A PUBLICATION OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Supreme Court Report

VOLUME 26, ISSUE 19 ■ JULY 8, 2019

This *Report* summarizes opinions issued on June 26 and 27, 2019 (Part I).

I. Opinions

● *Rucho v. Common Cause*, 18-422; *Lamone v. Benisek*, 18-726. By a 5-4 vote, the Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Common Cause* addressed a partisan gerrymander by the Republican-controlled North Carolina General Assembly in 2016. Republican legislators directed the mapmaker to draw a map that would produce a congressional delegation of 10 Republicans and three Democrats. The mapmaker did so, and Republicans went on to win 10 of the 13 congressional districts. A group of plaintiffs challenged the map. A three-judge district court eventually held that the partisan gerrymander violated the Equal Protection Clause, the First Amendment, the Elections Clause, and Article I, §2. *Lamone* addressed a partisan gerrymander by the Democratic-controlled Maryland Legislature and Democratic Governor. The Governor instructed the mapmaker to produce a congressional delegation of seven Democrats and one Republican by flipping the Sixth District, which had been held by a Republican for nearly twenty years. The mapmaker moved Republicans out of the district and Democrats into it; and a Democrat went on to win the district. A group of plaintiffs challenged the redistricting plan. A three-judge district court eventually held that the plan violated the First Amendment. In an opinion by Chief Justice Roberts, the Court vacated the remanded in both cases.

The Court explained that sometimes courts do not resolve claims "because the question is entrusted to one of the political branches or involves no judicially enforceable rights." Among such "political questions," said the Court, are claims "that lack 'judicially discoverable and manageable standards for resolving [them].'" The Court then turned to the history of gerrymandering, noting that it dates back to the Colonies. The Framers dealt with the issue by assigning state legislatures the initial power to prescribe how members of Congress shall be elected, but giving Congress the power to "make or alter" those regulations. Art. I, §4, cl. 1 (the Elections Clause). And Congress has used that power to address partisan gerrymandering by, for example, requiring single-member districts in 1842. The Framers did not, said the Court, intend the federal courts to play a role. The Court then distinguished one-person, one-vote and racial gerrymandering, where the Court has intervened. The challenge with partisan gerrymandering claims is that "'a jurisdiction may engage in constitutional political gerrymandering'"—the question is determining when it "'has gone too far.'" And given that courts would be entering a heated partisan fray, it is especially important to have clear standards "that can reliably differentiate unconstitutional from 'constitutional political gerrymandering.'" The Court found no way to draw such a line.

The Court stated that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation"—but the Court's precedents foreclose such a requirement. And many states elected their congressional delegations through at-large elections until 1842, which produced very non-proportional delegations. Plaintiffs next seek a "fair" apportionment of political power, but "it is not even clear what fairness looks like in this context." More competitive districts or more safe districts? Or adherence to traditional districting criteria? "Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal." And, said the Court, even if you decide on criteria for fairness, "how much deviation from those criteria is

© 2019, NAAG, 1850 M Street, NW • 12th Floor • Washington, DC 20036 • (202) 326-6047 • WWW.NAAG.ORG

constitutionally acceptable"? Would a court have "to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far"? In the Court's view, these questions pose difficulties not present in one-person, one-vote and racial gerrymandering cases.

The Court then rejected the specific tests the lower courts used and the dissent proposed. The *Common Cause* district court required plaintiffs to show that partisan gain was the plan's "predominant purpose" and that the plan had the effect of diluting the votes of the disfavored party. Then the defendants would have to show a neutral reason for the discriminatory effects. But, said the Court, mapmakers may take politics into account; it "does not become constitutionally impermissible . . . when that permissible intent 'predominates.'" Nor, found the Court, is the effects prong any more workable, for it requires judicial "prognostication as to the outcome of future elections," on "which neither judges nor anyone else can have any confidence." "Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change." The Court concluded that the district courts' First Amendment theory likewise failed. First, noted the Court, the maps imposed "no restrictions on speech, association, or any other First Amendment rights." Second, the supposed burdens those courts found on First Amendment rights—such as "difficulty drumming up volunteers and enthusiasm"—were far too indeterminate. The Court dismissed the dissent's proposed test (described below) as improperly varying from state to state and not answering the "how far is too far" problem. Lastly, the Court rejected the *Common Cause* district court's Elections Clause and Article I, §2 ruling as sounding in the Guarantee Clause—but the Guarantee Clause doesn't create justiciable claims. The Court closed by stating that its ruling "does not condone excessive partisan gerrymandering." But the solution rests, it said, in state constitutional rulings, independent redistricting commissions, and state laws mandating nonpartisan criteria. Plus, Congress can step in and address the problem.

