An Imagined Bloc and Other Figments

By Donald A. Daugherty, Jr.

Litigation Practice Group

A Review of:

American Justice 2019: The Roberts Court Arrives, by Mark Joseph Stern (University of Pennsylvania Press 2019), https://www.upenn.edu/pennpress/book/16045.html

About the Author:

Donald A. Daugherty is Senior Counsel at the Wisconsin Institute for Law & Liberty.

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. We invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

With Brett Kavanaugh replacing Anthony Kennedy, the Supreme Court's composition for the 2018-19 Term broke down into five "conservative" Justices, who generally follow an originalist/textualist approach, and four "liberal" Justices, who are more inclined to look for meaning beyond the constitutional or statutory language. Slate's Mark Joseph Stern reviews the Term in the latest installment of the University of Pennsylvania Press's "American Justice" series, "The Roberts Court Arrives."

Stern concurs with most court watchers that the Term was less momentous than anticipated and "by no means a conservative revolution—thanks in large part to the chief justice." Thus, he writes, "[t]he central topic of this book . . . is how Roberts wielded his newfound power" by, for example, writing more than a third of the Term's majority opinions in 5-4 or 5-3 decisions. In Stern's view, Chief Justice John Roberts' institutional interest in the judiciary is the thin black line keeping the Supreme Court from becoming an arm of the Republican Party. Nonetheless, Stern remains anxious: "even as Roberts played the role of centrist, he laid the groundwork for a coming turn to the right." As a result, the book is sometimes concerned less about the Term than about future terms.

Stern views judges as essentially politicians in robes, and there is no doubt where his own politics lie. He makes little effort to come across as evenhanded or nonideological. Outcomes he favors are lauded as "progressive," while conservatives are consistently described as "ardent," "rock ribbed," "staunch," and the like.

Stern also grinds on the tiresome falsehood that conservatives vote as one "bloc." In fact, most conservative observers wish there were a more coherent, functioning majority, and throughout the book, Stern himself points out abundant cracks in the bloc, including between President Donald Trump's two appointees.

Unexamined, however, is the possibility that a liberal bloc exists, which is a much more solid proposition. In the 67 cases decided after argument, the four Justices appointed by Democratic presidents voted the same way 51 times, while the five Republican appointees stuck together 37 times. Of the 20 cases that split 5-4, only seven followed the conservative-liberal divide that conventional wisdom would expect, with a conservative joining the four liberals more often than the five conservatives voting together. By the end of the Term, each conservative Justice had joined the liberals as the deciding vote at least once. As seen in Stern's book, votes by the conservative Justices (other than perhaps Samuel Alito) often surprise, while the four liberals vote reliably for "progressive" outcomes.

Also unexamined is the disconnect during the current administration between controlling Supreme Court precedent and some lower court decisions. From the outset, Trump's opponents have maintained that his presidency is fundamentally different from every other in American history, and they have sounded the rallying cry that it must not be "normalized." Although journalists

violate no oath by supporting this effort, judges cannot base legal analysis on personal feelings about a president. The most notable example of this disconnect is the Ninth Circuit, which had 12 of 14 of its cases reversed in the Term. At the same time, the Circuit's dismal record predates Trump. (And in light of the late Judge Stephen Reinhardt's boast that the Supreme Court "can't catch 'em all," the Circuit may not be concerned about its consistently miserable showing.)

The Term cannot be properly assessed without considering the brutal confirmation proceedings that occurred at its outset, and which may have caused the Court to try to keep a low profile. Stern opens the Introduction with a description of red-robed handmaidens standing outside the Court building protesting the newest Justice. Stern recounts the wrenching drama of the Kavanaugh hearings, duly noting the chaos and the differing recollections of Kavanaugh and his accuser, Christine Ford.

To give the Term historical context, Stern mentions a few landmark decisions since the Warren Court, and observes that the Court "has reached into nearly every aspect of American life." Asking rhetorically, "Is it healthy in a democracy for so many important issues to be settled by nine lawyers in Washington, D.C.?," Stern appears unaware that for decades, conservative legal and political scholars have answered emphatically, "*Of course not!*" In fact, a major theme of the Roberts Court is that Americans should look to the federal political branches and the states for resolution of "so many important issues" that have been directed at the federal judiciary for the past sixty years. This may explain why only 72 cases were decided on the merits in the Term, which although quite low by historical standards, is not under this Chief Justice.

