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The Cobra Effect: *Kisor*, Roberts, and the Law of Unintended Consequences

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**THE COBRA EFFECT: *KISOR*, ROBERTS, AND THE LAW
OF UNINTENDED CONSEQUENCES**

*By Patrick Warczak, Jr. **

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* Patrick Warczak is a J.D. Candidate at The University of Akron School of Law, December 2021. While my name appears in the by-line, this note is the product of contributions from many people to whom I must extend profound appreciation. Thank you to my advisor, Professor Richard Lavoie, for his guidance and, especially, for the offhand comment he made that was the genesis of this piece. This note exists because of it. Thank you to former Akron Law Professor, Elizabeth Shaver, who set very high standards in our first-year legal writing class. My *writing* is better for it. Thank you to all the *Akron Law Review* editors, especially Rebekah Branham and Matthew Modderman, for their suggestions and excellent editing along the way. This *note* is better for it. And finally, to my lovely wife, Tanneill, and my three amazing children, I thank you for allowing me to pursue my dream, certainly at your expense, and for your daily love and encouragement. *I* am surely better for it.

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I. INTRODUCTION

For years prior to the decision in *Kisor v. Wilkie*,¹ commentators had speculated that the Supreme Court would eventually reverse course on the principle of agency deference.² Yet in *Kisor* the Court elected not to overturn two earlier decisions that directed courts to defer to an agency’s reasonable interpretation of its own ambiguous rule.³ How did the Court come to a decision that seemed to go against all expectations? Answering this question ultimately reveals the following: the decision in *Kisor* represents a striking illustration of the law of unintended consequences at work—a principle often referred to as the *cobra effect*.⁴

Any affirmative action to resolve a problem that results in making the problem worse is said to illustrate the cobra effect.⁵ The phrase has its roots in colonial India; it was coined after the British government put a bounty on dead cobras in order to rid the capital city of its growing snake problem. In response, the citizens of Delhi began breeding cobras to earn the reward and released them after the government scrapped the offer.

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

2. See *Standard of Review—Deference to Administrative Agencies*, 34 No. 8 FED. LITIGATOR (Thomson Reuters, Toronto, Ont., Can., Aug. 2019), at NL 7 (“[T]wo flavors of judicial deference to agency interpretations—*Auer* deference for agency interpretations of the agency’s regulations and *Chevron* deference for agency interpretations of the statutes directing the agency to develop regulations—have drawn substantial criticism in recent years, with calls for both to be overturned.”).

3. *Kisor*, 139 S. Ct. at 2424.

4. Stevie Borrello, *The Cobra Effect*, QUARTZ WEEKLY OBSESSION (Oct. 11, 2019), <https://qz.com/emails/quartz-obsession/1726565/> [<https://perma.cc/T7N4-R6YC>].

5. See, e.g., Antony Davies & James R. Harrigan, *The Cobra Effect: Lessons in Unintended Consequences*, FOUND. FOR ECON. EDUC. (Sept. 6, 2019), <https://fee.org/articles/the-cobra-effect-lessons-in-unintended-consequences/> [<https://perma.cc/32ZM-2PRX>]. The term “cobra effect” was likely first introduced to describe this phenomenon by German economist Horst Siebert in his book, *Der Kobra-Effekt*. See generally HORST SIEBERT, *DER KOBRA-EFFEKT: WIE MAN IRRWEGE DER WIRTSCHAFTSPOLITIK VERMEIDET* (2001); Stephen J. Dunbar, *The Cobra Effect*, FREAKONOMICS (Oct. 11, 2012, 9:28 AM), <https://freakonomics.com/podcast/the-cobra-effect-a-new-freakonomics-radio-podcast/> [<https://perma.cc/MZF5-XGSW>] (describing “the Cobra Effect” as “a term popularized by the late German economist Horst Siebert”); Borrello, *supra* note 4 (explaining that the Cobra Effect was “[c]oined by German economist Horst Siebert in his 2001 book of the same name . . .”).

This left the city with more cobras than existed before the bounty.⁶ And so it was with the *Kisor* decision: the unintended consequence of Chief Justice John Roberts's well-meaning efforts to protect the Court's institutional reputation.

Courts have accorded deference to agency interpretations of statutes and regulations for decades, following the 1945 decision in *Bowles v. Seminole Rock*⁷ and 35 years later with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸ The two principles of deference are markedly different. Under *Chevron*, “a court must give effect to an agency’s . . . reasonable interpretation of an ambiguous statute,”⁹ while *Seminole Rock* deference requires the court to defer to “an agency’s interpretation of its own regulation.”¹⁰ The Supreme Court reaffirmed and expanded *Seminole Rock* in 1997 in *Auer v. Robbins*,¹¹ and the principle of deference it established has been referred to as “*Auer* deference” ever since.¹²

In the years following *Auer*, the Court has given every indication that time was running out on agency deference, particularly *Auer* deference.¹³ Conservative members of the Court, such as Justices Scalia and Thomas, have been particularly critical of all forms of agency deference in the last

6. This story is available from multiple sources. *See, e.g.*, LESLIE H. BRICKMAN, PREPARING THE 21ST CENTURY CHURCH 326–27 (2002); Davies & Harrigan, *supra* note 5; Shawn Langlois, *The “Cobra Effect” Will Have a “Disastrous and Unimaginable” Impact on the Market*, *Wall Street Vet Warns*, MARKETWATCH (July 25, 2020, 8:10 AM), <https://www.marketwatch.com/story/the-cobra-effect-will-have-a-disastrous-and-unimaginable-impact-on-the-market-wall-street-vet-warns-2020-07-22> [https://perma.cc/S54G-5W8X].

7. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

8. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

9. *Christensen v. Harris County*, 529 U.S. 576, 586–87 (2000).

10. *Id.* at 588.

11. *See generally* *Auer v. Robbins*, 519 U.S. 452 (1997); *see also* Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After Seminole Rock and Auer*, 42 HARV. J.L. & PUB. POL’Y 625, 635 (2019) (“The Court not only reaffirmed *Seminole Rock* in 1997 in *Auer v. Robbins*, but also applied the deference rule well beyond the original limited context of *Seminole Rock*.”).

12. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019) (“Before the doctrine was called *Auer* deference, it was called *Seminole Rock* deference . . .”).

13. *See Standard of Review – Deference to Administrative Agencies*, *supra* note 2; Adam Liptak, *Limiting Agency Power, a Goal of the Right, Gets Supreme Court Test*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/us/politics/supreme-court-agency-power.html> [https://perma.cc/4N4D-AXFQ] (explaining that *Seminole Rock* and *Auer* “have been the subject of much criticism, and several justices have urged the Supreme Court to revisit them”); Christopher Walker, *Judge Kavanaugh on Administrative Law and Separation of Powers*, SCOTUSBLOG (July 26, 2018, 2:55 PM), <https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/> [https://perma.cc/R7MX-FXH2] (“In recent years, there has been a growing call (mainly from those right-of-center) to eliminate — or at least narrow — administrative law’s judicial-deference doctrines regarding federal agency interpretations of law.”).

twenty years.¹⁴ This attitude among the justices reflects the perspective of the conservative legal community at large that administrative agencies have too much power.¹⁵ Justice Scalia, who originally penned the opinion in *Auer*, would eventually become one of its harshest critics.¹⁶ While continuing to endorse *Chevron* deference to the end, over time Scalia's support became "more nuanced and laced with express concern."¹⁷ He argued that it was inappropriate for the courts to abdicate to an agency the judiciary's authority of interpretation, leaving this function to an executive branch agency and thereby raising separation-of-powers concerns.¹⁸ Justice Thomas went further, referring to *Auer* deference as "unconstitutional,"¹⁹ while Justice Kavanaugh indicated his distaste for *Auer* even before joining the Court in 2018.²⁰ Meanwhile, Justice

14. See Robert V. Percival, *Despite Attacks on Judicial Deference, Reports of Auer's Demise are Premature*, 48 No. 4 TRENDS (A.B.A. Sec. of Env't, Energy and Resources, Chi., Ill.), March/April, 2017, at 5–6 ("The late Justice Antonin Scalia, joined by Justice Clarence Thomas, campaigned against a . . . form of judicial deference known as *Seminole Rock* or *Auer* deference . . .").

15. See generally Elizabeth Slattery, *Who Will Regulate the Regulators?* 3 (Heritage Found., Legal Memorandum No. 153, May 7, 2015), <https://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and> [<https://perma.cc/2K9Y-PMRA>] (describing the expansive role of administrative agencies, and the "massive amounts of power" they wield, "with little oversight," as amounting to "precisely the accumulation of power that Madison feared"); see also Nicholas Bagley, *Most of Government is Unconstitutional*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html> [<https://perma.cc/7GRZ-PG89>] ("[P]owerful agencies have long generated anxiety among conservatives.").

16. See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring) (explaining that *Auer* deference gives agencies too much power, giving them an "exemption from notice-and-comment rulemaking"); *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part) (asserting, in answer to the respondent's request that the Court reconsider *Auer*, "I believe that it is time to do so").

17. David Tarrien, *The Legacy of Justice Scalia: Liberal Lion? An Examination of Chevron Deference, Net Neutrality, and Possible Outcomes of a Supreme Court Decision on the Federal Communication Commission's Open Internet Order*, 17 TEX. TECH. ADMIN. L.J. 233, 245 (2016).

18. *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part) (explaining that any efficiency benefit derived from *Auer* deference "cannot justify a rule that . . . contravenes one of the great rules of separate of powers: He who writes the law must not adjudge its violation.").

19. *Perez*, 575 U.S. at 112 (Thomas, J., concurring) (expressing concern that *Auer* deference, by allowing agencies to interpret their own rules, "effects a transfer of the judicial power to an executive agency [that] raises constitutional concerns").

20. See The C. Boyden Gray Center, *Keynote Address: Justice Scalia and Deference*, VIMEO at 18:33 (June 2, 2016), <https://vimeo.com/169758593> [<https://perma.cc/BC35-SY3J>] (Hon. Brett Kavanaugh, D.C. Cir., describing Justice Scalia's view that *Auer* deference was "a dangerous permission slip for the arrogation of power" and explaining that there are "huge practical consequences for individual liberty when the law writer is also the law interpreter").

Gorsuch, though not addressing *Auer* directly, has expressed opposition to agency deference in the form of *Chevron* deference.²¹

Chief Justice John Roberts was perhaps the most reserved among the conservative wing of the Court in his criticism of agency deference.²² Yet, in a 2013 concurring opinion, he too suggested that *Auer* and *Seminole Rock* warranted review.²³ The Court, he wrote, “is now aware that there is some interest in reconsidering those cases.”²⁴ More to the point, he suggested that *Auer* deference faced an uncertain future, asserting that “it may be appropriate to reconsider that principle in an appropriate case.”²⁵

That “appropriate case” arguably came in 2019 in the form of *Kisor*. But the Court in *Kisor* left *Auer* deference intact, while significantly restricting its applicability.²⁶ Technically, *Kisor* was a unanimous decision, with all nine justices agreeing that the case should be sent down to the lower court for reconsideration.²⁷ But the justices split five to four on the reasoning, with the majority holding that a court’s deference to an agency’s interpretation under *Auer* was warranted only after “exhaust[ing] all the ‘traditional tools’ of construction.”²⁸

Beyond the principle of agency deference, there was much more at stake in *Kisor*. First, there was the principle of stare decisis. Had the Court overturned *Auer* (and *Seminole Rock* with it), *Kisor* would have represented the fourth case in its last two terms in which the Court overturned well-settled law.²⁹ Writing for the majority in *Kisor*, Justice Kagan asserted that stare decisis was a significant hurdle to overturning *Auer*.³⁰ Doing so, she argued, would require the Court “to overrule not a

21. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) (suggesting that *without* the principle of *Chevron* deference, “courts would then fulfill their duty to exercise their independent judgment about what the law is”).

22. See Matthew C. Turk & Karen E. Woody, *Justice Kavanaugh, Lorenzo v. SEC, and the Post-Kennedy Supreme Court*, 71 ADMIN. L. REV. 193, 247 (2019) (describing Chief Justice Roberts as a member of a “soft anti-*Chevron* camp”: those justices who express their opinions opposing *Chevron* deference with a “soft” voice, in contrast with the others, such as Justice Scalia, who argued against *Chevron* deference with a “loud” voice).

23. *Decker*, 568 U.S. at 615–16 (Roberts, C.J., concurring).

24. *Id.* at 616.

25. *Id.* at 615.

26. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

27. *Id.* at 2407. See also *id.* at 2423 (“[T]he Federal Circuit jumped the gun in declaring the regulation ambiguous . . .”).

28. *Id.* at 2415.

29. See *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019); *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

30. *Kisor*, 139 S. Ct. at 2418.

single case, but a ‘long line of precedents’—each one reaffirming the rest and going back 75 years or more.”³¹

For all the disdain several justices had previously expressed for *Auer* deference, as well as *Chevron* deference, the attention paid to stare decisis in *Kisor* reflected a second, perhaps more fundamental issue at stake: the reputation, credibility, and legitimacy of the Court as an institution. Evidence shows increased scrutiny of the Court in the few years leading up to *Kisor*,³² while public approval of the Court had been declining.³³ Disagreements among the justices, even highly contentious ones, are nothing new. But events *outside* the Court put the Court and its proceedings in a political context that may have adversely affected public perceptions of the Court’s institutional legitimacy.³⁴ Two obvious examples include the 2016 fight between the Republican Congress and President Obama over Supreme Court nominee Merrick Garland, and the highly divisive confirmation hearings of Justice Kavanaugh in 2018, complete with allegations of sexual misconduct and political malfeasance.³⁵

The *Kisor* decision also draws attention to the ability of the Chief Justice to impact the Court’s proceedings and influence its reputation. It is the Chief Justice, after all, who has traditionally borne the ultimate responsibility for managing and cultivating the integrity of the Supreme Court in historical, institutional, and even political contexts.³⁶ Chief Justice Roberts is no exception, expressing on numerous occasions his concern for the Court’s reputation and a willingness to act for its

31. *Id.* at 2422.

32. Henry Gass, *John Roberts’s Mission Impossible for the Supreme Court*, CHRISTIAN SCI. MONITOR (Nov. 16, 2016), <https://www.csmonitor.com/USA/Justice/2016/1116/John-Roberts-s-mission-impossible-for-the-Supreme-Court> [<https://perma.cc/XL42-UWDZ>].

33. *In Depth: Topics A to Z, Supreme Court*, GALLUP NEWS, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/URG4-8YJR>]. (The question asked was, “Do you approve or disapprove of the way the Supreme Court is handling its job?”).

34. See Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 36 (2012).

35. Michael Tomasky, *The Supreme Court’s Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html> [<https://perma.cc/XZ7T-M2B8>] (referring to the Senate’s failure to vote on the nomination of Judge Merrick Garland as “breaking the rules;” the fact that Justice Gorsuch was the first justice nominated by a president who had not won the popular vote; that Justice Kavanaugh’s confirmation was marred by allegations of sexual misconduct; and multiple justices have now been confirmed by legislators representing minority support).

