NOTES

Honesty in Reason: How *Department of Commerce v. New York* Began to Tackle the Problem of Regulatory Dishonesty

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INTRODUCTION

Imagine that you are a small business owner who has just received word that the Department of Labor proposed a new rule increasing the current minimum wage at all businesses from $7.25 per hour to $20 per hour. Understandably concerned about what this means for your business, you read the proposed rule, looking for information about why the Department of Labor made this drastic change. You find that the Department of Labor has primarily cited concerns over rising costs of living and the increasing wealth gap in the United States. Though you are sympathetic to these policy reasons, you disagree with this top-down approach. You contact other small business owners in your community, all of whom are similarly concerned. Together, you draft a response and submit a comment to the Department of Labor about why this new minimum wage standard, in your opinion, will not address the rising costs of living or the wealth gap and will, in the end, hurt small businesses.

Several months later, the Department of Labor finalizes its minimum wage standard to $20 per hour. Litigation ensues, and through this process, it is discovered that the Department of Labor increased the minimum wage due to pressure from Silicon Valley. In fact, Silicon Valley executives met with appointees in the Department of Labor months before the proposed rule. You find out that these executives pushed for a high minimum wage in order to squeeze out small businesses like yours.

The scenario described above may sound implausible, but it is not. In *Department of Commerce v. New York*, the Supreme Court heard a challenge to a decision by the Commerce Department to put a citizenship question on the 2020 decennial census.[1] Like a decision to increase the minimum wage, the decision to ask for one's citizenship on the census was not the central problem. The problem was that the Commerce Department misrepresented the reasons for adding the citizenship question. But did this misrepresentation violate the Administrative

1. 139 S. Ct. 2551, 2561 (2019).

Procedure Act (APA)?[2] In *Department of Commerce*, the Court suggested yes, but it is not all that clear.

The Supreme Court could have rubber-stamped the agency's decision. Instead, the Court remanded the decision, instructing the Commerce Department to come up with a better (and truthful) explanation for its decision.[3] Did the Court strictly apply administrative law principles of hard look review and reasoned decisionmaking? How did dishonesty come into the picture, and what was its role in the ultimate disposition? Do litigants face an easier time now when wanting to call out dishonest conduct by agency officials, and how should they proceed doing so? These questions are difficult. Accordingly, the goal of this Note is to reason through *Department of Commerce* and to evaluate how the law might have moved regarding regulatory dishonesty in agency decisionmaking.

To do so, the Note proceeds in the following manner. Part I briefly reviews what happened in *Department of Commerce*. The case involved many claims, but this Note focuses on the APA. The majority used the APA and the judicially crafted standard of hard look review to remand the decision based on a finding of pretext.[4] Then in Part II, this Note reviews the doctrine of hard look review. The history of the doctrine parallels theories of administrative behavior and tracks how scholars legitimize administrative governance. Debates over administrative governance continue today, with particular attention to the role that political motivations may play in agency decisionmaking. This academic foundation is helpful for framing how the issue of pretext in *Department of Commerce* implicates broader ideas about administrative governance. This Note transitions to Part III, which provides a practical assessment of the outcome of the case. It offers observations and suggestions for agencies and litigants to consider when handling future cases involving dishonesty by regulatory officials. A short conclusion then follows.

I. A BRIEF OVERVIEW OF *DEPARTMENT OF COMMERCE V. NEW YORK*

In *Department of Commerce v. New York*, the Supreme Court considered whether the Commerce Department's decision to reinstate a citizenship question on the 2020 decennial census violated the APA.[5] As the head of the agency, Secretary Wilbur Ross issued a memorandum that explained how the decision

2. 5 U.S.C. § 706(2).

3. *Dep't of Com.*, 139 S. Ct. at 2576.

4. *Id.* at 2575–76.

5. *Id.* at 2569; 5 U.S.C. § 706(2). The Court also considered the following issues: (1) whether state respondents had Article III standing; (2) whether Secretary Ross's decision violated the Enumeration Clause of the U.S. Constitution, U.S. CONST. art I, § 2, cl. 3; (3) whether the Secretary's decision was reviewable under the APA, 5 U.S.C. § 701(a)(2); and (4) whether the Secretary violated two provisions of the Census Act, 13 U.S.C. §§ 6(c), 141(f). *See Dep't of Com.*, 139 S. Ct. at 2565–69, 2571–73. The Court resolved these questions mostly in favor of the government, except for #3. The APA permitted review of the Secretary's decision because "[t]he taking of the census is not one of those areas traditionally committed to agency discretion," as understood by *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). *Dep't of Com.*, 139 S. Ct. at 2568. The Court ultimately remanded to the agency on the pretextual issue, as explained below and in the rest of this Note. *See id.* at 2576.

responded to a request from the Department of Justice (DOJ), which sought better data about the citizen voting-age population for purposes of enforcing the Voting Rights Act (VRA).[6] Career staff at the Census Bureau recommended against the addition of the citizenship question.[7] They predicted that adding the question would reduce response rates and harm the overall integrity of the census.[8] They also believed that DOJ's interest in having more citizenship data could be satisfied in a less costly and harmful manner.[9]

The Bureau evaluated three possible options for administering the census in response to DOJ's request.[10] These options estimated the additional administrative costs to produce data for DOJ, and they predicted changes in response rates among noncitizens.[11] For example, adding a citizenship question to the 2020 census questionnaire would "most likely deliver higher quality" citizen data to DOJ than the status quo, but "it would cost an estimated additional $27.5 million[,] . . . an estimated minimum 5.1% decline in self-response among noncitizen households, [and a minimum of] '154,000 fewer correct enumerations.'"[12] Secretary Ross ultimately asked the Census Bureau to develop a fourth option that would reinstate the citizenship question and use administrative records from other agencies that collect citizenship data.[13]

Chief Justice Roberts initially declined to find the citizenship question arbitrary or capricious because the "evidence before the Secretary" had "called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty."[14] According to the Court, the Secretary concluded that the Census Bureau's data could not "determine definitively"[15] whether adding the citizenship question would lower response rates; the data could only show that citizenship accounted for the decline without eliminating other causes.[16] The Secretary weighed that uncertainty against the value of obtaining more complete citizenship data and determined that reinstating the citizenship question was worth the risk.[17]

6. *Dep't of Com.*, 139 S. Ct. at 2562. Secretary Ross's March 26, 2018 memorandum announced the decision and explained that upon receiving DOJ's request, he had "set out to take a hard look at the request and ensure that [he] considered all facts and data relevant to the question so that [he] could make an informed decision on how to respond." New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 542 (S.D.N.Y. 2019) (alteration in original) (quoting Administrative Record at 1313, *New York*, 351 F. Supp. 3d 502 (No. 18-CV-2921)).

