131] In particular, Justice Field's dissent objected to Justice Miller's rejection of the 14th Amendment claim.[132] Justice Field viewed the *Slaughterhouse* monopoly as a violation of the Amendment and expressed "profound regret" that the Court's majority failed to recognize that the legislature's regulatory program violated "the right of free labor."[133] Similarly, Justice Bradley's dissent argued that "the right of any citizen to follow whatever lawful employment he chooses to adopt" is a right not to be invaded by the legislature.[134] Justice Bradley claimed that this right "is an essential part of th[e] liberty which is the object of government . . . and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."[135] Further, Justice Bradley raised the question of whether this monopoly was "a reasonable regulation," and concluded that it was, in fact, "onerous, unreasonable, arbitrary, and unjust," and not a legislative regulation within the police powers of the state.[136] Rejecting the majority's deference, Justice Bradley argued that the Court's "jurisdiction and [] duty are plain and imperative,"[137] requiring a judicial review that would reject the legislation. He called for a reversal of the judgment of the Louisiana Supreme Court's decision that upheld the legislature's monopoly.[138]

Following the decision in the *Slaughterhouse Cases*, members of the legal community, including legal commentators as well as legal representatives of business interests, looked toward an implementation

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[130] WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 115 (1988); *see also* Lino A. Graglia, *Constitutional Law Without the Constitution: The Supreme Court's Remaking of America*, *in* A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES 1, 14 (Robert H. Bork ed., 2005) (Professor Lino Graglia refers to Miller's demurral as "abnegation.").

[131] WIECEK, *supra* note 130.

[132] *Id.*

[133] *Slaughterhouse*, 83 U.S. (16 Wall.) at 110.

[134] *Id.* at 113–14.

[135] *Id.* at 116.

[136] *Id.* at 119–20.

[137] *Id.* at 123.

[138] *Id.* at 124.

of the Bradley dissent as a means of limiting regulation through non-deferential judicial review.[139] Of particular note in this effort was the work of Judge Thomas M. Cooley and his influential work, *Constitutional Limitations*, first published in 1868.[140] Regarding his role in the jurisprudence of the *Lochner*-New Deal Era, Cooley has been described as "the most influential legal author of the late nineteenth and early twentieth centuries."[141] Cooley's work led the way for lawyers and judges of the period to turn to non-deferential judicial review and substantive due process as a means to limit business regulations.[142] The development of this review came by means of a series of cases that moved away from the deferential stance taken by Justice Miller in the *Slaughterhouse Cases* to one of judicial oversight of governmental policy choices.

The social context of the times included a rise in theories of Social Darwinism and laissez-faire economics.[143] These perspectives called for limited governmental involvement in business activities.[144] Additionally, when state legislatures attempted to balance the rising problems associated with advancing industrialization, the Court began the movement away from Justice Miller's concern that the Court might become a perpetual censor.[145] Early signs of this development came in Supreme Court decisions in such cases as *Munn v. Illinois*,[146] an 1876

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[139] *See generally* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: A SHORT COURSE 329–30 (7th ed. 2018).

[140] THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (1868); Alan Jones, *Thomas M. Cooley and "Laissez Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 759 (1967). Another voice in this effort was Christopher G. Tiedemann, a well-known laissez faire constitutionalist and Dean of the University of Buffalo Law School 1902–1903. *See, e.g.*, CHRISTOPHER G. TIEDEMANN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWERS IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (1886).

[141] Phillip S. Paludan, *Law and the Failure of Reconstruction: The Case of Thomas Cooley*, 33 J. HIST. IDEAS 597, 598 (1972); *see also* TWISS, *supra* note 19.

[142] Paludan, *supra* note 141, at 599. For additional discussion of the role of lawyers and judges in this development, see SIDNEY FINE, LAISSEZ-FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865–1901 at 128–29 (1956); *see also* Howard Jay Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860*, 40 CALIF. L. REV. 483 (1953). Regarding other participants in this development, Graham notes that "[z]ealots, reformers, and politicians—not jurists—blazed the paths of substantive due process." *Id.* at 489.

[143] *See generally* EPSTEIN & WALKER, *supra* note 139.

[144] *Id.* at 330–32.

[145] *Id.*

[146] Munn v. Illinois, 94 U.S. 113 (1876).

case involving state regulation of grain storage elevators and alleged business corruption. In his majority opinion, Chief Justice Morrison Waite held that the regulations were in the public interest and, as such, did not violate the Constitution including the 14th Amendment: "when private property is devoted to a public use, it is subject to public regulation."[147] He went on to adopt an apparent deferential approach to the legislative choices and to declare that "the legislature is the exclusive judge"[148] of the propriety of legislative power and that "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts."[149] While Waite seemed to closely follow Justice Miller's reluctance in the *Slaughterhouse Cases* for judicial review of legislative regulation of business activities, he opened a door for a less deferential judicial review by recognizing a role for the courts in non-public business matters: "Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially."[150] With this comment, Waite opened the way for the judicial review and judicial determination of what counted as public interest or private interest. So that, when an issue was initially determined by the judge to be of a private nature, the judge's view of reasonableness would control, notwithstanding what the legislature had decided.

Justice Waite's opening for a non-deferential judicial review widened ten years later in the case of *Mugler v. Kansas*, which involved a challenge to a provision in a Kansas state statute that prohibited the production and sale of intoxicating liquor.[151] The challenge was based on a 14th Amendment substantive due process interference with economic liberty argument.[152] Justice John Marshall Harlan held that there were no grounds for the Court to declare the law unconstitutional and that "the courts cannot, without usurping legislative functions, override the will of the people as thus expressed

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[147] *Id.* at 130.

[148] *Id.* at 133.

[149] *Id.* at 134.

[150] *Id.*

[151] 123 U.S. 623 (1887).

[152] *Id.* at 654.

by their chosen representatives."[153] On the other hand, regarding deference and judicial review, Justice Harlan cited *Marbury v. Madison*,[154] and proclaimed that the courts

> [A]re under a solemn duty [] to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[155]

This marked a significant expansion of a less deferential role for the courts in reviewing legislative policy decisions.

And, in yet another ten years, *Munn*'s opening to judicial review and the widening in *Mugler* finally led to a purely non-deferential judicial review and to the acceptance of the 14th Amendment as the source of a liberty to contract in the case of *Allgeyer v. Louisiana*.[156] In *Allgeyer*, Justice Rufus Peckham's majority opinion followed Justice Harlan's lead in *Mugler* and exercised an expanded, non-deferential judicial review, by holding that a state law limiting out-of-state insurance businesses from operating within the state was not reasonable, and that such limitations violated the substantive due process rights of the citizens.[157] While acknowledging state police powers, Justice Peckham declared that it was the Court's job to determine whether legislation is "proper."[158]

Just eight years later in 1905, Justice Peckham authored the majority opinion in *Lochner v. New York*,[159] "one of the most controversial decisions in the history of the U.S. Supreme Court."[160] The level of judicial review exhibited by Peckham's *Lochner* opinion stands, for many, as the epitome of non-deferential review and "a poignant example of judicial activism."[161] The case dealt with state limits on

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[153] *Id.* at 662.