The most dramatic divisions among the Justices appeared in the Term's death penalty cases, which are considered in the first chapter, "Death Matters." The cases are highly fact-dependent and much of the activity occurred on the Court's "shadow docket," making it difficult to draw themes broader than that some Justices believe the Constitution allows for capital punishment and some (if not all) are unsettled personally by it. Unfortunately, Stern relies for his conclusions on caricatures of conservative Justices as death penalty enthusiasts, religious partisans, and/or beholden to public opinion. For example, explaining their votes to stay executions in two cases, Stern asserts that "Kavanaugh and Roberts do not want to be reviled as callous, bigoted, or bloodthirsty;" apparently, he thinks the other three conservatives don't mind.

In the factually similar cases of *Dunn v. Ray*[1] and *Murphy v. Collier*,[2] the Court reached different conclusions. Taken together, the results puzzled observers, but Stern's analysis doesn't help clarify matters. Both inmates sought to have their executions stayed while the Court considered whether they had the right to have clergy from their respective faiths with them in the death chamber. In February 2019, the Supreme Court denied as untimely the request for an imam by Ray, a Muslim, but a month later, it stayed Murphy's execution to consider his last minute claim of a right to have a Buddhist priest present.

At the time Ray's request was denied, Justice Elena Kagan wrote an impassioned dissent for the liberal Justices. Alito later issued a dissent in *Murphy* which, unusually, also tried to explain his vote in *Ray* two months earlier. Then, Kavanaugh and Roberts issued a statement pointing out a strong equal treatment claim raised by Murphy but not by Ray.

Because conservatives support religious liberty, Stern believes the result in *Ray* can only be explained by religious bias. He recounts non-death penalty cases from the past several terms that involved Christian or Muslim parties, but is unable to draw any meaningful conclusion. Similarly, he cannot explain the "pro-Buddhist" result in *Murphy*, but he still rejects Kavanaugh's reliance on the equal treatment claim and insists that he was responding to "the crush of bipartisan criticism that greeted the court's decision in *Ray.*"

The next chapter, "The Establishment Reversal," demonstrates how even when the Justices in the purported "bloc" reach the same conclusion, they often cannot agree on a path for getting there. In *American Legion v. American Humanist Association*, the Court considered the constitutionality of a forty-foot tall cross, which had stood on public land in Maryland for nearly a century as a memorial to soldiers who perished in World War I.[3] The Court held that allowing the cross to continue to stand did not constitute an unconstitutional establishment of religion by Maryland. As Stern notes, this result was expected: "[t]he real fight . . . wasn't really about whether the . . . cross would stay or go. It was whether the majority would go for broke by overturning decades of precedent—and specifically the *Lemon* test itself." In the event, the majority failed to cohere, seven different opinions were needed to reach a 7-2 result, and the widely-maligned *Lemon* test lives on.

For a plurality of four, Alito wrote that any religious monument permitted under the Establishment Clause as originally understood is constitutional, and that removing the long-standing cross now would in fact show hostility towards religion. Kavanaugh concurred, but focused less on the history of specific monuments and more on the history of certain governmental practices permitted under the clause. Justice Neil Gorsuch stated that the offense allegedly suffered by the challengers as a result of the monument was inadequate to give them standing, and Justice Clarence Thomas wrote, like he has in other cases, that under the language of the First Amendment ("*Congress* shall make no law . . . "), the clause should not constrain states in the first place.

Stern believes that notwithstanding its muddled holding, *American Legion* is an initial step by the new conservative majority "to compel government subsidization of religion," which requires that they "hobble the establishment clause to succeed." This seems farfetched. A more pertinent takeaway is that because the conservative Justices could not agree on a single opinion overruling *Lemon*, an opportunity to clarify one of the more confused areas of constitutional law was missed and an opening left for judges inclined to follow Reinhardt's lead.

