Motive and Opportunity: Courts' Intrusions Into Discretionary Decisions of Other Branches—A Comment on *Department of Commerce v. New York*

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Introduction

The scope and terms for judicial review of administrative action are critical aspects of the Constitution's separation of powers among the branches of government. The constitutional framework was self-consciously designed to limit unchecked discretionary power of government officers, including those in the executive branch.[1] The principal mechanisms are grants of only limited powers for each branch and provision of powers that allow one branch to check the others, through divided controls over appointments, funding, implementation of policy, and so on.[2]

The constitutional scheme does not give any branch general power over the others. Federal judges enjoy the power to interpret laws, including the Constitution, and to say when one conflicts with another, but were expressly denied broader superintendence over the political

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1 *See* THE FEDERALIST NO. 51, at 320–21 (James Madison) (Clinton Rossiter ed., 1961).

2 *See* THE FEDERALIST NOS. 45–51 (James Madison), NOS. 67–73, 78–80 (Alexander Hamilton). The American constitutional design was defended primarily on this score, see generally THE FEDERALIST, but acceptance of the goal of that design does not require agreement that it was the only possible set of arrangements that might achieve that end. *See generally* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

branches.[3] The Framers discussed granting judges, along with the president, a revisory power over legislation—permitting judges or the president to reject laws as inconsistent with the Constitution.[4] They rejected that option, however, limiting judges to deciding actual cases brought by parties with legally cognizable claims.[5]

Two derogations from this design have occurred. The first has given excessive deference to the political branches. A series of judicial decisions, including those abandoning limitations on Congress's commerce power and restraints on its ability to deputize others (executive officers and "independent" agencies) to exercise legislative powers, have undermined constitutional structure in significant ways.[6] Debates over the scope of the federal commerce power, over the need to ground legislation in a specific, positive grant of power in Article I, and over the nondelegation doctrine

[3] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803); THE FEDERALIST NO. 78, *supra* note 1, at 465 (Alexander Hamilton). For further discussion of the limited role of the federal courts (for reasons constitutionally enshrined or suggested as pragmatic solutions to institutional and political concerns), see, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 167–78 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010) (1835); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[4] *See* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 294–303 (Gaillard Hunt & James Brown Scott eds., Oxford Univ. Press 1920) (debates of July 21, 1787).

[5] U.S. CONST. art. III, § 2; *see* MADISON, *supra* note 4, at 300.

[6] *See, e.g.*, Perez v. United States, 402 U.S. 146, 154 (1971) (permitting Congress to exercise control under the Commerce Clause of power over activity that appears to take place entirely intrastate); Yakus v. United States, 321 U.S. 414, 424–26 (1944) (approving congressional delegation of broad regulatory powers to an administrative agency); Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 224 (1943) (upholding the constitutionality of expansive administrative regulations of commerce despite the vagueness of the delegation of authority and the absence of clear textual authorization for the powers asserted by the agency); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (expanding Congress's regulatory powers over any activity that, when taken together with other plausibly analogous conduct, could have a substantial economic impact on interstate commerce despite the demonstrable absence of such impact from the specific intrastate conduct at issue); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 396 (1937) (upholding the state legislature's police power to regulate women's wages and working conditions); *see also* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1042–43 (2007); Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225, 237–43 (2017). *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

continue.[7] So, too, ongoing arguments over the *Chevron* doctrine[8] and its cousin, the *Auer–Seminole Rock* doctrine,[9] implicate concerns about these developments. *Chevron* can be construed to require judicial deference to administrators' interpretations of law, and *Auer* (in its original formulation) plainly commanded judicial deference to administrative interpretations of regulations with the force of law.[10]

The second derogation is the other side of the coin, involving excessive intrusion by judges into matters legally committed to administrative discretion. This second problem is presented in cases dealing with inquiries into the reviewability of exercises of discretionary authority.[11] It also arises in questions respecting the scope of review—

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[7] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4–5 (1990); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1311–12 (2003); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 884–85 (2002); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 151–61 (2017); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387–93 (1987); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 478–91 (2016); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2165–81 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1743–54 (2002); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1506–25 (2015); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 979–81 (2018). *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (describing the background and history of American and continental laws' limitations on unchecked administrative power).

[8] *See, e.g.*, Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds., 2016); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 187–90 (1992); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 110–20 (2018).

[9] *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 924–26 (2017); Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 544–51 (2018); Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead, *Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 634–35 (2014); Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 945–51 (2017); Walker, *supra* note 8, at 105–10.

[10] *See* Auer v. Robbins, 519 U.S. 452, 461–62 (1997); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 703 (1995).

[11] *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603–04 (1988) (recognizing restrictions on judicial review when there is a specific commitment to agency discretion by Congress but providing an exception for review of claimed violations of constitutional rights); Motor Vehicle Mfrs. Ass'n, Inc. v.

whether a judge should defer to any reasonable policy choice that does not exceed the terms of the governing law or, instead, should require that the authorized administrative decision maker explore the potential choices and explain satisfactorily why his or her choice was best.[12] The problem occurs as well when litigants ask courts to look into the motivation of the decision maker to assess the decision's legitimacy.[13] Given the complexity of subjective motivation and the difficulty of divining it, basing decisions on motive inevitably expands judicial discretion and invites intrusions on legally conferred administrative discretion.[14]

Both types of departure from the Constitution's structure deserve attention, and, in fact, during its 2018 Term, the Supreme Court addressed both of these problems. It tackled the first problem—excessive deference—in *Kisor v. Wilkie*[15] and the second—excessive interference—in *Department of Commerce v. New York*.[16] Accepting both cases shows sensitivity to the balance between the contrasting considerations, as does much of the writing from the justices.[17] After *Kisor* and *Department of Commerce*, it is fair to characterize the justices as struggling to find ways to improve on the doctrines that have emerged to direct review of disputes over law and on the doctrines that guide review of decisions that lie in the

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–43, 46–51 (1983) (finding modification of agency regulations arbitrary and capricious for failing to sufficiently elaborate reasons for change from prior rule, despite statement of general basis for agency determination); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 (1971) (adopting an interpretation of substantive law providing for intrusive judicial review of complex policy judgments on highway route selections generally committed to agency discretion).

12 *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 511–15 (2009) (generally deferring to agency policy changes if accompanied by statement of reasons); Massachusetts v. EPA, 549 U.S. 497, 532–35 (2007) (overriding exercise of agency discretion respecting institution of action where majority questioned the sufficiency of agency's explanation for its underlying judgments); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 989 (2005) (granting agencies freedom to change policy and act "inconsistent[ly]" if accompanied by statement of reasons); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–47 (1996) (validating reasonable agency regulation as broadly within agency authority in context where statute was consistent with grant of agency discretion).

13 *See, e.g.*, Hawaii v. Trump, 265 F. Supp. 3d 1140, 1158 (D. Haw.), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 628 (D. Md. 2017), *aff'd*, 883 F.3d 233 (4th Cir.), *vacated*, 138 S. Ct. 2710 (2018). See discussion *infra* Section III.B.2.

14 See discussion *infra* text accompanying notes 184–199.

15 139 S. Ct. 2400 (2019).

16 139 S. Ct. 2551 (2019).

17 *See id.* at 2562–73; *id.* at 2576–77, 2580–84 (Thomas, J., concurring in part and dissenting in part); *id.* at 2596–98, 2603–06 (Alito, J., concurring in part and dissenting in part); *Kisor*, 139 S. Ct. at 2415–18; *id.* at 2424–25 (Roberts, C.J., concurring in part); *id.* at 2426–35, 2437–39 (Gorsuch, J., concurring in the judgment); *id.* at 2448–49 (Kavanaugh, J., concurring in the judgment).

domain of policy-makers' discretion. Both questions are important, and in its *Kisor* and *Department of Commerce* decisions the Court at least adumbrated—and, more likely, in fact made—significant changes along both margins.[18] While the first question (respecting disputes over *law*) consistently receives more attention from academic commentators,[19] the second question (respecting disputes over exercises of *policy discretion*) is at least as important to maintaining the balance among the branches of government. In particular, the risk of judicial intrusion into administrative decision-making based on inquiries into officials' motives presents special risks. Those risks are starkly presented in *Department of Commerce*, which deals with administrative decisions inextricably intertwined with political consequences and political conflicts.

This Article discusses the Court's decision in *Department of Commerce*, explores what it says and what consequences it might produce, and explains its consistency and tensions with the requisite rules for maintaining the structural balance created by the Constitution. The Article begins in Part I with a brief review of the *Department of Commerce* decision. Part II places the decision in context, rooting the questions it presents first in the division of responsibilities among the branches on lawmaking, implementation, and interpretation, and then in the Administrative Procedure Act ("APA").[20] Part III discusses the direction in which the Court seems to be moving, especially in its *Department of Commerce* decision—what to cheer and what to fear.

I. *Department of Commerce*: Citizenship Raising Cain

The litigation that gave rise to *Department of Commerce v. New York* could have been a fairly straightforward case about interpretation of the law governing the national census and the propriety of the administrative actions taken to implement that law. And up to a point, it was. Unfortunately, the decision did not stop there.

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[18] *See* Ronald A. Cass, *Deference After* Kisor, REG. REV. (July 10, 2019), https://perma.cc/CBZ2-FUEN; James Huffman, *SCOTUS Census Ruling Is Judicial Decision-Making at Its Worst*, INSIDE SOURCES (July 1, 2019), https://perma.cc/T2S8-H69L.

[19] *See, e.g.*, Beermann, *supra* note 8, at 782; Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 552–53 (2012); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1144 n.1 (2012).

[20] 5 U.S.C. §§ 501–808 (2018).