[154] 5 U.S. (1 Cranch) 137 (1803).

[155] *Mugler*, 123 U.S. at 661.

[156] 165 U.S. 578 (1897).

[157] *Id.* at 591.

[158] *Id.*

[159] 198 U.S. 45 (1905).

[160] PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK 2 (1990).

[161] *Id.*

the number of hours that employees of a bakery could work.[162] Citing *Allgeyer*, Justice Peckham rejected the New York law and declared that it violated "the right of contract between the employer and employees . . . part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[163] Just some 32 years after Justice Miller eschewed judicial review of Louisiana's regulatory monopoly in the *Slaughterhouse Cases*, the Supreme Court moved from deference to a dramatic non-deferential level of review of state policy legislation. Justice Peckham summarized this non-deferential overseer role of the Court in the judicial review process:

> In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course[,] the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.[164]

While *Lochner* is largely remembered for its role in creating a new substantive economic due process right, the case also represents the culmination of the judicial move from a deferential judicial review to a non-deferential review of social policy.

VII. CONCLUSION

A. Renaissance or Revival

The *Lochner*-New Deal Era is perhaps best known for the rise of substantive economic due process.[165] The Era also provides insight into issues with respect to several important aspects of the development of administrative law, including judicial review and deference. Additionally, an examination of the Era suggests a parallel between Judge Brown's call for an Article III renaissance and the development of the *Lochner* non-deferential judicial review of policy decisions. As

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[162] *Lochner*, 198 U.S. at 52.

[163] *Id.* at 53.

[164] *Id.* at 56.

[165] *See* EPSTEIN & WALKER, *supra* note 139, at 337.

demonstrated by the decisions of the Supreme Court running from the 1873 *Slaughterhouse Cases* to the 1905 *Lochner* decision, the role of reviewing courts can and do "evolve" with the times.[166] The evolution from *Slaughterhouse* to *Lochner* took judicial review from a "hands off" deferential approach to state legislative policy review, to a hint of review in *Munn*, to a limited review in *Mugler*, to a full review in *Allgeyer*, then to a strict review in *Lochner*. While this evolution accompanied the rise of a new constitutionally protected liberty—the substantive due process right of contract—the assumption of the Court as Miller's feared perpetual censor role was a significant part of the process. The *Lochner* Court overrode the legislative policy choices of the state legislatures, choices made pursuant to their state police powers.

In thinking about our current renaissance or revival question, a number of parallel factors come to mind regarding the debates over deference in judicial review, both in the past and the present. For example, an important aspect of the *Lochner* evolution was the role of outside actors, as well as such legal actors as Thomas Cooley and the bench and bar of the day.[167] As noted, *supra*, there are a number of actors in the current debate calling for a stricter judicial review of policy decisions.[168] These calls are, in fact, calls for judicial oversight of policy decisions. During the *Lochner*-New Deal Era, the policies were those of legislators. Presently, the policy makers are often agencies whose authority to make policy decisions has been delegated by Congress.

This paper began with the question of just what sort of renaissance is Judge Janice Rogers Brown calling for, particularly with her reference to the *Lochner*-New Deal Era and to the views of now Justice Neil Gorsuch regarding deference and judicial review. In looking at such factors as the words of Judges Rogers and Gorsuch, the *Chevron* deference debate, and the role of such outside actors as the Federalist Society in the debate, one might speculate that a new judicial review might, indeed, be a part of an Article III renaissance—a more robust non-deferential judicial review of policy decisions. However, given the model of the developments of the *Lochner*-New

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[166] For a discussion of the evolution of *Chevron* deference, see Aditya Bamzai, *Justice Scalia and the Evolution of* Chevron *Deference*, 21 TEX. REV. L. & POL. 295, 299 (2016).

[167] *See generally supra* notes 141–44 and accompanying text.

[168] *See generally supra* Parts IV, VI.A.

Deal Era, this new level of judicial review might not be quite so new, but rather is a revival of the non-deferential *Lochner* judicial review. This non-deferential review sees interpreting the ambiguities of policy choices by the other branches as questions of law and, as such, these are questions requiring judicial answers.[169] Such a robust review by Article III judges would, in actuality, be a means of largely limiting the ability of administrative agencies to interpret delegated policy-making authority by instituting judicial oversight. This revival would be the essence of Professor Metzger's "anti-administrativism."

The initial question addressed by this paper was simply: Is Judge Janice Rogers Brown's claim, that "an Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name," a clarion call for a modern-day revolution in American administrative law? If a revival can be a revolution, then the answer may, indeed, be "yes." Given the statements of Judges Brown and Gorsuch, particularly in light of the references to the days of 1930s and the *Lochner* Court's checks on New Deal public policy through judicial review, an incoming, new revival-minded federal judiciary may well be ready to make a journey that parallels that from Justice Miller's deferential refusal, to a perpetual censor, to Justice Peckham's assumption of the role of the judiciary as the non-deferential overseer of New Deal national policy. And with the prospect of a renaissance in which national policy decisions are subjects of a heightened non-deferential review, one may wonder just what actual policies will survive judicial determinations, and just how policies determined by judges will actually hold up in the often highly complex world of administrative policy implementation.[170]

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[169] For an example of Judge Gorsuch's reasoning regarding the policy-making function and the judicial function, see *supra* notes 70–82 and accompanying text.

[170] Will a renaissance judiciary be up to the task of ruling on the inevitable technical parts-per-million-type policy question? Somehow, Chief Justice Roberts' approach to assessing a statistical analysis of gerrymandering is not particularly reassuring with respect to the Court's ability to address complex policy issues. Note Chief Justice Roberts' exchange during oral arguments regarding partisan gerrymandering on October 3, 2017 in *Gill v. Whitford*:

> CHIEF JUSTICE ROBERTS: No, but you're going to take this—the whole point is you're taking these issues away from democracy and you're throwing them into the courts pursuant to, and it may be simply my educational background, but I can only describe as sociological gobbledygook.
>
> MR. SMITH: Your Honor, this is—this is not complicated.