36. Benjamin Pomerance, *Center of Order: Chief Justice John Roberts and the Coming Struggle for a Respected Supreme Court*, 82 ALB. L. REV. 449, 463–64 (2019) (explaining the role of the Chief Justice as “a kind of gatekeeper of the institution’s reputation”). See also Peter G. Fish, *The Office of the Chief Justice of the United States*, in THE OFFICE OF THE CHIEF JUSTICE 59 (1984) (“Chiefs have long sought to protect the status and political independence of their Court.”).

preservation.³⁷ For example, Roberts has taken the unusual step of directly responding to external criticism directed at the Court. For example, he has responded to sharp comments from both President Obama³⁸ and President Trump³⁹ on separate occasions. Roberts also appears to be willing to put aside his inclinations in particular cases, voting with the more liberal justices to steer the Court into calmer waters.⁴⁰

Understood in this context, the opinion in *Kisor* may not be entirely surprising after all. In fact, it is perhaps entirely *unsurprising* that the decisive fifth vote in *Kisor*—the vote that kept *Auer* intact—came from Roberts, joining his more liberal colleagues.⁴¹ The *Kisor* result represented a win for stare decisis. But the decision ultimately did not represent a victory for the Court (or the lower courts, for that matter), as the version of *Auer* deference left behind following *Kisor* is weak, perhaps even untenable.⁴²

Thus, *Kisor* ultimately represents a high-stakes example of the cobra effect. By leaving *Auer* intact, but in a weakened state, the Court—and Roberts specifically—likely did more harm than good to the Court’s institutional reputation. Stability in the law comes not just from reliance on precedent. It comes from providing clear, decisive direction to the lower courts. It springs from overturning bad law. And it arises from the Court’s steadfast authority over the interpretation of the law. The outcome in *Kisor* may have also weakened all of these.

37. See JOAN BISKUPIC, *THE CHIEF* 9 (2019) (“Roberts understood that public regard was crucial to the Supreme Court’s stature in American life. He had studied the reputations of past Chief Justices . . .”).

38. David G. Savage, *Chief Justice Unsettled by Obama’s Criticism of Supreme Court*, L.A. TIMES (Mar. 10, 2010), <https://www.latimes.com/archives/la-xpm-2010-mar-10-la-na-roberts-speech10-2010mar10-story.html> [<https://perma.cc/C2T4-7BTE>].

39. Robert Barnes, *Rebuking Trump’s Criticism of ‘Obama Judge,’ Chief Justice Roberts Defends Judiciary as ‘Independent.’* WASH. POST (Nov. 21, 2018), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html?noredirect=on [<https://perma.cc/4R3G-XR93>].

40. BISKUPIC, *supra* note 37, at 10 (“Yet Roberts has at times set aside his ideological and political interests on behalf of his commitments to the Court’s institutional reputation and his own public image.”).

41. Adam Liptak, *Supreme Court Limits Agency Power, a Goal of the Right*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/politics/supreme-court-agency-power.html> [<https://perma.cc/7WCS-KNTP>] (“[T]he justices [in *Kisor*] largely split 5 to 4 on the reasoning, with Chief Justice John G. Roberts Jr. joining the court’s four-member liberal wing to cast the decisive vote to retain the precedents.”).

42. See, e.g., Eric S. Schmitt, *Symposium: Kisor v. Wilkie – A Swing and a Miss*, SCOTUSBLOG (June 27, 2019, 12:46 PM), <https://www.scotusblog.com/2019/06/symposium-kisor-v-wilkie-a-swing-and-a-miss/> [<https://perma.cc/G3GC-JX76>].

The following note will address these issues in three parts. First, Part II will provide a background of *Kisor* in the context of *Auer* deference, with a closer look at why the Court was inclined to overturn *Auer*. Part III will provide a review of the recent cases in which the Court overturned precedents. This will include a discussion of the importance of stare decisis as a basic self-governing principle within the judicial branch.⁴³ Further, Part III will then explore evidence of Roberts’s perspective on stare decisis, the Court’s reputation, and the role of the Chief Justice. Finally, Part IV will present an analysis of why the Court ought to overturn *Auer*, clearly and decisively, at the next opportunity. It should do so both because it is the correct move jurisprudentially *and* because doing so will ultimately serve the Court’s institutional reputation more than deference to stare decisis would.

II. BACKGROUND: THE RISE AND ANTICIPATED FALL OF AUER DEFERENCE

A. Agency deference

Courts interpret the law. In doing so, judges often look to a variety of sources to aid them in determining the most proper reading of the Constitution, statute, ordinance, regulation, or contract—all of which can often be ambiguous or vague.⁴⁴ The federal agency responsible for the administration of a given statute or regulation has served as one such source for federal courts since 1944, with the holding in *Skidmore v. Swift & Co.*⁴⁵ Since *Skidmore*, in the face of unyielding ambiguity in the text of laws in different cases, the Supreme Court has called for varying levels of deference to the views of the relevant administrative agencies. Three doctrines of agency deference commonly invoked by the courts are relevant to the issue at stake here. They are *Skidmore* deference, *Chevron* deference, and *Seminole Rock* deference, which later became *Auer* deference.⁴⁶ This subsection will proceed to review each.

43. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888).

44. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410 (2019) (“Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous.”).

45. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

46. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1099 (2008) (explaining that “the Court’s deference practice functions along a continuum,” and describing *Skidmore* deference as falling on the less deferential end, with *Chevron* deference and *Seminole Rock* deference at the more deferential end of that continuum). See also Andrew Hessick, *The Future of Administrative Deference*, 41 CAMPBELL L. REV. 421, 422 (2019) (explaining that with *Chevron* and *Auer*, “courts have two doctrines of binding deference,” while under *Skidmore* deference

1. *Skidmore* Deference

Skidmore was one of many labor-related cases to come to the Court in the wake of New Deal legislation of the late 1930s, which also saw the growth of administrative agencies.⁴⁷ In *Skidmore*, employees of a meatpacking plant sued for overtime wages under the Fair Labor Standards Act of 1938 (“FLSA” or “the Act”). At issue was the interpretation of the term “working time” within the overtime provisions of the Act. The employees worked in the fire hall at the company’s plant. In this role, they worked 7:00 a.m. to 3:30 p.m., Monday through Friday, but also spent up to four nights each week “on call” (either on-premise or “within hailing distance”) to answer alarms. The question was whether the time spent “on call” was “working time” under the Act such that those hours would count toward the employees’ overtime calculations.⁴⁸

In deriving its interpretation of “working time,” the Court relied in part on the views of the FLSA Administrator.⁴⁹ The Administrator had addressed this very issue in an edition of an interpretative bulletin he occasionally published to serve as a guide to employers and employees on how the agency would apply the law in different circumstances. The Court noted that the Administrator’s conclusions were not authoritative, but were “entitled to respect.”⁵⁰

On the one hand, the *Skidmore* Court recognized that the Administrator’s findings “are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact.”⁵¹ As such, the Administrator is not fulfilling a truly judicial role, and so the conclusions he draws are not conclusive and binding on a district court “as an authoritative pronouncement of a higher court might [be].”⁵² At the same time, the Court also recognized that the Administrator’s representations and applications of the Act reflect his efforts in his official duties, with the benefit of more “specialized experience, broader investigations and information” than a judge would have.⁵³ Ultimately, the Court held that

“agency interpretations of the statutes they administer and of the regulations they promulgate are entitled to great weight—but they are not binding”).

47. See RICHARD L. PANCELLE, JR., *THE SUPREME COURT IN A SEPARATION OF POWERS SYSTEM* 111 (2015) (describing *Skidmore* as “[t]he first important New Deal era standard” that played a “fundamental role of the administrative state”).

48. *Skidmore*, 323 U.S. at 135–36.

49. *Id.* at 137–38.

50. *Id.* at 140.

51. *Id.* at 139.

52. *Id.* at 139.

53. *Id.*

“[t]he fact that the Administrator’s policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect.”⁵⁴ In other words, deference is due to the Administrator’s interpretation as input to the judge’s ultimate interpretive role.

With this, the Court established a new rule of law that would be known as *Skidmore* deference. Under this doctrine, federal courts are to give an appropriate level of deference to an agency’s interpretation of a statute it administers, as one of many sources of interpretation reflecting “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁵⁵ Under *Skidmore*, the agency’s interpretation is *persuasive, not controlling* on courts. The *Skidmore* Court further stated that the level of deference afforded the agency would depend on a variety of factors that reflect the soundness of the agency’s reasoning.⁵⁶

2. *Chevron* Deference

The Supreme Court’s 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁵⁷ established the principle of *Chevron* deference. Under the doctrine of *Chevron* deference, federal courts must defer to a federal agency’s construction of a statute the agency administers when the statutory language is ambiguous, so long as the agency’s interpretation is based upon a “permissible construction of the statute.”⁵⁸ In *Chevron*, the Natural Resource Defense Council challenged an EPA regulation that the agency had issued in 1981 for purposes of implementing the 1977 amendments to the Clean Air Act. One provision of the regulation, which addressed “stationary sources” of air pollution, included a definition of “stationary source” that would allow states to treat *all* pollution sources within an industrial group as one source.⁵⁹ The Court

54. *Id.* at 139–40.

55. *Id.* at 140.

56. *Id.* (“The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . .”). Descriptions of how *Skidmore* deference is to be applied have been provided by the Court in more recent cases as well. *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (explaining that agency interpretations are “entitled to respect . . . but only to the extent that those interpretations have the power to persuade” (internal punctuation removed)); *Doe v. Leavitt*, 552 F.3d 75, 81 (1st Cir. 2009) (describing the level of deference to afford an agency’s interpretation as based upon a “sliding scale”).

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

58. *Id.* at 843.

59. Under the 1977 amendments to the Act, states that have not met the agency’s air quality standards had to meet certain requirements. One of these requirements was the establishment of a permit program regulating “new or modified major stationary sources” of air pollution within the

of Appeals for the D.C. Circuit set aside the agency's regulation, and the Supreme Court reversed, holding that the EPA's interpretation of stationary source was permissible.⁶⁰ Consistent with the Court's view as expressed in *Skidmore*, the Court here explained that such deference to the agency's interpretation was appropriate because "[j]udges are not experts in the field, and are not part of either political branch of the Government."⁶¹

3. *Seminole Rock* or *Auer* Deference

Just a year after *Skidmore*, the Court decided *Bowles v. Seminole Rock & Sand Co.*, which expanded on *Skidmore* in two critical ways.⁶² First, unlike *Skidmore* or *Chevron*, the principle of *Seminole Rock* deference (and *Auer* deference with it) applies in cases where an agency regulation, rather than a statute, is at issue.⁶³ Second, *Seminole Rock* directed courts to yield to the agency's interpretation of an ambiguous rule, such that the agency's interpretation is authoritative, not merely persuasive. Only when the agency's interpretation is "plainly erroneous or inconsistent with the regulation" should the court not give it "controlling weight."⁶⁴

Auer deference arose following the case of *Auer v. Robbins* in 1997.⁶⁵ It is not so much a stand-alone form of agency deference as a rebranded form of *Seminole Rock* deference.⁶⁶ As with a *Chevron* analysis, courts applying *Auer* must first determine whether the agency

state. For such stationary sources, a permit was to be issued only if the entity seeking the permit met specific, strict conditions. But by defining "stationary source" as it did in the ensuing 1981 regulation, states would be able to treat all pollution control devices in a single plant as if they were encased in a "bubble." A company could thus install or modify equipment in a plant without meeting the new source requirements, so long as doing so did not increase the total emissions from the plant as a whole. This gave businesses the flexibility to meet the requirements by offsetting increased emissions from one building by reducing them elsewhere within the same plant. *Chevron*, 467 U.S. at 837, 840–41. See also *Chevron, U.S.A. v. Natural Res. Def. Council*, U.S. DEP'T OF JUSTICE (May 14, 2015), <https://www.justice.gov/enrd/chevron-usa-v-natural-res-def-council> [<https://perma.cc/UT3R-MP76>].

60. *Chevron*, 467 U.S. at 866.

61. *Id.* at 865.

62. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

63. See Conor Clarke, *The Uneasy Case Against Auer and Seminole Rock*, 33 YALE L. & POL'Y REV. 175, 175 (describing *Chevron* deference as applying "when Congress leaves an ambiguous gap in a piece of legislation," and *Auer* deference as that which "applies to agencies' interpretations of their own regulations") (emphasis removed).

64. *Bowles*, 325 U.S. at 414, 417–18.

65. *Auer v. Robbins*, 519 U.S. 452 (1997).

66. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019) ("For the past 20 or so years, we have referred to that doctrine as *Auer* deference But the name is something of a misnomer. Before the doctrine was called *Auer* deference, it was called *Seminole Rock* deference.").

rule is clear or ambiguous.⁶⁷ As *Auer* deference stood prior to the *Kisor* decision, if a court determined that a regulation was ambiguous, the agency's interpretation was binding as long as it was reasonable.⁶⁸ While *Auer* is perhaps less familiar than *Chevron*, it is no less significant. As Chief Justice Roberts has alluded, *Auer* goes "to the heart of administrative law," and applications of the doctrine "arise as a matter of course on a regular basis."⁶⁹

In *Auer*, the St. Louis Board of Police Commissioners denied overtime pay to a group of the city's police sergeants, under an exemption in the FLSA. The Secretary of Labor filed an amicus brief in which he provided an interpretation of the statutory exemption.⁷⁰ The Court held, consistent with *Seminole Rock*, that an interpretation of the statutory exemption provided by the Secretary of Labor, whose department administered the FLSA, was "a creature of the Secretary's own regulations," and thus "controlling unless 'plainly erroneous or inconsistent with the regulation.'"⁷¹

The very notion of deference in the context of a court decision is significant. *Black's Law Dictionary* defines deference as "showing respect for somebody or something" and "a polite or respectful attitude."⁷² This definition may accurately describe *Skidmore* deference,⁷³ but both *Chevron* and *Auer* deference may be better described as the courts bowing to the authority of another branch of government.⁷⁴ That courts relinquish power to another branch is likely one reason why agency deference has been described as "quite possibly the single most important concept in all

67. *Kisor*, 139 S. Ct. at 2414 (describing how under *Auer*, "the possibility of deference can arise only if a regulation is genuinely ambiguous"). See also Clarke, *supra* note 63, at 190 ("[B]efore the Court asks whether the agency's interpretation is plainly erroneous, it asks whether the regulation in question is actually ambiguous.").

68. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

69. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring).

70. *Auer*, 519 U.S. at 454–55.

71. *Id.* at 461 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

72. *Deference*, BLACK'S LAW DICTIONARY (10th ed. 2014).

73. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that the "rulings, interpretations and opinions" of the agency have the "power to persuade, if lacking power to control").