Justice Kagan issued a lengthy dissent, which Justices Ginsburg, Breyer, and Sotomayor joined. She began by stating that, "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities. And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. . . . If left unchecked, gerrymanders like the ones here may irreparably damage our system of government." Quoting Justice Kennedy, she stated that extreme partisan gerrymandering amounts to "rigging elections"; a party can entrench itself in office "for a decade or more, no matter what the voters would prefer." Justice Kagan acknowledged the practice's historic provenance, but said that the problem is far worse today because of "big data and modern technology," which enable mapmakers to use "granular data about party preferences" and "put that information to use with unprecedented efficiency and precision."

After discussing the constitutional harms inflicted by partisan gerrymandering, Justice Kagan noted that "nearly all [Justices] have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution." She then disputed the majority's contention that there are no judicially manageable standards for assessing partisan gerrymandering claims. She observed that the lower courts "have largely converged" on a three-step test that looks to intent, effects, and causation. Of particular note, Justice Kagan elaborated on how the effects prong operates. It "begins by using advanced computing technology to randomly generate a large

collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, except for partisan gain. . . . Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other. We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution." In North Carolina, for example, "[e]very single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more." Using this approach, Justice Kagan said, does not require courts to "choose among contested notions of electoral fairness"; rather, "the State select[s] its own fairness baseline in the form of its other districting criteria." As to "how much is too much," Justice Kagan gave "a first-cut answer: This much is too much. . . . The absolute worst of 3,001 possible maps. The only one that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote." Or, she said, courts could use a "substantial" effect test, a kind of test courts employ routinely. Finally, responding to the Court's discussion of alternatives to federal court oversight of partisan gerrymandering, Justice Kagan was doubtful Congress would act: "The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering." She added that fewer than half the states allow voter initiatives. And she queried why, if state courts can address the issue (as the majority suggests), the Court itself can't.

● *Department of Commerce v. New York*, 18-966. Through shifting 5-4 coalitions, the Court rejected Enumeration Clause and Administrative Procedure Act challenges to the Secretary of Commerce's decision to add a question about citizenship status to the 2020 census questionnaire, but affirmed the district court's conclusion that the Secretary's stated justification for adding the question was pretextual, which warrants a remand to the Department of Commerce to provide a non-pretextual justification. Between 1960 and 2000, a citizenship question was asked of one-fourth to one-sixth of the population in the long-form questionnaire. In 2010, the format changed and citizenship was asked only in the American Community Survey sent to about 2.6% of households. In March 2018, Secretary of Commerce Wilbur Ross announced that he had decided to reinstate a question about citizenship on the 2020 census questionnaire sent to all households. He stated he was doing so at the request of the Department of Justice, which wanted better data about citizen voting-age population for purposes of enforcing the Voting Rights Act. The Secretary's memo explained that he combined two options proposed by the Census Bureau: reinstating the census question and also using administrative records from various federal agencies to provide DOJ with citizenship data. Although the Bureau expressed concern that adding the citizenship question would depress responses, the Secretary concluded it wasn't possible to "determine definitively" whether that was so. Two groups of plaintiffs filed suit in federal district court in New York challenging the decision on constitutional and statutory (including Administrative Procedure Act) grounds. In June 2018, the government submitted to the district court the "administrative record": the materials Secretary Ross considered. A short time later, the government supplemented the record with a new memo from the Secretary stating that he had begun considering whether to add the question in early 2017 and that he had asked DOJ whether it would request adding the question. This prompted the government to add more than 12,000 pages to the administrative record and the district court to authorize discovery outside that record, specifically, depositions of certain DOJ and Commerce officials. Following a

bench trial, the district court held that the plaintiffs (respondents) had standing to sue and that the Secretary's actions were arbitrary and capricious, pretextual, and violated certain provisions of the Census Act. Through an opinion by Chief Justice Roberts, the Court affirmed in part, reversed in part, and remanded.

The Court unanimously held that at least some respondents had standing. The Court reasoned that the district court was not clearly erroneous in finding that adding the citizenship question would lead noncitizen households to respond at lower rates than other groups, which would lead to respondents' asserted injuries. For example, several state respondents showed that such an undercount would reduce federal funds they would otherwise receive. Seven Justices (all but Justices Alito and Gorsuch) joined the portion of the opinion rejecting the government's contention that the Secretary's decision is "committed to agency discretion by law," 5 U.S.C. §701(a)(2), and therefore not judicially reviewable. The Court found that although the Census Act grants the Secretary broad authority to take the census in "such form and content as he may determine," 13 U.S.C. §141(a), that provision and others delegating broad authority "do not leave his discretion unbounded." The Court has entertained "challenges to census-related decisionmaking"; and the Census Act generally imposes "'a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.'"

The next section of the opinion (joined by the Court's five conservatives) reversed the district court's ruling that the Secretary's decision was "arbitrary and capricious" because it was not supported by the evidence. Specifically, the Secretary reasoned that administrative records don't exist for about 10% of the population, meaning without the citizenship question the Bureau would have to estimate citizenship for that group. Better, he concluded, to add the citizenship question and supplement census responses with administrative data—even though an estimated 500,000 census responses would be erroneous and there would be about 9.5 million conflicts between responses and administrative record data. Although the Bureau wanted to rely on the administrative records alone, the "choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the court improperly substituted its judgment for that of the agency." The Court further felt it was for the Secretary to "weigh[] the benefit of collecting more complete and accurate citizenship data against the risk that inquiring about citizenship would depress census response rates, particularly among noncitizen households." Although the Bureau predicted a 5.1% decline in the response rates by noncitizen households, "[t]he Secretary justifiably found the Bureau's analysis inconclusive." The Court then made short work of respondents' claim (adopted by the district court) that the Secretary violated two specific provisions of the Census Act.