The *Chevron* debate, arguably a proxy for the renaissance itself, continues in the country's highest court. As the Supreme Court addresses the *Chevron* doctrine and its role in administrative law cases, the contours of Judge Janice Brown's Article III renaissance are, perhaps, beginning to show. In the recent case, *Pereira v. Sessions*,[171] Justice Kennedy's concurring opinion specifically raised the *Chevron* doctrine and called for a reconsideration of judicial deference based on his concern for "an abdication of the Judiciary's proper role in interpreting federal statutes."[172] Justice Kennedy, who generally has been viewed as a swing vote for many issues, appears to have joined four other Justices (Roberts, Alito, Thomas, and Gorsuch)[173] in questioning *Chevron* deference. However, shortly after the *Pereira* decision was announced, Justice Kennedy announced his retirement.[174] Given the July 31, 2018 retirement of Justice Kennedy, any Article III renaissance may depend who will take Justice Kennedy's seat on the Supreme Court.

On Monday, July 9, 2018, President Donald Trump announced the nomination of Judge Brett Kavanaugh of the D.C. Court of Appeals to take Justice Kennedy's seat on the Supreme Court.[175] After a contentious Senate confirmation process, Justice Kavanaugh took his seat as the ninth member of the Supreme Court on October 6, 2018.[176] Before his appointment to the Court, now Justice Kavanaugh had been involved on a significant number of administrative law appeals while on the D.C. Circuit Court.[177] Additionally, it is noteworthy that

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Transcript of Oral Argument at 40, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_bpm1.pdf.

[171] 138 S. Ct. 2105 (2018).

[172] *Id.* at 2120 (Kennedy, J., concurring).

[173] *See supra* notes 111–15 and accompanying text.

[174] Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html.

[175] Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SCOTUSBLOG (June 28, 2018, 5:48 PM), http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/.

[176] Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

[177] *See, e.g.*, Verizon New Eng. Inc. v. NLRB, 826 F.3d 480 (D.C. Cir. 2016); Int'l Internship Program v. Napolitano, 718 F.3d 986 (D.C. Cir. 2013); E. Niagara Pub. Power All. v. Fed. Energy Regulation Comm'n, 558 F.3d 564 (D.C. Cir. 2009); Kay v. FCC, 525 F.3d 1277 (D.C.

Justice Kavanaugh has had a close a long-term relationship with the newly seated Justice Neil Gorsuch that goes all the way back to prep school. Both served as judicial clerks to Justice Kennedy in the 1993 Term and worked together in the George W. Bush Administration.[178]

With respect to the question of judicial review in administrative law and *Chevron* deference, Justice Kavanaugh has a record of questioning deference to administrative agency decisions. More specifically, in a lengthy 2016 book review published in the *Harvard Law Review*, then Judge Kavanaugh outlined a view of the *Chevron* doctrine that holds its deference to agency actions as antithetical to review under the Administrative Procedure Act, and a mere "atextual invention by the courts" designed to cede power to the Executive Branch.[179] In a subsequent article, published in the *Notre Dame Law Review* in 2017, Judge Kavanaugh favorably cited the Gorsuch concurring opinion in the *Gutierrez-Brizuela* case and its rejection of judicial deference to an agency's interpretation of an ambiguous statute.[180] Additionally, Judge Kavanaugh argued that the *Chevron* doctrine encourages agency overreaching.[181] His article called for an approach to judicial review in which "courts would simply determine the best reading of the statute. Courts would no longer defer to agency interpretations of statutes."[182] In essence, Judge Kavanaugh was echoing the rulings of the *Lochner*-New Deal justices in rejecting the policy choices of the policy makers and policy experts and basing judicial review on the judge's view of reasonableness.

There has been a call for an Article III renaissance. Given the mounting clamor for rejecting *Chevron* deference by commentators and in judicial writings and statements including the pronouncements

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Cir. 2008); N. Baja Pipeline, LLC v. Fed. Energy Regulatory Comm'n, 483 F.3d 819 (D.C. Cir. 2007).

[178] Roberts, *supra* note 175.

[179] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (book review).

[180] Brett M. Kavanaugh, U.S. Circuit Judge: D.C. Circuit, Keynote Address at the University of Notre Dame Law Review Symposium: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions (Feb. 3, 2017), *in* 92 NOTRE DAME L. REV. 1907, 1912 & n.11 (2017).

[181] *Id.* at 1911.

[182] *Id.* at 1912. For an analysis of Judge Kavanaugh's approach to issues of administrative law, see Christopher Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018, 2:55 PM), http://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/.

of Judge Brown, Judge/Justice Gorsuch, as well as those of now Justice Kavanaugh, the demise of the *Chevron* doctrine as a key aspect of an Article III renaissance seems particularly plausible—some might say probable given the leanings of the Chief Justice and Justices Thomas and Alito.[183] And, beyond the demise of a single administrative law-related doctrine, the more important question is what will be the overall result of such a renaissance? If the Article III renaissance is to be a revival of the past, then the *Lochner*-New Deal jurisprudence of non-deferential judicial independence might well be in our future. Such a result may go well beyond administrative law to a revival of a non-deferential approach to judicial review in, perhaps, all areas of the law. This may even portend a "new" or perhaps "old" era of independent judicial oversight of governmental policy choices.

B. CODA: The 2018-2019 Supreme Court Term

The 2018-2019 Term of the Supreme Court with its new full complement of nine Justices offers a noteworthy opportunity to look for signs of any developing Article III renaissance. The Term resulted in a number of decisions of the Court in matters related to agency actions. A non-random review of several of these cases may be helpful in assessing the future of an Article III renaissance. These agency related cases address a number of issues relevant to our inquiry and, in particular, highlight such relevant administrative law matters as judicial review, *stare decisis*, general deference, delegation, and *Auer* deference.