74. Generally, with either *Chevron* or *Auer* deference, the court is to give an administrative agency's reasonable interpretation controlling weight. See Stephen M. DeGenaro, Note, *Why Should We Care About an Agency's Special Insight?* 89 NOTRE DAME L. REV. 909, 909 (2013) (explaining that under *Chevron* "an agency's permissible construction of an ambiguous statute is to be given controlling weight" and "the Supreme Court's holding in . . . *Seminole Rock* . . . gave controlling weight to an agency's reasonable interpretation of its own ambiguous regulation") (internal quotations omitted).

of legal thought.”⁷⁵ But while the agency’s interpretation is given controlling weight under both *Auer* and *Chevron*, these are not equivalent forms of deference, and the difference is significant. With *Auer* deference, “an agency serves as both the drafter and the interpreter of ambiguous regulations,” which empowers the agency to make the law and then control its interpretation, potentially undermining the authority of both Congress and the courts.⁷⁶

B. Kisor: the petitioner asked the Court to overturn Auer

In *Kisor v. Wilkie*, a Vietnam War veteran seeking retroactive disability benefits urged the Court to overturn *Auer*, and many observers seemed sure it would do so.⁷⁷ Instead, the Court upheld *Auer* but tightened the reins on its application by the courts.⁷⁸

James Kisor was a retired U.S. Marine whom the Department of Veterans Affairs (VA) had denied disability benefits dating back to 1982.⁷⁹ The VA reopened his case in 2006, at which time the department granted his benefits, but only from that date, not retroactively. An appeals board agreed with the decision, based on its interpretation of the agency rule governing such claims. The Court of Appeals for Veterans Claims affirmed the board’s decision. Applying *Auer* deference, the Federal Circuit also affirmed, concluding that the VA regulation was ambiguous, so the Board’s interpretation was controlling.⁸⁰

The Supreme Court granted certiorari for the specific purpose of deciding whether to overrule *Auer*.⁸¹ The Court unanimously agreed the

75. GARY LAWSON & GUY I. SEIDMAN, DEFERENCE: THE LEGAL CONCEPT AND THE LEGAL PRACTICE 3 (2019).

76. DeGenaro, *supra* note 74, at 911 (explaining that the key difference between *Chevron* deference and *Auer* deference is that with *Auer* deference “an agency serves as both the drafter and interpreter of ambiguous regulations”).

77. Clarke, *supra* note 63, at 175–76 (“The future of *Auer* is also in doubt. . . . [C]ommentators have chipped away at *Auer*’s foundations. . . . [and these] concerns have started to stir interest with the Supreme Court.”). See also Tom Lorenzen, Dan Wolff, & Sharmistha Das, *The Final Auer: Midnight Approaches for an Important Deference Doctrine*, TRENDS (A.B.A. Sec. of Env’t, Energy and Resources, Chi., Ill.) Mar. 8, 2019, https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/march-april-2019/the-final-auer/ [<https://perma.cc/5YN7-2PGM>] (“In *Kisor v. Wilkie*, the Supreme Court stands poised to banish *Auer* deference. . . . For Court watchers, it was just a matter of time.”).

78. See *Supreme Court Limits Rule That Requires Judges to Defer to Agencies*, THOMSON REUTERS TAX & ACCT. (July 1, 2019), <https://tax.thomsonreuters.com/news/supreme-court-limits-rule-that-requires-judges-to-defer-to-agencies/> [<https://perma.cc/ST7W-BFDP>].

79. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2409 (2019).

80. *Id.*

81. *Id.* at 2408 (“The only question presented here is whether we should overrule [*Auer* and *Seminole Rock*], discarding the deference they give to agencies.”).

case should be remanded to the lower court for reconsideration, admonishing the lower court for not working hard enough to interpret the meaning of the regulation.⁸² The opinion by Justice Kagan also explained that “the Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity. As we have explained, that is not always true. A court must assess whether the interpretation is of the sort that Congress would want to receive deference.”⁸³

The Court in *Kisor* went further, prescribing a strict five-step process of analysis for courts considering *Auer* deference in a given case. First, *Auer* deference applies only after the court has established that the regulation in question is “genuinely ambiguous.”⁸⁴ Second, if there is ambiguity, the agency’s interpretation is valid *only if it is reasonable*.⁸⁵ Third, the agency’s interpretation must reflect the agency’s official statement regarding the statute and its interpretation; it cannot be merely a generalized ad hoc statement.⁸⁶ Fourth, the agency’s interpretation must arise from the agency’s expertise on the subject matter.⁸⁷ Fifth, and finally, the interpretation must reflect “fair and considered judgment” of the issue⁸⁸ and ought not to represent a new interpretation or one that conflicts with a prior one.⁸⁹

The decision in *Kisor* was unanimous, but the opinion was not. On the issue of whether to overturn *Auer*, the Court voted five to four against, with Roberts joining Justices Sotomayor, Kagan, Ginsburg, and Breyer to form the majority.⁹⁰ In the opinion, written by Kagan, the Court noted “stare decisis cuts strongly against” overruling *Auer* deference.⁹¹

C. *Why Auer’s days appeared to be numbered*

Individual members of the Supreme Court have made statements, both in court (by way of judicial opinions, often in dissent) and out of

82. *Id.* at 2423–24 (“[T]he Federal Circuit jumped the gun in declaring the regulation ambiguous. . . . Rather, the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning.”).

83. *Id.* at 2424.

84. *Id.* at 2415 (“[A] court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.”).

85. *Id.* at 2415–16.

86. *Id.* at 2421.

87. *Id.* at 2417.

88. *Id.* at 2417.

89. *Id.* at 2418.

90. *Id.* at 2404.

91. *Id.* at 2422.

court (in public presentations or interviews), which have road-mapped a course to overturning *Auer*, if not *Chevron*.⁹² Their arguments are persuasive.

The primary argument in favor of overturning *Auer*, and thus in opposition to the principle of *Auer* deference specifically and agency deference in general, is that it “offends the core principle of the separation of powers.”⁹³ *Auer* in particular is held to be “extremely deferential,” removing a court’s discretion and, with it, the court’s interpretive authority over ambiguity in regulatory rules.⁹⁴ *Auer*, it is argued, compels the court to hand over its judicial role to the agency that promulgated the regulation in question.⁹⁵ Further, because *Auer* deference leads courts to turn over interpretive authority to the agencies, those agencies are encouraged to write rules *with* ambiguity, so they can later manipulate the meaning toward whatever end serves them at that time.⁹⁶

Although Justice Scalia is no longer a part of the Court, his attitudes about *Auer* deference helped to shape the current argument, both for and against it. To be sure, Scalia was initially a proponent of *Auer* deference. He wrote the majority opinion in the 1997 case that gave it its name.⁹⁷ But starting in 2011, with *Talk America v. Michigan Bell Telephone Co.*, Scalia would express discomfort with the very notion of *Auer* deference, even to the point of questioning why the Court (why *he*) had ever considered it a good idea.⁹⁸ In *Talk America*, writing in a concurring opinion, he referred to *Auer* deference, noting that he had “in the past uncritically accepted that rule” but had since “become increasingly doubtful of its validity.”⁹⁹ More to the point, Scalia stated that when the Court is eventually asked to reconsider *Auer* he would “be receptive to

92. See *infra* notes 93–113.

93. Cynthia Barmore, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 817 (2015).

94. *Alhambra Hosp. v. Thompson*, 259 F.3d 1071, 1074 (9th Cir. 2001).

95. Barmore, *supra* note 93, at 817–18.

96. Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1461 (2011) (describing *Auer* deference as having “the perverse effect of undermining agencies’ incentives to adopt clear regulations . . .” because under *Auer*, an agency will know that when its rules are ambiguous “it will be able to control their subsequent interpretation”). See also *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 111–12 (2015) (Scalia, J., concurring) (explaining that giving deference to an agency allows that agency’s rules to live outside the boundaries of notice-and-comment, and noting that “there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means”).

97. *Auer v. Robbins*, 519 U.S. 452, 454 (1997).

98. *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring).

99. *Id.* at 68.

doing so.”¹⁰⁰ He would go on to make the case against *Auer* deference, and call for overturning it, in numerous subsequent cases.¹⁰¹

Justice Thomas has been the most critical of *Auer* deference, questioning its validity under the Constitution.¹⁰² In a concurring opinion in 2015, he wrote that *Auer* deference “raises constitutional concerns” because it “effects a transfer of the judicial power to an executive agency” and “undermines [the Court’s] obligation to provide a judicial check on the other branches.”¹⁰³

Justice Kavanaugh was a vocal critic of *Auer* deference while serving on the D.C. Circuit. In a 2016 speech, then-Judge Kavanaugh cited Scalia when he stated that “*Auer* violates a fundamental principle of separation of powers.”¹⁰⁴ Kavanaugh went on to directly assert his prediction that “*Auer* will someday be overruled and that Justice Scalia’s dissent in *Decker* will be the law of the land.”¹⁰⁵

Justice Gorsuch has also been a critic of agency deference in general, most notably addressing concerns about *Chevron* deference. Thus, he foreshadowed his dissent in *Kisor* while still serving on the Tenth Circuit Court in his concurring opinion in *Gutierrez-Brizuela v. Lynch*.¹⁰⁶ “Under any conception of our separation of powers,” Gorsuch wrote, “I would have thought powerful and centralized authorities like today’s administrative agencies would have warranted less deference from other branches, not more.”¹⁰⁷ Addressing the question directly he stated, “We managed to live with the administrative state before *Chevron*. We could do it again.”¹⁰⁸

During Gorsuch’s confirmation hearings before the Senate Judiciary Committee, Senator Orrin Hatch asked him to elaborate on his views regarding *Chevron* deference. In his response, echoing the Constitutional

100. *Id.* at 69.

101. *See Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616–17 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing with apparent dismay that the Court has applied *Auer* deference “[f]or decades, and for no good reason,” and that the time had come to overturn it); *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109, 111–12 (2015) (Scalia, J., concurring) (describing *Auer* as “an elaborate law of deference” that encourages agencies to “write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later,” which the Court can best address “by abandoning *Auer*”).

102. *See Percival*, *supra* note 14, at 5 (“Justice Thomas is the only current Justice who has declared *Auer* deference unconstitutional.”).

103. *Perez*, 575 U.S. at 112–13 (Thomas, J., concurring).

104. The C. Boyden Gray Center, *supra* note 20, at 18:19 (June 2, 2016).

105. *Id.* at 19:05.

106. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016).

107. *Id.* at 1155.

108. *Id.* at 1158.

concerns raised earlier by Thomas and Scalia, Gorsuch asked, “What about the separation of powers? I thought that judges were supposed to say what the law is.”¹⁰⁹

Prior to *Kisor*, the Chief Justice had also questioned the wisdom of *Auer* and other forms of agency deference, though certainly with less vigor than his fellow conservative justices.¹¹⁰ In *Decker*, in 2013, he had suggested that the issue warranted reconsideration.¹¹¹ That same year, in a different case, Roberts wrote a dissenting opinion in which he argued more forcefully in opposition to judicial deference to agencies. In *City of Arlington v. F.C.C.*, he asserted that “[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference.”¹¹² His concern, as expressed in that case, was about the risk of the growing administrative state, urging the Court to “not leave it to the agency to decide when it is in charge.”¹¹³

By the time the Court heard oral arguments for *Kisor* in early 2019, Thomas, Kavanaugh, and Gorsuch had firmly established their opposition to agency deference. The Chief Justice, too, had at least hinted that he had significant issues with it. Therefore, it would have been reasonable to believe that, with *Kisor*, the Court would finally overturn *Auer*.

III. STARE DECISIS AND THE COURT’S REPUTATION

Three cases over the 2017 and 2018 terms established stare decisis as something more than a jurisprudential doctrine for the Supreme Court. It became the Court’s lightning rod, internally and externally. Inside, stare decisis served to fracture the Court along apparently ideological lines.¹¹⁴

109. Christopher J. Walker, *Gorsuch on Chevron Deference, Round II*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 23, 2017), <http://yalejreg.com/nc/gorsuch-on-chevron-deference-round-ii/> [<https://perma.cc/5W98-9W8K>].

110. See Hessick, *supra* note 46, at 427 (“[T]he Chief Justice might think *Chevron* and *Auer* are bad ideas, but I doubt [he is] ready to declare them unconstitutional.”).

111. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring).

112. *City of Arlington, Texas v. F.C.C.*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting).

113. *Id.* at 327 (Roberts, C.J., dissenting). He also warned that “the growing power of the administrative state cannot be dismissed.” *Id.* at 315.

114. See Jonathan H. Adler, *Is This Still the Stare Decisis Court?*, REASON: VOLOKH CONSPIRACY (June 24, 2019, 9:31 AM), https://reason.com/2019/06/24/is-this-still-the-stare-decisis-court/?itm_source=parsely-api [<https://perma.cc/KG8Y-FUWW>] (noting that “Justice Elena Kagan’s sharp dissent in *Knick v. Township of Scott* [in 2019] raised the concern that the Court’s conservative majority is showing insufficient concern for prior precedent, as did Justice Breyer’s earlier dissent in *Franchise Tax Board v. Hyatt*.”); Henry Gass, *Overruled: Is Precedent in Danger at the Supreme Court?*, CHRISTIAN SCI. MONITOR (June 25, 2019), <https://www.csmonitor.com/USA/Justice/2019/0625/Overruled-Is-precedent-in-danger-at-the-Supreme-Court> [<https://perma.cc/73JV-UXKF>] (explaining that Supreme Court justices have long debated when to overturn precedent, and “with a reliably conservative five-justice majority, that debate has surged back to prominence”).

Externally, stare decisis (and the divided Court that resulted) drew considerable criticism upon the Court.¹¹⁵ For these reasons, stare decisis ultimately played a significant role in the outcome in *Kisor*.

A. *Benefits and drawbacks of stare decisis*

The term “stare decisis” is derived from *stare decisis et non quieta movere*, which means “stand by the thing decided and do not disturb the calm.”¹¹⁶ As a legal principle, stare decisis was imported as a feature of the English common law system.¹¹⁷ In 1788, describing his vision for the judiciary, Alexander Hamilton explained that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents”¹¹⁸ The Supreme Court expanded on this view, describing stare decisis as “a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’”¹¹⁹

In practice, stare decisis obliges courts to follow prior decisions in two directions: vertically and horizontally. Vertically, within a given jurisdiction, the decisions of higher courts legally control those of the courts below. Horizontally, stare decisis gives prior decisions authority, even controlling force, over subsequent decisions of that same court on the same legal question.¹²⁰

Generally, support for stare decisis derives from the numerous benefits it provides. First, it ensures stability, protecting reliance on

115. See, e.g., *So Long Stare Decisis*, ALLIANCE FOR JUSTICE: BLOG (Aug. 16, 2019), <https://www.afj.org/article/so-long-stare-decisis/> [<https://perma.cc/PFV7-8RGD>] (“We have every reason to worry that the Court’s five conservatives will continue to disregard decades of precedent to benefit themselves and their right-wing allies.”); Erwin Chemerinsky, *Does Precedent Matter to Conservative Justices on the Roberts Court?*, ABA JOURNAL (June 27, 2019, 6:00 AM), <https://www.abajournal.com/news/article/chemerinsky-precedent-matters-little-to-conservatives-on-the-roberts-court> [<https://perma.cc/Y97P-EUUX>] (“Recent decisions of the Roberts Court indicate that the five conservative justices overall will give little deference to precedents that they want to overrule.”).

116. Thomas G. Field III, *The Role of Stare Decisis in the Federal Court*, 9 FED. CIR. B.J. 203, 204 (1999) (quoting James C. Rehnquist, *The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 BOS. L. REV. 345, 346 (1986)).

117. See *id.* at 204–05.

118. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888).

119. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888)).

120. LIEF H. CARTER & THOMAS F. BURKE, *REASON IN LAW* 47 (9th ed. 2016).

judicial decisions as “settled law.”¹²¹ Such stability, in turn, promotes fairness, because like cases produce like decisions,¹²² and judicial efficiency, as courts relying on earlier decisions may decide the subsequent cases more quickly.¹²³ Finally, stare decisis “contributes to the actual and perceived integrity of the judicial process.”¹²⁴ Some, including the late Justice Brandeis, have even gone so far as to suggest that consistency in the law, based on stare decisis, is more important than getting the law “right.”¹²⁵

Arguments in opposition to stare decisis have generally focused on three primary criticisms. First, to the last point above, stare decisis urges

121. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, [and] fosters reliance on judicial decisions . . .”).