In the final section of the opinion (joined by Chief Justice Roberts and the Court's four liberals), the Court affirmed "the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis." The Court explained that "an agency must 'disclose the basis' of its action" and that a court "ordinarily" evaluates agency action based solely on the administrative record. Further, while "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons," courts can look into "'the mental processes of administrative decisionmakers'"—and therefore allow extra-record discovery—on a

"'strong showing of bad faith.'" The Court concluded that, although the district court's decision to allow extra-record discovery was "premature," "it was ultimately justified in light of the expanded administrative record." The Court acknowledged that "[i]t is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy." But, found the Court, "viewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided." "In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived." Stating that the Court is "'not required to exhibit a naiveté from which ordinary citizens are free,'" it found the district court "warranted in remanding to the agency."

Justice Thomas filed an opinion concurring in part and dissenting in part, which Justices Gorsuch and Kavanaugh joined. This opinion criticized the final part of the Court's opinion, calling it the first time the Court have ever "invalidate[d] an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale." In Justice Thomas' view, "this holding would transform administrative law. It is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives. Significant policy decisions are regularly criticized as products of partisan influence, interest-group pressure, corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the [APA]." He also faulted the district court's decision as "transparently based on the application of an administration-specific standard." In Justice Thomas' view, nothing in the APA "instructs the Court to inquire into pretext"; "an agency action is not arbitrary or capricious merely because the decisionmaker has other, unstated reasons for the decision." He also disagreed that the Secretary engaged in any bad faith warranting extra-record discovery: the evidence "proves at most that the Secretary was predisposed to add a citizenship question to the census and took steps to achieve that end before settling on the VRA rationale he included in his memorandum." And even the extra-record evidence doesn't show, said Justice Thomas, that Voting Rights Act enforcement "did not factor *at all* into his decision."

Justice Breyer filed an opinion concurring in part and dissenting in part, which Justices Ginsburg, Sotomayor, and Kagan joined. In his view, the Secretary's decision was substantively arbitrary and capricious, even apart from pretext. He insisted that "[t]he administrative record includes repeated Census Bureau statements that adding the question would produce a less accurate count because noncitizens and Hispanics would be less likely to respond to the questionnaire." "Three distinct analyses" backed up that statement, which convinced the Bureau that the nonresponse could be "much greater" than 5.1%. Justice Breyer maintained that the Secretary's reasons for rejecting the Bureau's conclusion, set out in his memo, "are each contradicted by the record." And it is not enough to say that the Bureau's information wasn't definitive: "Few public-policy-related statistical

studies of risks (say, of many health or safety matters) are definitive." Similarly arbitrary, found Justice Breyer, was the Secretary's conclusion that adding a citizenship question would produce "more complete and accurate data" on citizenship. For various reasons detailed by Justice Breyer, the Bureau found that "using existing administrative records for 90% of the population and statistical modeling for the remaining 10% [ ] would yield more accurate citizenship data than also asking a citizenship question." Justice Breyer also found the Secretary's Voting Rights Act rationale "unconvincing" because, among other things, he did not "provide[] a single example in which enforcement of the Act has suffered due to lack of more precise citizenship data." All told, concluded Justice Breyer, "[t]he Secretary's failures in considering those critical issues . . . are the kinds of failures for which . . . the APA's arbitrary and capricious provision was written."

Finally, Justice Alito issued an opinion concurring in part and dissenting in part, expressing his view that the Secretary's decision was "committed to agency discretion by law" and therefore not subject to judicial review under the APA. He pointed to 13 U.S.C. §141(a), which authorizes the Secretary to "take a decennial census of population . . . in such form and content as he may determine." And "census of population" is defined as "a census of population . . . and matters relating to population. §141(g). In Justice Alito's view, [a] clearer and less restricted conferral of discretion is hard to imagine." He then walked through five provisions upon which respondents relied and explained why he believed they don't alter that unbounded discretion. In the end, he said, the Secretary is accountable to Congress and to the President, "who is, in turn, accountable to the people."