1. Judicial Review and the Agencies

The level of Article III judicial review by the Supreme Court of agency actions goes directly to the heart of administrative law. Any Article III renaissance will necessarily involve the general approach courts take toward judicial review. Two cases from the Term offer a view of the current judicial review jurisprudence. On June 3, 2019, the Court issued a decision that applied a review that rejected an agency's actions. In the case of *Azar v. Allina Health Services*, a number of hospitals challenged the rate calculation methodology devised by the Department of Health and Human Services (HHS) re-

[183] *See generally* Metzger, *supra* note 107, at 3

garding payments to the hospitals for care provided under the Medicare Act.[184] The hospitals claimed that the agency's methodology was adopted without going through required notice and comment procedures under the Medicare Act.[185] HSS argued that the APA's exception to the notice and comment requirement for interpretive rules applied to the methodology.[186] A key point of the analysis in the case was the Medicare Act's use of the phrase "substantive legal standard."[187] With only Justice Breyer dissenting, Justice Gorsuch authored the opinion of the Court that rejected the interpretation of the HHS.[188] Instead, the Court adopted the position that its own view of the text of the statute, the Medicare Act, and not the agency's view, controlled.[189] The majority held that, since the text of the Act called for notice and comment, the HSS methodology was invalid because the required notice and comment provisions had not been followed.[190] Justice Breyer's dissenting opinion basically followed the HHS interpretation.[191] In addition to an analysis of the statutory history of the Medicare Act, Justice Breyer pointed to the impact of the majority's view on the agency mission—the creation of "a major roadblock to the implementation of the Medicare program."[192] While the opinions in the *Azar* decision do not specifically mention deference to the agencies, the result illustrates a non-deferential judicial review.[193]

On June 27, 2019, the Supreme Court decided a second judicial review case that addressed a challenge to the addition of a citizenship question to the upcoming 2020 census questionnaire. In the case of

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[184] 139 S. Ct. 1804, 1810 (2019).

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* at 1808, 1817.

[189] *Id.* at 1812–13.

[190] *Id.* at 1817.

[191] *Id.* (Breyer, J., dissenting).

[192] *Id.* at 1822.

[193] *See* Thomas S. Crane et al., Azar v. Allina*: Supreme Court Decides Important Case on When CMS Must Use Formal Rulemaking When Instructing Medicare Contractors*, MINTZ (June 4, 2019), https://www.mintz.com/insights-center/viewpoints/2146/2019-06-azar-v-allina-supreme-court-decides-important-case-when-cms ("Notably here, nowhere does the Court speak in terms of deference . . . . But unmistakably, the conservative Justices took a meaningful chip out of Medicare deference jurisprudence by dislodging Medicare procedural interpretation from the APA's jurisprudence.").

Department of Commerce v. New York,[194] Chief Justice Robert's opinion of the Court examined the decision of the Secretary of Commerce to include the question in light of the Enumeration Clause of the Constitution, the Census Act, and the provisions of the APA.[195] While the case produced a fractured opinion, a majority of the Court, which included the Chief Justice joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, rejected the Secretary's explanation for the question and voted to remand the case.[196] With respect to judicial review of agency decisions, the Chief Justice recognized that the Court's review is "deferential" under the APA,[197] but also that it is not necessarily naive or merely "an empty ritual."[198] Finding that the Secretary's explanation of the decision to include the question was apparently "contrived,"[199] the Court's majority agreed with the District Court that the explanation was a pretext and that the census question should not be added to the questionnaire without a proper explanation.[200] Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, added a concurrence which also found the Secretary's actions to be "arbitrary, capricious, and an abuse of his lawfully delegated discretion."[201]

In dissent, Justices Thomas and Alito issued opinions reflecting a different view of judicial review of agency action.[202] Justice Thomas, joined by Justices Gorsuch and Kavanaugh, declared that the majority's approach to judicial review, which includes a questioning of "the sincerity of the agency's otherwise adequate rationale," is "an unprecedented departure from our deferential review of discretionary agency decisions [that,] if taken seriously . . . would transform administrative law."[203] Justice Thomas warned that the majority's standard of judicial review of the agency's decision "offends the presumption of regularity we owe the Executive,"[204] and that it "has opened a Pandora's box

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[194] 139 S. Ct. 2551 (2019).

[195] *Id.* at 2561.

[196] *Id.* at 2576.

[197] *Id.* at 2569.

[198] *Id.* at 2576.

[199] *Id.*

[200] *See id.* at 2564–65, 2575–76.

[201] *Id.* at 2595 (Breyer, J., dissenting).

[202] *Id.* at 2576, 2596 (Thomas, J., dissenting) (Alito, J., dissenting).

[203] *Id.* at 2576 (Thomas, J., dissenting).

[204] *Id.* at 2578.

of pretext-based challenges in administrative law."[205] Justice Alito's concurring and dissenting opinion declared that, regarding the standard for judicial review, "the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons."[206]

Both of these cases raised the question of how searching the Court's review of agency actions will be. In each case the Court's majority undertook a non-deferential look at the case and the position of the agency. In *Azar*, a substantial majority, 7-1, made its own determination of what law was to be applied. In the census case, a bare majority flatly rejected the agency's position.

2. Stare Decisis and the Agencies

If there is to be an Article III renaissance, any real changes in the Court's approach to deciding cases will potentially bring about conflict with previous cases. If renaissance means change, the Court's view of the principle of *stare decisis* will necessarily be a significant part of the process. Two cases from the 2018 Term illustrate different views of *stare decisis* and, perhaps, offer a suggestion as to the development of any renaissance. The case of *Gamble v. United States* was decided by the Supreme Court on June 17, 2019.[207] The *Gamble* case involved a direct call to overturn the longstanding limitation on the double jeopardy clause of the U.S. Constitution, known the dual-sovereignty doctrine.[208] Justice Alito authored the majority opinion which upheld the doctrine. His opinion was joined by the Chief Justice and Justices Thomas, Breyer, Sotomayor, Kagan, and Kavanaugh.[209] Justice Thomas concurred while Justices Ginsburg and Gorsuch both wrote dissenting opinions.[210] These various opinions offer a sampling of the views of the current members of the Court regarding the role of precedent in Supreme Court jurisprudence. Factually, the case is fairly straight forward. Gamble pled guilty to a

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[205] *Id.* at 2583.

[206] *Id.* at 2597 (Alito, J., dissenting).

[207] 139 S. Ct. 1960 (2019).

[208] *Id.* at 1963–64.

[209] *Id.* at 1963.

[210] *Id.* at 1980, 1989, 1996.

felon in possession of a firearm statute in Alabama.[211] Subsequently, he was indicted under federal law by Department of Justice prosecutors for the same possession.[212] After pleading guilty to the federal charge, Gamble appealed citing the double jeopardy clause of the Fifth Amendment to the U.S. Constitution.[213] The 11th Circuit rejected his appeal based on the dual-sovereignty doctrine, which holds that state and federal offenses are laws of different sovereigns making the double jeopardy clause inapplicable.[214] Gamble asked the Supreme Court to overturn the doctrine. While Justice Alito's majority opinion explored the history and theory of the double jeopardy concept, including British history and caselaw, he also pointedly discussed U.S. precedential support for the doctrine stretching from 1847 to a 2016 Supreme Court decision.[215] In the end, *stare decisis* won out over Gamble's arguments. As Justice Alito concluded, Mr. Gamble's "historical evidence must, at a minimum, be better than middling. And it is not."[216]

Justice Thomas' concurrence cautioned that the *stare decisis* concept should not limit the correction of errors: "When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it. This view of *stare decisis* follows directly from the Constitution's supremacy over other sources of law—including our own precedents."[217] Justice Ginsburg, in dissent, pointed to "relentless criticism" of the "separate-sovereigns [or dual sovereignty] doctrine"[218] and argued that rather than protecting individual rights, as intended, the Court's decision regarding the double jeopardy clause takes away rights.[219] Justice Gorsuch also addressed *stare decisis*. He criticized the majority's approach and declared that the concept is not "'the art of being methodically ignorant of what everyone knows.' Indeed, blind obedience to *stare decisis* would leave this Court still abiding [such]

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[211] *Id.* at 1964.