122. Michael Gentithes, *Precedent, Humility, and Justice*, 18 TEX. WESLEYAN L. REV. 835, 845–46 (2012) (“[A] strong theory of precedent is encapsulated by the intuitively appealing doctrine of treating like cases alike. At its heart, this view suggests that precedent is vital . . . to achieve consistency in adjudicatory outcomes Fairness seems to demand that claims that are identical in all respects other than the time they were raised be resolved the same way If a meaningful distinction between the cases is lacking, then it only seems fair that both claimants receive the same result.”).

123. See Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHL-KENT L. REV. 93, 108 (1989) (noting that stare decisis provides economic value to the legal system “because it lowers uncertainty and hence reduces transaction costs”); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921) (addressing the inefficiency that would result without stare decisis, and noting that “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him”).

124. *Payne*, 501 U.S. at 827. Also note that much has been made of stare decisis as a significant contributor to the integrity and reputation of the courts, particularly that of the Supreme Court. *E.g.*, Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis*, 60 U. PITT. L. REV. 89, 107 (1998) (“Stare decisis allows courts to strengthen their reputation by promoting the perception that decisions are consistent over time. Thus, not only fairness in fact, but the appearance of fairness, are advanced as rationales for the use of stare decisis.”); Leah Litman & Seth Davis, *A Momentous Change May be Upon the Supreme Court*, WASH. POST (June 26, 2019, 10:04 PM), <https://www.washingtonpost.com/opinions/2019/06/27/progressive-supreme-court-justices-are-sounding-warning-we-should-heed-it/> [<https://perma.cc/SP2P-SMF7>] (“The doctrine of stare decisis ensures stability in the law, protects private parties who rely on the law and helps preserve the court’s reputation as a nonpartisan — or at least not entirely partisan — institution.”). *But see* Ilya Shapiro, *How the Supreme Court Undermines its own Legitimacy*, WASH. EXAMINER (July 18, 2019, 11:00 PM), <https://www.washingtonexaminer.com/opinion/how-the-supreme-court-undermines-its-own-legitimacy> [<https://perma.cc/MP46-KGE4>] (describing how one’s view of stare decisis, among other factors, as impacting the legitimacy of the Court “now also parallels where you sit politically,” asking “is there any doubt that a progressive majority would act the same way toward conservative shibboleths?”).

125. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”).

that past wrong decisions remain in force,¹²⁶ which can then perpetuate through subsequent rulings based on the earlier wrong ones.¹²⁷ Second, stare decisis places all emphasis on prior *decisions*, not on prior *decision-making*.¹²⁸ As such, judges can “pick and choose” earlier holdings that provide the conclusion they seek in the present case, giving the judiciary the power to legislate from the bench.¹²⁹ Some have argued further that stare decisis, at least to some extent, subverts¹³⁰ the very role of the judge to “say what the law is.”¹³¹ Based on this perspective, stare decisis encourages a form of intellectual laziness among judges who can rely on precedent rather than embarking anew on a thorough legal analysis of a given case.¹³² Alternatively, this suggests that stare decisis puts judicial power in the hands of judges and justices of the past, which, according to Justices Scalia and Douglas, undercuts the current judge’s duty to the Constitution.¹³³ Third, and finally, reliance on past decisions restricts the

126. Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2040 (1996) (“[S]tare decisis sometimes requires perpetuating erroneous decisions in the name of consistency.”).

127. *Id.* at 2033–34 (“A single erroneous court decision, if followed, becomes two erroneous decisions, then three, and soon a ‘line’ of cases.”).

128. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) (“If precedent is seen as a rule directing a decisionmaker to take prior decisions into account, then it follows that a pure argument from precedent, unlike an argument from experience, depends only on the *results* of those decisions, and not on the validity of the reasons supporting those results.”).

129. See generally Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1743–45 (2013). See also Peters, *supra* note 125, at 2034 (“Courts may be adept at manipulating precedent to reach decisions they want to reach . . .”).

130. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 26 (1994). “This is the true import of Chief Justice Marshall’s oft-misunderstood injunction that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’ The court must decide the case in accordance with *law*, and a vital part of the judicial task is to determine whether a claimed source of law—even one that seems *prima facie* to be a proper subject of judicial cognizance—may be inapplicable to the case at hand because it conflicts with some hierarchically superior legal source.” (quoting *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 177 (1803)).

131. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

132. See Macey, *supra* note 122, at 102 (“[N]ot even the best judges go about formulating what they believe to be the substantively correct legal result in every case, and then checking that result with the relevant precedents. Instead, judges generally employ stare decisis precisely because it enables them to *avoid* having to rethink the merits of particular legal doctrine. Instead of rethinking, the judges can ‘free-ride’ on the opinions of previous judges.”).

133. *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (“I agree with Justice Douglas: ‘A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.’” (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949))).

judiciary in its ability to respond to the “mores of the day,” the current social and political environments, and modern standards of justice.¹³⁴

For these reasons, courts have reserved the right—perhaps the responsibility—to overturn precedent under certain conditions. In simplest terms, *stare decisis* gives way when the court has valid legal grounds for doing so.¹³⁵ When the prior decision that governs the current one is poorly reasoned or fails to reflect current realities or standards, the Court “has never felt constrained to follow precedent.”¹³⁶ Thus, in practice, *stare decisis* is generally a flexible doctrine.¹³⁷

To this point, the Supreme Court has previously established that, in overturning settled precedent, the Court must go beyond the mere belief that the prior holding was erroneous and find “special justification.”¹³⁸ The Court has relied on a variety of factors to form the basis of such special justification. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Court held that the inquiry into whether to set aside *stare decisis* should include considerations of five such factors: “the quality of reasoning [behind the prior decision], the workability of the rule it establishe[s], its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.”¹³⁹

B. *Overturning precedent in the Roberts Court*

John Roberts assumed his position as Chief Justice in 2005. Since that time, the Court moved to either directly overrule or at least sidestep established precedent on three occasions between 2005 and 2016.

134. See James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court*, 66 B.U. L. REV. 345, 348 (1986) (“[N]o discussion of *stare decisis* can ignore the stark tension between the doctrine’s literal command—obey precedents!—and the law’s ability to respond to social change.”); Field, *supra* note 116, at 207–08 (“[T]here are limits to *stare decisis*. Our system of law is organic: It constantly evolves and adapts with the changing needs of society.” (citing generally William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735–36 (1949))).

135. See Parisi G. Filippatos, *The Doctrine of Stare Decisis and the Protection of Civil Rights and Liberties in the Rehnquist Court*, 11 B.C. THIRD WORLD L.J. 335, 339 (1991).

136. *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

137. See Peters, *supra* note 125, at 2034 (“[T]he rule of *stare decisis* as currently observed in Anglo-American law is not a strict one: Courts can decline to follow their own previous decisions when those precedents are judged to be clearly in error.”).

138. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.”).

139. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018).

In 2008, in *District of Columbia v. Heller*, the Court broadened Second Amendment protections for firearm possession, distinguishing a 69-year-old ruling.¹⁴⁰ In 2010, in *Citizens United v. Federal Election Commission*, it held that a ban on corporate donations to political campaigns was unconstitutional, overturning a 20-year-old precedent.¹⁴¹ And in 2015, in *Obergefell v. Hodges*, the Court overturned a 44-year-old law when it held that marriage is a fundamental right of same-sex couples guaranteed by the constitution.¹⁴² In the two earlier cases, the Court was split five-to-four with the more conservative wing in the majority (consisting at that time of Roberts, Scalia, Alito, Thomas, and Kennedy).¹⁴³ In *Obergefell*, Justice Kennedy joined the Court's four more liberal justices (Ginsburg, Breyer, Sotomayor, and Kagan) to form the five-to-four majority.¹⁴⁴

Following this, the Court then overturned longstanding precedents on three more occasions over the span of just two terms. In all three cases, the decisions were five to four, with the conservative members of the Court in the majority, and the liberal justices in dissent.

In *Knick v. Township of Scott, Pa.*, a divided Court held that an owner of a 90-acre property with a small family graveyard had a § 1983 takings claim against the town, overturning the 1985 holding of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.¹⁴⁵ In dissent, Justice Kagan attacked the *Knick* majority's lack of

140. *District of Columbia v. Heller*, 554 U.S. 570 (2008). In a dissenting opinion, Justice Stevens argued that the majority was overturning *United States v. Miller*, 307 U.S. 174 (1939), in which the Court held that the federal indictment of two men for transporting an unregistered shotgun was constitutional because the defendants' possession of the weapon was for nonmilitary purposes. *Heller*, 554 U.S. at 639 (Stevens, J., dissenting). In response, the majority, led by Justice Scalia, argued that the *Miller* Court had upheld the federal statute as constitutional because of the *type* of weapon the defendants had possessed in that case, not because their purpose was nonmilitary in nature. *Id.* at 621–22.

141. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 318 (2010), *overruling* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

142. *Obergefell v. Hodges*, 576 U.S. 644, 647 (2015), *overruling* *Baker v. Nelson*, 409 U.S. 810 (1972).

143. *Heller*, 554 U.S. at 572; *Citizens United*, 558 U.S. at 317.

144. *Obergefell*, 576 U.S. at 648.

145. *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2179 (2019), *overruling* *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985). In *Knick*, the town had passed an ordinance that required all cemeteries in the town to remain open and accessible to the public during daylight hours. The town alerted the owner that she was in violation, so she filed a claim in Federal District Court. On authority of *Williamson County*, the district court dismissed the case because the owner had not sought compensation first, under state law, in state court. The Third Circuit affirmed. The Supreme Court reversed, *overruling Williamson County* in the process. The Court held that the state litigation requirement would result in no ability to appeal to

authority and disregard for stare decisis. “[T]he 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.”¹⁴⁶

In *Franchise Tax Board of California v. Hyatt*, a complex case regarding a state claim of sovereign immunity from private suits brought in another state’s courts, the Supreme Court again overruled a 40-year-old precedent, *Nevada v. Hall*.¹⁴⁷ Justice Breyer, writing in dissent, specifically asserted that stare decisis “requires us to follow *Hall*, not overrule it.”¹⁴⁸ He explained that stare decisis is important because people “rely upon stability in the law. . . . Each time the Court overrules a case, the Court produces increased uncertainty. . . . and . . . cause[s] the public to become increasingly uncertain about which cases the Court will overrule and which cases are here to stay.”¹⁴⁹

In *Janus*, handed down in late June 2018, the Court overturned *Abood v. Detroit Board of Education*, a 1977 case in which the Court held constitutionally valid state agency fee schemes compelling public employees to contribute to the union.¹⁵⁰ The district court in *Janus* dismissed the case on the authority of *Abood*, and the Seventh Circuit affirmed. But the Supreme Court reversed and overturned *Abood*,

federal court if the landowner’s compensation claim failed in state court, under the Full Faith and Credit Clause. *Knick*, 139 S. Ct. at 2171.

146. *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting).

147. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019), *overruling* *Nevada v. Hall*, 440 U.S. 410 (1979). In *Franchise Tax Board*, a Nevada taxpayer sued the California Tax Board in Nevada state court for alleged torts and bad-faith conduct during audits. The Nevada state court allowed the claim to proceed and the U.S. Supreme Court affirmed and remanded. A jury trial resulted in judgment for the taxpayer and the Board appealed to the Nevada Supreme Court, which affirmed in part and reversed/remanded in part. U.S. Supreme Court vacated and remanded. The Nevada Supreme Court, on remand, affirmed in part, reversed and remanded in part. The U.S. Supreme Court held that states retain their sovereign immunity in such cases, *overruling Nevada v. Hall*. *Franchise Tax Bd.*, 139 S. Ct. at 1490–91.

148. *Franchise Tax Bd.*, 139 S. Ct. at 1504 (Breyer, J., dissenting).

149. *Id.* at 1506.

150. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), *overruling* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977). Prior to *Janus*, the Illinois governor had filed a claim challenging the constitutionality of an Illinois statute which authorized public-sector unions to assess “agency fees” on public employees who choose not to be members. After the district court dismissed the Governor’s action for lack of standing, the case was refiled by Mark Janus. Janus was a state employee whose unit was represented by a public-sector union which Janus refused to join for political reasons. The Supreme Court ruled in favor of Janus and overturned a 40-year-old precedent. The Court held that the state’s assessment of agency fees from public sector employees without their consent was a form of coerced speech, in violation of employees’ First Amendment free speech rights. *Janus*, 138 S. Ct. at 2460–62.

rejecting it as “poorly reasoned.”¹⁵¹ In a sharply worded dissenting opinion, Justice Kagan decried the majority’s dismissal of stare decisis. “Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of stare decisis.”¹⁵²

C. *The Court’s reputation in recent years*

While the Court’s reputation has ebbed and flowed over time, there are indications that it has taken a decidedly more negative turn in recent years.¹⁵³ According to Jeffrey Rosen, a law professor at the George Washington University Law School, public perceptions of the Supreme Court are at issue, perhaps more than ever before. In a 2016 interview, he stated that “[t]here’s no question that citizens are looking closely at the [C]ourt.”¹⁵⁴

Poll data supports Rosen’s assertion. Gallup polls in 2000 and 2018 reveal that public approval of the Court has declined in that time. In 2000, 62% of respondents indicated they approved of the way the Supreme Court was handling its job, with 29% disapproving. In September 2018, the numbers were 51% approving, 40% disapproving.¹⁵⁵ Polls also show that views of the Supreme Court are generally bifurcated along political party lines. Among Republicans, perceptions of the Court have skewed more positive since 2015 (from 55% then to 75% in 2019), while views among Democrats have grown less favorable (from 72% in 2016 to 49% in 2019).¹⁵⁶

Many factors have contributed to the recent decline in the Court’s public reputation. Perhaps, most notable are the controversies surrounding

151. *Janus*, 138 S. Ct. at 2460.

152. *Id.* at 2487 (Kagan, J., dissenting).

153. See Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2241–42 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)) (“Although the Supreme Court has been subject to attacks in the past, recent decades have been a period of relative calm. . . . But things seem to have changed—and in very short order.”).

154. Gass, *supra* note 32.

155. *In Depth: Topics A to Z*, *supra* note 33. The question asked was, “Do you approve or disapprove of the way the Supreme Court is handling its job?” Results were as follows: 2000, 62% approve, 29% disapprove, 9% no opinion; 2019, 54% approve, 42% disapprove, 4% no opinion. *Id.*

156. Claire Brockway & Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, PEW RES. CTR. (Aug. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/> [<https://perma.cc/F5KN-53BG>]. In a July 2019 Pew Research Poll, 75% of Republican or Republican-leaning respondents had a favorable view of the Supreme Court, compared with 33% in mid-2015. Meanwhile, 49% of Democratic or Democratic-leaning respondents held a favorable view of the Court in 2019, compared with 72% in 2016. The gap is more pronounced among the conservative Republicans (78% favorable in July 2019) compared with the liberal Democrats (40% favorable in July 2019). *Id.*

Merrick Garland's failed nomination in early 2016 and Brett Kavanaugh's dramatic confirmation hearings in 2018.¹⁵⁷ In addition to this, the Court's decisions themselves may feed the perceived "politicization" of the Court that "causes the American people to lose faith in the Court."¹⁵⁸

Public accusations and criticism of the Court by public officials, especially the President, also serve to undercut the Court's reputation. By calling the Court's integrity into question, the Court's reputation takes a direct public hit. Doing this also serves to erode the Court's reputation indirectly by calling attention to the Court in a mostly political context. Even without taking any action, the Court may be seen as political by association.¹⁵⁹

One incident illustrating this point involved the president publicly criticizing the Court and thereby drawing attention to the Court in a highly political context.¹⁶⁰ During his 2010 State of the Union address, President Obama condemned the *Citizens United* ruling, which had come down a week earlier. With six members of the Court sitting in the front two rows of the House chambers, the President directly chastised the Court for "revers[ing] a century of law."¹⁶¹ Democratic Senators, surrounding the members of the Court in attendance, stood and cheered the President's statements.¹⁶² While this was not the first time a President had criticized the Court or its decisions,¹⁶³ this incident garnered attention. It also drew

157. Tomasky, *supra* note 35. In describing the effects of recent events on the Court's reputation, Tomasky referred to the Senate's failure to vote on the nomination of Judge Merrick Garland as "breaking the rules" and how Justice Kavanaugh's confirmation was marred by allegations of sexual misconduct. He also noted that multiple Justices have been confirmed by legislators representing minority support and that Justice Gorsuch was the first justice nominated by a president who had not won the popular vote. *Id.*

158. Hamilton, *supra* note 34, at 36.

159. *See generally* Pomerance, *supra* note 36.