A. *The Census: Constitutional Politics to Administration*

The Constitution provides for a decennial "enumeration" of the population (commonly referred to as the "census") and assigns Congress responsibility for deciding how that will proceed.[21] Congress, in turn, by law has assigned various administrative officers to supervise and to conduct the census,[22] with the current version of the Census Act deputizing the Secretary of Commerce to conduct the census "in such form and content as he may determine."[23] The form and content have varied some over the years, with questions being added, removed, or shifted among different components of the census (the basic form, supplemental forms, surveys, and interviews).[24] The general contours of the census, however, have remained relatively constant over time.[25]

In a sense, this relative constancy is emblematic of American democracy and especially the polity's willingness to devolve essentially political issues to administrators' domain.[26] Far from an academic exercise, the decennial census determines the allocation of representatives among the states.[27] Since the 1960s, when the Supreme Court concluded that historical boundaries cannot be used to draw voting districts if that produces districts with unequal numbers of voters,[28] the census also has played a pivotal role in determining what voting districts will look like. Moreover, the process of drawing district lines, once freed from

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21 U.S. CONST. art. I, § 2, cl. 3. The manner in which individuals are counted was changed by the 14th Amendment. *See id.* amend. 14, § 2.

22 The original authorization assigned collection of census information to the marshals in the judicial districts. *See* 1790 Census Act, ch. 2, § 1, 2 Stat. 101.

23 13 U.S.C. § 141(a) (2018).

24 *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2561–62 (2019).

25 *See id.*

26 While there is ample evidence of the American polity's general willingness to permit decisions to rest with administrative officials, see, e.g., Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 157–59 (2016), there also is support for the observation that many other western democracies place far greater trust than Americans do in administrative bodies and less in elections as a means of grounding official decisions. *See, e.g.*, Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Governmen*t, 124 YALE L.J. 804, 809–11 (2014).

27 *See* U.S. CONST. art. I, § 2, cl. 3.

28 *See* Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

traditional anchors, became not only political but in a true sense permanently unmoored from any fixed, determinative principle.[29]

Yet, while inevitably enmeshed in politics and important to politicians and to others dependent on the allocation of funds that are tied to population,[30] decisions shaping the census count are rarely matters of high political drama. That is particularly true for census questions that provide information about the population but that do not define who counts or dictate how to make the count.[31] The founding generation's argument over how to count slaves—with Southern states that had large numbers of slaves seeking full inclusion of slaves in the census count and Northern states seeking to exclude them altogether, arguments concluding in the infamous three-fifths compromise[32]—was a matter of constitutional moment. For many generations now, however, the most pressing political decisions respecting the census have receded from constitutional-level debates to merely administrative ones. Still, it is worth restating that the retreat of census politics from the highest level did not deprive the census of political import.

B. *Reinstating the Census Citizenship Question*

That is the essential background for the *Department of Commerce* case. In 2018, Secretary of Commerce Wilbur Ross issued a memorandum announcing his decision to reinstate a question respecting citizenship on the main 2020 census form.[33] Of the twenty-three decennial censuses, thirteen had asked everyone about his or her citizenship and five others had asked a substantial subset of households.[34] Citizenship information also is routinely requested by other democracies—including Australia, Canada, France, Germany, Mexico, Spain, and the United Kingdom—as part of their census functions.[35]

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29 *See generally* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION (2002) (describing the nature and consequences of the reapportionment decisions, including their effects on reducing interparty competition, increasing incumbency advantage, and also increasing the probability and durability of Democrats' prospects of controlling Congress).

30 *See* Michael P. Murray, *Census Adjustment and the Distribution of Federal Spending*, 29 DEMOGRAPHY 319, 319 (1992).

31 For discussion of information-gathering uses of the census, see Dep't of Commerce v. New York, 139 S. Ct. 2551, 2561–62 (2019).

32 *See, e.g.*, MADISON, *supra* note 4, at 246–51 (debates of July 13, 1787).

33 *Dep't of Commerce*, 139 S. Ct. at 2562.

34 *See id.* at 2561.

35 *Id.* at 2563.

The Secretary's memorandum explained that the Department of Justice ("DOJ") had requested that the information be included in the census and that the citizenship information available from other sources did not align well with the Department's needs related to assuring compliance with provisions of the Voting Rights Act ("VRA") (especially as related to the enforcement of provisions addressing drawing congressional districts in ways that dilute minority voters' prospects for electing minority representatives).[36] Secretary Ross's memo also recounted the different options he had explored with the assistance of the Census Bureau (the part of the Department charged with carrying out census functions), as well as the additional option he had asked the Bureau to create to compare with other potential alternatives for acquiring the information asked for by the DOJ.[37] Ultimately, despite the Bureau's contrary recommendation, the Secretary decided that inclusion of a direct question respecting citizenship was the best means to effectuate the goals associated with the census, which notably include providing suitable information to the DOJ.[38]

C. *Litigation, Issues, and the District Court Decision*

The Secretary's decision was promptly challenged by a coalition of states, municipalities, and organizations interested in the issue. Not surprisingly, given the prevailing political climate and the routine use of courts as extensions of political conflicts, the lead plaintiffs were a group of eighteen states—fifteen with Democrat administrations and three states that have predominantly (two of them overwhelmingly) Democratic political registrations, Democrat attorneys general, and (mostly) Republican governors who have been vocal critics of President Trump.[39]

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[36] *See id.* at 2562.

[37] *See id.* at 2562–63.

[38] *See id.*

[39] The states are listed in *New York v. Department of Commerce* (*SDNY Decision*), 351 F. Supp. 3d 502, 528 (S.D.N.Y. 2019). For current political party affiliations of state governors and attorneys general, see *Partisan Composition of Governors*, *in Encyclopedia of American Politics*, BALLOTPEDIA, https://perma.cc/AT4K-ZEYB; see also Rod Boshart, *Iowa's Tom Miller About to Become Longest-Serving State Attorney General Ever*, THE GAZETTE (Jan. 3, 2020), https://perma.cc/74DU-HTF8; LORI KOLANI & BERNARD NASH, COZEN O'CONNOR, THE STATE AG REPORT (2020), https://perma.cc/T6E7-XTDC. For relevant commentary about the Trump administration, see, e.g., Zack Budryk, *GOP Massachusetts Governor Calls Trump Tweets "Shameful," "Racist*,*"* THE HILL (July 15, 2019, 10:54 PM), https://perma.cc/N8EZ-U862 (reporting remarks by Massachusetts Governor Charlie Baker criticizing President Trump); Nik DeCosta-Klipa, *Charlie Baker Says Trump's Refugee Ban "Will Not*

In a suit before the Southern District of New York, plaintiffs asserted, among other things, that the Secretary's decision to reinstate the citizenship question was arbitrary and capricious and constituted an abuse of his discretion.[40] That claim included assertions that the Secretary failed to justify his decision, ignored the advice of experts in the Census Bureau, was not truly concerned about the quality of data obtained or its utility to VRA enforcement, and that his real motivation in reinstating the citizenship question was political.[41]

The plaintiffs asked the district court to order Department of Commerce officials, including the Secretary, to provide additional information and to submit to depositions designed to establish the real motivation for reinstating the citizenship inquiry.[42] The district judge granted these requests.[43] The Department submitted an additional 12,000 pages of material for the record, and the plaintiffs were able to depose officials other than the Secretary.[44]

After trial, the district judge, in a decision that (in slip opinion format) ran nearly 300 pages, found several violations of law (the "*SDNY Decision*"). The judge determined that: the Secretary had failed to obey the Census Act; he had acted arbitrarily and capriciously by failing to give a reasonable explanation of his decision, failing to follow advice from the Census Bureau (the body with expertise in designing of census questionnaires), and implementing essentially a political agenda rather than seeking earnestly to gain information essential to the required enumeration of the population or to other legitimate needs served by collecting census information; and he had abused his discretion in presenting a pretextual explanation to the court, hiding the real motivation behind the citizenship

Make the Country Safer," BOSTON.COM (Jan. 29, 2017), https://perma.cc/W3CQ-HUGW (same); Donald Judd, *Maryland Gov. Larry Hogan Hits Trump Over Mueller Report as He Mulls 2020 Challenge*, CNN POLITICS (Apr. 23, 2019, 11:10 PM), https://perma.cc/9XQH-5YVT (reporting remarks by Maryland Governor Larry Hogan criticizing President Trump); John Rydell, *Governor Hogan Discusses Trump Travel Ban, City Schools Deficit*, FOX45 NEWS (Feb. 16, 2017), https://perma.cc/TB6D-KKGR (same).

40 *See Dep't of Commerce*, 139 S. Ct. at 2563, 2567. Plaintiffs also asserted that the decision failed to meet statutory requirements and violated the Enumeration Clause of the Constitution and the Due Process and Equal Protection Clauses of the 14th Amendment. *Id.* at 2563–64; *SDNY Decision*, 351 F. Supp. 3d at 635–54, 664–71.

41 *See Dep't of Commerce*, 139 S. Ct. at 2563–64; *SDNY Decision*, 351 F. Supp. 3d at 515.

42 *See Dep't of Commerce*, 139 S. Ct. at 2564.

43 *See id.* at 2564–65.

44 The Supreme Court stayed the Secretary's deposition but allowed the other inquiries to proceed. *See id.*

question's reinstatement.[45] The *SDNY Decision* left no doubt that the judge did not agree with the government's evaluation of the costs and benefits of reinstating the citizenship inquiry to the general census questionnaire and, even more definitively, did not trust the Secretary to make a reasoned, apolitical decision or to be honest with the court about his motivations.[46]

D. *Legal Authority and Review of Discretion*

While appeal was also pending in the US Court of Appeals for the Second Circuit, the United States government sought, and the Supreme Court granted, review on a broad array of statutory and constitutional issues, covering both matters peculiar to the census and general questions about judicial review of administrative actions under the APA. In the resultant *Department of Commerce* decision, the Court's treatment of two sets of issues in particular stands out: first, those issues related to identifying the scope of discretionary authority subject to review and the standards for determining if the Secretary had acted in an arbitrary or capricious manner; and second, those issues addressing whether and when a reviewing court can inquire into the motivation of the administrative decision maker.