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.* at 1965–67.

[216] *Id.* at 1969.

[217] *Id.* at 1984 (Thomas, J., concurring).

[218] *Id.* at 1995 (Ginsburg, J., dissenting).

[219] *Id.* at 1995–96.

grotesque errors like *Dred Scott v. Sanford*, *Plessy v. Ferguson*, and *Korematsu v. United States*."[220]

Just a few days after the *Gamble* decision was released, another case involving the Court's treatment of a *stare decisis* was announced. The case of *Knick v. Township of Scott* brought a Fifth Amendment Takings Clause claim regarding the regulation of a private cemetery by a local government.[221] While the basic issue in the *Knick* case was whether a Fifth Amendment takings claim must be filed in state court before a federal court lawsuit can commence, *stare decisis* was at issue because a 34-year old precedent, *Williamson County Regional Planning Commission v. Hamilton Bank*, held that such claims should go to the state courts first.[222] Chief Justice Roberts authored the majority opinion which overruled the earlier case.[223] The opinion was joined by Justices Thomas, Alito, Gorsuch and Kavanaugh.[224] In his opinion, Chief Justice Roberts cited *Janus v. American Federation of State, County, and Municipal Employees*[225]—a case from the 2017-2018 Supreme Court Term—as a baseline for overruling a case and also listed several factors to take into account when considering whether to overrule a precedent: "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision."[226] The majority held that the *Williamson County* case failed the *Janus* analysis.[227]

Justice Kagan authored a dissent in the *Knick* case.[228] Her dissent was joined by Justices Ginsburg, Breyer, and Sotomayor.[229] Justice Kagan declared that the Court's majority has "overthrow[n] the Court's long-settled view of the *Takings Clause* . . . against a mountain of precedent[.]"[230] She decried the use of a one-year-old case as the basis

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[220] *Id.* at 2005–06 (Gorsuch, J., dissenting) (quoting an aphorism attributed to Jeremy Bentham).

[221] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2168 (2019).

[222] *Id.* (citing Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).

[223] *Id.* at 2167.

[224] *Id.* at 2166.

[225] 138 S. Ct. 2448 (2018).

[226] *Knick*, 139 S. Ct. at 2178 (quoting *Janus*, 138 S. Ct at 2478–79).

[227] *Id.* at 2177–78.

[228] *Id.* at 2180.

[229] *Id.*

[230] *Id.* at 2183 (Kagan, J., dissenting).

for overruling *Williamson County*: "Under cover of overruling 'only' a single decision, today's opinion smashes a hundred-plus years of legal rulings to smithereens."[231] Responding to the claim by the majority that the rationale for *Williamson* has "evolved,"[232] her dissent concluded with a cautionary note regarding the principle of *stare decisis* itself:

> And anyway, "evolution" . . . has never been a ground for abandoning *stare decisis*. Here, the majority's only citation is to last Term's decision overruling a 40-year-old precedent. If that is the way the majority means to proceed—relying on one subversion of *stare decisis* to support another—we may as well not have principles about precedents at all. . . . But the entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason *other than* the idea "that the precedent was wrongly decided."[233]

These two cases illustrate that the current Court has a number of disparate views regarding the application of the *stare decisis* principle. One difference of note is how the winning argument in Justice Alito's majority opinion in *Gamble* was, to a large degree, the long history of the dual-sovereignty concept, while in *Knick*, an older precedent, *Williamson County*, was overruled and not followed based on the one-year-old *Janus* decision.

3. Delegation and Agencies

In his 1947 classic article on the delegation of legislative power, Harvard Professor Louis L. Jaffe proclaimed that the "[d]elegation of 'lawmaking' power is the dynamo of modern government."[234] As discussed in the Introduction, *supra*, the delegation of legislative authority to agencies has led to the growth of the administrative state. And, while post WWII America has seen growth founded, to a large degree, on the actions of administrative agencies, this has not occurred without debate regarding the limits on delegation to agencies.[235] The case of

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[231] *Id.*

[232] *See id.* at 2178 (majority opinion).

[233] *Id.* at 2190 (Kagan, J., dissenting).

[234] Louis L. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 359 (1947).

[235] For a general discussion of governmental operations and delegation, see WARREN, *supra* note 8, at 46–52; PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 41–54 (3rd ed. 2016); HALL, *supra* note 4, at 115–29; BARRY & WHITCOMB, *supra* note 16, at 49–52. For a discussion of the actual application of the delegation doctrine, see Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147 (2017). For a challenge to the doctrine, see Eric A.

Gundy v. United States,[236] decided June 20, 2019, involved a challenge to the Sex Offender Registration and Notification Act's (SORNA) delegation of certain broad authority to the Attorney General regarding the treatment of pre-Act sex offenders. Gundy's challenge claimed that the delegation to the Attorney General was in violation of the delegation doctrine.[237] This doctrine (also known as the non-delegation doctrine) has separation of powers underpinnings "which—in theory if not in fact—places limits on Congress's power to vest decision-making authority in other branches of government."[238] The vitality of the doctrine has rarely come into question in recent times at the Supreme Court level. In fact, it has been applied by the Court to invalidate legislation only twice—both in the *Lochner*-New Deal Era.[239]

Justice Kagan authored a plurality opinion in *Gundy* that was joined by Justices Ginsburg, Breyer, and Sotomayor.[240] In the opinion, Justice Kagan described the current norm regarding delegation in administrative law:

> [T]he Constitution does not deny to the Congress the necessary resources of flexibility and practicality that enable it to perform its functions. Congress may obtain the assistance of its coordinate Branches—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. . . . So we have held, time and again, that a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.[241]

Recognizing this reality, Justice Kagan also examined a variety of sources of limits or guidelines regarding the Attorney General's

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Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

[236] 139 S. Ct. 2116 (2019).

[237] *See id.* at 2122–23.

[238] Evan Zoldan, Gundy v. United States*: A Peek into the Future of Government Regulation*, HILL (June 21, 2019, 12:24 PM), https://thehill.com/opinion/judiciary/449687-gundy-v-united-states-a-peek-into-the-future-of-government-regulation.