7. *New York*, 351 F. Supp. 3d at 530.

8. *Id.*

9. *Id.*

10. *Id.* at 533.

11. *Id.*

12. *Id.* at 533 (emphasis omitted) (quoting Administrative Record at 5474, *New York*, 351 F. Supp. 3d 502 (No. 18-CV-2921)).

13. Dep't of Com. v. New York, 139 S. Ct. 2551, 2563 (2019).

14. *Id.* at 2571.

15. *Id.* at 2563 (quoting Appendix to the Petition for a Writ of Certiorari Before Judgment at 562a, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966)).

16. *Id.* at 2570.

17. *Id.*

The APA entitled the agency to make this policy choice.[18] To conclude otherwise would "improperly substitute[s one's] judgment for that of the agency."[19]

But the Court did not stop there. First admitting that the agency's decision was "reasonable and reasonably explained,"[20] the Chief Justice then made a striking turn and joined four Justices in remanding the decision to the agency to provide "something better than the explanation offered."[21] Secretary Ross's memo explained the decision solely on the basis of DOJ's request for more accurate citizenship data.[22] The evidence, however, revealed a different story. It revealed that the Commerce Department went to "great lengths" to elicit the request from DOJ.[23] For example, the Secretary contacted Attorney General Jeff Sessions about the "interest" from the Civil Rights Division to better enforce the VRA by adding more citizenship data.[24] DOJ's "interest," however, was "directed more to helping the Commerce Department than to securing the data."[25] And the letter from DOJ, which Secretary Ross identified in his original memorandum, "drew heavily on contributions from Commerce staff and advisors," strangely narrowing the "specific request" that Commerce collect the data by reinstating a citizenship question on the census.[26]

The Court could not ignore the glaring disconnect between the agency's decision and the explanation it gave.[27] "If judicial review is to be more than an empty ritual," the Court wrote, it must have "genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."[28] "Accepting contrived reasons would defeat the purpose" of the reasoned-decisionmaking requirement in administrative law.[29] The next Part explains the history of the reasoned-decisionmaking requirement and its potent force in administrative law.

18. *See id.* ("[T]he choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision.").

19. *Id.*

20. *Id.* at 2571.

21. *Id.* at 2575–76.

22. *Id.* at 2575.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* ("[The Commerce Department's] influence may explain why the letter went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency—to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census.").

27. The Chief Justice quoted Judge Friendly in a powerful rebuke of the Secretary's rationale: "Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Id.* (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

28. *Id.* at 2575–76.

29. *Id.* at 2576.

II. HARD LOOK REVIEW

A. THE STANDARD OF HARD LOOK REVIEW IN AGENCY DECISIONMAKING

The Administrative Procedure Act governs judicial review of federal agency decisions by instructing courts to hold unlawful and set aside agency action found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.[30] This standard, often used interchangeably with "hard look" review,[31] requires federal administrative agencies to act with reasoned judgment[32] and to justify their regulatory choices in relevant statutory and technocratic terms.[33] If an agency satisfies these requirements, a reviewing court's scope of review is narrow and deferential, and it will not substitute its judgment for that of the agency.[34]

In the APA's early years, courts deferred to the policy decisions and judgments of federal agencies.[35] The Supreme Court likened agencies to legislatures making policy judgments in the face of "factual uncertainty and statutory silence."[36] Unlike legislatures, however, federal agencies are unelected, so they derive their

30. 5 U.S.C. § 706(2)(A).

31. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009).

32. *See Dep't of Com.*, 139 S. Ct. at 2569; Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (holding that agencies must provide a "rational connection between the facts found and the choice made" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))); Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 104 (1983) (holding that an agency's policy judgment must be "within the bounds of reasoned decisionmaking"); P.R. Sun Oil Co. v. EPA, 8 F.3d 73, 78 (1st Cir. 1993) (agency decisions must provide reasons for its actions and those reasons must make sense); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 758 (8th ed. 2019) ("[T]he 'arbitrary or capricious' test regulates an agency's decisionmaking process by ensuring that the agency reaches its conclusions through a rational decisionmaking mechanism." (emphasis omitted)).

33. *See* Massachusetts v. EPA, 549 U.S. 497, 533 (2007) (requiring EPA's decision not to regulate greenhouse gas emissions from new motor vehicles to be grounded in scientific judgment as dictated by the Clean Air Act); *State Farm*, 463 U.S. at 43; William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1360 & n.8, 1428–30 (2018) (discussing cases and scholarship relating to constraints on administrative agencies).

34. FCC v. Fox Television Stations, Inc., 566 U.S. 502, 513 (2009); *see also Dep't of Com.*, 139 S. Ct. at 2569 ("We may not substitute our judgment for that of the Secretary . . . .").

35. *See* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 454 (1986) (explaining that the original arbitrary and capricious standard called for overturning agency action when the "agency had acted like a lunatic"); LAWSON, *supra* note 32, at 751 (citing the 1947 U.S. Department of Justice Attorney General's Manual on the Administrative Procedure Act, which "consistently interpreted the phrase 'arbitrary or capricious' to permit only the most minimal judicial review of agency decisions," and citing cases); Watts, *supra* note 31, at 15 (describing the "very minimal judicial review" that applied to agency action).

36. LAWSON, *supra* note 32, at 751; *see* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 532 (1985); Watts, *supra* note 31, at 15; *see also* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935) ("[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.").

legitimacy from their relatively independent nature.[37] For example, they consist of professional government experts, who offer expertise to serve the broader public interest rather than a political party.[38] Indeed, agencies have "unique expertise" in scientific or technical areas, can conduct factual investigations, and can consider how their own experts have handled certain issues over the course of a regulatory program.[39] And courts believed that agencies were particularly well-suited to handle complex, ever-emerging regulatory problems that began during the Great Depression.[40] To this end, courts shared an optimistic vision of bureaucratic governance,[41] trusting agencies to act in accordance with law and in the public interest.[42] Thus, when Congress passed the APA in 1946, courts interpreted the statute to require deference when reviewing agency decisions and to overturn only those that were arbitrary and capricious.[43] Many agree with this interpretation today, reasoning that deep pools of agency expertise justify judicial respect for and deference to discretionary decisions as new issues and policy calls emerge.[44]

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37. *See* Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1186 (1973) (describing how the early model of bureaucratic governance assumed a predicate of a "self-sufficiency or autonomy, implying an immunity from the political process").