1. Reviewing Exercises of Discretion

Chief Justice John Roberts's opinion for the Court in *Department of Commerce* carefully delineates the scope of statutory authority assigned to the Secretary of Commerce, the breadth of the discretion granted together with that authority, the basic statement of grounds on which administrative actions can be held unlawful, and the considerations relevant to deciding whether the Secretary's exercise of discretion violates the standards set forth in APA § 706.[47] The opinion recounts provisions of the Census Act that direct the Secretary to take the required census in "such form and content as he may determine"[48] and authorize the Secretary to "determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses" provided for

45 *See SDNY Decision*, 351 F. Supp. 3d at 635–64.

46 *See id.* at 527–28, 530–72, 635–64.

47 *See Dep't of Commerce*, 139 S. Ct. at 2568–71.

48 *Id.* at 2568 (quoting 13 U.S.C. § 141 (2018)).

by law.[49] The Court noted that the law broadly defines the focus of the census as "population, housing, and matters relating to population and housing"[50] and empowers the Secretary to collect "such other census information as necessary."[51] The opinion describes statutory limitations on the Secretary's authority and decides that these limitations are sufficient to prevent his decisions from being so "committed to agency discretion" as to preclude review.[52]

Having determined for itself the statutory bounds of the Secretary's discretionary authority respecting census design, however, the Court employed a decidedly deferential standard of review with respect to the exercise of that authority. The opinion reviews the Secretary's decision under APA § 706(2)(A), which directs reviewing courts to "hold unlawful and set aside" agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[53] Roberts's *Department of Commerce* opinion does not ask whether the Secretary's choice of a form to request citizenship information was the best way, the least costly way, or the way that was likely to elicit the most complete and accurate information. Instead, it asks only whether the Secretary acted unreasonably—that is, arbitrarily, capriciously, unlawfully—in making his decision to include a citizenship question on the short-form questionnaire that is distributed to everyone rather than on a longer-form questionnaire distributed to a smaller segment of the population (or a survey used for a far smaller number of households).[54]

The Court acknowledged the different view of the Census Bureau (relied on heavily by the district court and by Justice Breyer's dissent) but also explained crisply why it was reasonable for the Secretary to reject the Bureau's advice (including the advice that it could create a model that would accurately extrapolate from more limited information, given that the model did not yet exist when the Secretary needed to make a decision).[55] The Court reviewed the arguments put forward by the Bureau and the Secretary's explanation for taking a different path.[56] But it reminded litigants and lower courts that "the choice between reasonable

49 *Id.* (quoting 13 U.S.C. § 5 (2018)).

50 *Id.* (quoting 13 U.S.C. § 141(g) (2018)).

51 *Id.* (quoting 13 U.S.C. § 141(a) (2018)).

52 *Id.*; *see id.* at 2568–69.

53 5 U.S.C. § 706(2)(A) (2018).

54 *See Dep't of Commerce*, 139 S. Ct. at 2569–71.

55 *See id.* at 2569–70.

56 *See id.* at 2569–71.

policy alternatives in the face of uncertainty was the Secretary's to make."[57] The Court declared that insisting on more than that the Secretary "consider the evidence and give reasons for his chosen course of action" would (and in the *SDNY Decision*'s case *did*) improperly substitute judicial judgment for the Secretary's.[58]

2. Delving into Motive: Bias and Pretext

Having laid down a marker of judicial reticence to intrude on policy choices committed to administrators' discretion (even if not so fully as to insulate them from any review), the Court turned to another avenue of attack on the Secretary's decision: plaintiffs' assertion that the decision was motivated not by a desire to accommodate the DOJ's request for better information respecting citizenship in order to facilitate VRA enforcement, but by a desire to advance his own (or the administration's) political agenda. The Court's opinion on this aspect of the case is especially notable.

The opinion acknowledges that "in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."[59] It declares that courts "may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons," citing a Tenth Circuit decision rejecting a request to look behind stated reasons to see if subjective motivation might provide grounds to invalidate agency action.[60]

In particular, the majority opinion in *Department of Commerce* emphasizes that courts are not to ask whether agency actions were influenced by political priorities, as those are part-and-parcel of the policy-making process:

> [A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power." Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations,

57 *Id.* at 2570.

58 *Id.* at 2571.

59 *Id.* at 2573 (citing Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978)).

60 *Dep't of Commerce*, 139 S. Ct. at 2573 (citing Jagers v. Fed. Crop Ins. Corp., 758 F.3d 1179, 1185–86 (10th Cir. 2014)).

> interest group relations, foreign relations, and national security concerns (among others).[61]

The opinion could not have been clearer on this point. Policy-making is a messy, complex, essentially *political* process. The focus of the Court aligned with the APA's limited direction, in which it permits courts to intercede only to prevent discretionary actions from violating legal strictures or from veering away from statutory authority by virtue of being arbitrary, capricious, or outside the bounds of what could have been understood to be permitted by law.[62]

Given its clear rejection of notions that subjective intention of policy makers should be the touchstone for reviewing policy decisions, it is not surprising that the Court also remonstrated that "inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided."[63] In the same vein, the Court understandably stated that the district court improperly ordered extra-record discovery respecting the decision-makers' motives.[64]

The Court took a decidedly different tack, however, in its view on exceptions to the rule of judicial review for consistency of discretionary agency actions (and contemporaneous agency explanations) with the APA's basic requirements of rationality and reasonableness. The Court repeated the dictum from *Citizens to Preserve Overton Park, Inc. v. Volpe*[65] that an inquiry into the mental processes of an administrative decision maker might be permitted where there is a "strong showing of bad faith or improper behavior."[66]

Although the Chief Justice's opinion in *Department of Commerce* declared that the court below had been "premature" in approving inquiries into Secretary Ross's motivation,[67] it determined that there was sufficient ground for the inquiries once additional information was submitted suggesting that the Secretary had asked the DOJ to request the citizenship information in connection with the census rather than the other way around.[68] Having found sufficient ground for inquiry, the Court upheld

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61 *Id.* (citation omitted).

62 See *infra* text accompanying notes 113–127.

63 *Dep't of Commerce*, 139 S. Ct. at 2573 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977)).

64 *See id.* at 2573–74.

65 401 U.S. 402 (1971).

66 *Dep't of Commerce*, 139 S. Ct. at 2574 (quoting *Overton Park*, 401 U.S. at 420).

67 *See id.*

68 *See id.* at 2574–76.

the extra-record discovery and also determined from the additional evidence that the Secretary's action was based on purposes that differed from those the government had pointed to as justification for his decision.[69] And because the Court found that the Secretary's action was based on undisclosed reasons, it concluded that the statement of reasons given to the court below did not provide a suitable basis for judicial review.[70] That conclusion sufficed as grounds for reversal, even as the Court declared that it did "not hold that the agency decision here was substantively invalid."[71]

3. Contrary Views

The opinion for the Court is the primary focus of this Article, but it is far from a simple statement of what the justices as a collective—or even a cohesive group that comprises a majority—believe. The opinion represents what majorities believe on each issue, but it is followed by fifty-seven pages of concurring and dissenting opinions explaining the disparate views of the other eight justices, all of whom agreed with some but not all of the Court's opinion. Professor Jim Huffman pithily summarized the complicated alignment in *Department of Commerce* this way:

> Chief Justice Roberts wrote an opinion Parts I & II of which were joined by all eight justices, Parts III, IV-B, and IV-C by Justices Thomas, Alito, Gorsuch and Kavanaugh, Part IV-A by Justices Thomas, Ginsburg, Breyer, Kagan and Kavanaugh and Part V by Justices Ginsburg, Breyer, Sotomayor and Kagan. Justices Thomas, Breyer and Alito wrote opinions concurring in part and dissenting in part. Whatever one thinks of the apparent substantive rulings, this is judicial decision-making at its worst. One should not need a law degree and a convoluted chart to know what the law is.[72]

Professor Huffman's concluding point is well taken, and the fractured nature of the consensus will be important to making predictions about where the law stands after this case.

As a modest step toward integrating the justices' views into analysis of the decision's import, a dramatically abbreviated (super-speedreading) version of the other opinions follows. All of the justices agreed that the Secretary's action did not violate specific constitutional or statutory provisions. But the agreement ended there. Justice Alito would have found the subject of the suit, apart from questions respecting the

69 *See id.*

70 *See id.* at 2575–76.

71 *Id.* at 2576.

72 Huffman, *supra* note 18.

constitutionality of the Secretary's action, unreviewable under the APA and prior law.[73] Justices Thomas, Gorsuch, and Kavanaugh would have ended the analysis of the action's consistency with the law (and the APA standards of review) after finding that the Secretary's action was based on a reasoned consideration of the issues before him and was not arbitrary, capricious, or an abuse of discretion judged in reference to his contemporaneous explanation.[74] They viewed the inquiry into motive as ill-advised, contrary to precedent, and at odds with the separate powers constitutionally given to the various branches of government.[75] Justices Breyer, Ginsburg, Sotomayor, and Kagan would have found that the Secretary's action was arbitrary and capricious, even if it were based on the reasons given in the Secretary's memorandum, in light of their evaluation of the evidence in the record.[76] In the end, the only member of the Court in agreement with substantially all of the Court's opinion was its author, Chief Justice Roberts.

II. Before *Department of Commerce*: Separated Powers and the APA

To appreciate the most important aspect of the *Department of Commerce* decision, it is helpful to step back and look at the broader context of the constitutional assignment of powers to the different parts of government and the role played by courts in reviewing what other branches have done.