The third chapter, "Abortion Access Denied," seems to have been titled by someone who didn't read it. Stern writes that the

1 139 S. Ct. 661 (Mem.) (2019).

2 139 S. Ct. 1475 (Mem.) (2019).

3 139 S. Ct. 2067 (2019).

Court ducked and dodged abortion cases, and it is unclear how access was curtailed, let alone denied. The Term's only decision on the merits, *Box v. Planned Parenthood of Indiana and Kentucky*, was decided without oral argument, and the majority opinion was unsigned.[4] There, a 7-2 majority upheld on rational basis review a provision of Indiana law regulating the disposal of what remains *after* the fetus is aborted. (In the same opinion, the Court also denied certiorari review of the Seventh Circuit's decision striking down as unconstitutional a related provision prohibiting abortions based on the fetus's race, sex, or disability.)

In the only other notable abortion case, *June Medical Services v. Gee*, a five-Justice majority stayed without explanation a Fifth Circuit decision upholding a Louisiana law that required abortion doctors to have admitting privileges at local hospitals.[5] Stern contends that the Fifth Circuit's decision was an outlandish disregard of the Supreme Court's 2016 decision, *Whole Woman's Health v. Hellerstedt*, which struck down a similar Texas statute on the grounds that it unduly burdened women seeking abortions.[6] Rather than showing how the lower court's decision was so obviously wrong, however, Stern speculates about the authoring judge's hopes for the Kavanaugh nomination.

Looking ahead, Stern writes, "[T]he conventional wisdom is that the chief justice will erode *Roe* and its progeny by methodically granting states more and more leeway to regulate abortion." In fact, consistent with this thinking, New York recently passed liberal abortion legislation in anticipation of *Roe's* demise. Given his rhetorical question in the Introduction, Stern should welcome such state legislation.

Chapter 4, "The Libertarian Court?," is the book's longest and most interesting. Stern observes that in criminal law cases, the Court "often splinters along unusual lines that do not track partisan ideology," and this prevents him from simply categorizing decisions as conservative or liberal.

For example, the Chief Justice and Kavanaugh joined Justice Sonia Sotomayor's majority opinion in *Garza v. Idaho*.[7] There, a 6-3 majority held that the refusal by counsel to file an appeal on behalf of his client, who previously had pled guilty and signed an appeal waiver, constituted ineffective assistance under the Sixth Amendment, regardless of the merits of the appeal.

Gorsuch's originalist/textualist approach may be stricter than that of his conservative colleagues and, in several criminal cases, it led him to "progressive" conclusions. For example, Gorsuch and Justice Ruth Bader Ginsberg dissented in *Gamble v. United States*, where a 7-2 majority upheld the "dual sovereigns" rule, which permits federal and state governments to try a defendant separately for the same offense without violating the Double Jeopardy Clause.[8]

Also, Gorsuch joined the liberals to form a 5-4 majority in *United States v. Davis*,[9] the third in a series of cases since 2015 in which the Court has struck down a federal criminal statute under the "void for vagueness" doctrine. Under the doctrine, a criminal law violates due process where it is so vague that it fails either to give notice of the conduct it proscribes or to provide any real standard such that arbitrary enforcement may occur. The statute at issue in *Davis* lengthened prison sentences for certain offenders who used a gun in a "crime of violence," the definition of which the Court found to be unconstitutionally vague.

Gorsuch's opinion expressed structural concerns:

> Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.

In his dissent, Kavanaugh showed a greater willingness to interpret the statute so it was less vague, in order to avoid "a serious mistake" that would allow "many dangerous offenders [to] walk out of prison early." Stern writes that this reflects a "philosophical dispute about the role of courts in American democracy" between Gorsuch and the other four conservatives.

Although the Trump Administration's immigration policy remains a significant political issue, it has had less significance in the courts since *Trump v. Hawaii*, a decision from the previous term addressing related legal issues.[10] Nonetheless, in the fifth chapter, "Huddled Masses," Stern discusses two immigration cases.