- *Kisor v. Wilkie*, 18-15. By a 5-4 vote, the Court declined to overrule *Auer v. Robbin*s, 519 U.S. 452 (1997), which directs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. James Kisor, a Vietnam War veteran, sought disability benefits from the Department of Veterans Affairs. He first applied in 1982, claiming he developed post-traumatic stress disorder from his participation in the Operation Harvest Moon military operation. The VA denied his benefits after its evaluating psychiatrist concluded he did not suffer from PTSD. Twenty-four years later, Kisor moved to reopen his claim. This time, the VA granted him benefits—but only from the time of his motion to reopen, not from the date of his first application. The Board of Veterans' Appeals affirmed that timing ruling based on its interpretation of an agency rule allowing retroactive benefits only if there were "relevant official service department records" it had not considered in its initial denial. Kisor had introduced new records, but they merely confirmed his participation in Operation Harvest Moon. The Board deemed those records not "relevant" because they did not go to the reason the VA had denied benefits previously (that he didn't have PTSD). The Court of Veterans Claims affirmed. Then the Federal Circuit affirmed based on deference to the Board's interpretation of its rule. Through an opinion by Justice Kagan and joined only in part by Chief Justice Roberts (the decisive fifth vote for parts of the opinion), the Court rejected Kisor's request that the Court abandon *Auer* deference.

In a portion of her opinion speaking for a plurality, Justice Kagan explained the background and basis for *Auer* deference. She said it traces to *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945), which itself "traces back to the later nineteenth century." The doctrine is "rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities." That is so "because the agency that promulgated a rule is in the 'better position [to] reconstruct' its original meaning"; because "resolving genuine regulatory ambiguities often 'entail[s] the exercise of judgment grounded in policy concerns'"; because "[a]gencies (unlike

courts) have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances'"; and because it produces uniformity.

In a portion of the opinion speaking for the Court, the opinion clarified that "*Auer* deference is not the answer to every question of interpreting an agency's rules." First off, *Auer* deference applies only when a court finds a statute "genuinely" ambiguous after "resort[ing] to all the standard tools of interpretation." "That means," said the Court, that "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." A reviewing "court must 'carefully consider[]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." Next, even if the regulation is ambiguous, "the agency's reading must still be 'reasonable.' In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." (Citation omitted.) Further, even reasonable agency interpretations might not be entitled to deference. The Court explained that to obtain deference: (1) the interpretation must be "the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views"; (2) "the agency's interpretation must in some way implicate [the agency's] substantive expertise"; (3) the interpretation "must reflect 'fair and considered judgment'" (and isn't "a merely 'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack'"); and (4) an interpretation won't receive deference if it "creates 'unfair surprise' to regulated parties."

Speaking again for a plurality, Justice Kagan then responded to Kisor and the dissent's attack on *Auer* deference. She said that *Auer* is consistent with §706 of the APA, which states that reviewing courts shall "determine the meaning or applicability of the terms of an agency action." She explained that courts independently review agency rules and determine whether deference is warranted. And, she said, §706 "does not specify the standard of review a court should use in 'determin[ing] the meaning' of an ambiguous rule." On top of that, added Justice Kagan, the APA has been understood as not altering preexisting practice and "pre-APA common law included *Seminole Rock* itself." Justice Kagan next rejected Kisor's contention that *Auer* circumvents the APA's notice-and-comment rulemaking requirement by effectively giving the force of law to agency interpretations that did not go through notice and comment. Justice Kagan stated that "interpretive rules, even when given *Auer* deference, do not have the force of law"; and "the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency's interpretation." Justice Kagan also turned aside Kisor's contention that "*Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer." She found no empirical support for that claim, and found that agencies have every incentive to issue clear rules. Finally, Justice Kagan rejected Kisor's claim "that *Auer* deference violates 'separation-of-powers principles.'" She said that the "commingling of functions (that is, the legislative and judicial) within an agency . . . is endemic in agencies, and has been 'since the beginning of the Republic.'"

Finally, writing again for the Court, Justice Kagan wrote that *stare decisis* supports retaining *Auer*. She observed that "Kisor asks us to overrule not a single case, but a 'long line of precedents'—each one reaffirming the rest and going back 75 years or more. This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times." (Citation omitted.) Second, "abandoning *Auer* deference would cast doubt on many settled constructions of rules." And third, Congress

"could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors." The Court vacated and remanded to allow the Federal Circuit to apply the principles set out in the Court's opinion.

Chief Justice Roberts issued a concurring opinion stating that—given the many "prerequisites for, and limitations on, *Auer* deference" the Court catalogs—"the distance between the majority and" the dissent "is not as great as it may initially appear." He added that the issues this case presents "are distinct from those raised" by *Chevron* deference. Justice Kavanaugh's separate opinion (joined by Justice Alito) echoed both points.