A. *Constitutional Design*

The starting point is the constitutional design. The Constitution was intended to cure one glaring deficiency of the Articles of Confederation—the inability of the national government to accomplish fundamental tasks of national governance—without empowering national officeholders to exercise the sort of unchecked discretionary authority that colonial Americans had objected to under British rule (and observed in other nations) as the essence of tyranny.[77] To that end, the new governance

[73] *See Dep't of Commerce*, 139 S. Ct. at 2596–606 (Alito, J., concurring in part and dissenting in part).

[74] *See id.* at 2576–84 (Thomas, J., concurring in part and dissenting in part).

[75] *See id.*

[76] *See id.* at 2584–95 (Breyer, J., concurring in part and dissenting in part).

[77] *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 524, 536–47 (1969). On the centrality of concerns with discretionary governmental authority, both in the United Kingdom and the United States, see HAMBURGER, *supra* note 7, at 4–8.

framework assigned tasks suited to national governance to the central government institutions, retained other powers in the states, divided the authority of various government entities and offices, and asserted the continued primacy of individual (natural) rights against all government powers.[78] In particular, the Constitution divided powers among the three branches and provided mechanisms for each to check the others. The simple formulation is that the Congress makes laws (and makes the critical policy choices necessary for governance),[79] the president and those who work for him implement the laws (and make the less important policy choices assigned to that function),[80] and the courts decide disputes about law (and interpret the laws as necessary to resolving those disputes).[81]

As simple as that division is, it has not been free from controversy. The distinction between lawmaking and law implementing has been grist for periodic fights over the limits of congressional delegations (and executive assertions) of power for administrative officers to make particular decisions.[82] Similarly, controversy has attended efforts at distinguishing the judicial authority granted to Article III courts from other adjudicatory determinations.[83] James Madison, as in many things, is a source of handy quotations for all sides, articulating both the necessity of separating government powers[84] and the difficulty of finding the right manner of describing the assignments and limits of powers for doing that.[85]

The most serious conflict has been over the shape and vitality of the nondelegation doctrine, which asserts the general proposition that only Congress can make decisions that constitute "law" even if both courts and administrators can make decisions within some parameters that have "the

78 *See, e.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 118 (2010).

79 *See* U.S. CONST. art. I, § 1; THE FEDERALIST NOS. 45–48 (James Madison).

80 *See* U.S. CONST. art. II, § 1; Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825); THE FEDERALIST NOS. 67–77 (Alexander Hamilton).

81 *See* U.S. CONST. art. III, § 1; THE FEDERALIST NOS. 78–80 (Alexander Hamilton).

82 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019); Am. Textile Mfrs. Inst., Inc. v. Donovan (*The Cotton Dust Case*), 452 U.S. 490 (1981); Yakus v. United States, 321 U.S. 414 (1944); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

83 *See, e.g.*, Stern v. Marshall, 564 U.S. 462 (2011); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Crowell v. Benson, 285 U.S. 22, 51–54 (1932).

84 *See, e.g.*, THE FEDERALIST NOS. 37, 47–48, 51 (James Madison).

85 *See* THE FEDERALIST NO. 37 (James Madison).

force of law."[86] The limitation of restricting lawmaking to Congress was undeniably a major focus of the Constitution's design. That aim explains the investment of so much time, energy, and space in the document to constructing a lawmaking apparatus that has power divided among different houses of Congress that are differently constituted (with election of one house and legislative selection of the other before the 17th Amendment and with the election of the two houses differently constituted and temporally divided after that Amendment) and constrained by requirements of bicameralism and presentment.[87] Some restriction on delegation of lawmaking power, hence, is essential to constitutional integrity.[88]

The specific test for what delegations are constitutionally permitted, of course, is contested. The test adopted in *J. W. Hampton, Jr., & Co. v. United States* (*Hampton*),[89] which has been the officially accepted metric for almost a century,[90] requires simply that Congress give the

[86] *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 467–70 (2013); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 476–77 (2002). *But see* Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. (SPECIAL EDITION) 5, 23 (2009).

[87] *See, e.g.*, THE FEDERALIST NOS. 45–51, 62 (James Madison), NOS. 73–75 (Alexander Hamilton); DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING 33–34, 81–109, 112–19, 169–76, 192– 203 (2013); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 554–57 (1833); WOOD, *supra* note 77, at 559–61, 608–09; Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 147–49 (1992); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 707–10, 709 n.149 (1997) (explaining bicameralism and presentment and citing, inter alia, comments of James Wilson—one of the most thoughtful and influential members of the framing generation—on the role and importance of these aspects of constitutional lawmaking process); *see also* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992) (explaining both a formal model of decision-making under bicameralism and presentment requirements and the common sense of the requirements for the framing generation). More than half the Constitution is devoted to stating the terms for selection of members of Congress (and the differences between the two Houses of Congress) and the bases, limitations, and means for making law. *See* U.S. CONST. art. I.

[88] *See* Alexander & Prakash, *supra* note 6, at 1050–51, 1554; Alexander & Prakash, *supra* note 7, at 1323–27; Cass, *supra* note 7, at 153–55; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 353–55 (2002); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 382 (1987).

[89] 276 U.S. 394 (1928).

[90] *See* Gundy v. United States, 139 S. Ct. 2116, 2123–24, 2129 (2019) (plurality opinion); *id.* at 2130–31 (Alito, J., concurring in the judgment); *id.* at 2138–40 (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.Rs. (*American Railroads*), 575 U.S. 43, 76–87 (2015) (Thomas, J., concurring in the judgment); Cass, *supra* note 7, at 164–71; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–26, 1229–34 (1985).

administrative delegate an "intelligible principle" to guide the exercise of authority.[91] A telling objection to the *Hampton* test is that only two enactments in the last ninety-plus years have failed to satisfy that standard.[92] The "intelligible principle" test, in other words, has all the stopping power of an open door.

A more thoughtful test was proposed by Chief Justice Marshall in *Wayman v. Southard*,[93] a century before *Hampton*, focusing not on the intelligibility of the standard for exercising a power but on the *nature* of the power itself.[94] Marshall's *Wayman* opinion for the Court declared that some decisions are essentially legislative because of their importance—matters that Alexander Hamilton had described in *Federalist 75* as "rules for the regulation of society"[95]—and that these must be made exclusively by Congress.[96] Other decisions may be assigned to administrators if they are of lesser importance to society.[97] One additional qualifier, which is implicit in *Wayman*, was made explicit by Justice Scalia's dissenting opinion in *Mistretta v. United States*[98]: the power assigned to administrators to make those further decisions must be connected to and in service of the exercise of an executive function.[99] Congress cannot give any other body authority to engage in freestanding rule-making, separate from actual implementing conduct, which would, in Scalia's typically catchy phrase, make that body "a sort of junior-varsity Congress."[100]

While the majority of the Supreme Court continues to apply *Hampton*'s intelligible principle test, including this past Term in *Gundy v. United States*,[101] aspects of what might be termed the Marshall–Scalia "importance-plus-function" test have made appearances in various decisions focused expressly on the nondelegation question or on

91 *Hampton*, 276 U.S. at 409; *see also* Fahey v. Mallonee, 332 U.S. 245, 248–50, 253–54 (1947); Yakus v. United States, 321 U.S. 414, 427 (1944); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

92 *See* Cass, *supra* note 7, at 168.

93 23 U.S. (10 Wheat.) 1 (1825).

94 Cass, *supra* note 7, at 160; *see Wayman*, 23 U.S. at 43–47.

95 THE FEDERALIST NO. 75, *supra* note 1, at 450 (Alexander Hamilton).

96 *See Wayman*, 23 U.S. at 42–43.

97 *See id.* at 43.

98 488 U.S. 361 (1989).

99 *See id.* at 417–22 (Scalia, J., dissenting).

100 *Id.* at 427; *see also* Alexander & Prakash, *supra* note 6, at 1040, 1043–44; Cass, *supra* note 7, at 178–81; Lawson, *supra* note 88, at 343.

101 139 S. Ct. 2116 (2019).

arguments cognate to it.[102] Indeed, opinions on the underlying issue in recent cases, including *Gundy*, raise serious questions respecting the *Hampton* test's future.[103]

If one side of the separation-of-powers coin for the Constitution's design consists of dividing powers among the branches, the other side is providing powers that allow each branch to help keep the coordinate branches in check. That was Madison's emphasis in his famous essay in *Federalist 51*:

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[104]

While vocal members of the founding generation focused primarily on finding ways to control the legislature and, secondarily, the executive,[105] some of the resistance to the Constitution came from Anti-Federalists who feared the uncontrolled discretionary power of the courts.[106] Indeed, the one notable proposal advanced in the Constitutional Convention for a greatly expanded role for courts, granting revisory power over legislation, failed.[107]

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102 *See id.* at 2123–24, 2129–30 (plurality opinion); *id.* 2138–40 (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 57–66 (2015) (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring)*; see also* Cass, *supra* note 7, at 172, 195–96; Lawson, *supra* note 88, at 375–77; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 327 (2000); Wurman, *supra* note 7, at 996–98, 1002–03. While Justice Scalia's insight respecting the importance of tying adjudicatory or rule-making authority to specific tasks within the ambit of the assignee's constitutional authority is critical to a proper understanding of nondelegation, he did not believe that it was possible to frame a suitably definite doctrine to prevent judicial adventurism. *See Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting). This does not, however, mean that principles that inform the nondelegation argument cannot be served by other doctrines. *See generally* Aaron Nielson, Erie *as Nondelegation*, 72 OHIO ST. L.J. 239 (2011) (arguing that the federal judiciary's deference to state judicial decisions is best understood as reflecting nondelegation principles).

103 *See, e.g.,* Gundy, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment); *id.* at 2138–42 (Gorsuch, J., dissenting); *American Railroads*, 575 U.S. at 57–66 (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment).

104 THE FEDERALIST NO. 51, *supra* note 1, at 321–22 (James Madison).

105 *See* THE FEDERALIST NOS. 37, 47–48, 51 (James Madison), NOS. 75, 78 (Alexander Hamilton); WOOD, *supra* note 77, at 547–53, 558–59.