38. *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 60–62 (1988) ("The Progressive creed was experts in the service of the public and government as essentially a set of technical services provided to the citizenry."); Joseph B. Eastman, *The Place of the Independent Commission*, 12 CONST. REV. 95, 101 (1928) (describing the Interstate Commerce Commission, an independent agency, as "clearly nonpartisan in [its] makeup, and party policies do not enter into [its] activities except to the extent that such policies may be definitely registered in the statutes which [it is] sworn to enforce"); Jaffe, *supra* note 37, at 1187 (explaining that the administrative state "derived its content and its authority, not from legislative or imperial dictates, but from an assumed comprehensive body of expertise available for the implementation of legislative grants of authority"); Watts, *supra* note 31, at 33.

39. Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019) (quoting Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1991)).

40. *See* Garland, *supra* note 36, at 577 ("The [agencies'] experts were to determine, by objective techniques, the socially optimal solutions to regulatory problems."); Jaffe, *supra* note 37, at 1186–87.

41. *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 154–55 (1938) ("The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts.").

42. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the [Federal Communications] Commission will act in accordance with its statutory obligations.").

43. *See id.* at 224 ("'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.' Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress." (quoting Bd. of Trade v. United States, 314 U.S. 534, 548 (1942))); SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 207 (1947).

44. *See Kisor*, 139 S. Ct. at 2413; LAWSON, *supra* note 32, at 751 (explaining that the language of § 706(2)(A) is "very strong, suggesting an extraordinary level of deference to agencies"); *see also* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1299 (2012) ("On their face, the statutory terms 'arbitrary' and 'capricious' seem to suggest a more minimal judicial inquiry . . . ." (quoting 5 U.S.C. § 706(2)(A))); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 893 (2020) ("There is reason to believe that arbitrary and capricious review was understood when the APA was enacted as closer to rational basis review under constitutional law . . . .").

Such high levels of trust within courts did not last long.[45] Beginning in the 1960s and 1970s, judges grew increasingly concerned about industry capture.[46] The deferential standard soon gave way to hard look review, a concept coined by the D.C. Circuit[47] in the early 1970s to scrutinize agency decisions and ensure they served the public interest.[48] Led by Judge Harold Leventhal, the D.C. Circuit began reviewing agency decisions with an obligation to intervene if "the agency ha[d] not really taken a 'hard look' at the salient problems, and ha[d] not genuinely engaged in reasoned decision-making."[49] Hard look review further evolved as courts demanded increasingly detailed and specific explanations,[50] along with demonstrations that the agency had responded to public comments, examined all relevant factors, and considered alternatives to the course of action ultimately chosen.[51]

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45. *See* Roger G. Noll, *Reforming Regulation*, *in* LAWSON, *supra* note 32, at 79 (describing agencies as "overly responsive to the interests of the regulated"); *see also* Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2602 (2002) (describing how "trust in agency experts evaporated" as "academics and public officials began to believe that many agencies had been captured by the industries and private interests that they regulated"); Watts, *supra* note 31, at 15 n.51 (citing scholarship); *id.* at 34 ("In place of the expertise-based model had come a new theory of agency behavior—the 'capture' theory—which saw agencies *not* as apolitical experts but rather as entities that were susceptible to 'capture' by the regulated industry.").

46. *See* Env't Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) (Bazelon, J.) (describing how reviewing courts often bowed to "the mysteries of administrative expertise"); *see also* Gary C. Leedes, 12 U. RICH. L. REV. 469, 500 (1978) ("[M]ore and more judges realize[d] that agency expertise ha[d] been oversold . . . .").

47. Although the D.C. Circuit officially coined the term, the origins of the hard look doctrine can be traced to *Chenery II*, 332 U.S. 194, which required agencies to explain the bases for their decisions. Garland, *supra* note 36, at 526. *Citizens to Preserve Overton Park, Inc. v. Volpe* also sowed the seeds for hard look review by stating that judicial review is to be "searching and careful," even though the "ultimate standard of review is a narrow one." 401 U.S. 402, 416 (1971). Further, *Citizens to Preserve Overton Park* affirmed *Chenery II* by stating that agencies may only justify decisions on the record before them, not on "'post hoc' rationalizations." *Id.* at 419 (emphasis omitted) (first quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1982); and then citing SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 87 (1943)).

48. Watts, *supra* note 31, at 16; *see Env't Def. Fund, Inc.*, 439 F.2d at 598 (describing the need to protect fundamental interests in life, health, and liberty from "administrative arbitrariness," and thus calling upon courts to "insist on strict judicial scrutiny of administrative action").

49. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851–52 (D.C. Cir. 1970) (footnote omitted) (citing WAIT Radio v. FCC, 418 F.2d 1153, 1156 n.8 (1969)) (also explaining that the reasoned decisionmaking process "promotes results in the public interest by requiring the agency to focus on the values served by its decision"); *see also* Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("In the case of agency decision-making the courts have an additional responsibility . . . . [T]o assure that the agency exercises the delegated power within statutory limits . . . by an administration that is not irrational or discriminatory.")

50. Garland, *supra* note 36, at 526; *see, e.g.*, P.R. Sun Oil Co. v. EPA, 8 F.3d 73, 78 (1st Cir. 1993) (explaining that an agency failing to show *why* it wanted to quickly proceed with a permit application fails hard look review even though it explains that it was allowed to do so); Indus. Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 481 (D.C. Cir. 1974) (holding that "reasons of practical administration" lacked detail and specificity).