[239] *Id.* ("Doubts about the vitality of the non-delegation doctrine have dogged it for decades; indeed, the Supreme Court has struck down only two statutes for violating the doctrine in the history of the United States and has not done so since the advent of the New Deal."). Regarding the two statutes, see Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[240] *Gundy*, 139 S. Ct. at 2121.

[241] *Id.* at 2123 (internal quotation marks and brackets omitted).

discretion under the statute.[242] Justice Kagan found that these guidelines formed the required "intelligible principle[s]" necessary for upholding the delegation presented in SORNA.[243] She concluded that the "delegation easily passes constitutional muster."[244] Justice Alito offered a brief concurring opinion that concluded with his vote to affirm based on *stare decisis*.[245] On the other hand, Justice Alito also indicated in his concurrence that the application of the nondelegation doctrine may, indeed, be in question in the future.[246] He alluded to the possibility of a reconsideration of the role of delegation in American governance:

> 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. 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.[247]

Justice Gorsuch authored a detailed dissent in the *Gundy* case that argued for the application of a robust version of the nondelegation doctrine, which would have invalidated the SORNA delegation to the Attorney General.[248] The dissent was joined by the Chief Justice and Justice Thomas.[249] For Justice Gorsuch, the delegation in *Gundy* amounted to an "extraconstitutional arrangement"[250] in which the Attorney General is given "free rein to write the rules for virtually the entire existing sex offender population in this country . . . ."[251] Justice Gorsuch began with a summary of his view of the design of the American system and the delegation in SORNA:

> The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. 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.[252]

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[242] *Id.* at 2123–24.

[243] *Id.* at 2123.

[244] *Id.* at 2121.

[245] *Id.* at 2130–31 (Alito, J., concurring).

[246] *Id.* at 2131.

[247] *Id.*

[248] *Id.* (Gorsuch, J., dissenting).

[249] *Id.*

[250] *Id.*

[251] *Id.* at 2132.

[252] *Id.* at 2131.

Viewing the SORNA delegation as a constitutional separation of powers issue, Justice Gorsuch argued that it is a judicial duty to respond:

> It's about respecting the people's sovereign choice to vest the legislative power in Congress alone. And it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law. So when a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul [and] . . . do [our] duty as faithful guardians of the Constitution.[253]

Citing John Locke, Justice Gorsuch claimed that an "excess of law-making" was a disease that the framer's strove to avoid.[254] Additionally, Justice Gorsuch addressed delegation caselaw from early 19th century to the current decade.[255] Justice Gorsuch gave special attention to the two 1935 *Lochner*-New Deal Era cases of *Schechter Poultry*[256] and *Panama Refining*,[257] which invalidated New Deal policies based on improper delegation, as well as the 1928 case of *J.W. Hampton, Jr. & Co v. United States*,[258] which articulated the intelligible principle requirement for authorized delegation.[259] Justice Gorsuch also discussed the application of legislative history and textual analysis to the case.[260] In his view, "abdication"[261] is not an appropriate judicial response to the delegation in SORNA: "To leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight

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[253] *Id.* at 2135.

[254] *Id.* at 2134. Justice Gorsuch's reliance on John Locke has generated some controversy over whether Locke's views were actually embraced by the founders. *See, e.g.*, Richard Primus, *John Locke, Justice Gorsuch, and* Gundy v. United States, BALKINIZATION (July 22, 2019, 11:27 AM), https://balkin.blogspot.com/2019/07/john-locke-justice-gorsuch-and-gundy-v.html ("For several decades now, leading scholars have cast considerable doubt on the idea that Locke's political writing was particularly influential for the Founders.").

[255] *Gundy*, 139 S. Ct. at 2135–42 (Gorsuch, J., dissenting).

[256] *Id.* at 2137–38 (discussing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). The Gorsuch discussion of the facts of *Schechter Poultry* also raised some controversy. *See* Mark Tushnet, *Epistemic Closure at the Supreme Court*, BALKINIZATION (July 5, 2019, 4:59 PM), https://balkin.blogspot.com/2019/07/epistemic-closure-at-supreme-court.html (questioning the Justice's reliance on the *Schechter Poultry* facts as described by Amity Shlaes's book, THE FORGOTTEN MAN).

[257] *Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting) (discussing Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935)).

[258] *Id.* at 2138–39 (discussing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928)).

[259] *J.W. Hampton*, 276 U.S. at 409.

[260] *Gundy*, 139 S. Ct. at 2143–44 (Gorsuch, J., dissenting).

[261] *Id.* at 2142.

of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties."[262]

Justice Gorsuch concluded with a cite to the *Lochner*-New Deal Era *Schechter Poultry* case and with a call for a future full panel of the Court, i.e., a Court including the newly seated Justice Kavanaugh, to act to limit "delegation running riot."[263] Given Justice Alito's call for a review of delegation, it seems possible that, should the views of Justice Gorsuch regarding delegation gain support from Justice Kavanaugh, a truly significant Article III renaissance may be on the horizon—a renaissance that echoes the reasoning of the *Lochner*-New Deal "sick chicken" case,[264] and turns delegation practice on its head.

4. *Auer* Deference and the Agencies

As discussed, *supra*, judicial deference to administrative agency choices is a key factor in modern administrative law.[265] On June 26, 2019, the "Supreme Court issued a major opinion on administrative law"[266] that raised issues of *stare decisis* and deference regarding judicial review of agency actions. The case, *Kisor v. Wilkie*,[267] specifically addressed the viability of a doctrine of deference generally known as *Auer* deference. *Auer* deference, a cousin to *Chevron* deference, is based on the earlier cases of *Bowles v. Seminole Rock & Sand Co.*, decided in 1945,[268] and *Auer v. Robbins*, decided in 1997;[269] both "cases introduced the practice of judicial deference to a federal agency's interpretation of [the agency's own] ambiguous regulation."[270]

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[262] *Id.*

[263] *Id.* at 2138, 2148 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

[264] *A.L.A Schechter Poultry*, 295 U.S. 495.

[265] *See supra* notes 23–30, 239 and accompanying text.

[266] Amy Howe, *Opinion Analysis: Justices Leave Agency Deference Doctrine in Place – With Limits*, SCOTUSBLOG (June 26, 2019, 1:20 PM), https://www.scotusblog.com/2019/06/opinion-analysis-justices-leave-agency-deference-doctrine-in-place/.

[267] 139 S. Ct. 2400 (2019).

[268] 325 U.S. 410 (1945).

[269] 519 U.S. 452 (1997).