Stern's penchant for speculation is noticeable in his discussion of *East Bay Sanctuary Covenant v. Trump*, where the Court cursorily declined the government's request to stay a nationwide preliminary injunction of an executive order denying asylum to any individual crossing the U.S.-Mexican border illegally between "ports of entry."[11] The executive order had been directed at a long caravan of migrants heading toward the border and threatening to further overwhelm the immigration system. The lower courts had found that the executive order conflicted with the Immigration and Nationality Act, which states that "any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival)" may apply for asylum.

The Court's unsigned order indicated that Alito, Gorsuch, Kavanaugh, and Thomas would have stayed the injunction,

4 139 S. Ct. 1780 (2019).

5 139 S. Ct. 663 (Mem.) (2019). *See* Rachel N. Morrison, *The Supreme Court Takes Up Abortion: What You Need to Know About* June Medical Services v. Gee, 20 Federalist Soc'y Rev. 144 (2019).

6 136 S. Ct. 2292 (2016).

7 139 S. Ct. 738 (2019).

8 139 S. Ct. 1960 (2019).

9 139 S. Ct. 2319 (2019).

10 138 S. Ct. 2392 (2018).

11 139 S. Ct. 782 (2018).

causing speculation about the reasoning behind Roberts' vote. At the time of the injunction, President Trump had called the judge who issued it "an Obama judge," and the Chief Justice responded that it was improper to categorize judges based on which president appointed them. Like many observers, Stern reads a lot into this high profile exchange, writing that Roberts' subsequent vote in *East Bay* to continue the stay "marked a turning point in the chief justice's relationship with the administration," and "indicated that his deference to the president had a limit." And going beyond *East Bay,* Stern believes that Roberts' vote reflected his "disillusionment" with the Trump administration, and "would prove incredibly consequential for the term's biggest blockbuster—a fight over the president's ability to add a citizenship question to the 2020 census," which is the subject of the last chapter.

In the only merits decision on immigration, *Nielsen v. Preap*, the Court was forced to construe the kind of inartfully-drafted statute that tests the limits of the textualist approach.[12] By a 5-4 vote, the Court upheld a policy allowing immigration officials to detain without bail illegal immigrants who had committed certain criminal offenses, even if detention did not begin promptly after their release from prison. The governing statute provided that such immigrants could be taken into custody "when the alien is released," and the defendant argued that the government could not hold him without bond unless it intercepted him immediately when he got out of prison.

Looking beyond the statutory language, Justice Stephen Breyer's dissent read a six-month deadline into the term "when," stating that "the Court should interpret the words of this statute to reflect Congress' likely intent, an intent that is consistent with our basic values."

Perhaps because the policy originated in the Obama administration, Stern concludes that *Nielsen* was not a political decision. Nonetheless, although he calls Alito's majority opinion "plausible if debatable—as it tried to make sense of the law and implement it as Congress intended"—Stern accuses the four conservatives of employing textualism cynically: in *Nielsen,* it led to their preferred outcome (he presumes), but the statutory language would have led to a "pro-immigrant" result in *East Bay*, so they ignored it there.

As with "pro-criminal defendant" decisions by conservative Justices, Stern expresses surprise in Chapter 6, "Big Business Before the Bar," at three cases whose results favored consumers and employees.

New Prime v. Oliveira[13] diverged from a trend over the past decade in which, relying on the broadly-worded Federal Arbitration Act, the Supreme Court has enforced arbitration provisions against consumers and employees seeking to bring contract claims in court. In *New Prime*, a unanimous Court held that an independent contractor for a trucking company could pursue a class action on behalf of himself and other drivers for improper paycheck deductions, notwithstanding a provision in his contract that all disputes be resolved through individual arbitration. The FAA excluded from its scope "contracts of employment of . . . workers engaged in . . . interstate commerce." In a textbook example of an originalist/textualist approach, Gorsuch looked at usage of the word "employment" when the FAA was passed in 1925 and, citing contemporaneous dictionaries and statutes, concluded that it was broad enough to encompass "work agreements involving independent contractors."