Justice Gorsuch issued a lengthy opinion (joined by Justice Thomas and mostly by Justices Kavanaugh and Alito) that concurred in the judgment but fundamentally disagreed with the majority: they would overrule *Auer*. Justice Gorsuch disagreed with Justice Kagan's treatment of *Auer* deference's history, insisting that the issue rarely arose before the mid-20th century; it began as mere dicta in *Seminole Rock*, a case involving an emergency Second World War program; and it was largely forgotten till the mid-1960s. Justice Gorsuch then emphasized the force of *Auer* deference: "Under *Auer*, judges are forced to subordinate their own views about what the law means to those of a political actor, one who may even be a party to the litigation before the court." In his view, *Auer* violates the APA and the Constitution. First, he said, it violates APA §706, which requires courts to "decide all relevant questions of law" and "set aside agency action . . . found to be . . . not in accordance with law." In Justice Gorsuch's view, "[a] court that, in deference to an agency, adopts something other than the best reading of a regulation isn't 'decid[ing]' the relevant 'questio[n] of law' or 'determin[ing] the meaning' of the regulation. Instead, it's allowing the agency to dictate the answer to that question." Justice Gorsuch said that *Auer* also violates APA §553, which requires notice-and-comment procedures for legally binding regulations but not for interpretive rules. "*Auer* effectively nullifies the distinction Congress drew here. Under *Auer*, courts must treat as 'controlling' not only an agency's duly promulgated rules but also its mere interpretations—even ones that appear only in a legal brief, press release, or guidance document issued without affording the public advance notice or a chance to comment." Justice Gorsuch disagreed that Congress should be presumed to have intended that result. And he specifically disagreed that the Congress that enacted the APA intended to codify *Seminole Rock*'s dicta: many thought the APA would expand the scope of judicial review; and the law of judicial review of agency action at that time "was in a confused state."

Justice Gorsuch next wrote that *Auer* deference conflicts with core separation-of-powers principles, namely, that the judiciary is empowered with saying what the law is, a power that cannot be shared with the executive branch. "*Auer* represents no trivial threat to these foundational principles," for it "tells the judge that he must interpret these binding laws to mean not what he thinks they mean, but what an executive agency says they mean." Indeed, he wrote, "[i]f *Auer* were a statute, it would [be] a forbidden attempt 'to prescribe or superintend how they decide those cases.'" Justice Gorsuch next responded to Justice Kagan's policy arguments. First, he said, *Auer* doesn't help ascertain what the regulation's author intended because "[a]gency personnel change over time, and an agency's policy priorities may shift dramatically from one presidential administration to another." Second, he disagreed that resolving ambiguities is properly viewed as sounding in policy. "The text of the regulation is treated *as* the law, and the agency's policy judgment has the force of law *only* insofar as it is embodied in the regulatory text." Third, he disagreed that agencies' technical expertise justified *Auer*. Courts "should pay close attention to an expert agency's views on technical questions in its field," but through *Skidmore* deference only.

Finally, Justice Gorsuch disagreed that *stare decisis* justified retaining *Auer*. He noted that the Court does not usually give *stare decisis* force to rules regarding "generally applicable interpretive methods." Even assuming "standard *stare decisis* considerations apply," he would not award it here because in his view: "no persuasive rationale supports *Auer*"; *Auer* has not proven to be a workable standard, as shown by the Court's refinement of it here; the doctrine is "out of step with how courts normally interpret written laws"; "the explosive growth of the administrative state over the last half-century has exacerbated *Auer*'s potential for mischief"; and "*Auer* has generated no serious reliance interests." Justice Gorsuch concluded by stating that "the majority's attempt to remodel *Auer*'s rule into a multistep, multi-factor inquiry guarantees more uncertainty and much litigation."

● *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 18-96. By a 7-2 vote, the Court held that a Tennessee law that requires applicants for a new license to operate a liquor store to have resided in the state the prior two years "violates the Commerce Clause and is not shielded by §2 of the Twenty-first Amendment." Under Tennessee's three-tiered liquor distribution system, only licensed retailers may sell to consumers. Tennessee law imposes a variety of durational residency requirements for persons or companies seeking to operate retail liquor stores. As most relevant here, to obtain an initial retail license an individual must show that he or she has "been a *bona fide* resident" of the state for the prior two years. The case has a complicated procedural history which culminated in the Sixth Circuit holding that various Tennessee durational requirements—including the above-mentioned two-year requirement—violate the dormant Commerce Clause and are not saved by the Twenty-first Amendment. In an opinion by Justice Alito, the Court affirmed.

The first section of the Court's opinion forcefully reaffirmed the Court's dormant Commerce Clause jurisprudence. The Court stated that "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising. That is so because removing state trade barriers was a principal reason for the adoption of the Constitution." And, the Court found, no one disputed that Tennessee's two-year residency requirement fails standard dormant Commerce Clause review. And so the Court turned to the Twenty-first Amendment, §2 of which provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Court explained that §2 can't possibly be read to prohibit the importation of alcohol in violation of *any* state law, for that would mean the provision immunizes "a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex." Rather, to determine §2's scope, "we have looked to history for guidance."