[270] John F. Martin & Gwendolyn K. Nightengale, *Supreme Court Keeps Auer, but Dilutes Its Power*, NAT'L L. REV. (July 3, 2019), https://www.natlawreview.com/article/supreme-court-keeps-auer-dilutes-its-power.

Factually, the *Kisor* case involved the challenge by a Vietnam War veteran of the Department of Veterans Affairs (VA) decision to deny certain retroactive PTSD related benefits.[271] The denial was based on the VA's interpretation of its own regulations.[272] The U.S. Court of Appeals for the Federal Circuit deferred to the agency under *Auer* deference.[273] The veteran brought the appeal to the Supreme Court asking that *Auer* be overturned.[274] While the case resulted in a 5-4 split that rejected overturning *Auer* deference, all of the Justices voted for remand for further consideration by the lower court.[275]

Justice Kagan authored the plurality opinion of the Court.[276] She was joined by Justices Ginsburg, Breyer, and Sotomayor.[277] The Court majority declined to overrule the long line of cases supporting the *Auer* doctrine, but instead, narrowed its application criteria.[278] Citing the *Chevron* case, Justice Kagan emphasized that the first question for courts addressing potential *Auer* deference situations is whether the regulation is, after traditional legal analysis, indeed, ambiguous.[279] Additionally, Justice Kagan discussed a number of factors or "markers" to be considered by the courts before a regulation is determined to be ambiguous and deference applied: agency expertise, competency, accountability, and direct knowledge.[280] Based on these considerations, Justice Kagan pointed out that deference is not automatic.[281] Aside from considerations of real ambiguity and markers, the principle of *stare decisis* played a key role in the plurality's decision in *Kisor*. In upholding *Auer*, Justice Kagan emphasized that "*stare decisis* cuts strongly against Kisor's position," who was asking the Court "to overrule

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[271] *Kisor*, 139 S. Ct. at 2409.

[272] *Id.*

[273] *Id.*; *see also* Howe, *supra* note 266.

[274] *Kisor*, 139 S. Ct. at 2409.

[275] *Id.* at 2408; *see* Howe, *supra* note 266.

[276] *Kisor*, 139 S. Ct. at 2404.

[277] *Id.*

[278] *Id.* at 2408.

[279] *Id.* at 2415–16.

[280] *Id.* at 2416–18; *see also* Ronald Levin, *Symposium: Auer Deference — Supreme Court Chooses Evolution, Not Revolution*, SCOTUSBLOG (June 27, 2019, 11:36 AM), https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/.

[281] *Kisor*, 139 S. Ct. at 2414; Howe, *supra* note 266 (stating that Justice Kagan made it clear that *Auer* deference "will not apply in every scenario in which an agency is interpreting its own rules.").

not a single case, but a 'long line of precedents'—each one reaffirming the rest and going back 75 years or more."[282]

While there were no direct dissents in the case, three Justices wrote "concurring" opinions that primarily agreed with just the remand. Chief Justice Roberts' brief concurring opinion joined the plurality regarding narrowing deference and following *stare decisis* with respect to *Auer*.[283] With respect to the future of such deference cases, the Chief Justice noted "that the distance between the majority and Justice [Gorsuch] is not as great as it may initially appear[,]"[284] and that deference to agency interpretations of their own regulations is a different question than raised by *Chevron* deference, which involves agency interpretations of statutes, which is not addressed in *Kisor*.[285] Justice Kavanaugh also authored a brief concurring opinion that primarily agreed with the Chief Justice and emphasized that "after today's decision, a judge should engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation, and can simultaneously be appropriately deferential to an agency's reasonable policy choices within the discretion allowed by [the] regulation."[286] Justice Kavanaugh also saw a difference between *Auer* deference and *Chevron* deference and indicated that the *Kisor* decision was not dispositive of *Chevron*.[287]

In contrast to the mild responses of the Chief Justice and Justice Kavanaugh, Justice Gorsuch issued a "fiery and lengthy"[288] opinion that concurred in the remand but basically dissented in the reasoning of the main opinion. The opinion was joined in full by Justices Thomas, Alito, and Kavanaugh.[289] Describing the results of the Court's decision as "more [of] a stay of execution than a pardon,"[290] Justice Gorsuch criticized the Chief Justice's approach as the creation of a "zombified" doctrine.[291] He argued that the *Auer* doctrine "represents

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

[283] *Id.* at 2424 (Roberts, J., concurring).

[284] *Id.*

[285] *Id.* at 2425.

[286] *Id.* at 2449 (Kavanaugh, J., concurring).

[287] *Id.*

[288] Levin, *supra* note 280.

[289] *Kisor*, 139 S. Ct. at 2425.

[290] *Id.* (Gorsuch, J., concurring).

[291] *Id.*

no trivial threat" to the foundational principles of judicial power—the duty to interpret and apply the law and judicial independence:[292] a power not to be shared.[293] And, as a consequence, Justice Gorsuch declared that in following *Auer* deference rather than our "best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them."[294] Going further, Justice Gorsuch explained that the doctrine, in effect:

> [D]oes not *limit* the scope of the judicial power; instead, it seeks to *coopt* the judicial power by requiring an Article III judge to decide a case before him according to principles that he believes do not accurately reflect the law. . . . "Abdication of responsibility is not part of the constitutional design."[295]

Justice Gorsuch discounted the majority view of *stare decisis* by pointing out that the narrowing of the deference designed to save the doctrine was actually merely a "*reshaping* [of the] precedent in new and experimental ways."[296] Justice Gorsuch also questioned application of *stare decisis* in the case of deference as opposed to the specific holdings in a specific case: "does *stare decisis* extend beyond those discrete holdings and bind future Members of this Court to apply *Auer's* broader deference framework?"[297] Justice Gorsuch concluded his dissent by urging a future Court to end homage to *Auer* should it become clear that it is no more than a "tin god," or "if *Auer* proves more resilient, this Court should reassert its responsibility to say what the law is[.]"[298]

While judicial deference has become a basic, yet challenged, characteristic of modern administrative law, it seems that *stare decisis* may be a key to its viability. Again, given just a small shift in the votes of the Chief Justice and Justice Kavanaugh, an Article III renaissance may resemble the non-deferential *Lochner*-New Deal Article III jurisprudence.

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[292] *Id.* at 2438.

[293] *Id.*

[294] *Id.* at 2439.

[295] *Id.* at 2440 (quoting Clinton v. City of New York, 524 U.S. 417, 452 (1988)).

[296] *Id.* at 2443 (emphasis added).

[297] *Id.* at 2444.

[298] *Id.* at 2448.