160. *Id.* at 522.

161. Alan Silverleib, *Gloves Come Off After Obama Rips Supreme Court Ruling*, CNN: POLITICS (Jan. 28, 2010, 1:26 PM), <https://www.cnn.com/2010/POLITICS/01/28/alito.obama.sotu/index.html> [<https://perma.cc/6XZN-CM65>].

162. Savage, *supra* note 38. *See also* Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), <https://www.nytimes.com/2010/01/29/us/politics/29scotus.html> [<https://perma.cc/R92D-VM2H>], which includes a photo of the justices in attendance surrounded by applauding Democratic members of Congress.

163. In 2008, President George W. Bush was critical of the Court's holding in *Boumediene v. Bush*, 553 U.S. 723 (2008), that prisoners held at Guantánamo Bay, Cuba, had constitutional due process rights. However, here, the president made his remarks while in Rome during a news conference. President Richard M. Nixon expressed disappointment with the 1974 Court decision that ultimately led to his resignation. Nixon's comments were delivered in a prepared statement read by his lawyer. *See* Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation, supra* note 161.

some criticism to the President for being particularly public, personal, and disrespectful in his attack.¹⁶⁴

Another example occurred in early 2020. Senator Chuck Schumer made comments critical of the Court to a crowd of activists outside the Supreme Court building, while the Court was hearing arguments in a high-profile abortion case inside. Schumer, the Senate Minority leader, referred to Gorsuch and Kavanaugh by name when he exclaimed that “[y]ou have released the whirlwind, and you will pay the price. You will not know what hit you if you go forward with these awful decisions.”¹⁶⁵ Other political leaders quickly responded, rebuking Schumer for his comments. President Trump, for example, described the remarks as “a direct [and] dangerous threat to the U.S. Supreme Court.”¹⁶⁶ Senate Majority Leader Mitch McConnell spoke out for more than fifteen minutes from the Senate floor, accusing Schumer of “bully[ing] our nation’s independent judiciary.”¹⁶⁷ The verbal sparring, which included numerous senators and representatives, was joined by the media. One online political news and opinion forum, *The Hill*, perhaps summarized the entire debate most aptly, explaining that it was “igniting a partisan fight over the Supreme Court.”¹⁶⁸

D. Chief Justice Roberts seeks to protect the Court’s reputation

The Chief Justice serves as the presiding officer of the Court, a largely administrative role prescribed by the Judiciary Act of 1789.¹⁶⁹ But

164. See, e.g., Bradley A. Smith, *President Wrong on Citizens United Case*, NATIONAL REVIEW: THE CORNER (Jan. 28, 2010, 4:00 AM), <https://www.nationalreview.com/corner/president-wrong-citizens-united-case-bradley-smith/> [https://perma.cc/54J6-LK4P] (“Tonight the president engaged in demagoguery [*sic*] of the worst kind . . . This is either blithering ignorance of the law or demagoguery of the worst kind.”).

165. Adam Liptak, *John Roberts Condemns Schumer for Saying Justices ‘Will Pay the Price’ for ‘Awful Decisions,’* N.Y. TIMES (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/roberts-schumer-supreme-court.html> [https://perma.cc/A73H-DZ38].

166. *Id.* (noting also President Trump’s statement on Twitter that if Schumer’s comments had been made by a Republican, “he or she would be arrested, or impeached”).

167. Andrew Desiderio, *Schumer Walks Back SCOTUS Comments After Roberts Rebuke*, POLITICO (last updated Mar. 5, 2020, 1:03 PM), <https://www.politico.com/news/2020/03/05/chuck-schumer-supreme-court-comments-121960> [https://perma.cc/3YVU-2EFP].

168. Jordain Carney & Harper Neidig, *Schumer, Roberts Clash Inflames Partisan Rift Over Supreme Court*, THE HILL (Mar. 5, 2020, 4:34 PM), <https://thehill.com/homenews/senate/486207-schumer-roberts-clash-inflames-partisan-rift-over-supreme-court> [https://perma.cc/CU3E-9WQ2].

169. See Robert Longley, *Duties of the Chief Justice of the United States*, THOUGHTCO (last updated Aug. 15, 2019), <https://www.thoughtco.com/chief-justice-of-united-states-duties-3322405> [https://perma.cc/4PVH-7HS4], for a summary of the United States Chief Justice’s roles and responsibilities. See also Kristin Linsley Myles, Michelle Friedland, Aimee Feinberg, Miriam Seifter & Michael Mongan, *Hail to the Chief*, 48-AUG TENN. B.J. 12 (2012).

beyond the various procedural duties, the Chief Justice has also served an unofficial position as steward of the Court's integrity and reputation.¹⁷⁰ Roberts takes this role seriously.¹⁷¹ His words and actions as Chief Justice reflect someone who cares about the Court's institutional legitimacy, the judiciary's place among the branches of government, and its position in history.¹⁷² According to author and law professor Eric Segall,¹⁷³ "Roberts cares a lot about the Supreme Court as an institution."¹⁷⁴ In fact, according to Segall, Roberts may feel "that he's the only thing that prevents the Court from losing all legitimacy in the eyes of the public."¹⁷⁵

Of particular concern for Roberts is the perception that the Court is political or otherwise partial to the ideologies of the individual justices.¹⁷⁶ According to Sara Benesh, a political scientist at the University of Wisconsin–Milwaukee who was quoted in a 2019 article, "[t]he [C]ourt has this position institutionally where the only power it has is people's

170. See Morning Edition, *Fear and Loathing at the Supreme Court – What is Chief Justice John Roberts Up To?* (NPR radio broadcast July 8, 2019, 5:00 AM), <https://www.npr.org/2019/07/08/738930098/fear-and-loathing-at-the-supreme-court-what-is-chief-justice-john-roberts-up-to> [<https://perma.cc/YHJ8-7AWM>] ("[C]hief [J]ustices — Republican and Democratic, liberal and conservative alike — have uniformly believed that they have a particular duty to maintain public confidence in the [C]ourt as an institution.").

171. In her book about the Chief Justice, Joan Biskupic describes how Roberts "was . . . concerned . . . with the institutional reputation of the Court," BISKUPIC, *supra* note 37, at 177, to the extent that, she wrote, "[s]ometimes it seemed this concern was overriding." *Id.* at 197. In his 2019 annual report to the judiciary, Roberts himself urged judges to "continue their efforts to promote public confidence in the judiciary," and to do their best "to maintain the public's trust . . ." HON. JOHN G. ROBERTS, JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (Dec. 31, 2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> [<https://perma.cc/FF2E-B5DT>].

172. See Melissa Quinn, *John Roberts is Voting with Liberal Justices, But He's Not One of Them*, WASH. EXAMINER (Mar. 8, 2019, 12:03 AM) (quoting Brianne Gorod, Chief Counsel of the Constitutional Accountability Center, who said "[t]he Supreme Court's reputation is something the chief justice cares a lot about . . . [He] cares very deeply about the institutional legitimacy of the Supreme Court and the courts more generally"), <https://www.washingtonexaminer.com/policy/courts/john-roberts-is-voting-with-liberal-justices-but-hes-not-one-of-them> [<https://perma.cc/KWL5-A8EF>].

173. Eric J. Segall, GA. ST. U., <https://news.gsu.edu/expert/eric-j-segall/> [<https://perma.cc/3FSS-3GJ4>].

174. Bill Blum, *Supremely Conservative*, PROGRESSIVE, (Aug. 1, 2019), <https://progressive.org/magazine/supremely-conservative-blum/> [<https://perma.cc/2S8M-22HS>].

175. *Id.*

176. See Quinn, *supra* note 171 ("Roberts himself has publicly sought to dispel any notion that the justices — and the federal judiciary as a whole — are driven by politics."). See also The Editorial Board, *An Apolitical Supreme Court*, WALL ST. J. (Sept. 25, 2019, 7:30 PM), <https://www.wsj.com/articles/an-apolitical-supreme-court-11569454257> [<https://perma.cc/RKT8-54VQ>] (describing how Chief Justice Roberts recognizes that people often see the Court as a political body, but wants them to understand that the Court does not function that way).

voluntary compliance with its decisions.”¹⁷⁷ Accordingly, Benesh said, the Court needs to appear to be above politics whenever possible, and “the chief is in a particularly important position on that.”¹⁷⁸

That the Chief Justice is protective of, or at least sensitive to, the Court’s reputation was evident in his responses to specific incidents where the Court’s integrity was questioned publicly and in a political context. For example, Roberts publicly expressed his distaste for the President’s criticism of the Court during the 2010 State of the Union address described above.¹⁷⁹ “The image of having the members of one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering,” he said, “while the Court—according to the requirements of protocol—has to sit there expressionless, I think is very troubling.”¹⁸⁰

Roberts has responded directly to attacks by President Trump as well. In late 2018, the President lashed out regarding a Ninth Circuit Court ruling to block his asylum ban, calling the court a “disgrace” and referring to the author of the court’s opinion as an “Obama judge.” The Chief Justice issued a statement in response, explaining, “[w]e do not have Obama judges or Trump judges . . . [but] an extraordinary group of dedicated judges doing their level best”¹⁸¹

Finally, after Senator Chuck Schumer verbally attacked Justices Kavanaugh and Gorsuch in early 2020,¹⁸² Roberts condemned the senator. In a statement released later the same day that Schumer made his comments, Roberts expressed concern that “threatening statements of this sort from the highest levels of government are not only inappropriate, they are dangerous. All Members of the Court will continue to do their job, without fear or favor, from whatever quarter.”¹⁸³

It is not entirely clear what the Chief Justice is trying to accomplish. On the one hand, he may be seeking to maintain the Court’s institutional integrity by ensuring actual impartiality. Or Roberts’s aim may be to build the Court’s reputation based on *appearances* of the Court as an apolitical

177. Henry Gass, *Why Chief Justice Roberts is Moving to the Center of the Court*, CHRISTIAN SCI. MONITOR (Mar. 26, 2019), <https://www.csmonitor.com/USA/Justice/2019/0326/Why-Chief-Justice-Roberts-is-moving-to-the-center-of-the-court> [https://perma.cc/YH3X-3TH9].

178. *Id.*

179. *Supra* Part III, Section C.

180. Savage, *supra* note 38.

181. Barnes, *supra* note 39.

182. *See* Liptak, *supra* note 164.

183. Ariane de Vogue, *Chief Justice John Roberts Rebukes Chuck Schumer for Comments About Kavanaugh and Gorsuch*, CNN (last updated Mar. 4, 2020, 9:06 PM), <https://www.cnn.com/2020/03/04/politics/schumer-roberts-threats-supreme-court/index.html> [https://perma.cc/724Z-NY8T].

institution.¹⁸⁴ Either way, his public statements¹⁸⁵ and actions on the Court, which include forging compromises and voting with his liberal colleagues at times, demonstrate that Roberts's concern for the Court's reputation is genuine and provides a clue as to how he best sees his role in protecting it.¹⁸⁶ His vote in *Kisor* is but one example.

IV. THE COBRA EFFECT IN *KISOR*: GOOD INTENTIONS, BAD RESULT

Kisor arrived amidst growing concern about the Court's institutional reputation¹⁸⁷ and at a time when the Court had overturned longstanding precedent on multiple occasions in the prior two terms.¹⁸⁸ This section will lay out, first, how *Kisor* represented an example of Roberts attempting to create a compromise among the Court, deferring to stare decisis for the sake of the Court's reputation.¹⁸⁹ Stare decisis will then be critically examined for its value as a legal doctrine and as a means of preserving the Court's public standing.¹⁹⁰ Next, it will be shown that the result in *Kisor*, by which *Auer* deference was upheld but significantly weakened, represents the cobra effect at work. For all of Roberts's intentions, his actions and the result in *Kisor* will ultimately do more to *damage* the Court's reputation than to support it.¹⁹¹ From this, it can then be demonstrated that the Court must overturn *Auer* once and for all.

A. *Kisor* revisited: Chief Justice Roberts plays centrist

The decision in *Kisor*, in which the Court upheld but limited the reach of *Auer*, illustrates three prominent features of the Court's jurisprudence under Roberts. None of the three have anything to do with agency deference.

First, *Kisor* represents another example of the Court's recent emphasis on stare decisis, as stare decisis was at the heart of the result. Justice Kagan, writing for the majority, explained that stare decisis discouraged the Court from overruling *Auer*.¹⁹² The Court, she asserted,

184. BISKUPIC, *supra* note 37, at 197 ("With his focus on the public's perception, the chief justice seemed more concerned with protecting the judiciary's reputation than with ferreting out actual impartiality.").

185. For examples, see Roberts's comments described above, *supra* Part III, Section D.

186. *See supra* Part III, Section D.

187. *See supra* Part III, Section B.

188. *See supra* Part III, Section B.

189. *Infra* Part IV, Section A.

190. *Infra* Part IV, Section B.

191. *Infra* Part IV, Section C.

192. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019).

lacked the “special justification”¹⁹³ previously deemed necessary for overturning settled precedent.¹⁹⁴ Doing so here, she wrote, would involve overruling “not a single case, but a long line of precedents . . . going back 75 years or more.”¹⁹⁵

In his concurring opinion, Justice Gorsuch alluded to *stare decisis* in explaining that the Court should have overturned *Auer*.¹⁹⁶ Specifically, he noted that the substantial “reshaping” of the *Auer* deference test imposed by the Court was tantamount to overruling *Auer*.¹⁹⁷ But because of the extent to which *Auer* deference dictates “the interpretive inferences that future Justices must draw in construing statutes and regulations that the Court has never engaged,” Gorsuch argued that upholding *Auer* “may well ‘exceed the limits of *stare decisis*.’”¹⁹⁸

Second, *Kisor* also showcases the (perhaps uncomfortable) role Roberts is now trying to play: that of a centrist. Observers noted that Justice Kennedy had played the role of the Court’s centrist or “swing vote”—that is, a justice who might side with his ideologically opposing colleagues on certain issues, thus casting the decisive vote in strongly divided cases.¹⁹⁹ Kennedy, himself, a conservative appointed by President Reagan in 1986, had gradually replaced Justice Sandra Day O’Connor as the “center of the Court.”²⁰⁰ Following Kennedy’s retirement in 2018, commentators began to speculate as to whether Roberts might take over as the Court’s center.²⁰¹

193. As noted above, *supra* note 137, the need for a “special justification” to overturn settled precedent was first suggested in *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

194. *Kisor*, 139 S. Ct. at 2418.