Like *South Dakota v. Wayfair*,[14] the eCommerce sales tax case from the previous term, *Apple v. Pepper* reviewed established legal concepts in light of new business models.[15] To list an app in Apple's App Store, a third-party developer must pay Apple an annual fee plus a commission for each sale of the app. The developer—not Apple—sets the retail price. Plaintiffs were iPhone users claiming that this arrangement inflated prices for apps.

Since its *Illinois Brick* decision in 1977,[16] the Court had prohibited antitrust lawsuits by "indirect purchasers"—that is, those who do not buy directly from an alleged antitrust violator. Over the dissent of the other four conservatives, however, Kavanaugh concluded that under the text of antitrust laws and precedent, the plaintiffs were "direct purchasers" harmed by Apple's alleged monopoly, and thus they could assert an antitrust claim: "There is no intermediary in the distribution chain between Apple and the consumer. . . . . The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple," and *Illinois Brick* was not "a get-out-of-court free card."

Similarly, Thomas joined the four liberal Justices in *Home Depot v. Jackson*, which held that a third-party defendant could not remove a class-action from state to federal court.[17] A bank brought a collection action in state court against a credit card holder, who in turn filed a class action counterclaim against both the bank and Home Depot, a retailer not previously involved in the case. The credit card holder alleged that he and others were victims of a consumer scam orchestrated by the bank and Home Depot. Analyzing the general removal statute, the majority concluded that removability is based on whether the *action*, not the *claim*, could have been filed in federal court, and that a removal provision in the Class Action Fairness Act did not change this result.

Stern writes that Thomas' "methodology led to a surprisingly progressive outcome" in *Home Depot.* This shows his misunderstanding of textualism: a *statute* can embody a policy that is (or is not) progressive, and a textualist legal interpretation will be consistent with the language expressing that policy. Similarly, Stern states, "Using the U.S. Chamber of Commerce's position as a proxy for conservativism, business should have won all three cases;" although the Chamber might be a useful proxy for conservative public policy, it is irrelevant to which legal conclusions are reached through a originalist/textualist approach.

Eventually, Stern does acknowledge that "[t]extualism is the link" between the three decisions: "[t]extualism is sometimes derided as inherently conservative, but in each case here the

12 139 S. Ct. 954 (2019).

13 139 S. Ct. 532 (2019).

14 138 S. Ct. 2080 (2018).

15 139 S. Ct. 1514 (2019).

16 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

17 139 S. Ct. 1743 (2019).

winning party snatched a liberal victory by zeroing in on a few key words." This shows the catholic nature of the method, as lawyers of every political stripe would agree that focusing on critical statutory language is important for winning a lawsuit.

Chapter 7, "Gunning for the Administrative State," describes two failed efforts by conservatives in the Term to restore a constitutional separation of powers. In both *Gundy v. United States*,[18] and *Kisor v. Wilkie*,[19] Kagan "finagled a solution" that preserved the administrative status quo. Stern warns, however, that the Court still "laid the groundwork for a judicial attack on the 'administrative state' that may well carry the day in the near future."

Gundy centered on the "nondelegation doctrine," which holds that Congress cannot delegate its Article I legislative authority to the executive branch without also providing an "intelligible principle" to guide exercise of that authority. Critics claim that the intelligible principle standard makes it too easy for Congress to slough its responsibility for making tough policy decisions off onto administrative agencies, pointing to the fact that the doctrine has not been invoked to strike down a statute since two early New Deal cases from 1935.

The petitioner in *Gundy* challenged the Sex Offender Registration and Notification Act, which established a national sex offender registry and required that offenders convicted after its enactment register with state officials. At issue was a provision delegating to the Attorney General "authority to specify" SORNA's retroactive application and to "prescribe rules" for those like the petitioner, who had been convicted before the legislation went into effect in 2006.

The Court voted 5-3 to uphold SORNA's retroactivity provision. (Kavanaugh was not on the Court when it was argued.) Writing for the four liberal Justices, Kagan sidestepped the doctrine by finding that Congress had given up little authority in the first place: "Reasonably read, the Attorney General's role . . . was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it was feasible to do so," which was a "delegation [that easily] passes constitutional muster." Alito begrudgingly cast the fifth vote, stating that he was willing to reconsider the intelligible principle standard, but that "because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."