51. Garland, *supra* note 36, at 526–27 & n.110 (citing cases); *see* Watts, *supra* note 31, at 55–56.

The Supreme Court embraced the substantive nature of hard look review in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co*.[52] Upon review of the National Highway Traffic and Safety Administration's (NHTSA) rejection of a safety regulation that required cars be equipped with airbags or automatic seatbelts, the Court held that the agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[53] An agency action, however, would still be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[54] These elements of hard look review are much more substantive and probing of an agency's decision than the deferential standard applied by the Court in the early years of the APA.[55]

State Farm is considered the "foundational modern case" for arbitrary and capricious review.[56] Not only did it adopt hard look review for agency decisionmaking, but it also adopted hard look review for deregulatory actions.[57] This considerably broadened the application of hard look review. Some have argued that such deregulatory actions should receive *more* deference than the initial regulations.[58] Justice Rehnquist, in partial dissent, considered this possibility.[59]

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52. 463 U.S. 29 (1983); *see* Garland, *supra* note 36, at 542–46 (distinguishing quasi-procedural and quasi-substantive elements of hard look review and finding that the Supreme Court in *State Farm* adopted both).

53. 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

54. *Id.*

55. *See id.* at 43 n.9 ("We do not view as equivalent the presumption of constitutionally afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.").

56. Buzbee, *supra* note 33, at 1396–97 (explaining why the *State Farm* Court subjected deregulatory policy changes to the same standard of review); *see* Garland, *supra* note 36, at 545–48 (explaining how the Court applied the three elements of hard look review to the agency's rescission and found that the agency (1) lacked record support for its finding of fact and (2) failed to establish a reasonable relationship between its decision and the relevant evidence, alternatives, and statutory purpose).

57. *See* Buzbee, *supra* note 33, at 1396–97.

58. *See* Brief for the Federal Parties at 27, *State Farm*, 463 U.S. 29 (Nos. 82-354, 82-355 & 82-398), 1983 WL 961778, at *27 ("Rescission of the passive restraint requirement plainly was within the limits prescribed by Congress . . . ." (citation omitted)); *id.* at 28–29 ("[A] court must be extremely reluctant under the APA to set aside an agency's decision to rescind a regulation that was not required by its authorizing statute . . . . A rule of administrative law that tends to 'lock in' an agency so that action taken cannot be undone . . . would in the long run deter valuable experimentation."); *see also* Brief for the Petitioners at 21–22, FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (No. 07-582), 2008 WL 2308909, at *21–22 ("[A]n agency also may alter its policy for the simple reason that, in its judgment, the 'prior policy failed to implement properly the statute.' The 'discretion provided by the ambiguities of a statute' is left 'with the implementing agency,' not the reviewing court." (citations omitted) (first quoting Rust v. Sullivan, 500 U.S. 173, 187 (1991); and then quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996))).

59. *See State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

Nonetheless, since *State Farm*, the Supreme Court has affirmed that agencies seeking to change policies, even in a deregulatory setting, must substantially engage with underlying facts, reasoning, and previous agency choices.[60]

B. HARD LOOK REVIEW IN *DEPARTMENT OF COMMERCE*: A TALE OF TWO HOLDINGS

By a 5–4 margin, the Supreme Court in *Department of Commerce* held that the decision to reinstate citizenship on the census passed hard look review insofar as the evidence supported the decision and presented Secretary Ross several reasonable courses of action.[61] As discussed in Part I, the Census Bureau evaluated the administrative costs of seeking citizenship data from existing administrative records (such as those collected by the Social Security Administration) and estimated the potential decline in response rates if the census questionnaire inquired about citizenship. According to the Court, Secretary Ross considered these data along with the Bureau's recommendation to use administrative records alone to estimate citizenship data.[62] He noted that administrative records would be lacking for about ten percent of the population and thus, the Census Bureau would still need to estimate citizenship for 35 million people.[63] Despite the Bureau's "high confidence" it could accurately do so, the Bureau conceded that it "will most likely never possess a fully adequate truth deck to benchmark" the relative accuracy of the citizenship data compared to other collection measures.[64]

The Court held that the agency's examination of these relevant data satisfied the hard look review standard.[65] As the head of the Commerce Department, Secretary Ross "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision."[66] He did not need to choose the recommendation offered by the Census Bureau.[67] He only needed to articulate a reason for departing from that recommendation.[68] He did so by explaining in the decisional memorandum that asking a citizenship question

60. Buzbee, *supra* note 33, at 1400–01; *see* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) ("An arbitrary and capricious regulation [that is an unexplained inconsistency] is itself unlawful and receives no . . . deference."); *Fox Television Stations, Inc.*, 556 U.S. at 514–15; Massachusetts v. EPA, 549 U.S. 497, 528 (2007); *State Farm*, 463 U.S. at 43 (holding that NHTSA's choice to rescind the safety regulation should have drawn a "rational connection" between the evidence and the choice made (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))).

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

62. *See id.* at 2569–70.

63. *Id.*

64. *Id.* at 2570 (quoting Joint Appendix (Volume 1) at 146, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966)).

65. *See id.*; *see also State Farm*, 463 U.S. at 52 (explaining that it is not arbitrary and capricious when "the available data do not settle a regulatory issue, and the agency . . . exercise[s] its judgment in moving from the facts and probabilities . . . to a policy conclusion").

66. *Dep't of Com.*, 139 S. Ct. at 2570; *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009) (describing how the agency need only "examine the relevant data and articulate a satisfactory explanation for its action" (quoting *State Farm*, 463 U.S. at 43)).

67. *See Dep't of Com.*, 139 S. Ct. at 2571.

68. *See id.*

would be worth the risk of a potentially lower response rate.[69] In light of lingering uncertainty and a "long history of the citizenship question on the census,"[70] the Secretary and his agency acted "within the bounds of reasoned decisionmaking."[71]

The majority did not need to find that the agency's decision was "the best one possible" or "whether it was better than the alternatives."[72] To the contrary, the "choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make."[73] Moreover, the Census Act confers considerable discretion to the Secretary to administer the census.[74] The Secretary exercised that discretion in a reasonable manner after considering the evidence and coming up with a choice among other reasonable options.[75]

C. POLITICS AND PRETEXT

Although the Commerce Department passed hard look review for the policy *decision*,[76] the policy's *explanation* posed a glaring problem. The Chief Justice, along with four other Justices, found that the reason given by the agency—supporting DOJ's request for better citizenship data—had been "contrived."[77] The

69. The Secretary concluded that "even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns. The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond." Brief for the Petitioners at 31, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966), 2019 WL 1093052, at *31 (citation omitted) (quoting Appendix to the Petition for a Writ of Certiorari Before Judgment at 562a, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966)).