106 *See* BRUTUS, *Essay XI*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT 293, 293–98 (Ralph Ketcham ed., Signet Classic 2003) (1986).

107 *See* MADISON, *supra* note 4, at 294–303.

For the great bulk of their history, the Article III courts have respected their constitutionally assigned role as limited to resolving disputes, not broadly superintending the operation of coequal branches.[108] It is instructive that Alexis de Tocqueville highlighted that the limited sphere of judicial review of government acts as a noteworthy benefit of America's legal system, especially as it kept the judges from entanglement in politics.[109] De Tocqueville's observations were in line with the defense offered by Alexander Hamilton in *Federalist 78* for the restricted domain of the courts[110] and reprised by John Marshall in *Marbury v. Madison*.[111] Over time, criticisms of the federal courts for failing to rein in other branches' excesses have been at least as common as criticisms for intruding excessively on the other branches' domains.[112]

108 *See generally* BICKEL, *supra* note 3 (criticizing some judicial doctrines and decisions but more broadly defending judicial decision-making, especially of the Supreme Court, over the broad sweep of American jurisprudence and particularly defending judicial reluctance to intervene in disputes that require assertion of judicial principle over politically freighted conflicts); RONALD A. CASS, THE RULE OF LAW IN AMERICA 24–45 (2001) (exploring congruence between judicial decision-making in America and rule-of-law values); *see also* Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 32–37 (2019); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 392–420 (2017). *But see* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 1–3 (1964) (criticizing failures to enforce important principles and critiquing Professor Bickel's arguments in favor of judicial restraint).

109 *See* DE TOCQUEVILLE, *supra* note 3, at 167–78.

110 *See* THE FEDERALIST NO. 78, *supra* note 1, at 467–70 (Alexander Hamilton).

111 5 U.S. (1 Cranch) 137 (1803).

112 *See* TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 302–47 (2013); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 143–74 (2009); Alexander & Prakash, *supra* note 6, at 1053–54, 1063–73, 1078–79; Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1479–80 (2008); Cass, *supra* note 6, at 243–48; Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta*,* Morrison*, and Administrative Government*, 57 U. CHI. L. REV. 357, 364–76 (1990); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2570–71 (2003); Louis Fisher, *How the Supreme Court Promotes Independent Presidential Power*, 39 CATO J. 683, 683–85 (2019); Ginsburg & Menashi, *supra* note 7, at 475–78; Herz, *supra* note 8, at 187–90; Alan B. Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841, 861–62 (1977); Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 652–60 (2003); Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POL'Y 213, 214–17 (2012); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065–71 (1990).

B. *Empowering and Cabining Judicial Review: The APA*

The APA's provisions constituting the statutory framework for federal court review of administrative agencies' work reflect sensitivity to concerns both about preventing agencies from exceeding their legal mandates or abusing their authority and about preventing courts from intruding into the domain allocated to agencies' discretion. Apart from evidence of the actual discussions behind the drafting and adoption of the APA,[113] the terms on which review is permitted and the scope specified for review make this clear.

Review is denied to the extent that the matter on which review is sought is statutorily precluded or "is committed to agency discretion by law."[114] This restriction on review recognizes that some matters are not only given to agency discretion but, even more, require the sort of sensitive, multivariate judgments that are inappropriate for judicial superintendence. Judgments about military operations or national security operations are the clearest examples, as the arguments in *Webster v. Doe*[115]—about just where the line was drawn around CIA personnel matters—demonstrate.[116] The Court has accorded the same insulation to prosecutorial judgments respecting cases to charge or to decline to pursue, among other elements of prosecutorial discretion.[117]

For matters that involve ordinary discretion (not the sort of exceptional discretion that is wholly removed from court review), the APA lists a series of potential decision-making defects that can give rise to judicial reversal: decisions that are arbitrary (i.e., unreasoned), capricious

113 *See* McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 181, 199–206 (1999); Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 772–73 (2015) (explaining that the APA was designed to strike a balance between the costs and benefits of discretion); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560–61, 1583–1623, 1655–68 (1996).

114 5 U.S.C. § 701(a)(2) (2018).

115 486 U.S. 592 (1988).

116 *See id.* at 595–605; *id.* at 605–06 (O'Connor, J., concurring in part and dissenting in part); *id.* at 606–10 (Scalia, J., dissenting).

117 *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 838 (1985). However, the nature of prosecutorial discretion and the degree to which it *should* be excepted from review are not uncontroverted. *See* Ronald A. Cass, *Power Failures: Prosecution, Power, and Problems*, 16 ENGAGE 29, 33–34 (2015); Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 388 (1976); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736–41 (1996); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 919–24 (2000). For a recent, notable discussion of prosecutorial discretion and the limits of judicial authority to intervene, see In re Flynn, No. 20-5143 (D.C. Cir. Jun. 24, 2020) (granting mandamus directing the district court to grant government's motion to dismiss).

(based on whim), or abuse discretion (based on reasons that cannot possibly be credited as appropriate grounds for the action being reviewed).[118] These often are collectively referred to as "arbitrary, capricious" review, allowing courts to set aside agency actions that significantly depart from a reasoned approach, but not allowing courts to substitute their judgment for that of administrators or to reverse actions simply because the judges believe a better course existed.[119] Although judges at times strain the language of the APA in reviewing exercises of ordinary discretion,[120] more often they recognize the limits to such review.

The arena in which judicial decisions (and academic commentary) demonstrate most confusion respecting review of administrative decisions involves separation of interpretation of law from exercises of delegated discretion. The APA in no uncertain terms directs reviewing courts to interpret the law but not to intervene on matters within the agency's discretionary authority.[121] The terms respecting review of legal authority are especially plain:

> [T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.[122]

In sharp contrast to the terms used to direct review of discretionary actions, these standards tell courts to interpret contested provisions of law—in all its forms, whether constitutional, statutory, or regulatory—without any suggestion that the court should take a back seat to the agency in that decision.[123] Put differently, judges are not to defer to agencies on matters of law that are properly presented to the courts. But

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118 *See* 5 U.S.C. § 706(2)(A) (2018).

119 *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 511–14 (2009); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 989 (2005); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–47 (1996).

120 *See, e.g.*, Mass. v. EPA, 549 U.S. 497, 532–35 (2007).

121 *See* Cass, *supra* note 9, at 537–38; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 189–211 (1998).

122 5 U.S.C. § 706.

123 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2432–34 (2019) (Gorsuch, J., dissenting); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 262–63, 266–67 (1988); Cass, *supra* note 9, at 537–39; Ronald A. Cass, *Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1314 (2015); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 472–73 (1989); Herz, *supra* note 8, at 187–90.

judges are expected to defer to administrators on matters of policy committed in some measure to agency discretion.[124] The difference between those two judgments has presented difficulty for decades, in part because administrators often couch policy judgments in the same terms as statutes empowering them to make the judgments.

Perhaps the best-known example involves the Clean Air Act of 1970[125] and the Clean Air Act Amendments of 1977.[126] The initial act directs the Environmental Protection Agency ("EPA") to supervise state efforts to reduce air pollution, in part through setting goals for pollution reduction and plans to achieve those goals, and in part through requirements for private entities in less successful regions ("non-attainment zones") to secure approval for various pollution-generating activities.[127] The amendments alter some of the details and timetables for these efforts.[128] One part of the statutory scheme requires permits for the construction and operation of "new or modified stationary sources" of emissions in a non-attainment zone.[129] The EPA defined a "stationary source" as any "building, structure, facility, or installation that emits" a pollutant subject to regulation under the Clean Air Act.[130] The more difficult question was whether, under the law, that had to include any single smokestack or whether it could refer to all sources of emission within a single building or a group of buildings (a definition referred to as the "bubble concept"). The EPA adopted a definition of "stationary source" that embraced the bubble concept, giving the agency, and those who sought permits for a new stationary source, leeway to determine how to constrain emissions.[131] While advocates of this approach argued that it facilitated more efficient and more effective control of pollution (in part by encouraging trade-offs at the plant level that could bring newer, more efficient controls on line faster than if each smokestack required independent regulation),

124 *See* Cass, *supra* note 123, at 1314–15; Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 742–43 (2002); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 310–12 (1988).

125 42 U.S.C. § 7401–671 (2018).

126 Pub. L. No. 95–95, 91 Stat. 685 (1977), codified at various sections of 42 U.S.C. § 7401–671.

127 *See* RONALD A. CASS ET AL. ADMINISTRATIVE LAW: CASES AND MATERIALS 25–26 (8th ed. 2020) (describing statutory framework and the EPA's implementation of the 1970 and 1977 amendments).

128 *See id. at* 25–27, 180.

129 42 U.S.C. § 7502(b)(6) (2018).

130 40 C.F.R. § 70.2 (2020).

131 *See id.*

opponents asserted that it allowed less concern for environmental improvements.[132]

A challenge to the EPA's new standard gave rise to litigation that produced the now famous opinion for the Court by Justice John Paul Stevens in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[133] Justice Stevens's *Chevron* opinion endeavors to explain the standard appropriate for review under the Clean Air Act, which essentially reprises the standards set out in the APA.[134] The opinion explains that courts interpret laws using "traditional tools of statutory construction."[135] If the reviewing court finds that a statute authorizing agency action has a clear meaning in respect to a contested issue, the court resolves the matter based on that reading.[136] But if the statute is silent or ambiguous on which among different possible readings should be understood to have been enacted, the Court said a different resolution was called for. In that event, the Court viewed the choice among such readings as encompassed within the law, which it would read as having delegated authority to the agency to select a construction that fit its policy priorities.[137] That approach explains why Stevens' opinion repeatedly references the policy implications of the choice between treating all emission sources within a plant as covered by the same "bubble" and, thus, constituting a single "stationary source."[138] In fact, his opinion concludes by asserting that the conflict before the Court "really centers on the wisdom of the agency's policy," rather than the meaning of the law.[139]

In essence, then, *Chevron* did not really break new ground so much as provide a new vocabulary for the long-accepted understanding that *courts interpret the law* (*Chevron*'s step one) and, when they find that the law grants discretion to an administrator within some domain, *courts defer to administrators' delegated, discretionary policy choices* so long as those choices are reasonably within the law's domain (*Chevron*'s step two).[140] The

132 *See* CASS, ET AL., *supra* note 127, at 180–81.