Echoing his structural concerns in *Davis*, Gorsuch wrote for the dissenters that the Constitution demanded that Congress give the executive branch greater direction in enforcing statutes, and he argued for a more rigorous standard that would restrict agencies to making "factual findings" using "criteria" and "policy judgments" determined by Congress.

Kagan identified an enormous practical problem that could result from robust enforcement of the nondelegation doctrine: "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs." However, if the Court were to better align its jurisprudence with the constitutional separation of powers, options exist for addressing the problem she warns about. For example, the (unelected) administrative bureaucracy, whose technical expertise is required for the specialized rules promulgated by agencies, could be relocated to Congress, so that it can inform the legislation drafted by (elected) senators and representatives.

In *Kisor,* the Veterans Administration had awarded a Vietnam War veteran disability benefits prospectively after finding in 2006 that he suffered from PTSD, even though it had denied him those benefits in 1982. The VA rejected his request for back payments, finding that his new application failed to include "relevant" records that had not been considered at the time of the initial application, which its regulations require for retroactive benefits.

The Court took *Kisor* expressly to decide one issue: whether to overrule *Auer v. Robbins*, a 1997 decision which held that courts must defer to an agency's "reasonable interpretation" of its own ambiguous regulations.[20] Based on previous writings by the conservative Justices and their questions at oral argument, it was widely-expected that *Auer* would be overruled. However, the Chief Justice joined Kagan's opinion declining to do so on a 5-4 vote.

Kagan listed examples of arcane issues arising under federal regulations (e.g., does a jar of truffle pate or olive tapenade qualify as a "liquid" or "gel" under TSA rules?) that are best left to agencies, which are better able to "get[]into the weeds of the rule's policy." Addressing concerns that administrative power went beyond such esoterica, Kagan stressed the limits of judicial deference: for example, a court must exhaust "all the 'traditional tools' of construction" before concluding that a regulation is genuinely ambiguous, and must also conclude that the agency's interpretation is truly "reasonable."

Roberts and Kavanaugh each wrote separately to point out that if lower courts are faithful to Kagan's opinion, *Auer* deference will be exercised less frequently. Similarly, Gorsuch's dissent asserted that the majority had "zombified" *Auer,* such that it retained little force going forward. By leaving *Auer* in place, however, the Court left room for lower courts to resist, as it did in *American Legion.*

To support the result in *Kisor,* Stern cites the "unitary executive" theory as a democratic limitation on the administrative state: although "[a]gencies are not directly accountable to the people, . . . most are accountable to the president—and when the people do not like the executive branch's actions, they can vote the president out." Of course, this is disingenuous, as commentators like Stern are generally dismissive of the theory, particularly since November 2016. (Also, Stern does not explain how agencies that are not "accountable to the president" pass constitutional muster.)

Looking ahead, Roberts and Kavanaugh both noted that the result in *Kisor* did not guarantee that the related "*Chevron* doctrine," which requires that courts defer to agencies' reasonable interpretations of ambiguous statutes, would survive their future scrutiny. *Chevron* has much greater significance than *Auer,* and Stern closes the chapter warning that if it is overturned and the size of the federal government decreased as a result, Americans "may come to miss the administrative state when it is gone"

18 139 S. Ct. 2116 (2019).

19 139 S. Ct. 2400 (2019).

20 519 U.S. 452 (1997).

because "a smaller government is not always a more competent one." Of course, those who are concerned that the administrative state has become an unaccountable, D.C.-centric fourth branch, greatly outstripping the three constitutional branches in size and scope, would counter that government should simply focus on those core functions that it can perform more competently than the private sector.

In Chapter 8, Stern recounts the history of "[d]rawing districts to boost the power of the ruling party and dilute votes for the opposition," which "is as old as the American republic." He acknowledges that despite many efforts over the years, the Supreme Court has "never struck down a partisan gerrymander, or even agreed on a standard to gauge their legality." Given that the franchise has been greatly expanded in the United States over that history, the chapter's title—"Democracy Imperiled"—seems overwrought.