70. *Dep't of Com.*, 139 S. Ct. at 2571.

71. *Id.* at 2569 (quoting Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105 (1983)).

72. *Id.* at 2571 (internal quotation marks omitted) (quoting Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 782 (2016)).

73. *Id.* at 2570.

74. *See* 13 U.S.C. § 141(a) (establishing that the Secretary of Commerce shall conduct the decennial census "in such form and content as *he* may determine" (emphasis added)).

75. *See Dep't of Com.*, 139 S. Ct. at 2571. Justice Breyer, joined by three other Justices, disagreed. He emphasized that the "nature and importance of the particular decision" to reinstate a citizenship question made it "particularly important" that the Court not overlook the substantive elements of hard look review. *Id.* at 2585 (Breyer, J., concurring in part and dissenting in part). On his own hard look, Justice Breyer concluded that the Secretary failed hard look review. *Id.* As such, there is some debate about whether Chief Justice Roberts truly applied hard look review or if he instead embraced a "thin rationality review"—a term coined by Jacob Gersen and Adrian Vermeule. *See* Christopher J. Walker, *What the Census Case Means for Administrative Law: Harder Look Review?*, YALE J. ON REGUL.: NOTICE & COMMENT (June 27, 2019), https://www.yalejreg.com/nc/what-the-census-case-means-for-administrative-law-harder-look-review/ [https://perma.cc/LT4K-5JUN]. This term describes an approach to judicial review where agencies are "entitled to adopt any rational assumptions to cope with uncertainty . . . [and] courts [do] not demand the impossible by requiring agencies to explain why they have chosen the assumptions they have." Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1406 (2016). This debate is important and requires deeper probing into the nuances of hard look review. Although relevant to this Note, the debate is beyond its scope.

76. *See Dep't of Com.*, 139 S. Ct. at 2574–75 ("[N]o particular step in the process stands out as inappropriate or defective.").

77. *Id.* at 2575.

Court could not truly review the decision and therefore remanded it to the agency to provide "something better" than the explanation offered.[78]

In a partial concurrence and partial dissent, Justice Thomas believed the majority took a wide turn from Supreme Court precedent.[79] The majority had reiterated earlier that "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."[80] This principle indeed stems from Supreme Court precedent—*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*—which recognizes that judicial review is "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."[81] Further inquiry into additional motivations, as the majority here acknowledged, represents "'a substantial intrusion' into the workings of another branch of Government and should normally be avoided."[82]

According to Justice Thomas, if Secretary Ross had other, unstated reasons for the decision or if he was inclined towards the citizenship question upon entering office, then it remained puzzling how his actions could be arbitrary and capricious.[83] Again, the majority just previously affirmed precedent that "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons."[84] But the citizenship question on the census was unique. Unlike the "typical case in which an agency may have *both* stated and unstated reasons for a decision," the Commerce Department had put forth the VRA enforcement rationale as the *sole* reason for the decision.[85] This made all the difference.

1. Administrative Law's Tenuous Relationship with Politics

The debate between the majority and Justice Thomas in *Department of Commerce* illuminates administrative law's tenuous relationship with politics in agency decisionmaking. As described above, hard look review contemplates reasoned decisionmaking,[86] and reasoned decisionmaking requires agencies to justify their decisions in expert-driven or technocratic terms.[87] The Supreme Court expanded this requirement to even more politically discretionary actions in

78. *Id.* at 2576.

79. *See id.* at 2579 (Thomas, J., concurring in part and dissenting in part).

80. *Id.* at 2573 (majority opinion).

81. *Id.* (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978)).

82. *Id.* (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977)).

83. *See id.* at 2579 (Thomas J., concurring in part and dissenting in part).

84. *Id.* at 2573 (majority opinion).

85. *Id.* at 2575 (emphasis added).

86. *See supra* notes 31–33 and accompanying text; *see also* Buzbee, *supra* note 33, at 1403–04 (describing how reasoned decisionmaking is a constraint and "among the most durable of administrative law tenets").

87. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Watts, *supra* note 31, at 7 ("Courts applying arbitrary and capricious review today routinely search agency decisions to ensure they represent expert-driven decisionmaking." (citing Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2270 (2001))); *see also* Genuine Parts Co. v.

Massachusetts v. EPA.[88] There, the Court rejected the EPA's argument that the agency should have received judicial deference for its denial of a rulemaking petition and decision not to regulate greenhouse gases from new motor vehicles.[89] The EPA argued for deference specifically because "discretionary decision[s] not to regulate a given activity [are] inevitably based" on "internal management considerations as to budget and personnel; evaluations of its own competence; [and] weighing of competing policies within a broad statutory framework."[90] But the Court held that such policy considerations—even in this relatively discretionary setting—did not have sufficient grounding in the underlying statute;[91] the Clean Air Act required the EPA to judge regulation of greenhouse gas emissions based on whether such emissions endanger the public health and welfare, not whether it was politically unwise to do so.[92]

The majority in *Massachusetts v. EPA* exhibited an "implicit suspicion of politics" to which it performed "an expertise-forcing role" as a check to "a number of bureaucratic pathologies, including vulnerability to interest group pressure or institutional resistance to a new statutory mission."[93] This mirrored the vision of judicial review espoused by Judge Leventhal and the D.C. Circuit in the 1970s,[94] and which *State Farm* followed.[95] But the Supreme Court has also explained that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided."[96] Thus, it would be a mistake to say that the debate over the proper

EPA, 890 F.3d 304, 312 (D.C. Cir. 2018) (describing arbitrary and capricious review in expert-driven terms).

88. 549 U.S. 497, 510–14, 533 (2007); *see* Buzbee, *supra* note 33, at 1398 (describing how the EPA's denial involved a "policy change grounded in both a new statutory interpretation, as well as presidential priorities and discretion"); Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 64 ("Given the charged context in which EPA arrived at this position, it was not surprising that questions arose about whether the petition denial was in fact the product of expertise—a decision supported by the scientific evidence—or whether it was an instance of politics overriding scientific judgment.").

89. *See Massachusetts*, 549 U.S. at 533; Buzbee, *supra* note 33, at 1360 n.8 (discussing *Massachusetts v. EPA*'s "expertise-forcing underpinnings" and its emphasis on the "agency's obligation to engage with underlying facts and science"); Watts, *supra* note 31, at 11 (citing Freeman & Vermeule, *supra* note 88, at 54).