195. *Id.* at 2422.

196. *Id.* at 2425–48 (Gorsuch, J., concurring).

197. *Id.* at 2443.

198. *Id.* at 2444 (quoting Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1158 (2019)).

199. Ephrat Livni, *John Roberts May Be the New Swing Vote on the US Supreme Court*, QUARTZ (Dec. 24, 2018), <https://qz.com/1506186/chief-justice-roberts-the-new-swing-vote-on-supreme-court/> [<https://perma.cc/S38V-RUB3>]. See also Horace E. Johns, *Nine Means to an End*, 39 TENN. B.J. 26, 32 (2003) (“Justice Kennedy has moved steadily toward the center of the court, and away from his solid conservatism . . .”).

200. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 40 (Anchor Books ed. 2008) (referring to O’Connor as the “social as well as the political center of the Court”).

201. See Pomerance, *supra* note 36, at 457 (“[O]ne could genuinely see the Chief Justice filling Kennedy’s shoes as the Court’s ideological center.”); Julie Hirschfeld Davis, *With Kennedy Gone, Roberts Will Be the Supreme Court’s Swing Vote*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/politics/anthony-kennedy-chief-justice-roberts.html> [<https://perma.cc/G5UK-5KVF>] (“The retirement of Justice Anthony M. Kennedy is likely to thrust Chief Justice John G. Roberts Jr. into the court’s ideological center, making him the deciding vote . . . alongside a newly solidified conservative majority.”).

There are examples of Robert's "centrist" efforts predating Kennedy's retirement. Perhaps most notable was the 2012 case, *National Federation of Independent Business v. Sebelius*.²⁰² Roberts caught the wrath of conservatives after he voted in *Sebelius* to uphold the Affordable Care Act, sponsored by President Obama.²⁰³ In 2014, Roberts voted to bar a state action that would prevent a Native American tribe from operating a casino on land outside its reservation on the basis of tribal sovereign immunity.²⁰⁴ He then voted with the liberal wing of the Court in two cases in 2015. First, in *Yates v. United States*, the Court determined that a fish was not a "tangible object" for purposes of determining violations of the Sarbanes-Oxley Act.²⁰⁵ In the second case, *Williams-Yulee v. Florida Bar*, the Court held that states imposing a bar on the solicitation of funds by judicial candidates for their campaigns did not violate the First Amendment.²⁰⁶ In 2018, Roberts voted to deny the Trump Administration's effort to reinstate its policy restricting grants of asylum for illegal immigrants.²⁰⁷ Then, in 2019, there was *Kisor*.²⁰⁸

The third point to be drawn from the *Kisor* outcome is that it provides a specific example of Roberts acting to support and nurture the Court's reputation. Political scientists have known for decades that the ideology of a judge is predictive of his or her voting.²⁰⁹ But the *image* of impartiality is what is perhaps most important when it comes to the reputation of the Court.²¹⁰ Roberts has been particularly active in asserting

202. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). See also Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES (June 28, 2012), <https://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html> [<https://perma.cc/DH3Y-R8QX>].

203. See, e.g., Randy E. Barnett, *Chief Justice Roberts was Principled but Wrong in his Obamacare Decision*, REASON: THE VOLOKH CONSPIRACY (May 6, 2016, 4:19 PM), <https://reason.com/2016/05/06/chief-justice-roberts-was-prin/> [<https://perma.cc/PQ85-7DFY>] ("[I]t was Chief Justice Roberts's decision to defer . . . that demoralized constitutional conservatives.").

204. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014).

205. Yates v. United States, 574 U.S. 528 (2015).

206. Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015).

207. Trump v. E. Bay Sanctuary Covenant, 139 S. Ct. 782 (Mem) (2018). See also Lyle Denniston, *Supreme Court Keeps Asylum Limits on Hold*, CONSTITUTION DAILY (Dec. 21, 2018), <https://constitutioncenter.org/blog/supreme-court-keeps-asylum-limits-on-hold> [<https://perma.cc/78SQ-LT67>].

208. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

209. See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUE, 1937-1947* (Digital Edition, Quid Pro Books 2014). Pritchett argued that Supreme Court Justices and judges generally were biased and political in nature, noting that "[a]ny examination of the present-day Court must accept the fact that its decisions inevitably have a political character, and the real question is not whether, but how well, its justices perform political functions." *Id.* at 45.

210. See BISKUPIC, *supra* note 37, at 9 ("Roberts understood that public regard was crucial to the Supreme Court's stature in American life.").

that the Court is an “apolitical branch of government.”²¹¹ Taking the point a step further, Roberts may be showing us by his use of the “swing vote” that it will be he who will serve to bridge the gap between the two sides of the Court, if not the country.²¹²

On multiple occasions, Roberts has expressed his concern for the legitimacy of the Court, often promoting the Court’s impartial, apolitical nature.²¹³ For example, during an appearance at Rensselaer Polytechnic Institute with the school’s president Shirley Ann Jackson, Roberts said, “[W]e in the judiciary do not do our business in a partisan, ideological manner.”²¹⁴

Beyond his words, Roberts’s actions may be demonstrating his role as de facto steward of the Court’s reputation and institutional integrity. There are instances of Roberts voting with the liberal wing of the Court, reflecting his migration to the center. These likely represent calculated attempts by Roberts to move the Court in a particular direction, with the general goal of protecting the Court’s reputation. For example, observers have suggested that the outcome in *Sebelius* reflects Roberts’s concern that the Court’s reputation would have been damaged had it moved to strike down the Affordable Care Act.²¹⁵ Pundits have argued that Roberts, who wrote the majority opinion in *Sibeli*, changed his vote and then stretched to provide a rationale to justify that decision.²¹⁶

211. See, e.g., Robert Barnes, *Chief Justice Tries to Assure the Supreme Court is Apolitical, but Term’s Biggest Cases Present Partisan Challenges*, WASH. POST (June 16, 2019), https://www.washingtonpost.com/politics/courts_law/chief-justice-assures-the-supreme-court-is-apolitical-hes-facing-his-next-big-test/2019/06/16/8603bac6-8def-11e9-8f69-a2795fca3343_story.html [<https://perma.cc/F8WN-YVU3>] (“People need to know we’re not doing politics . . .”).

212. Livni, *supra* note 198. See also Richard Wolf, *Chief Justice John Roberts Inherits Expanded Role as the Supreme Court’s Man in the Middle*, USA TODAY (June 29, 2018), <https://www.usatoday.com/story/news/politics/2018/06/29/chief-justice-john-roberts-supreme-courts-new-man-middle/743208002/> [<https://perma.cc/R8HN-USNN>] (“With the retirement of Associate Justice Anthony Kennedy, the court’s most influential member by virtue of his ‘swing vote’ status, Roberts will move to the middle . . .”).

213. Roberts’s concern for the legitimacy of the Court is described in Part III above. See *supra* Part III, Section D.

214. Rensselaer Polytechnic Institute, *A Conversation with Chief Justice John G. Roberts, Jr.*, YOUTUBE (Apr. 12, 2017), <https://www.youtube.com/watch?v=TuZEKIRgDEg&t=1363s> [<https://perma.cc/G6YY-RQSB>].

215. See, e.g., Grove, *supra* note 152, at 2254 (“According to media reports, the Chief Justice believed that the Affordable Care Act’s individual mandate was unconstitutional. But after a barrage of criticism declaring that a ruling against President Obama’s signature legislation would destroy the Court’s reputation, the Chief Justice opted to change his vote; he then relied on a ‘strained’ theory that the mandate was valid under the federal taxing power.”).

216. *Id.*

Cases in 2019 and 2020 further illustrate how Roberts has voted against his more conservative tendencies for the benefit of the Court's reputation. In *Department of Commerce v. New York*, Roberts sided with the Court's liberal wing to block the inclusion of a citizenship question in the 2020 census.²¹⁷ Roberts wrote the majority opinion, joined by Justices Breyer, Ginsburg, Kagan, and Sotomayor. In the decision, Roberts explained that the administration's rationale for including the question "seems to have been contrived."²¹⁸ But he also noted that the Constitution does not block the inclusion of a citizenship question in the future. Roberts appears to have controlled the outcome of the case by way of a compromise, likely intended to avoid more criticism directed at the Court.²¹⁹

In June 2020, Roberts again cast a decisive fifth vote in *June Medical Services v. Russo*.²²⁰ Roberts joined the Court's liberal justices in striking down a restrictive Louisiana abortion law, a near mirror-image of a similar law in Texas which the Court had struck down four years earlier in *Whole Woman's Health v. Hellerstedt*.²²¹ In his concurring opinion in *June Medical Services*, Roberts specifically cited *stare decisis* as the sole factor in his decision.²²² He dedicated the first section of his opinion to the importance of *stare decisis*, before embarking on a sharp critique of the *Whole Woman's Health* holding, reiterating his dissent in that case.²²³ Commentators were quick to take note.²²⁴ For example, *The Economist*

217. *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

218. *Id.* at 2575.

219. Lawrence Hurley, *U.S. Chief Justice's 'Swing' Role Shown in Census, Gerrymandering Rulings*, REUTERS (June 27, 2019, 6:20 PM), <https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-chief-justices-swing-role-shown-in-census-gerrymandering-rulings-idUSKCN1TS3A4> [<https://perma.cc/CD8Z-UZWU>] ("The census ruling in particular showcased the willingness of Roberts to craft compromises.").

220. *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020).

221. *June Med. Servs.*, 140 S. Ct. at 2113 (noting that the lower court's findings regarding the abortion regulation in question "mirror those made in *Whole Woman's Health* in every relevant respect and require the same result"); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

222. *June Med. Servs.*, 140 S. Ct. at 2141–42 (Roberts, C.J., concurring) ("Stare decisis instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law For that reason, I concur in the judgment of the Court").

223. *Id.* at 2133 ("I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided."). See also Gretchen Borchelt, *June Medical Services v. Russo: When a "Win" Is Not a Win*, SCOTUSBLOG (June 30, 2020, 12:31 PM), <https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/> [<https://perma.cc/SC3B-MBUP>] ("Roberts spends the bulk of his concurrence on his disdain for *Whole Woman's Health*").

224. See Jane Schacter, *June Medical and the Many Faces of Judicial Discretion*, SCOTUSBLOG (June 30, 2020, 1:22 PM), <https://www.scotusblog.com/2020/06/>

described Roberts's vote as evidence of his effort to "cultivat[e] a reputation for non-partisanship at the Supreme Court."²²⁵

In light of these prior cases, most notably *Sebelius*, it is reasonable to believe that incidents of Roberts joining the liberal justices and casting the decisive vote in a case reveal his concern for the institutional integrity of the Court. Such concern arises from a larger sense of his role in protecting the Court's reputation, beyond the specific facts or jurisprudential implications of any specific case. *Kisor* is no exception. It is telling that the result in *Kisor*, upholding *Auer*, came on the heels of multiple five-to-four decisions in a short period, wherein the Court had struck down settled precedents.²²⁶ It is also meaningful that the Court upheld *Auer* by the narrowest of terms, with the Court insisting that lower courts make a more concerted effort at interpreting regulations before deferring to the agency's proposed interpretation. This outcome represents an effort by Roberts to offer a compromise—to appease the left by deferring to *stare decisis* on the one hand, while appeasing the right by restricting agency deference on the other.

B. *Stare decisis and the Court's reputation*

As described above,²²⁷ one argument in support of *stare decisis* is that it plays a significant role in supporting the integrity of the judicial process.²²⁸ Reliance on settled law contributes to the public reputation of the Supreme Court as an institution.²²⁹ Legitimacy in judicial rulings depends on the influence of binding legal principles rather than personal

june-medical-and-the-many-faces-of-judicial-discretion/ [https://perma.cc/V7P2-UDXU] (explaining that Roberts's vote in *June Medical Services* was "significant" not only because "he determined the outcome," but for its contribution to "stability in constitutional law"); Robert Barnes, *Supreme Court Strikes Down Restrictive Louisiana Abortion Law That Would Have Closed Clinics*, WASH. POST (June 29, 2020, 7:06 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-louisiana-abortion-law-john-roberts/2020/06/29/6f42067e-ba00-11ea-8cf5-9c1b8d7f84c6_story.html [https://perma.cc/G967-3XQE] (asserting that Roberts's vote in *June Medical Services* "was perhaps the most dramatic example of Roberts's new role as the pivotal member of the court.").

225. *Justice John Roberts Joins the Supreme Court's Liberal Wing in Some Key Rulings*, ECONOMIST (Jul. 2, 2020), <https://www.economist.com/united-states/2020/07/02/justice-john-roberts-joins-the-supreme-courts-liberal-wing-in-some-key-rulings> [https://perma.cc/5YXP-WCXY].

226. See cases cited *supra* notes 144, 146, 149 and accompanying text.

227. See *supra* Part III, Section A.

228. See Gely, *supra* note 123, at 107.

229. James C. Rehnquist, *The Power That Shall be Vested in a Precedent*, 66 B.U. L. REV. 345, 354–55 (1986).

bias and political judgment.²³⁰ When the Court consistently holds its prior decisions as settled law, lower courts and litigants can function with an understanding of just what the law is.²³¹ Stare decisis, therefore, provides for consistency in the law and in the Court itself.²³² Such stability fosters reliance on the Court's decisions,²³³ which also promotes greater efficiency throughout the entire judicial system.²³⁴ All of this presents the decisions of the Court as the product of an impartial, apolitical institution.²³⁵

When the Court occasionally overturns precedent, with sufficient reasoning to back it up, little is said of it. But when the Court strikes down a prior rule in a high-profile, politically charged case, the result is likely to draw attention and criticism directed at the Court. The Court is then seen not as applying judicial discretion in reconsidering outmoded or wrongly decided cases, but “participating in an unceremonious ‘heave-ho’ of both the prior decisions and the previously applicable standards of

230. The link between the Court's adherence to stare decisis and its reputation has been promoted frequently in the general press. See, e.g., Litman & Davis, *supra* note 123, (“The doctrine of stare decisis . . . helps preserve the court's reputation as a nonpartisan—or at least not entirely partisan—institution.”). See also Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 463 (2010) (suggesting that the Court's concern about its own reputation may influence its likelihood or willingness to dispense with stare decisis, asserting that “the Court will be extraordinarily reluctant to overrule its precedents based on concerns over perceived legitimacy”).

231. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (explaining that stare decisis is “of fundamental importance to the rule of law” because, among other things, it promotes “predictability”).

232. See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1179 (2006) (“[O]nly by following the reasoning of previous decisions can the courts provide guidance for the future, rather than a series of unconnected outcomes in particular cases.”).

233. *Hilton*, 502 U.S. at 202 (explaining how stare decisis establishes reliance on precedent, such that in situations where both the legislature and individuals “have acted in reliance on a previous decision . . . overruling the decision would dislodge settled rights and expectations”).

234. Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62, 68 (2018) (“The most prominent rationales for stare decisis [include] . . . judicial efficiency.”).