The Court described the pre-Prohibition history of liquor, culminating in the Webb-Kenyon Act, which sought to override Court decisions that made it impossible for dry states to ban the importation of out-of-state liquor (as long as it remained in its original package). Although the Webb-Kenyon Act—unlike its predecessor, the Wilson Act—did not expressly mandate equal treatment for imported and domestically produced alcohol, the Court in *Granholm v. Heald*, 544 U.S. 460 (2005), held that "the Webb-Kenyon Act did not purport to authorize States to enact protectionist measures." The Court then explained that the text of §2 of the Twenty-first Amendment "'closely follow[ed]' the operative

language of the Webb-Kenyon Act, and this naturally suggests that §2 was meant to have a similar meaning"—meaning that it, too, "did not purport to authorize States to enact protectionist measures." More generally, observed the Court, "we have inferred that §2 was meant to 'constitutionaliz[e]' the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition. And as recognized during that period, the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations." (Citations omitted.)

The Court acknowledged that its earliest post-Twenty-first Amendment cases "read §2 as granting each State plenary 'power to forbid all importations which do not comply with the conditions which it prescribes.'" But, the Court observed, its later cases recognized that §2 could not be read that way. Instead, when assessing dormant Commerce Clause challenges, the Court "examined whether state alcohol laws that burden interstate commerce serve a State's legitimate §2 interests. And protectionism, we have stressed, is not such an interest." See, *e.g.*, *Granholm*, *supra*; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). The Court rejected petitioner's contention that "a different rule applies to state laws that regulate in-state alcohol distribution," finding "no sound basis for this distinction." The Court found nothing in §2's text supporting that distinction; and it disagreed that *Granholm*'s reaffirmation of three-tiered alcohol distribution systems supports the distinction. To the contrary, said the Court, "[m]any such schemes do not impose durational-residency requirements—or indeed any residency requirements—on individual or corporate liquor store owners." Nor was the Court persuaded that durational requirements are justified by their long pedigree.

Finally, "[r]ecognizing that §2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens," the Court asked "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." It answered no. The Court reviewed each of the claimed public-health and safety rationales for the durational requirement and found each wanting. In particular, the Court wasn't persuaded by the claims that the requirement was need to "ensure[] that retailers are 'amenable to the direct process of state courts'"; to "give[] the State a better opportunity to determine an applicant's fitness to sell alcohol"; or to "enable the State to maintain oversight over liquor store operators." In the end, found the Court, "the predominant effect of the 2-year residency requirement is simply to protect the [in-state liquor stores] from out-of-state competition."

Justice Gorsuch filed a dissenting opinion, which Justice Thomas joined. In their view, the Webb-Kenyon Act invoked Congress' power to override the dormant Commerce Clause and gave states "wide latitude to restrict the sale of alcohol within their borders"; §2 of the Twenty-first Amendment constitutionalized that latitude. "Accordingly," Justice Gorsuch reasoned, "the people who adopted the Amendment naturally would have understood it to constitutionalize an 'exception to the normal operation of the [dormant] Commerce Clause.'" He noted that the immediate post-Prohibition Court had that understanding, as did the 18 states that "adopted residency requirements within the first 15 years after its ratification." In short, Justice Gorsuch wrote, "[t]he point of §2 was to allow each State the opportunity to assess for itself the costs and benefits of free trade in alcohol." Because the residency requirement "is surely one reasonable way" of "ensur[ing] retailers will be amenable to state regulatory oversight," it should have been upheld.

● *Mitchell v. Wisconsin*, 18-6210. By a 4-1-4 vote, the Court held that "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC" under the exigent circumstances exception to the Fourth Amendment's warrant requirement. Under Wisconsin's implied-consent law, drivers are deemed to have consented to breath or blood tests if an officer reasonably believes they were driving while intoxicated. The driver can withdraw that consent, at the cost of losing his license. But, under the law, "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have" withdrawn it. In this case, a police officer (Jaeger) received a report about a drunk driver and soon found Gerald Mitchell stumbling and slurring his words. Jaeger arrested Mitchell based on the results of a preliminary breath test. Jaeger tried to drive Mitchell to the police station for a more reliable blood test, but Mitchell became too lethargic to take that test. Jaeger instead drove Mitchell to a nearby hospital for a blood test, during which time Mitchell lost consciousness. Hospital staff drew a blood sample while Mitchell was unconscious, which showed a blood alcohol level of 0.222%. Mitchell was charged with two drunk-driving offenses. The trial court denied his motion to suppress the blood, and a jury found him guilty. The Wisconsin Supreme Court affirmed the convictions. Through a plurality opinion by Justice Alito, the Court adopted a new near-categorical rule allowing warrantless blood tests in these circumstances, but vacated and remanded to allow the Wisconsin courts to apply it.

Justice Alito's plurality opinion (joined by Chief Justice Roberts and Justices Breyer and Kavanaugh) acknowledged that *Missouri v. McNeely*, 569 U.S. 141 (2013), held that the exigent circumstances exception to the warrant requirement does not categorically apply in drunk driving cases merely because blood-alcohol evidence dissipates. What that teaches, said the plurality, is "that the fleeting quality of BAC evidence alone is not enough." But *Schmerber v. California*, 384 U.S. 757 (1966), teaches that the exigent circumstances exception allows blood tests of drunk drivers when there are special circumstances (there, a car accident). The plurality concluded that, "[l]ike *Schmerber*, this case sits much higher than *McNeely* on the exigency spectrum" because of "Mitchell's medical condition." More specifically, "it was reasonable for Jaeger to seek a better breath test at the station; he acted with reasonable dispatch to procure one; and when Mitchell's condition got in the way, it was reasonable for Jaeger to pursue a blood test."