133 467 U.S. 837 (1984).

134 *See* 42 U.S.C. § 7607(b)(1) (2018).

135 *Chevron*, 467 U.S. at 843 n.9.

136 *See id.* at 842–43.

137 *See id.* at 843–45, 862, 865.

138 *See id.* at 843–45, 847–53, 859, 861–66.

139 *Id.* at 866.

140 *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 511–14 (2009); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 989 (2005); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–47 (1996); Cass, *supra* note 8, at 57–58; Cass, *supra* note 9, at 535–36, 539–41; Cass, *supra* note

legal, juridical, and academic communities have spent decades trying to parse what deference is due to agency interpretations of law, when the actual answer is *none*. Agencies *are* due deference on matters committed to their discretion so long as the commitment does not violate constitutional assignment of powers among the branches, so long as the agency has stayed within the bounds of what has been committed to it, and so long as its decision does not breach one of the limitations on proper exercise of discretion.[141]

III. *Department of Commerce* Again: Right on Reason, Wrong on Motive—and One Wrong Trumps a Right

Judged against these standards, *Department of Commerce* merits plaudits for parts of the decision evaluating the reasonableness of Secretary Ross's decision on standard "arbitrary, capricious" grounds. It goes seriously off course, however, in its treatment of motives. As explained below, that part of the Court's decision, if taken as a predictor of future returns, sends danger signals that should be attended to promptly.

A. *Arbitrary, Capricious Review: Positive Steps*

The Court's decision in *Department of Commerce* clearly signals appreciation of the limited role given to courts in reviewing discretionary policy judgments of politically responsible officials. Despite criticism from the dissenting justices, the majority was correct that reviewing courts are supposed to check discretionary administrative decisions for a fairly cabined set of potential errors, apart from errors of law. Secretary Ross's reasons for reinstating the citizenship question certainly can be debated, but it is undeniable that using census efforts to obtain citizenship information is common around the world and has a long tradition in the United States as well.[142] The Court's review of the issues raised,

123, at 1314–15; Duffy, *supra* note 121, at 190–93; Merrill, *supra* note 19, at 554–56; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516; *see also* Beermann, *supra* note 8, at 833–34, 844–51; Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 3–5 (2013); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 863–64, 870–72 (2001).

141 *See* Cass, *supra* note 9, at 551–59.

142 *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2561–63 (2019).

explanations given, and acceptability of the rationales is entirely within the range of past decisions examining discretionary agency decisions.[143]

In particular, the Court rightly declined to give great weight to the views of long-time officials in the Census Bureau who opposed the change championed by Secretary Ross and other officials holding "political" appointments within the Department of Commerce.[144] Long-term agency staff, who tend to turn over far less often than politically appointed officials with policy-making authority, very often are the most effective barriers to change. While relative longevity in office can be helpful, the frequent association of these "embedded officials" with adoption of earlier policy initiatives also can reduce enthusiasm for making changes supported by politically appointed officers (who typically have different views and shorter time horizons on getting policies implemented).[145] Preferencing staff views as better informed and entitled to special weight reinforces existing impediments to change and reduces administrative agencies' responsiveness to democratic controls, generally expressed through elections.[146]

The importance of political accountability in public decision-making supports deference to policy-making officials on discretionary policy choices that have been lawfully—statutorily and constitutionally—assigned to them. In particular, it supports deference to judgments of the president and those most directly accountable to the president, the official in the executive branch who has direct electoral connection and who is constitutionally instructed to "take Care that the Laws be faithfully

143 *See, e.g.*, *Fox Television Stations*, 556 U.S. at 513–22; Nat'l Ass'n. of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007); *Brand X*, 545 U.S. at 981, 989; Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 101–04 (1983); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 802–08 (1978); Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam); *see also* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2127 (2016) (rejecting an agency interpretation of a legal provision that changed a policy on which there was substantial industry reliance when "the Department said almost nothing" to explain the reasons for the change).

144 *See Dep't of Commerce*, 139 S. Ct. at 2569–71.

145 *See* Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 185–87, 216–19 (1978); James Q. Wilson, *The Dead Hand of Regulation*, 25 PUB. INT. 39, 48 (1971).

146 For information on the impediments to policy changes, especially through rulemaking (the dominant format for effecting broad changes in policy), see Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 508 (1985); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–88, 1396–98 (1992). For connection of similar issues to review standards applicable to changes in agency policies, see Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 114–17 (2011); Ronald M. Levin, *Hard Look Review, Policy Change, and* Fox Television, 65 U. MIAMI L. REV. 555, 561–67 (2011).

executed."[147] Those in the framing generation recognized the importance of presidential control of executive action, reflected in "the chain of dependence" between the elected officer and those under him—"the lowest officers, the middle grade, and the highest."[148] Searching inquiries into details of the reasoning behind discretionary policy choices and insistence on elaborate justification for decisions that depart from staff recommendations are at odds with the basic framework of governance. *Department of Commerce*, thus, strikes the appropriate chord in stating that it should be enough to sustain his action under the "arbitrary, capricious" standard that Secretary Ross "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision."[149]

B. *Mixed Up on Motive: Wrong Inquiry, Wrong Result*

For all its thoughtfulness in assessing the right way to review the Secretary's decision as an exercise of discretion, *Department of Commerce* veers badly off course in approving the inquiry into the Secretary's motivation for reinstating the citizenship question to the census. After asserting that "judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided," the Court declared that there is a "narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers'" where parties challenging government action make a "strong showing of bad faith or improper behavior."[150]

The Court did not in fact find that Secretary Ross had based his decision to restore a citizenship question to the census on an improper motive. Instead, it found that, although he had sufficient grounds to support his decision, he had made the decision on a basis different from the one his memorandum stated at the time, which was the basis asserted

147 U.S. CONST., art. II, § 3; *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 582–84 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001).

148 Free Enter. Fund v. Pub. Co. Accountability Oversight Bd., 561 U.S. 477, 498 (2010) (quoting James Madison, House Debate on June 17, 1789, in 1 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 518 (Joseph Gales ed., 1834)) (1789).

149 *Dep't of Commerce*, 139 S. Ct. at 2570.

150 *Id.* at 2573–74 (first quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977); then quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)).

in court as well.[151] Because the asserted basis was "pretextual," it failed to provide a suitable ground for judicial review.[152]

Further, looking backward, the Court said that the "premature" inquiry into the Secretary's motives, though wrong at the time, was essentially made (retroactively) appropriate by virtue of the government's provision of additional materials that should have been part of the administrative record.[153] As explained below, this part of the *Department of Commerce* decision is both inconsistent with prior law and a dangerous precedent if taken to be something more than a special, one-case holding.

1. Boldly Going Where No Court Has Gone Before

Support for inquiring into judicial motives rests on very thin reeds. Indeed, it rests on marshy ground, providing only support that looks substantial, not something that can actually bear weight.

a. *Background Rules and Precedents*

Courts are often implored to look beyond what officials say is the basis for an action and inquire into the officials' motives. But courts routinely decline those entreaties. The Supreme Court has explained in no uncertain terms why that is the proper course. In a series of cases involving suits against the Secretary of Agriculture by Fred O. Morgan of the Fred O. Morgan Sheep Commission Company, the Supreme Court repeatedly confronted questions respecting (1) the degree to which aspects of a decision required to be made by the Secretary of Agriculture after a full hearing could be delegated by the Secretary to other officers and (2) the degree to which a party engaged in a contest with the department could inquire into what the Secretary knew about the record on which a decision was made.[154] After three cases in which the Supreme Court reversed lower court decisions, at least twice for failure to appropriately require substantial participation in the decision-making process by the Secretary himself, Mr. Morgan asked that the Court approve further

151 *See Dep't of Commerce*, 139 S. Ct. at 2574–76.

152 *See id.* at 2575–76.

153 *See id.* at 2574–76.

154 *See* United States v. Morgan (*Morgan IV*), 313 U.S. 409, 416–21 (1941); United States v. Morgan, 307 U.S. 183, 198 (1939); Morgan v. United States, 304 U.S. 1, 22 (1938); Morgan v. United States, 298 U.S. 468, 482 (1936).

inquiry into just what the Secretary knew. In the fourth case, *Morgan IV*, Justice Frankfurter writing for the Court firmly put that inquiry to rest:

> [T]he district court authorized the [plaintiffs] to take the deposition of the Secretary. . . . [T]he short of the business is that the Secretary should never have been subjected to this examination. . . . Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that it was not the function of the court to probe the mental processes of the Secretary. Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected . . . [A]lthough the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.[155]

Frankfurter's comments are addressed specifically to the inquiries approved by the lower court in the *Morgan* cases, including questioning the Secretary as to why he had not followed suggestions contained in a memorandum from one of his subordinates.[156] But the Justice's (and the Court's) reasons for finding inquiry into motivations for an officer's decisions improper apply more broadly.

Consider the analogy to judges. Disappointed litigants and other critics of judicial decisions may be so certain of the correctness of their position that they greet any contrary decision with suspicion. Every judge is familiar with speculation that something in the judge's background, personal life, religion, or past political associations explains the *real* basis for a decision.[157] Yet appellate courts routinely review lower court

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155 *Morgan IV*, 313 U.S. at 421–22 (internal quotation marks and citations omitted).

156 *See id.* at 422.