235. Litman & Davis, *supra* note 123 (“The doctrine of stare decisis ensures stability in the law, protects private parties who rely on the law and *helps preserve the court's reputation.*” (emphasis added)). See also Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1534 (2008) (“[Stare decisis] is based not on the assumption that prior judges are smarter than their successors but on the need for consistency, efficiency, predictability, and the need not to overpoliticize the judicial process *and thereby undermine its credibility.*” (emphasis added)).

stare decisis.”²³⁶ When this happens, scrutiny of those decisions, and the Court in general, is likely to rise.²³⁷

A public view of the Court as “overly partisan and result-driven” leads to “gradual erosion and crumbling of its bedrock foundation [and] the public’s perception of its legitimacy.”²³⁸ Following precedent is one way to avoid such arguments.²³⁹ However, stare decisis can only go so far. The Court’s reputation often hinges on what happens *outside* the Court as much as *inside*.

To begin, whether people agree with the decisions in specific cases often influences their opinions of the Court.²⁴⁰ Some issues are unavoidably controversial, leaving the Court in the position of deciding, as Roberts himself described it, “whether the Democrats win or the Republicans win.”²⁴¹ When the issue is itself politically divisive, the outcome of the case will be politically charged, and the public will react accordingly. Attitudes about the Court among those who agree with the decision will be positive. Those who disagree with the decision will likely have negative views of the Court.²⁴² In this way, politically charged issues lead to division along partisan lines, both inside and outside the Court.

Inside the Court, observers have noted that the Court has divided five to four along ideological lines on numerous occasions.²⁴³ That the Court appears to hand down so many split decisions is itself significant to the

236. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 649 (1999).

237. See Kozel, *supra* note 229, at 463 (suggesting that “the country ordinarily tolerates the Court’s occasional need to revisit precedents,” but that highly politicized cases are likely to garner more attention).

238. Peter Irons, *Has the Supreme Court Lost its Legitimacy?*, NBC NEWS (Feb. 4, 2019, 10:46 AM), <https://www.nbcnews.com/think/opinion/has-supreme-court-lost-its-legitimacy-ncna966211> [<https://perma.cc/2JZ3-ULGP>].

239. *Id.*

240. See Jeffery J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675, 676 (1994) (explaining that one perspective on Supreme Court legitimacy is based on public agreement, such that “legitimacy exists when the citizen approves of” the policy behind the given Court decision).

241. As quoted in Greg Stohr, *Political Cases Test Roberts’s Efforts to Keep the Supreme Court Above It All*, BLOOMBERG (last updated June 28, 2019, 10:40 AM), <https://www.bloomberg.com/news/articles/2019-06-28/political-cases-test-roberts-bid-to-keep-high-court-above-it-all> [<https://perma.cc/UA4P-96CP>].

242. See Grove, *supra* note 152, at 2252 (noting that some scholars have argued recently that “members of the public tend to support the Court if it rules ‘their way’ in salient cases”); but see James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court*, 10 ANN. REV. L. & SOC. SCI. 201, 209 (2014) (arguing that “institutional support for the U.S. Supreme Court is not polarized along partisan and/or ideological lines,” but reflects fundamental values that lead to fairly equal support for the Court between Democrats and Republicans).

243. Cass S. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 770 (2015) (“On many of the great issues of the day, the Court has been divided 5–4.”).

Court's reputation, suggesting a general discord among the justices.²⁴⁴ The impact is more profound when those decisions appear to run along ideological lines, as was the case recently in *Obergefell*, *Knick*, and *Janus*. Joan Biskupic describes this very scenario in her biography of Roberts, *The Chief*, explaining that such cases as *Citizens United* in 2010, *Shelby County* in 2013, and “a series of other 5–4 rulings . . . buttressed the perception that the Court majority was politically motivated and that Roberts was engaged in the partisanship he claimed to abhor.”²⁴⁵ Roberts himself has asserted that the Court's legitimacy is “threatened by a steady term after term focus on 5–4 decisions,” which the Court must avoid, or it “[is] going to lose its credibility and legitimacy as an institution.”²⁴⁶

Outside the Court, when politicians criticize the decisions publicly, they politicize those decisions and conflate the Court's holding with the policy arguments for or against the issue in question.²⁴⁷ So much attention on high profile and politically charged cases tends to blur the reality and mislead the public. For example, the American people likely are not aware of the fact that nearly 40% of the decisions in merits cases heard in the Court's 2018 term were unanimous, compared with under 30% decided by a five-to-four split.²⁴⁸

Consequently, the Court's best course of action vis-à-vis its reputation and legitimacy may be to do as Roberts suggested during his confirmation hearings: to “decide every case based on the record,

244. Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 667-68 (1993) (“In the early decades of this century, when 5-4 decisions were few and unanimity was the rule, critics of the Court often suggested that decisions by a single vote . . . were somehow illegitimate.”); Mondak, *supra* note 239, at 679 (“[A] 9-0 ruling may achieve a higher level of legitimacy than a 5-4 ruling.”); Tomasky, *supra* note 35 (explaining that “past chief justices worked to avoid 5-4 decisions on controversial matters [because] [t]hey wanted Americans to see that the court was unified”).

245. BISKUPIC, *supra* note 37, at 9.

246. As quoted in Jeffrey Rosen, *Are Liberals Trying to Intimidate John Roberts?*, NEW REPUBLIC (May 28, 2012), <https://newrepublic.com/article/103656/obamacare-affordable-care-act-critics-response> [<https://perma.cc/43RA-2A5D>]. See also Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan./Feb. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/> [<https://perma.cc/D9V3-MUF9>] (expressing Roberts's view that “closely divided, 5-4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics”).

247. See Hamilton, *supra* note 34, at 35-36. See also Grove, *supra* note 152, at 2272 (“The partisan actions of the President and the Senate have damaged the Supreme Court's public reputation.”).

248. *Final Stat Pack for October Term 2018*, SCOTUSBLOG 5 (June 28, 2019, 5:59 PM), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf [<https://perma.cc/8DCK-UMDM>].

according to the rule of law, without fear or favor”²⁴⁹ In fact, throughout its history, the Court has overruled its prior decisions on more than 200 occasions.²⁵⁰ Many of these cases are now applauded as examples of the Court getting it right.²⁵¹ For example, *Brown v. Board of Education* (1954)²⁵² overturned *Plessy v. Ferguson* (1896);²⁵³ *Obergefell v. Hodges* (2015)²⁵⁴ overturned *Baker v. Nelson* (1972);²⁵⁵ *West Coast Hotel v. Parrish* (1937)²⁵⁶ overturned *Lochner v. New York* (1905);²⁵⁷ and *Keyishian v. Board of Regents* (1967)²⁵⁸ overturned *Adler v. Board of Education* (1952).²⁵⁹ Given the historical view, it can be argued that the Court’s decisions in these cases ultimately strengthened, rather than weakened, its institutional integrity, despite its disregard for stare decisis.²⁶⁰

C. *The result in Kisor was harmful to the Court’s reputation*

The decision in *Kisor* has generally been viewed, as Corbin Barthold and Cory Andrews described on SCOTUSblog shortly after *Kisor* came down, as a “small win for James Kisor; a big loss for the Constitution.”²⁶¹

249. Roberts: ‘My Job is to Call Balls and Strikes and Not to Pitch or Bat,’ CNN (Sept. 12, 2005, 4:58 PM), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/> [<https://perma.cc/JCS8-UUMZ>] (opening statement of Judge John Roberts during his nomination hearings before the Senate judiciary committee).

250. A.J. Willingham, *The Supreme Court Has Overturned More Than 200 of Its Own Decisions. Here’s What It Could Mean for Roe v. Wade*, CNN (May 29, 2019, 7:31 AM), <https://www.cnn.com/2019/05/29/politics/supreme-court-cases-overturned-history-constitution-trnd/index.html> [<https://perma.cc/GSB4-C2U9>].

251. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]t is more important that the applicable rule of law be settled than that it be settled right.”). *But see generally* Thomas Jipping & Alexis Huggins, *Yes, The Supreme Court Should Overturn Precedent Sometimes*, HERITAGE FOUND. (Aug. 9, 2019), <https://www.heritage.org/courts/commentary/yes-the-supreme-court-should-overturn-precedent-sometimes> [<https://perma.cc/3RNM-SME9>].

252. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

253. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

254. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

255. *Baker v. Nelson*, 409 U.S. 810 (1972).

256. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

257. *Lochner v. New York*, 198 U.S. 45 (1905).

258. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

259. *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952).

260. *See* Jipping & Huggins, *supra* note 250 (“Following a past decision simply because it was decided, rather than because it was decided correctly, would make it impossible to correct grievous errors such as *Dred Scott v. Sandford* or *Plessy v. Ferguson*.”); Willingham, *supra* note 249 (explaining how many instances of the Court overturning precedent over the years “marked sea changes in American society and rule of law,” including *Brown* and *Obergefell*).

261. Corbin Barthold & Cory Andrews, *Symposium: A Small Win for James Kisor; a Big Loss for the Constitution*, SCOTUSBLOG (June 27, 2019, 2:19 PM), <https://www.scotusblog.com/>

As described above, deference to *stare decisis* alone does not ensure a net gain for the Court's institutional reputation.²⁶² Whether the Court had overturned *Auer* or not, it was a clear, decisive, and unambiguous holding in *Kisor* that would likely have provided a more lasting positive effect. When commentators are questioning the Court's logic on constitutional grounds, as they have with *Kisor*, is there any doubt that the integrity of the law, let alone the Court's public image, is equally questioned? When the Court hands down decisions in cases addressing politically charged and polarizing issues, commentators, politicians, and the public at large are likely to be more vocal in their support or criticism of the Court.²⁶³ Strangely, while the *Kisor* result has drawn significant attention and commentary, the reactions ran from "muted pessimism" to "unenthusiastic optimism."²⁶⁴ Even the legal analysts do not seem to know quite what to make of it.

Two issues are at the heart of the criticism of the *Kisor* result. First, fundamentally, is whether *Auer* deference in *any* form represents a sound legal doctrine. This issue will be addressed in the next section below. Second, the *Kisor* Court *did* uphold *Auer*,²⁶⁵ but in a "maimed and enfeebled" form that leaves courts with less certainty as to when, whether, and how to apply *Auer* deference in a given case, moving forward.²⁶⁶ Trimming what was a broad, and broadly applied, legal principle may be a good thing.²⁶⁷ But as one observer put it, "the cure for *Auer*'s overreach may turn out to be almost as bad as the disease."²⁶⁸ Alas, the *Kisor* decision better illustrates the cobra effect than any legal principle—in this case, where the efforts of the Chief Justice undermined his intentions.

In this case, the unintended consequences are far-reaching. Following *Kisor*, courts and litigants have to deal with "needless and

2019/06/symposium-a-small-win-for-james-kisor-a-big-loss-for-the-constitution/
[<https://perma.cc/J27U-U9Q3>].

262. See *supra* Part IV, Section B ("But *stare decisis* can only go so far.").

263. See Hamilton, *supra* note 34, at 35 (describing how highly publicized "above-the-fold" decisions draw more attention on the Court, often with politicians promoting their views about the results of those cases on political or ideological grounds and, ultimately, shaping public opinion).

264. Paul J. Larkin Jr., *Baseball, Legal Doctrines, and Judicial Deference to an Agency's Interpretation of the Law: Kisor v. Wilkie*, 2019 CATO SUP. CT. REV. 69, 74 (2019).

265. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

266. *Id.* at 2425 (Gorsuch, J., concurring in part). See also Schmitt, *supra* note 42 (explaining that the decision in *Kisor* resulted in "all this indeterminacy").

267. See Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L. J. 47, 53 (2015) (describing how *Seminole Rock* deference, now referred to as *Auer* deference, was originally constrained and narrowly applied, but evolved and broadened in scope, and "courts began to apply the doctrine more widely in the 1960s and 1970s").

268. Schmitt, *supra* note 42.

perplexing new hoops” in applying *Auer* deference.²⁶⁹ In the *Kisor* opinion, the Court outlined multiple steps that courts must follow and various factors they must consider to determine whether an agency’s interpretation should control (that is, whether *Auer* deference applies) in a given case.²⁷⁰ First, the court must ensure that the regulation in question is genuinely ambiguous.²⁷¹ To do this, the court “must exhaust all the traditional tools of construction.”²⁷² If the language of the rule is indeed deemed ambiguous, then the court must ensure that the agency’s interpretation is “within the bounds of reasonable.”²⁷³ If, after “‘carefully consider[ing]’ [its] text, structure, history, and purpose,”²⁷⁴ the court still finds the regulation to be ambiguous, the court must then go on to “make an independent inquiry” into the agency’s interpretation to determine whether it has the proper “character and context” to warrant deference.²⁷⁵ In other words, a court can only consider *Auer* if it is *really* sure the regulation is ambiguous, and it should only then defer to the agency’s interpretation if it is both “reasonable” and worthy of such deference.

But we are not done. To evaluate the worthiness of the agency’s reading of the regulation, a court must consider several factors.²⁷⁶ To begin, the court must ensure that the interpretation was “actually made by the agency,” by evaluating whether (a) the proper agency representatives provided the interpretation and (b) did so in some official forum.²⁷⁷ The Court’s guidance to the lower courts here is that they ensure the agency’s interpretation “emanate[d] from those actors, using those vehicles, understood to make authoritative policy in the relevant context.”²⁷⁸ Next, the court must verify that the interpretation is the result of the agency’s “substantive expertise.”²⁷⁹ That means the subject of the interpretation itself must be related to “the agency’s ordinary duties,” and not “within

269. *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in part).

270. *Id.* at 2415–18 (majority opinion).

271. *Id.* at 2415.

272. *Id.* (internal quotations removed) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843, n.9).

273. *Id.* at 2416 (quoting *Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013)).

274. *Id.* at 2415 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991)).

275. *Id.* at 2416.

276. *Id.* (describing the various “important markers” a court must consider, “for identifying when *Auer* deference is and is not appropriate”).

277. *Id.* (“[T]he regulatory interpretation must be one actually made by the agency. In other words, it must be the agency’s ‘authoritative’ or ‘official position,’ rather than any m[er]e ad hoc statement not reflecting the agency’s views.”).

278. *Id.*

279. *Id.* at 2417.

the scope of another agency's authority."²⁸⁰ Finally, the Court advises that an agency's interpretation "must reflect 'fair and considered judgment' to receive *Auer* deference."²⁸¹

With the Court's direction in *Kisor*, lower courts attempting to apply *Auer* deference now face many "new and nebulous qualifications and limitations."²⁸² As Justice Gorsuch lamented in his concurrence, "We owe our colleagues on the lower courts more candid and useful guidance than this."²⁸³ The decision also leaves the courts with a form of deference that is, at best, weak²⁸⁴ and perhaps nonexistent.²⁸⁵ In fact, on three occasions in the *Kisor* opinion, the Court reminded us that *Auer* "does not apply in all cases."²⁸⁶ When a court determines that it does, the new Court-imposed multi-step analysis leaves those courts susceptible to challenges on numerous fronts. Was the regulation genuinely ambiguous? Was the agency's interpretation reasonable? Did the interpretation reflect the substantive expertise of the agency? Did the agency arrive at its interpretation following fair and considered judgment? The list goes on. As such, lower courts may elect to simply avoid *Auer* deference entirely, to sidestep the "indeterminacy" that *Kisor* now brings.²⁸⁷

The resulting confusion among the lower courts, however they respond, is a serious and legitimate concern that also does little to enhance the Court's reputation. Ironically, it was adherence to stare decisis that led to this result.²⁸⁸ In the *Kisor* opinion, Justice Kagan explained that for the petitioner, Mr. Kisor, to prevail in overturning *Auer* deference, "he must overcome stare decisis—that special care we take to preserve our precedents."²⁸⁹ He failed to do so, Kagen asserted, because he "[did] not offer the kind of special justification needed."²⁹⁰ Yet, the decision raised doubts about whether such deference to stare decisis was genuine²⁹¹ or at

280. *Id.* at 2417 (internal editing and quotation marks omitted) (quoting *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 309 (2013)).