The plurality elaborated that it was focusing on a "category of cases encompassed by the question on which we granted certiorari—those involving unconscious drivers. In those cases, the need for a blood test is compelling, and an officer's duty to attend to more pressing needs may leave no time to seek a warrant." This is because "[p]olice can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital; that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value." (Footnotes omitted.) In the plurality's view, "[a]ll of that sets this case apart from the uncomplicated drunk-driving scenarios addressed in *McNeely*." Nor is it an adequate response, said the plurality, that warrants can be obtained quickly these days. They nonetheless still take *some* time to obtain; and "[i]n the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible

collateral costs." And so the plurality adopted the following rule: "When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." Nonetheless, the plurality left open "the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." The Court vacated and remanded to allow Mitchell to try to make that showing.

Justice Thomas filed a concurring opinion that provided the fifth vote. He had dissented in *McNeely* and would adopt the rule set out in that dissent: "the natural metabolization of alcohol in the blood stream 'creates an exigency once police have probable cause to believe the driver is drunk,' regardless of whether the driver is conscious."

Justice Sotomayor filed a dissenting opinion, which Justices Ginsburg and Kagan joined. The dissent criticized the plurality for relying on the exigent circumstances exception because the Wisconsin courts did not rely on it and the question presented by the petition for certiorari asked only whether the Wisconsin implied-consent statute provides an exception to the warrant requirement. In its view, "*Schmerber* and *McNeely* establish that there is no categorical exigency exception for blood draws, although exigent circumstances might justify a warrantless blood draw on the facts of a particular case. . . The lesson is straightforward: Unless there is too little time to do so, police officers must get a warrant before ordering a blood draw." Justice Sotomayor stated that *McNeely*'s reasons for rejecting a categorical rule that exigent circumstances always exist in drunk driving cases fully apply to unconscious drivers. *McNeely* reasoned that some delay in taking the blood test is inevitable; while police are taking the driver to a hospital for a blood draw they can seek a warrant; blood dissipates gradually; and warrants can be obtained expeditiously. All those considerations, said the dissent, apply when the drunk driver is unconscious. "And if police officers are truly confronted with a 'now or never' situation, they will be able to rely on the exigent-circumstances exception to order the blood draw immediately." (Internal quotation marks omitted.)

Justice Gorsuch filed a separate dissent stating that he would dismiss the petition as improvidently granted because neither the parties nor the lower courts addressed the exigent circumstances doctrine; the question presented instead (as noted) concerned the state's implied-consent statute.

● *United States v. Haymond*, 17-1672. By a 4-1-4 vote, the Court held that 18 U.S.C. §3583(k), when applied to impose a mandatory minimum prison term following the revocation of supervised release, violates the Fifth and Sixth Amendment right to a jury trial. Under the general provision regarding the revocation of supervised release, 18 U.S.C. §3583(e)(3), "a district judge who finds that a defendant has violated the conditions of his supervised release normally may (but is not required to) impose a new prison term up to the maximum period of supervised release authorized by statute for the defendant's original crime of conviction, subject to certain limits." In 2003, however, Congress added §3583(k) to the Sentencing Reform Act. It provides that "if a judge finds by a preponderance of the evidence that a defendant on supervised release committed one of several enumerated offenses, including the possession of child pornography, the judge *must* impose an additional prison term of at least five years and up to life

without regard to the length of the prison term authorized for the defendant's initial crime of conviction." A trial judge applied that provision to petitioner Andre Haymond, who had been sentenced to 38 months' imprisonment and 10 years of supervised release for possessing child pornography. During his supervised release, the government found images of child pornography on his computer. A district judge held a hearing and ruled, under the preponderance of the evidence standard, that Haymond knowingly downloaded and possessed 13 images of child pornography. As he was required to by §3583(k), the judge imposed an additional prison term of five years. The Tenth Circuit vacated the sentence, concluding that §3583(k) violated the Fifth and Sixth Amendments. As a remedy, it held that the last two sentences of §3583(k)—which mandate the five-year mandatory minimum term—was "unconstitutional and unenforceable." Through a four-Justice plurality opinion by Justice Gorsuch (joined by Justices Ginsburg, Sotomayor, and Kagan) and a concurring opinion by Justice Breyer, the Court upheld the Tenth Circuit's ruling that §3583(k) violates the right to a jury trial guaranteed by the Fifth and Sixth Amendments.