157 *See, e.g.*, Donald L. Beschle, *Catechism or Imagination: Is Justice Scalia's Judicial Style Typically Catholic?*, 37 VILL. L. REV. 1329, 1332 n.14 (1992); Dara Lind, *There Hasn't Been a Criminal Defense Lawyer on the Supreme Court in 25 Years. That's a Problem*, VOX (Mar. 22, 2017, 10:54 AM), https://perma.cc/K4XU-4XLN (noting correlation of service as a prosecutor with support for government against criminal defendants); Society for Personality & Social Psychology, *Gender Roles Highlight Gender Bias in Judicial Decisions*, SCIENCE DAILY (Apr. 3, 2018), https://perma.cc/75EZ-CPDP; Jonathan Turley, *Judge Attacking Conservatives Spotlights Bias in Court System*, THE HILL (Mar. 14, 2020, 10:00 AM), https://perma.cc/T6JV-9TW8; Debra Cassens Weiss, *Judge Accused of Religious Bias*, ABA J. (Aug. 13, 2007, 2:18 PM), https://perma.cc/CXP6-RFE5. Indeed, speculation of this sort extends to expectations—and objections—that particular aspects of a judge's life will dictate future decisions. For commentary critical of such speculation, see Ronald A. Cass, *Stalking Scalia*, REALCLEARPOLITICS (Mar. 30, 2006), https://perma.cc/238V-X54Q. In addition to speculation about particular decisions of individual judges, there is a large literature respecting the influence of religion and other personal characteristics across larger numbers of cases and judges. *See*, *e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86–87 (2002); Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, 45 CT. REV. 112, 112–15 (2008); Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 POL. RES. Q. 788, 789 (2016); Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry*

decisions for consistency with the law and do not examine the record to divine the judges' true motives, as opposed to evaluating whether the decision was legally justified on the grounds asserted. Further, public questioning of judges' motives tends to be met with condemnation by prominent legal and political voices. For instance, not many months before his opinion in *Department of Commerce* was announced, Chief Justice Roberts reacted to such a criticism by pointedly declaring that federal judges make decisions on the law, not on their political associations or inclinations: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges."[158]

Even for decisions with retrospective effect focused on determining specific, identified individuals' legal rights—settings where concerns over possible bias of decision makers are most trenchant—courts do not indulge ad hoc inquiries into the basis for a decision. Instead, rules intended to prevent bias address specific types of relationships (principally financial) that can be ascertained from facts.[159] This focus makes objectively established relationships—rather than subjective determinations of motive—decisive.[160] Courts simply do not countenance subjective examination of the reasons a judge makes a decision; the judge's decision speaks for itself.

The same is true for administrative decision makers. In general, decisions are evaluated on the basis of the reasons put forward at the time. Reviewing courts do not look at subsequent explanations of a decision,[161] nor do they look at officials' possible motivations, as Frankfurter made

Into Legal Interpretation, 2 J. LEGAL ANALYSIS 257, 259–60 (2010); Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 L. & HUM. BEHAV. 69, 80–83 (2003); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1052–56 (1990). *But see* Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 685–86 (2016); John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 748–50 (2017).

158 Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), https://perma.cc/3BFT-TGYB.

159 *See, e.g.*, 28 U.S.C. §§ 144, 455 (2018); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (AM. BAR ASS'N 2020).

160 *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881–87 (2009); Gibson v. Berryhill, 411 U.S. 564, 577–79 (1973); Ward v. Village of Monroeville, 409 U.S. 57, 60–62 (1972); Tumey v. Ohio, 273 U.S. 510, 531–35 (1927).

161 *See* Camp v. Pitts, 411 U.S. 138, 142 (1973) (noting that "the focal point for judicial review [of administrative decisions] should be the administrative record already in existence, not some new record made initially in the reviewing court").

clear in *Morgan IV*.[162] That is particularly true for broad policy decisions, for which officials are not even subject to the sort of "relationship" rules that address bias in the context of individuated adjudications.[163]

b. *Motive Forces: Cite-seeing with the Chief Justice*

The portion of the Chief Justice's *Department of Commerce* opinion that addresses the question of official motivation must be seen in conjunction with three sources of possible inspiration: cases identified as transparently based on prohibited animus; cases identified as supporting an exception to the general rule against inquiring into official motivation; and a comment from Judge Henry Friendly cautioning against turning a blind eye to the sort of decision-making defects that the rest of the world can see.

i. Prohibited Animus: Supporting cases?

The Chief Justice identified the first possible sources of support in his opinion in *Trump v. Hawaii*,[164] decided the Term preceding *Department of Commerce*. *Hawaii* concerned challenges to a temporary suspension of most travel to the United States from a set of nations said to pose special problems because of the inability of those nations to screen travelers adequately for security concerns (or of the United States to secure necessary information on security issues from those nations).[165] The principal complaints challenged the consistency of the "travel ban" (as the suspension orders were commonly called) with "statutory structure and

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162 *See* Villege of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977); United States v. Morgan (*Morgan IV*), 313 U.S. 409, 421–22 (1941); Jagers v. Fed. Crop Ins. Corp., 758 F.3d 1179, 1185–86 (10th Cir. 2014).

163 *See* Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias In Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 488 (1990) ("*Chevron* and *Mistretta* yield a new understanding . . . . The political branches of government can exercise policy-based control of all agency decisionmaking, including adjudication."). The one possible exception among Supreme Court decisions is Gibson v. Berryhill, 411 U.S. 564 (1973), which concerns a rule-based determination on licensing and turns on the question of the administrators' financial self-interest in adopting the rule. *Id.* at 578–79. The rule's effect was to make individuals working for one specific firm ineligible to practice optometry. *Id.* at 567–68. Those specific individuals challenged the rule excluding them from practice. *Id.* at 569–70. The action at issue in *Gibson*, thus, is tantamount to the sort of individual determination in other cases.

164 138 S. Ct. 2392 (2018).

165 *See id.* at 2404–05.

legislative purpose."[166] But the complaints also alleged that the actions reflected religious animus and should be reviewed in light of statements by the president and others that might reveal the true purpose of the travel suspensions.[167]

The Court rejected that plea, rooting its decision in precedents that limited review to assessing "whether the Executive gave a 'facially legitimate and bona fide' reason for its action."[168] The *Hawaii* decision also noted that the rare cases that rejected actions for lacking a rational basis concluded "the laws at issue lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.'"[169] *Hawaii* listed cases in which the Court commented on the absence of any other plausible explanation for challenged government actions.[170] Each of the decisions cited, however, was simply applying rational basis review, not addressing whether courts should approve inquiries into the motivations of other officials. These are especially inapt bases for the Court's *Department of Commerce* decision, which, before looking into motivation, expressly finds the action under review supportable as a reasonable action, connected to legitimate concerns, reasonably explained at the time.[171]

ii. An Exception to the Rule: *Overton Park's* Dictum

That may explain why the opinion in *Department of Commerce*, instead of reaching back one year to its *Hawaii* decision, rested the inquiry into motivation on statements from *Overton Park.*[172] Although *Overton Park* did delineate the occasions on which inquiries into motivation are permitted, the case itself did not involve any contemporaneous explanation of the administrative action.[173] In fact, Justice Marshall's opinion for the Court in *Overton Park* distinguishes that setting from the normal one where, because an explanation has been given, inquiries into motive are not needed and, worse, create prospects for judicial

166 *Id.* at 2410.

167 *See id.* at 2415–20.

168 *Id.* at 2419 (quoting Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)); *see also id.* at 2418–20.

169 *Id.* at 2420 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

170 *See Hawaii*, 138 S. Ct. at 2420 (first citing Romer v. Evans, 517 U.S. 620, 632, 635 (1996); then citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448–50 (1985); then citing *Moreno*, 413 U.S. at 534).

171 *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2569–71 (2019).

172 *See id.* at 2573 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)).

173 *See Overton Park*, 401 U.S. at 408, 420.

overreach.[174] In other words, *Department of Commerce* dealt with exactly the setting that *Overton Park* did not and to which the comments in *Overton Park* were decidedly not addressed.

iii. A Friendly Quote

This brings us to the final piece of the puzzle as to why, after finding Secretary Ross's explanation for his decision sufficient under generally applicable "arbitrary, capricious" review standards and cautioning against looking at motivation, Roberts's *Department of Commerce* opinion makes the inquiry into motivation determinative. The Chief Justice quotes Judge Henry Friendly, the first judge for whom he clerked, declaring that judges "are 'not required to exhibit a naiveté from which ordinary citizens are free.'"[175] Like much of Judge Friendly's writing, it is a sensible and memorable observation. Yet, that quote, like the other reeds on which the inquiry into motivation in *Department of Commerce* rests, is out of place in the resulting decision. In *United States v. Stanchich*,[176] the source of the quote, Judge Friendly was writing about whether evidence of criminal conduct was sufficient to support conviction.[177] His point was that even if pieces of evidence have plausible explanations standing alone, when seen together they may present a picture of considerable clarity.[178] Friendly also notes that, while the higher standard for evidence in a conspiracy case prevented sending charges on that count to a jury, the same evidence sufficed to meet the lower standard applicable to substantive criminal charges.[179]

Except for the quote pulled out of context, the *Stanchich* case is not relevant to the inquiry respecting officials' motives in *Department of Commerce*. Indeed, Friendly's sensitivity to different standards for conspiracy and substantive criminal charges—demanding greater caution against permitting judgments in conspiracy cases, where conclusions about criminality may be less well grounded—makes the quotation particularly ill-suited to the *Department of Commerce* setting. In contrast to *Stanchich*, *Department of Commerce* addresses a setting where the bar to

174 *See id.* at 420.

175 *Dep't of Commerce*, 139 S. Ct. at 2575 (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

176 550 F.2d 1294 (2d Cir. 1977).

177 *See id.* at 1294.

178 *See id.* at 1300.

179 *See id.* at 1298–99.

judicial intrusion into decisions of the executive branch should be especially high. That is the subject of the following section.