Rucho v. Common Cause involved a challenge to a map of North Carolina's congressional districts drawn by state lawmakers, the majority of whom were Republican.[21] The Court ruled 5-4 that political gerrymandering claims present a nonjusticiable "political question." In his majority opinion, Roberts wrote, "There are no legal standards discernible in the Constitution for making . . . judgments" as to whether political power is apportioned fairly, "let alone limited and precise standards that are clear, manageable, and politically neutral."

Stern spends much of the chapter on the dissent of the four liberal Justices, with Kagan "act[ing] as the conscience of the court. In her dissent," Kagan charged that "[f]or the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities." She expressed concern that advances in information technology "have enabled mapmakers to put [voter data] to use with unprecedented efficiency and precision," thereby threatening "free and fair elections."

As Stern recounts, many tests have been proffered for determining when inherently political redistricting decisions become too political, but none have been accepted by the Court. The outcome in *Rucho* was a foregone conclusion after the previous term's *Gill v. Whitford*,[22] where the Court rejected the latest such test and, contrary to Stern, it is not "a hugely consequential decision." In addition, changes in legislative control (e.g., Democrats capturing the House in 2018) have undercut warnings about permanently-entrenched partisan majorities, which are often cited as justification for involving federal judges. Democracy in America remains intact, and future claims of improper political gerrymandering will be addressed at the state level.

The last chapter is "Drawing the Line on Lies" and by framing the question in *Department of Commerce v. New York*,[23] as "whether Donald Trump's administration can add a citizenship question to the 2020 census," Stern gives us his answer. Although the issues of constitutional and administrative law at the heart of the case were fairly well-settled, its political ramifications gave it a high profile.

As even New York conceded in *DOC*, it was legitimate to ask census respondents whether they were citizens because the government has a clear interest in knowing the number of noncitizens in the country. DOC had included the question in past censuses, and there was little doubt it had discretion to do so. However, mainstream analysis focused on DOC's ham-handed efforts to justify adding it back into the census.

The Secretary of Commerce claimed he relied on a letter from the Department of Justice stating that the question would assist its enforcement of the Voting Rights Act by preventing dilution of minority votes. Private communications told a different story. Although judicial review under the Administrative Procedure Act is usually confined to the administrative record, the district court had taken the unusual step of ordering extra-record discovery, which led to emails between DOC and DOJ that conflicted with the Secretary's public explanation. Not only had DOC aggressively solicited the letter, but it had recommended the VRA rationale to DOJ. Further, besides legitimate reasons for including the question, the Secretary had a political motive: DOC data showed that it could cause an undercounting of undocumented immigrants, which could in turn lead to an underallotment of Democratic seats in the House of Representatives and state legislatures.

Stern contends that Kavanaugh and Gorsuch "shocked many observers" when they noted at oral argument that many other countries asked the same question on their national censuses and that the United Nations recommended the practice, because the two Justices generally hold that foreign law is not a valid basis for deciding United States law. However, Stern's contention confuses issues of fact (what is the actual practice in other countries?) with issues of law (what is legally permissible under the APA?).

After oral argument, but before the decision issued, a dramatic development occurred that supported a finding that DOC had political motivations. After a Republican political consultant died in 2018, his estranged daughter found computer drives among his personal belongings, and the drives contained communications with DOC citing the VRA to justify adding the citizenship question. His daughter gave the drives to Common Cause, which had filed *Rucho* and whose law firm represented some of the *DOC* plaintiffs. The law firm then provided some of the deceased consultant's communications to the *DOC* district court, in part hoping that publicity about them would get the attention of the Supreme Court. However, as Stern notes, the communications were never in the record before the Court, nor were they mentioned by any of the Justices in their opinions.

Most of the Chief Justice's majority opinion was devoted to the conclusion by the four other conservatives and him that including the citizenship question was not unconstitutional, nor was it arbitrary or capricious under the APA. DOC has "broad authority over the census" and may collect "demographic information" as it sees fit. Further, the Secretary was permitted "to make policy choices within the range of reasonable options," and judges should not be "second-guessing [his] weighing of risks and benefits."