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

282. *Id.* at 2425 (Gorsuch, J., concurring in part).

283. *Id.* at 2425.

284. *Id.* at 2426 (asserting that the ruling in *Kisor* "has transformed *Auer* into a paper tiger").

285. In his concurring opinion in *Kisor*, Roberts asserted that the difference between the majority's modified form of *Auer* deference and Justice Gorsuch's preference to do away with it entirely, is "not as great as it may initially appear." *Id.* at 2425 (Roberts, C.J., concurring in part).

286. *Id.* at 2414 (majority opinion) (quoting *Christopher*, 567 U.S. at 155).

287. Schmitt, *supra* note 42.

288. *Kisor*, 139 S. Ct. at 2422 ("[S]tare decisis cuts strongly against [overturning *Auer*.]").

289. *Id.* at 2418.

290. *Id.*

291. In fairness, both liberals and conservatives have shown a relationship to stare decisis that may be best described as opportunistic. See, e.g., Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) (describing stare

least whether it was proper here.²⁹² Either way, the *Kisor* result leaves several losers in its wake. First, lower courts will find that applying *Auer* deference in future cases is a significant challenge. Second, administrative agencies will now lack confidence that their interpretations will have controlling weight. Third, litigants will be unsure of what principle of deference, if any, applies in regulatory interpretation cases. Finally, the High Court is left with a record of having just “zombified” a legal doctrine.²⁹³ As Justice Gorsuch complained in his concurring opinion, “we’re stuck with it because of the respect due precedent.”²⁹⁴

D. The Court should overturn Auer once and for all

Evidence of the cobra effect is apparent in the *Kisor* decision. By compromising and deferring to stare decisis to avoid further damage to the Court’s reputation, Roberts’s efforts in *Kisor* appear to have done more harm than good. There are certainly numerous reasons why *Auer* deference should be shelved as a legal doctrine. But it is the fact that separation of powers is at stake that is most salient to the question of the Court’s institutional integrity. By allowing the agencies which promulgated ambiguous rules to provide interpretations of those rules, courts necessarily delegate their role of providing legal construction. In doing so, the courts allow an administrative agency to do that which Chief Justice Marshall famously asserted was the sole province of the courts: “to say what the law is.”²⁹⁵

That the Court should overturn *Auer* is best understood in light of the arguments in support of *Auer* deference. These arguments arise out of the rationale the Court has provided over the years when deferring to agency interpretations, and outlined by Justice Kagan in the *Kisor* opinion. First, “the agency that promulgated a rule is in the ‘better position [to] reconstruct’ its original meaning,”²⁹⁶ simply because it understands the

decisis as “a doctrine of convenience, to both conservatives and liberals,” proponents of which are “determined by the needs of the moment,” and explaining that those who seek to overturn a longstanding law today are often most urgently supporting stare decisis when the new law is later at risk of being overturned).

292. *Kisor*, 139 S. Ct. at 2443–44 (Gorsuch, J., concurring in part) (asserting that the majority was “pretending to bow to stare decisis,” and arguing that “[t]here are serious questions about whether stare decisis should apply here at all”).

293. *Id.* at 2425.

294. *Id.* at 2443.

295. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

296. *Kisor*, 139 S. Ct. at 2412 (quoting *Martin v. O.S.H. Review Comm’n*, 499 U.S. 144, 152 (1991)).

subject matter and the intentions of Congress better than the courts do.²⁹⁷ Second, as the Court explained in *Pauley v. BethEnergy Mines, Inc.*, the need for “judgment grounded in policy concerns” in interpreting regulations makes it appropriate to allow the agency “to make such policy determinations,” rather than leaving such policy-related questions in the hands of the courts.²⁹⁸ Finally, as the Court in *Kisor* explained, “Auer deference [is] rooted in a presumption . . . that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.”²⁹⁹

What the Court left behind following *Kisor* is a weakened form of *Auer* deference, which retains many of its drawbacks, while the few benefits are diluted. To begin, the Court weakened one notable feature of *Auer* deference: its power to bind the courts.³⁰⁰ Following *Kisor*, courts are only to consider applying *Auer* deference after determining they cannot crack the mystery of the rule in question, using “all the traditional tools of construction.”³⁰¹ Before *Kisor*, in cases of agency rule interpretation, application of *Auer* deference went something like this: if the rule language was not “free from doubt,”³⁰² then the interpretation provided by the agency that promulgated the rule was controlling.³⁰³ Thus, the first question before the courts was often not whether the statute was “genuinely ambiguous,” but whether the agency’s interpretation was “plainly erroneous.”³⁰⁴ And the answer to that question addressed not whether deference to that interpretation was due, as that was effectively a forgone conclusion, but whether that interpretation would bind the

297. See *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 629 (1991) (describing the “significant expertise” needed to understand and properly interpret what may be a “complex and highly technical regulatory program”).

298. *Id.* at 697. See also *Martin* 499 U.S. at 153 (“[H]istorical familiarity and policymaking expertise account . . . for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court.”).

299. *Kisor*, 139 S. Ct. at 2412.

300. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (explaining that where a term is “a creature of the [agency’s] own regulations,” the agency’s “interpretation of it is, under our jurisprudence, controlling . . .”). See also Hessick, *supra* note 46, at 422 (explaining that, along with *Chevron*, *Auer* is one of “two doctrines of binding deference,” and explaining further that, under *Auer*, where a “court concludes that [a] regulation is ambiguous, the court will treat the agency’s interpretation as binding—so long as the agency’s interpretation of the regulation is reasonable”).

301. *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843, n.9).

302. *Martin*, 499 U.S. at 150.

303. *Auer*, 519 U.S. at 461. See also *Ehlert v. United States*, 402 U.S. 99, 105 (1971) (“[When] the meaning of the language is not free from doubt, we are *obligated to regard as controlling* a reasonable, consistently applied administrative interpretation if the Government’s be such.” (emphasis added)).

304. *Kisor*, 139 S. Ct. at 2412.

court.³⁰⁵ In that instance, as explained in *Auer*, the agency’s interpretation was “controlling unless plainly erroneous or inconsistent with the regulation.”³⁰⁶ With *Kisor*, the Court changed the nature of *Auer* deference as a result of the many qualifications now required to show that the agency’s interpretation is worthy of consideration.³⁰⁷

Even with such qualifications, the constitutional concerns about *Auer* remain. At the heart of the constitutional arguments against agency deference is the fact that it represents the courts delegating their interpretive, and thus judicial, authority.³⁰⁸ Article III, Section 1 of the Constitution vests the judicial power of the United States exclusively in the Supreme Court and lower federal courts.³⁰⁹ Alexander Hamilton, in Federalist Number 78, further established in 1788 that “[t]he interpretation of the laws is the proper and peculiar province of the courts,” and “[i]t therefore belongs to them to ascertain . . . the meaning of any particular act proceeding from the legislative body.”³¹⁰

The constitutional concerns about *Auer* deference have been expressed by many of the Supreme Court Justices themselves. Justice Thomas shared Hamilton’s view. In his concurring opinion for *Perez v. Mortgage Bankers Association*, he argued that *Auer* “represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a ‘check’ on the political branches.”³¹¹ Roberts, in his concurring opinion in *Kisor*, drew a distinction between *Auer* and *Skidmore*. “There is a difference between holding that a court ought to be persuaded by an agency’s interpretation [as with *Skidmore*

305. Even in *Auer* itself, the Court made no reference to the challenges in interpretation of the regulatory language (whether public-sector employees are “subject to” overtime pay requirements under the Fair Labor Standards Act), but simply held that “we must sustain the Secretary’s approach so long as it is based on a permissible construction of the statute.” *Auer*, 519 U.S. at 457. In determining that the “deferential standard is easily met here,” the Court then demonstrated how the Secretary’s interpretation of “subject to” was reasonable because it was consistent with the dictionary definition. *Id.* at 461.

306. *Id.* (internal quotation marks omitted) (emphasis added) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

307. The various “qualifications” are described above, *supra* Part IV, Section C. But even before *Kisor*, lower courts had been attaching exceptions and qualifications to *Auer*, such that it was evolving in practice. See Kristin E. Hickman & Mark R. Thomson, *The Chevronization of Auer*, 103 MINN. L. REV. HEADNOTES 103, 110, 112 (2019) (“Exceptions and caveats . . . have profoundly transformed *Auer* deference” to the point that “[p]erhaps the benefits of applying *Auer* just aren’t worth the trouble.”).

308. Hessick, *supra* note 46, at 426 (“The constitutional argument [against *Auer* deference] turns on Article III [of the U.S. Constitution], which provides that the judicial power shall be vested in the federal courts.” (internal edits and punctuation omitted)).

309. U.S. CONST. art. III, § 1.

310. THE FEDERALIST NO. 78, at 485–86 (Alexander Hamilton) (H. Lodge ed., 1888).

311. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring).

deference],” he wrote, “and holding that it should *defer* to that interpretation under certain conditions [as required under *Auer*].”³¹² Once a judge reasonably determines that *Auer* deference applies to a given case, the judge is necessarily relinquishing his interpretive authority to the regulatory agency.³¹³ By contrast, under *Skidmore* deference, where the agency’s interpretation is persuasive, but not controlling,³¹⁴ the *court* determines how much weight, if any, to give to an agency’s interpretation of statutory or regulatory language. All of the justifications for *Auer* deference, emphasizing the value of the agency’s technical expertise and policy-oriented considerations, seem to ignore the fact that “every day, in courts throughout this country, judges manage with these traditional tools [of interpretation] to reach conclusions about the meaning of statutes, rules of procedure, contracts, and the Constitution.”³¹⁵

There are two other arguments in support of overturning *Auer* that are relevant here. First, the doctrine of *Auer* deference is inconsistent with the Administrative Procedure Act (thus contradicting Congress’s view that courts are “to ‘determine the meaning’ of any relevant ‘agency action,’ including any rule issued by the agency”).³¹⁶ Second, deferring to an agency’s interpretation of ambiguous rules creates an incentive for agencies to construct ambiguous regulations.³¹⁷ Both of these arguments serve to emphasize further the disparity between *Auer* deference and the judicial role of the courts. By overturning *Auer*, the Court would have left the lower courts the form of deference prescribed in *Skidmore*. Courts could then refer to the agency as one source—perhaps the *primary* source, but merely a *persuasive* one—for its own interpretation of regulations, without the risks associated with *Auer* deference described here.³¹⁸

The fact that *Auer* deference is inconsistent with the Administrative Procedure Act is another way of framing the Constitutional questions

312. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019) (Roberts, C.J., concurring in part) (emphasis added).

313. *Id.* at 2429 (Gorsuch, J., concurring in part) (“Under *Auer*, judges are forced to subordinate their own views about what the law means to those of a political actor . . .”).

314. *Skidmore* deference is described above, *supra* Part II, Section A.1.

315. *Kisor*, 139 S. Ct. at 2430 (Gorsuch, J., concurring in part).

316. *Id.* at 2432, 2434 (quoting from 5 U.S.C. § 706 (2018) to explain that “*Auer* is . . . incompatible with the APA’s instructions”).

317. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J. concurring) (“[D]eferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases.”).

318. *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., concurring in part) (“Overruling *Auer* would have taken us directly back to *Skidmore*, liberating courts to decide cases based on their independent judgment and follow the agency’s view only to the extent it is persuasive.” (internal edits and punctuation omitted)).

raised above. This may also be the most crucial argument for overturning *Auer* when the Court's reputation is of primary concern. Allowing executive branch agencies to both write the rules *and* interpret them, establishing controlling legal authority in the process, violates the constitutional principle of separation of powers.³¹⁹ Combined with the fact that such deference denies the courts of their interpretive role, upholding *Auer* only serves to weaken the judiciary and, with it, the Court's institutional integrity.³²⁰

All of this explains why the decision in *Kisor* is a case study of the cobra effect at work on the High Court, showcasing how the Chief Justice's efforts were self-defeating. As a means of strengthening the Court's institutional integrity, Roberts supported upholding a constitutionally questionable legal doctrine that usurps power from the judiciary in a form that places a significant burden on lower courts that attempt to apply it. Any stabilizing effects of abiding by *stare decisis* were more than offset by the destabilizing effects of the *Kisor* decision. Overturning *Auer* is the only appropriate next step for the Court. The question remaining is simply when that opportunity will again arise, and whether the Court will then have the courage to do it.³²¹

V. CONCLUSION

The unexpected and confounding decision in *Kisor* produced several unintended consequences. The form of *Auer* deference left in its wake is narrower and, as such, more akin to *Skidmore* deference.³²² This only begs the question as to why the Court did not simply do away with *Auer* entirely since the principle of *Skidmore* deference is already available to the courts. Additionally, the willingness and ability of courts to apply *Auer* are now in doubt given *Kisor*'s "splintered opinions and multi-factored tests."³²³ Even knowing whether it is appropriate to apply *Auer* at all is

319. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 696 (1996) ("[A]t the end of the day [*Auer* deference] leaves only one actor—the agency—to write the relevant regulatory law and then to 'say what the law is.' This arrangement contradicts a central and strictly enforced commitment of the separation of powers . . .").

320. *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., concurring in part) ("[T]he majority's attempt to remodel *Auer*'s rule into a multi-step, multi-factor inquiry guarantees more uncertainty and much litigation.").

321. *Id.* at 2426 ("The Court's failure to be done with *Auer* . . . all but guarantees we will have to pass this way again. When that day comes, I hope this Court will find the nerve it lacks today and inter *Auer* at last.").

322. Schmitt, *supra* note 42.

323. Schmitt, *supra* note 42.

sure to leave lower courts confused.³²⁴ Of course, the true *unintended consequence* of *Kisor* arises because of the impact it will have on the lower courts, combined with the disregard for separation of powers it allows. In the long run, *Kisor*'s legacy will likely be that it undermined the Court's legitimacy.

All is not lost. In their separate concurring opinions in *Kisor*, Roberts and Kavanaugh both leave open the possibility that the Court may one day reconsider *Chevron* deference.³²⁵ In truth, even *Auer* is still not entirely off the chopping block. As Justice Gorsuch prophesied in his separate *Kisor* opinion, "This case hardly promises to be this Court's last word on *Auer*."³²⁶ Perhaps the Court will one day call the cobras back.

324. *Kisor*, 139 S. Ct. at 2430 (Gorsuch, J., concurring in part) (describing *Auer* deference, following *Kisor*, as "a doctrine of uncertain scope and application" (quoting Hickman & Thomson, *supra* note 306 at 105)).

325. *Id.* at 2425 (Roberts, C.J., concurring in part) (explaining that issues surrounding *Auer* deference are distinct from those surrounding *Chevron* deference, and that "I do not regard the Court's decision today to touch upon the latter question"); *Id.* at 2449 (Kavanaugh, J., concurring in part) (explaining that "like the Chief Justice, I do not regard the Court's decision not to formally overrule *Auer*" to preclude reconsideration of *Chevron* deference (internal quotation marks omitted)).

326. *Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., concurring in part).