2. Motive Inquiries' Threat to Separated Powers

Courts examine motives or mental states in a wide variety of contexts. Criminal prohibitions frequently require evidence of a particular state of mind. Killing, for example, is not murder without intentional or reckless acts—descriptions that, at least for some conduct, plainly refer to motive.[180] Torts similarly are frequently defined not merely by the consequences of actions but by the state of mind of the actors.[181] So, for example, assault requires an intention to cause fear of bodily harm.[182] Almost all of the instances in which the law requires inquiry into motivation traditionally have incorporated proof of mental state as a *limitation* on liability, a concept captured, among other places, in Oliver Wendell Holmes's aphorism about dogs knowing the difference between being tripped over and being kicked.[183]

Even in that context, judges have warned against permitting government officials to be brought into court to face inquiries about their motives. Chief Judge Learned Hand, writing for the Second Circuit in *Gregoire v. Biddle*,[184] 70 years ago, articulated those concerns. Gregoire sued five federal officials, including two Attorneys General of the United States, asserting that his arrest and incarceration were based on pretext and were in fact motivated by malice.[185] The district judge dismissed the suit,[186] and the circuit decision upheld the dismissal.[187] Judge Hand's *Gregoire* opinion sympathized with concerns that officials not act willfully and maliciously, violating law and harming individuals, but explained that those concerns did not justify burdening the far broader class of officials who, acting

180 *See* 18 U.S.C. § 1111(a) (2018); MODEL PENAL CODE § 210.2 (AM. LAW INST., Official Draft & Revised Comments 1985); *see also* Paul H. Robinson & Markus K. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320, 336, 340 (2007).

181 *See generally* John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 917–18 (2010) (arguing that tort law comprises not "accident law plus" but a "law of wrongs," culpability for which can depend on an actor's state of mind).

182 *See* RESTATEMENT (SECOND) OF TORTS § 21(1)(a) (AM. LAW INST. 1965) (listing elements of the tort of assault); *see also* MODEL PENAL CODE § 211.1(1)(b) (AM. LAW. INST., Official Draft & Revised Comments 1985) (stating similar requirements for crime of assault).

183 O.W. HOLMES, JR., THE COMMON LAW 3 (3d ed., 1923) (1881).

184 177 F.2d 579 (2d Cir. 1949).

185 *See id.* at 579.

186 *See id.*

187 *See id.* at 582.

without such animus, would be called on to justify their motives in court.[188] After reviewing the precedents, Hand concluded that "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[189]

Hand's concern that subjecting officers to probing and potentially invasive judicial process would undermine official functions applies with even greater force in cases such as *Department of Commerce*. Although the suit did not involve potential personal financial liability for defendants, litigation over policy decisions like the one challenged in *Department of Commerce* has the potential to entangle courts in political battles—battles better resolved (at least as to the policy choices) by officers more politically accountable than Article III judges.[190] Yet politically selected officials increasingly use litigation to challenge official decisions seeking a more sympathetic forum in which to replay the battle—often state attorneys general of one political party jointly file suit to contest the decision of a federal official from a different party.[191]

It is critical that courts are bound by clear rules when reviewing the work-product of co-equal branches of government.[192] Less definite, less constraining rules give scope for decisions to be influenced by considerations connected to each decision maker's own views and values.[193] In this context, this means that judges may apply relatively

188 *See id.* at 581.

189 *Id.*

190 For further discussion, see Cass, *Nationwide Injunctions*, *supra* note 108, at 58 ("[T]he assignments of authority in Articles I and II of the Constitution cannot be made consistent with granting courts broad power to reverse national policy decisions made by the politically responsible branches.").

191 *See generally* Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633 (2018) (describing a recent increase in coordination among politically allied state attorneys general and other groups in legal challenges); Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS & WORLD REP. (Oct. 27, 2017, 12:01 AM), https://perma.cc/69WB-LPVY (describing lawsuits by twenty-two Democrat state attorneys general seeking injunctions against actions of the Trump administration); Paul Nolette, *State Attorneys General Have Taken Off as a Partisan Force in National Politics*, WASH. POST (Oct. 23, 2017, 7:00 AM), https://perma.cc/C3JJ-T5QP (recounting state attorneys general's efforts to stop actions of opposing parties); *see also* sources cited *supra* note 39.

192 *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (citing Mistretta v. United States, 488 U.S. 361, 415–17 (1989) (Scalia, J., dissenting)).

193 *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13–23 (Amy Gutmann ed., 1997); Cass, *Nationwide Injunctions*, *supra* note 108, at 45–51; *see also* Farnsworth et al., *supra* note 157, at 271–89 (presenting experimental work supporting the conclusion that one's personal viewpoints affect legal decisions).

malleable rules in ways that fit their own policy preferences, and far more often will be accused by others of intentionally using soft rules to produce those results.[194] Concern for keeping judicial decisions from infringing private rights or intruding on the prerogatives of other branches, as well as for protecting the courts from accusations of political influence, militate in favor of grounding judicial decisions in clearer, more determinate, externally generated rules.[195]

Inquiries into officials' motives exacerbate problems associated with complaints about politicization of judicial process. Apart from their intrusion into the thought processes of officials with policy-making authority, questions respecting unstated motives for official action necessarily require far more subjective inquiries than does asking whether there is evidence of arbitrariness or capriciousness or other grounds specified in the APA. Legal tests that turn on more subjective judgments at times are appropriate, but in general such tests reduce the clarity of decisions and provide increased scope for considerations apart from those readily identified with the merits of the legal dispute.[196] Further, unlike the situation in *Gregoire*, inquiries into motive in the more common context of cases such as *Department of Commerce* are directed at *expanding* potential grounds for overturning decisions of a coordinate branch of government. In *Department of Commerce*, the inquiry concerns an

194 *See, e.g.*, Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore*?*, in *BUSH V. GORE*: THE QUESTION OF LEGITIMACY 110, 114–22 (Bruce Ackerman ed., 2002); Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1410–141 (2001); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1093–95 (2001); Sanford Levinson, *Return of Legal Realism*, NATION (Dec. 22, 2000), https://perma.cc/85CY-KG6Z; Elspeth Reeve, *Just How Bad Was* Bush v. Gore*?*, THE ATLANTIC (Nov. 29, 2010), https://perma.cc/9K8W-96GL; Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Nov. 29, 2010), https://perma.cc/E6UN-ZJH5; Jonathan Chait, *Yes,* Bush v. Gore *Did Steal the Election*, NEW YORK MAG. (Jun. 25, 2012), https://perma.cc/77UG-DJJB.

195 Calls for narrower, more certain legal tests and more narrowly confined sources of decision have come from scholars and jurists of widely divergent views in an array of disparate contexts. *See, e.g.*, CASS, RULE OF LAW, *supra* note 108, at 4–20, 28–29; A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107–22 (Liberty Classics ed., Macmillan ed. 8th prtg., 1982) (1885); LON L. FULLER, THE MORALITY OF LAW 46–94, 209–13 (rev. ed. 1969); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 653, 689 (1995); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176, 1178–83 (1989); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 20–35 (1959).

196 *See* KENT GREENAWALT, LAW AND OBJECTIVITY 93–119, 193–201 (1992); SCALIA, *supra* note 193, at 13–23; Cass, *Nationwide Injunctions*, *supra* note 108, at 45–51. *See generally* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Ties that Bind*, 75 COLUM. L. REV. 359 (1975); Manning, *supra* note 157.

essentially political topic and broadening the inquiry further entwines the courts in political disputes.[197]

Both the expansion of potential grounds for overturning official actions and the reduction in certainty in the application of legal rules produce incentives for litigants to engage in forum-shopping.[198] These factors expand the range of possible routes to overturning official action while also expanding the dispersion of outcomes. Those are changes that invite forum-shopping, making expected returns from litigation more productive and also making the identity of the particular judge more significant. They also encourage increased engagement with politically salient issues in the midst of political fights—the very context where forum shopping is especially controversial and where politicization of the judiciary is most feared and most likely.[199]

Conclusion

Reading the Court's opinion in *Department of Commerce* is a bit like looking at a painting by Picasso. It is interesting, has a lot to engage the viewer, but ultimately is discomfiting, a split personality—like seeing two pictures forced together into one image.

Large parts of the *Department of Commerce* decision seem committed to keeping judicial determinations focused on core aspects of the judicial power, especially as framed by the review provisions of the APA. Those portions of the decision focus first, on interpreting statutory and constitutional provisions (the quintessential, traditional legal materials within the courts' domain) and second, on review of discretionary administrative determinations in ways consistent with the APA's limited grounds for setting those determinations aside.

Yet at the end, the opinion of the Court, like the Picasso painting, twists to set aside the action just upheld as a reasonable exercise of legally committed discretionary authority. And it does this on the basis of an unusual—widely condemned and almost uniformly rejected—inquiry

197 *See supra* notes 21–32 and accompanying text.

198 *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 460–61 (2017); Cass, *Nationwide Injunctions*, *supra* note 108, at 42–51; Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 531–34 (2016); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1090–91 (2017).

199 *See* Cass, *Nationwide Injunctions*, *supra* note 108, at 51–57, 60–62, 66–72; *see also* Bray, *supra* note 198, at 460–61; Berger, *supra* note 198, at 1090–91.

into the subjective motivation for taking the challenged action, contrasting the Court's conclusion on that score with the explanation given in court. Permitting that inquiry increases incentives to use courts for political battles and engages courts in decision-making on grounds that widely will be seen as political or at least politically tinged.

Perhaps, this is a sign of things to come—an unpredictable combination of restrained and unchained bases for judicial review of administrative decisions. More likely, and far more optimistically, it is, as Justice Thomas mused in his concurring and dissenting opinion, "an aberration—a ticket good for this day and this train only."[200] That view at once sees a picture that is better for the law and better for democracy.

[200] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2584 (2019) (Thomas, J., concurring in part and dissenting in part).