90. Brief for the Federal Respondent at 36, *Massachusetts*, 549 U.S. 497 (No. 05-1120), 2006 WL 3043970, at *36 (quoting Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979)). The EPA also requested deference for application of its own expertise to the decision: "Further, even if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived." *Id.* (quoting Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979)).

91. *Massachusetts*, 549 U.S. at 533 ("[I]t is evident [these policy judgments] have nothing to do with whether greenhouse gas emissions contribute to climate change.").

92. *Id.* at 532–33 (citing 42 U.S.C. § 7521(a)(1)) ("[T]he use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.").

93. Freeman & Vermeule, *supra* note 88, at 90, 92; *see* Buzbee, *supra* note 33, at 1360 n.8.

94. *See supra* note 49 and accompanying text.

95. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

96. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); *see* United States v. Morgan, 313 U.S. 409, 422 (1941); *see also* Village of Arlington Heights v. Metro. Hous. Dev. Corp.,

role of politics in agency decisionmaking is settled.[97] To the contrary, *Department of Commerce* reveals that this struggle continues.[98] The majority was clear that "a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations," yet when it came to the issue of pretext, the Court went in a different direction.[99]

2. Administrative Law's New Relationship with Pretext

If administrative law had a tenuous relationship with political motivations in agency decisionmaking, it has an emerging one with pretext. Pretext is similar to political motivations—both are implicit or unstated reasons behind a decision.[100] However, pretext is distinguishable. It is defined as a "false or weak reason or motive advanced to hide the actual or strong reason or motive."[101] Put simply, pretext is dishonest and untruthful reasoning.

Judges have long probed for pretext while reviewing government actions under the Commerce Clause[102] and Equal Protection Clause.[103] Whereas political motivations seem to be an objective inquiry (that is, did a government official have

429 U.S. 252, 268 n.18 (1977) ("This Court has recognized . . . that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." (citation omitted)).

97. *See* Jennifer Nou, *Census Symposium: A Place for Pretext in Administrative Law?*, SCOTUSBLOG (June 28, 2019, 12:54 PM), https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law/ [https://perma.cc/6EX3-6Q2J].

98. *Compare* Chris Hajec, *Census Symposium: A Win for the Deep State*, SCOTUSBLOG (June 28, 2019, 9:07 AM), https://www.scotusblog.com/2019/06/symposium-a-win-for-the-deep-state/ [https://perma.cc/NPX3-5BSH] (opining that the Supreme Court weakened the authority of the President over his own subordinates, which "went against the import of its own precedent and practice" of "ignor[ing] presidential influence on agency action"), *with* Nicholas Bronni, *Census Symposium: Unusual Facts Make for Unusual Decisions*, SCOTUSBLOG (June 28, 2019, 11:51 AM), https://www.scotusblog.com/2019/06/census-symposium-unusual-facts-make-for-unusual-decisions/ [https://perma.cc/XET9-A4MT] ("It would be wrong . . . to suggest—as countless practitioners undoubtedly will—that this case changes the standard for . . . examining an agency's motives . . . .").

99. Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019); *see also* Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (determining that Congress did not intend "that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power").

100. *See Pretext*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Dep't of Com.*, 139 S. Ct. at 2574; *see also* Nou, *supra* note 97 (discussing how administrative law has and will likely continue to tolerate some forms of pretext); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 854 (2012) (discussing how *State Farm* ignored political context and decided the case based on NHTSA's lack of a reasoned explanation).

101. *Pretext*, *supra* note 100.

102. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (explaining that the real reason for the Child Labor Act was not for interstate commerce but rather to impermissibly regulate means of production within states); United States v. Butler, 297 U.S. 1, 68, 70 (1936) (holding that a tax in the Agricultural Adjustment Act was pretextual and impermissibly infringed on states' rights); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 35, 64–65 (1824) (reasoning that Congress's power over commerce must be for national purposes and not to regulate traditional areas of state domain).

103. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533–35 (1996) (reasoning that the real reason for Virginia Military Institute's policy was not diversity but rather because of stereotypes about women); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982) (holding that state nursing school's reason for denying admission to men was really based on gendered ideas about men rather than the proffered (and legitimate reason) of remedial action for discrimination against women). *But see*

political reasons for this action?), pretext is a subjective inquiry—it actively probes the minds of government actors to search for unlawful intent or motives (such as impermissible discrimination).[104] The frameworks for judicial review in the Commerce Clause and Equal Protection Clause areas help illustrate the difference.

Pretext plays a central role in Commerce Clause and Equal Protection Clause cases because of deep-rooted concerns of federal encroachment on state power or on individual rights. In the Commerce Clause setting, courts ensure that congressional decisionmaking does not infringe on areas otherwise regulated by the state.[105] First performed in *McCulloch v. Maryland*, judicial review for pretext ensures that Congress has actually legislated pursuant to Congress's power instead of passing laws "under the pretext of executing its [constitutional] powers" that are not "really calculated to effect any of the objects entrusted to the government."[106] Similarly, in equal protection cases, a reviewing court must undertake a more "intrusive oversight" to ensure that legislatures do not hold prejudicial or discriminatory reasons behind a particular law.[107] If they do, it would violate the Fourteenth Amendment's guarantee of individual rights and equal protection of the laws.[108]

When considered in these two contexts, a probe for pretext is a necessary judicial check on government power. For example, a law that refuses to rezone an area for multifamily housing units may be facially neutral, but when a court searches the subjective mindsets of the legislating body, it may reveal, behind a legislative curtain, discriminatory or unconstitutional action.[109] Or when a law purports to regulate interstate commerce but is really motivated by a desire to regulate an area of state power, a court that probes for pretext is able to identify an unconstitutional encroachment on state power.[110] The ultimate aim of a pretext probe, then, is to determine the lawfulness behind government action.

Unlike Commerce Clause or Equal Protection Clause cases, however, administrative law is much more reluctant to probe into the mindsets and subjective intentions of agency actors unless there is a "*strong* showing of bad faith or improper behavior."[111] There is no similar deep-rooted fear of government

Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 269–70 (1977) (failing to find discriminatory intent, and accepting as true the city's reasons).

104. *See supra* notes 102–03 and accompanying text.

105. *See* Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1290, 1294 (2003).