5. Article III Renaissance and the Agencies

The Supreme Court's 2018-2019 Term was notable for, perhaps, a number of reasons. However, just the fact that there is a full complement of Justices is particularly significant for our examination of Judge Brown's call for an Article III renaissance. As this newly constituted group of Justices decides cases, it may be possible to discern trends and potential approaches in how administrative cases will be decided. For example, based on past actions and statements of Justices Gorsuch and Kavanaugh, it is possible to conclude that, with the new Court membership, change may indeed be afoot.[299] On the other hand, the 2018 Term suggests that any change will not necessarily be immediate and that the opinions of the Justices are not necessarily predictable. Majorities and dissenters were not always the same. The case decisions went for and against agency actions. On the other hand, there were some signs of things to come. These signs suggest that the nature of a possible Article III renaissance may reflect a revival of judicial independence as exhibited in *Lochner*-New Deal Era non-deferential jurisprudence.

The summary of the reviewed six 2018 Term case decisions reveals that, while the Justices reached mixed results in the particular cases, some possible characteristics of Judge Brown's Article III renaissance do appear. In particular, views of increased judicial independence, willingness to overrule precedents and policy choices of other branches, a skepticism of broad delegation, and a questioning of the concept of deference in administrative law have some resonance in the 2018 Term. Such views also have parallels to the jurisprudence of the *Lochner*-New Deal Era.

In both the *Azar* and *New York* cases, the Court took a strong stand for an independent judicial review of agency actions. In *Azar*, a 7-1 decision written by Justice Gorsuch, with only Justice Breyer in dissent, employed the Court's own textual interpretation to a rule against HSS.[300] In the *New York* case, which challenged the citizenship census question, the Justices issued a number of opinions in a decision

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[299] This will, of course, depend on how "conservative" members of the new Court coalesce around similar views of the basic concepts of delegation, the limits of agency authority, and the role of the courts in reviewing agency actions, including the issue of judicial deference to policy choices.

[300] Azar v. Allina Health Servs., 139 S. Ct. 1804, 1808, 1817 (2019).

that remanded the question for further explanation.[301] The Chief Justice's opinion, joined by Justices Ginsburg, Kagan, Breyer, and Sotomayor, basically looked beyond the Secretary's justification for the question and found pretext.[302] This approach exhibited a significantly non-deferential independent judicial review.

An important aspect of any substantial change in judicial direction is the concept of *stare decisis*. With *stare decisis*, case decisions generally follow past decisions. This process tends to limit change. The question of following past decisions was addressed in several cases in the 2018 Term with mixed results. For example, *stare decisis* was a prominent issue in both the *Gamble* and *Knick* cases as well as a factor in *Kisor*. In *Gamble*, a 7-2 majority of the Court rejected a call to reject the line of previous cases that relied on the "dual sovereigns" doctrine to allow prosecutions for the same acts at the federal and state level.[303] Also, in *Kisor*, a majority of the Court followed—for the time being—*stare decisis* to uphold a modified *Auer* deference. On the other hand, in *Knick*'s 5-4 decision, the majority, consisting of the Chief Justice and Justices Alito, Gorsuch, Thomas, and Kavanaugh, overruled long-standing prior decisions regarding the procedure for bringing a Fifth Amendment Takings Clause case.[304] The dissenters, Justices Kagan, Breyer, Ginsburg, and Sotomayor would have followed precedent.

As noted, *supra*,[305] the concept of delegation is a key aspect of the justification for agency authority. In the *Gundy* case, this concept was directly challenged.[306] In a 5-3 decision, Justices Kagan, Ginsburg, Breyer, Sotomayor, and Alito upheld SORNA's delegations to the Attorney General regarding pre-Act sex offenders by relying on inferred intelligible principles and a long history of prior decisions.[307] Justice Alito concurred only because of *stare decisis*.[308] The dissenters, the Chief Justice, Gorsuch, and Thomas, decried such broad delegation and judicial abdication.[309]

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[301] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2560 (2019).

[302] *Id.*

[303] Gamble v. United States, 139 S. Ct. 1960, 1963, 1980 (2019).

[304] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2167, 2179 (2019).

[305] Jaffe, *supra* note 234, at 360.

[306] Gundy v. United States, 139 S. Ct. 2121, 2122 (2019).

[307] *Id.* at 2121, 2129–30.

[308] *Id.* at 2130–31.

[309] *Id.* at 2131.

And, finally, in the *Kisor* case, the judicial cousin to *Chevron* deference—that is, *Auer* deference—was challenged.[310] A divided Court refined and upheld *Auer* deference.[311] Justice Gorsuch expressed doubts about *Auer* deference and whether *stare decisis* was enough to keep it viable.[312] And, while *Auer* was upheld, the case was remanded to determine whether the deference would apply under the new refinements.[313] Many see the *Kisor* case as a step along the way, but not necessarily a precursor, to a future ruling on the *Chevron* deference.[314]

It has only been three years since Circuit Judge Janice Rodgers Brown challenged the doctrine of judicial deference to agency interpretations and called for an Article III renaissance. Judge Brown called for a new judicial independence and a return to the jurisprudence of the *Lochner*-New Deal Era. Three years is not a long time in the development of the law. Since Judge Brown's call for a renaissance, the Supreme Court has been reconstituted. Perhaps her renaissance is upon us. Change seems in the air. However, the 2018 Term indicates that, at least for the near term, any renaissance will not necessarily be abrupt, but perhaps somewhat incremental. After all, the swing from Justice Miller's judicial deference review in the *Slaughterhouse Cases* to Justice Peckham's judicial independence review in *Lochner* took 32 years. Professor Ronald Levin of the Washington University College of Law foresees an evolution in Supreme Court administrative law jurisprudence.[315] Perhaps he is correct. Another possibility is for an impending Article III renaissance to be a revival rather than an evolution—a revival of the judicial independence of the *Lochner*-New Deal Era.

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[310] Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

[311] *Id.*

[312] *Id.* at 2425 (Gorsuch, J., concurring).

[313] *Id.* at 2424 (majority opinion).

[314] *See, e.g.*, Martin & Nightengale, supra note 270 ("Chief Justice Roberts also strongly signaled that while he voted to save *Auer* for now, he holds no such sentiment for *Chevron* deference . . . ."); Steven D. Schwinn, *Auer Deference, Limited, Hangs On (But Chevron May Soon Go)*, CONST. L. PROF BLOG (June 26, 2019), https://lawprofessors.typepad.com/conlaw/2019/06/auer-deference-limited-hangs-on-but-chevron-may-go.html ("[I]t's next on the chopping block."); Levin, *supra* note 280 ("*Kisor* raises questions about the continued viability of *Chevron*[.]").

[315] Levin, *supra* note 280.