21 139 S. Ct. 2484 (2019).

22 138 S. Ct. 1916 (2018).

23 139 S. Ct. 2551 (2019).

In the latter portion of the opinion, however, Roberts was joined by the four liberal Justices. He wrote that the APA required DOC to "disclose the basis" for its action, and that its "sole stated reason" for including the citizenship question "seems to have been contrived." Although it was generally not appropriate for a court to look beyond the administrative record when reviewing an agency's decision, here the extra-record discovery "shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project;" rather, the VRA rationale came much later, after DOC had gone "to great lengths to elicit [support] from DOJ (or any other willing agency)." "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case," the Court stated, remanding the case for DOC to try again to justify inclusion. Eventually, time overtook events, and the Administration announced in July 2019 that it would proceed to prepare 2020 census forms without the citizenship question.

Administrative law rarely permits judicial examination of the motives behind otherwise permissible policy decisions, as occurred in *DOC*, and political appointees acting with political motives should not be shocking. Moreover, it is unclear whether the limited exception that allows for such review applied in *DOC* as a legal matter or merely because the administrative agency was part of the Trump administration.

Stern cites veteran courtwatcher Linda Greenhouse, who imagines that in some "dark night of the soul" shortly before *DOC* was released, the Chief Justice changed his vote "to reject the administration's position" because of the consultant's communications that were made public after oral argument. Greenhouse "readily admit[s] that I have no sources for the claim I just made." However, as Stern notes, it has been similarly suggested that Roberts switched his vote at the last minute vote in the 2012 Affordable Care Act case, *NFIB v. Sebelius*.[24]

The book's Epilogue begins by reviewing the roles played in the Term by each Justice. Comparing the swing votes of Kennedy and Roberts, Stern portrays the latter as a more "fundamentally conservative justice, whose jurisprudence consistently aligns with the Republican Party." At the same time, Stern offers the faint praise that due to the institutional concerns he showed in *June Medical, East Bay,* and *DOC*, Roberts is "not a hack or a reactionary."

Stern writes, "When it comes to the most contentious debates sundering the country today, the law of the land will be what John Roberts says it is." This overstatement does contain a kernel of truth: again, the Chief Justice (and others) have been saying for some time that many of our "most contentious debates" should be resolved in the federal political branches or the states, and this may become increasingly likely due to the Roberts Court.

Although most observers see Roberts as the likely successor to Kennedy as a swing vote, Stern suggests it could be Gorsuch: he "is willing to swing left on criminal justice when he believes that the original meaning of the U.S. Constitution requires it." Given that Gorsuch looks to the text as understood when it became law, certainly he will "swing" where it takes him, including in noncriminal cases.

Stern agrees with others that Ginsberg has passed the liberal mantle to Kagan, who he casts as standing Buckley-esque "athwart [conservative efforts] yelling 'Stop.'" Seemingly despondent, Stern tries to find solace by imagining "an alternative world in which Kagan served as the chief justice," achieving progressive results with Roberts-like deftness.

Pining for the late Justice John Paul Stevens, Stern concludes his book with the lament that Kavanaugh and Gorsuch are not among "the ranks of stealth liberals" appointed by Republican presidents. And, predictably, Leonard Leo makes an appearance so that Stern can blame him for successful conservative nominations.

Throughout the book, Stern tries to hoist conservative Justices on their originalist/textualist petard and, occasionally, he succeeds. However, he is unable to offer a principled alternative, and can only bemoan the composition of the Court and outcomes he doesn't like. Presumably, the lack of a viable path forward for achieving progressive results explains his hopelessness. In any event, as the book shows, the originalist/textualist approach has gained wide traction; Kagan famously observed during her confirmation that "we're all originalists," and in her short concurrence in *New Prime,* Ginsberg made clear that she is a statutory originalist. This could offer hope even to progressives. To the extent the Justices agree on fundamental methodology, it should be heartening that they're playing on the same field, and that they are certainly less divided than the rest of the federal government.

24 567 U.S. 519 (2012).