106. 17 U.S. (4 Wheat.) 316, 423 (1819).

107. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443 (1985).

108. *See* U.S. CONST. amend. XIV, § 1.

109. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.").

110. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 176 (1824).

111. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (emphasis added). *Compare* Chevron, U.S.A. Inc., v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (describing that because judges "are not experts in the field, and are not part of either political branch of Government," the wisdom of certain policy choices is not an issue fit for judicial resolution), *and* Dep't

encroachment—at least in an individual right or state power sense. Thus, in administrative law, there is a higher burden of proof that must be met before triggering a pretextual analysis. This suggests courts have been either assuming that administrative agencies honestly explained their decisions or neglecting to find reasons to question these explanations. The reason is likely because administrative agencies are known for making policy choices from technical expertise[112] rather than from interest-group pressure and electoral politics.[113] But as described below, this view may sometimes be mistaken. Agencies may indeed be subject to industry capture and politics. Thus, judicial review for pretext would encourage agencies to be honest; put them on par with other government actors; and ensure greater political accountability, monitoring, and transparency in significant regulatory decisions.[114] *Department of Commerce* now provides the blueprint.[115]

3. Applying Pretextual Analysis to Administrative Law After *Department of Commerce*

The issue of pretext arose at the end of the Court's opinion in *Department of Commerce*. According to the Court, the Commerce Department "contrived" the explanation for the decision to reinstate the citizenship question on the decennial census.[116] This was problematic; if the Court looked past such a discrepancy, it

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of Com. v. New York, 139 S. Ct. 2551, 2573 (2019) ("[F]urther judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." (quoting *Village of Arlington Heights*, 429 U.S. at 268 n.18)), *with* Massachusetts v. EPA, 549 U.S. 497, 533 (2007) ("Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change."). *But see* Woods Petroleum Corp. v. U.S. Dep't of the Interior, 18 F.3d 854, 859 (10th Cir. 1994); Home Box Off., Inc., v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977); Tummino v. Torti, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009).

112. *See, e.g.*, Sidney Shapiro, Elizabeth Fisher & Wendy Wager, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 465 (2012); *see also* Jon C. Rogowski, *The Administrative Presidency and Public Trust in Bureaucracy*, 1 J. POL. INSTS. & POL. ECON. 27, 27 (2020) ("Survey experiments embedded on a national sample of Americans provide evidence that the loss of expertise significantly reduces public confidence in bureaucracy.").

113. *See, e.g.*, Freeman & Vermeule, *supra* note 88, at 66 (observing that the Supreme Court's refusal to grant deference to the EPA's view of its statutory authority regarding greenhouse gas regulation from new motor vehicles "suggests that for the . . . Court insulating expertise from politics is a greater imperative than forcing democratic accountability"). *See generally* Greater Bos. Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) (explaining the worry among members of the D.C. Circuit about agency capture).

114. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332, 2337 (2001) ("It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment."); Nou, *supra* note 97 (describing how "administrative law has and will likely continue to tolerate some forms of pretext"). *See generally* Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth "Science" Strategies*, 68 DUKE L.J. 1719 (2019) (explaining how political appointees manipulate science to achieve deregulatory ends).

115. At the trial level, litigants claimed that the Secretary was impermissibly motivated in part by invidious discrimination against immigrant communities of color, but the district judge was unable to find that this constitutional violation occurred. Brief Amicus Curiae of Citizens United et al. in Support of Petitioners at 19, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966), 2019 WL 1167891, at *19; *see* New York v. Dep't of Com., 315 F. Supp. 3d 766, 809 (S.D.N.Y. 2018).

116. *See Dep't of Com.*, 139 S. Ct. at 2576.

would "defeat the purpose" of the reasoned explanation requirement that forms the heart of hard look review.[117] To be more than an empty ritual, judicial review must demand something better than this glaring mismatch.[118]

In his opinion, Justice Thomas called the Court's holding "an unprecedented departure," which, if taken seriously, "would transform administrative law."[119] Remanding an agency decision because of pretext, he argued, would "lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes," because litigants will now "have strong incentives to craft narratives that would derail" unfavorable executive actions.[120] He added that this drastic departure from traditional "deferential review of discretionary agency decisions" would enable judicial interference with the Executive's enforcement of the laws.[121]

In practical terms, this means that courts could impose additional, burdensome requirements on an agency. For example, as the district court did in *Department of Commerce*, a court could force an agency to complete or supplement the record with materials it believes the agency omitted.[122] Although this may seem normatively good for promoting transparency, some scholars argue that the APA does not compel such requirements, which enlarge the judiciary's power over administrative agencies.[123] Moreover, as these scholars note, it would waste agency time and resources, result in judicial indeterminacy, weaken the arbitrary and capricious standard, and raise separation-of-powers concerns.[124] By considering the evidence that emerged after additional record production, some believe that the Court "ratified some of the . . . most problematic holdings regarding the composition of the administrative record" and "compounded" existing confusion over appropriate judicial involvement in agency record reviews.[125]

Though they raise important issues, the criticisms miss the mark and misunderstand the fundamental principle of the Court's holding. True, the Supreme Court

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117. *Id.*

118. *See id.*

119. *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part).

120. *Id.* at 2576, 2583.

121. *Id.* at 2576; *see* Hajec, *supra* note 98 (arguing that the Supreme Court weakened the authority of the Executive over his own subordinates in the Executive Branch "in a way that will diminish the influence that voters have over regulatory policy in Washington").

122. *See* New York v. U.S. Dep't of Com., 333 F. Supp. 3d 282, 291 (S.D.N.Y. 2018). The government eventually conceded record issues and negotiated the record's contents with the state of New York. *See Dep't of Com.*, 139 S. Ct. at 2564.

123. *See, e.g.*, Aram A. Gavoor & Steven A. Platt, *Administrative Records After* Department of Commerce v. New York, 72 ADMIN. L. REV. 87, 89 (2020).

124. *Id.* at 90.