The plurality traced the history of the jury trial right, as well as the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties.'" Because "a range of punishments includes not only a maximum but a minimum," the Court in *Alleyne v. United States*, 570 U.S. 99 (2013), held that facts increasing the mandatory minimum must be found by a jury. The plurality found the "lesson" of the *Apprendi* lines of cases, culminating in *Alleyne*, "clear": "like the facts the judge found at the defendant's sentencing hearing in *Alleyne*, the facts the judge found here increased 'the legally prescribed range of allowable sentences' in violation of the Fifth and Sixth Amendments." The plurality rejected the government's contention that *Apprendi* and *Alleyne* don't apply here "because the Sixth Amendment's jury trial promise applies only to 'criminal prosecutions,' which end with the issuance of a sentence and do not extend to 'postjudgment sentence-administration proceedings.'" The plurality stated that the government cannot "dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution." In its view, "an accused's final sentence includes any supervised release sentence he may receive." The plurality cautioned that this "does not mean a jury must find every fact in a revocation hearing that may affect the judge's exercise of discretion within the range of punishments authorized by the jury's verdict. But it does mean that a jury must find any facts that trigger a *new* mandatory minimum prison term." The plurality also rejected as foreclosed by *Alleyne* the government's contention that the jury's original verdict authorized Haymond's sentence for violating his supervised release.

The plurality next rejected the government's resort to history: that judges, not juries, have long adjudicated parole and probation revocations. The plurality said that this argument overlooks the novelty of §3583(k) and the fact that supervised release (unlike parole) is intended "to encourage rehabilitation *after* the completion of [a] prison term." The plurality then reiterated that its "decision is limited to §3583(k)—an unusual provision enacted little more than a decade ago—and the *Alleyne* problem raised by its 5-year mandatory minimum term of imprisonment. Section §3583(e), which governs supervised release revocation proceedings generally, does not contain any similar mandatory minimum triggered by judge-found facts." (Citation omitted.) Finally, the Court remanded to allow the Tenth Circuit to assess the government's arguments as to the proper remedy.

Justice Breyer issued the decisive concurring opinion. In contrast to the plurality, he "would not transplant the *Apprendi* line of cases to the supervised-release context." But he agreed with the plurality that §3583(k) is unconstitutional. He found decisive that, in contrast to ordinary supervised-release statutes, §3583(k) "applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute"; "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long"; and imposes a five-year mandatory minimum term of imprisonment "upon a judge's finding that a defendant has 'commit[ted] any' listed 'criminal offense.'" "Taken together," he concluded, "these features of §3583(k) more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution."

Justice Alito filed a lengthy dissenting opinion, which Chief Justice Roberts and Justices Thomas and Gorsuch joined. The dissent criticized the plurality opinion, finding that its reasoning sweeps far more broadly than it admits: "Many passages in the opinion suggest that the entire system of supervised release, which has been an integral part of the federal criminal justice system for the past 35 years, is fundamentally flawed in ways that cannot be fixed." According to the dissent, the plurality does that by (among other things) stating that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty"; declaring that "every supervised-release revocation proceeding is a criminal prosecution"; insisting that "sending a defendant found to have violated supervised release back to prison is 'punishment,'"; and distinguishing supervised release from parole by saying the former "is added to the term of imprisonment."

Justice Alito then asserted that, just as juries have never been required at parole revocation hearings, they are not required at supervised release revocation proceedings. The Sixth Amendment says that in "criminal prosecutions" the "accused" is entitled to a jury trial. Yet, Justice Alito said, a person already convicted of a crime is no longer the "accused." Further, once a final judgment is entered and sentence imposed, the "criminal prosecution" has ended. The dissent pointed to *Morrissey v. Brewer*, 408 U. S. 471 (1972), which expressly stated that "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply in parole revocations." And that decision "did not turn on any features of parole or probation that might distinguish them from supervised release. . . . In recognition of this, the courts of appeals for the past 35 years have overwhelmingly declined to apply the Sixth Amendment in supervised-release revocation proceedings, and they have done so precisely on the ground that these proceedings are not part of criminal prosecutions." Justice Alito distinguished the *Apprendi* line of cases because they relied on the historical role of juries—yet "the plurality can muster no support for the proposition that the jury trial right was extended to anything like a supervised-release or parole revocation proceeding at the time of the adoption of the Sixth Amendment." On top of that, said Justice Alito, *Apprendi* focused on determining the true elements of a criminal offense and having them submitted to a jury. But the "postjudgment facts" addressed at supervised release proceeding do not go to the elements "of the charged offense."

The Supreme Court Report is published biweekly during the U.S. Supreme Court Term by the NAAG Center for Supreme Court Advocacy.

SUPREME COURT CENTER STAFF

Dan Schweitzer
Director and Chief Counsel
NAAG Center for Supreme
Court Advocacy
(202) 326-6010

The views and opinions of authors expressed in this newsletter do not necessarily state or reflect those of the National Association of Attorneys General (NAAG). This newsletter does not provide any legal advice and is not a substitute for the procurement of such services from a legal professional. NAAG does not endorse or recommend any commercial products, processes, or services.

Any use and/or copies of the publication in whole or part must include the customary bibliographic citation. NAAG retains copyright and all other intellectual property rights in the material presented in the publications.