125. *Id.* at 92, 94. These scholars heavily criticize *Overton Park*'s bad faith exception, which allows inquiries into "the mental processes of administrative decisionmakers" upon "a strong showing of bad faith or improper behavior." Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). By allowing consideration of the record evidence retrieved from the district court level, the Court accepted application of the "bad faith" exception in the lower court. *See Dep't of Com.*, 139 S. Ct. at 2564. Gavoor and Platt argue that *Department of Commerce* thus "further explicates [their] criticism of the bad faith exception to APA record review." Gavoor & Platt, *supra* note 123, at 87.

has never *had* to remand a decision to an agency for such a contrived explanation for its decision. But requiring honesty by agency officials does not render the Supreme Court's decision "unprecedented," as Justice Thomas argued.[126] Nor does it "adversely affect the government's ability to defend itself in APA litigation."[127]

To the contrary, *Department of Commerce* doubles down on why robust judicial review of agency decisionmaking is good governance. The APA's notice-and-comment provision affords stakeholders the right to receive notice about and participate in agency decisions that substantially affect their rights or interests.[128] This right mandates "'openness, explanation, and participatory democracy' in the rulemaking process."[129] A dishonest agency undermines this mandate. Consider the small business owner mentioned at the beginning of this Note. If the Department of Labor misrepresented the reasons why it adopted a new minimum wage standard, can the business owner meaningfully participate? Probably not. The owner will not know the true reasons for the decision, and therefore, the owner cannot offer rebuttals or points for the agency to consider as it finalizes the rule. Contrary to what others have said, robust judicial review to check agency dishonesty is fully consistent with the APA and administrative governance. And so long as agencies fulfill this promise—so long as they are merely honest—they will not be burdened any more than they already are by the procedural requirements of the APA. Nor is this requirement a form of judicial overreach; it is just good, democratic governance.

Furthermore, requiring agency officials to be honest "assure[s] the legitimacy of administrative norms."[130] Administrative agencies are unelected, so their legitimacy is derived from a fine balance between indirect political accountability and expert-driven judgments.[131] It is the appropriate role for the judiciary to ensure this balance. And as scholars explain, it always has been.[132] Here, the agency misrepresented its reasons to the district court, and Secretary Ross misrepresented before Congress—and to the public—about the real motivations for the citizenship question.[133] If we are to uphold the Constitution's vision of democratic

126. *Dep't of Com.*, 139 S. Ct. at 2576 (Thomas, J., concurring in part and dissenting in part).

127. Gavoor & Platt, *supra* note 123, at 98.

128. *See* 5 U.S.C. § 553(b)–(c); *see also* Air Transp. Ass'n of Am. v. Dep't of Transp., 900 F.2d 369, 375 (D.C. Cir. 1990), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991) (per curiam) (holding that the rules in question were subject to notice-and-comment requirements because the rules "substantially affected civil penalty defendants' right to avail themselves of an administrative adjudication").

129. *Air Transp. Ass'n of Am.*, 900 F.2d at 375 (quoting Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978)).

130. *Id.* at 375.

131. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019) (describing how agencies "have political accountability, because they are subject to the supervision of the President, who in turn answers to the public"); *supra* Section II.A.

132. *See* Shapiro et al., *supra* note 112, at 463 ("The history of administrative law in the United States constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy.").

133. According to the House Committee on Oversight and Reform, Secretary Ross falsely testified before Congress at least three times about the real motivations for the citizenship question. Complaint

accountability—and if the public is to believe in the legitimacy of the administrative process—this agency behavior simply cannot be acceptable.[134]

III. POST-*DEPARTMENT OF COMMERCE*: HOW TO USE THE COURT'S HOLDING ON PRETEXT IN FUTURE CASES AND ISSUES

Despite these fundamental principles, many believe that the "unusual circumstances" of *Department of Commerce v. New York* will limit its holding to just this case.[135] At the time of this Note's writing, the evidence has been scant to confirm or rebut this proposition, but there are indications among lower courts that litigants are using *Department of Commerce* as an additional ground to challenge allegedly dishonest conduct by administrative agencies.[136] Additionally, past

for Declaratory & Injunctive Relief at 30–32, Comm. on Oversight & Reform, U.S. House of Representatives v. Barr, No. 1:19-cv-03557 (D.D.C. Nov. 26, 2019); *see Commerce, Justice, Science, and Related Agencies Appropriations for Fiscal Year 2019: Hearing Before the Subcomm. on Com., Just., Sci., & Related Agencies of the S. Comm. on Appropriations*, 115th Cong. 25 (2018); *Commerce Secretary Ross: Hearing Before the H. Comm. on Ways & Means*, 115th Cong. 35 (2018); *Commerce, Justice, Science, and Related Agencies Appropriations for 2019: Hearings Before the Subcomm. on Com., Just., Sci., & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. 15, 38 (2018).

In July 2021, the Office of Inspector General at the Commerce Department informed congressional leaders that Secretary Ross misrepresented the rationales for adding citizenship on the census during his congressional testimony. *See* Letter from Peggy E. Gustafson, Inspector Gen., U.S. Dep't of Com. Off. of Inspector Gen., to Charles E. Schumer, Majority Leader, U.S. Senate & Carolyn B. Maloney, Chairwoman, H. Comm. on Oversight & Reform (July 15, 2021), https://www.oig.doc.gov/OIGPublications/Inspector-General-Letter-to-Majority-Leader-Charles-Schumer-and-Chairwoman-Carolyn-Maloney-re-OIG-Case-No-19-0728.pdf [https://perma.cc/BN6D-STGN]. The investigation was presented to the DOJ for criminal prosecution, but the Justice Department declined. *Id.*

134. *See* Greater Bos. Television Corp., 444 F.2d 841, 852 (D.C. Cir. 1970) ("[Reasoned decision] furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers."); Kagan, *supra* note 114, at 2332 ("Bureaucracy is the ultimate black box of government—the place where exercises of coercive power are most unfathomable and thus most threatening.").

135. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019) (describing how "rare" it was to review the extensive record after the district court required additional discovery and completion of the administrative record and that "[i]n these unusual circumstances, the District Court was warranted in remanding to the agency"); *Census Act—Review of Administrative Action—Judicial Review of Pretext*—Department of Commerce v. New York, 133 HARV. L. REV. 372, 380–81 (2019) ("The holding is perhaps better understood on the basis of the unusual facts of the case."); Bronni, *supra* note 98 ("Indeed, in every sense, this case was atypical from the start.").

136. *See, e.g.*, Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 33–34 (D.D.C. 2020) (rejecting plaintiff's argument at oral hearing that a court could invalidate an otherwise lawful action if the reasons justifying the emergency declaration at the border were pretextual); Harmonia Holdings Grp., LLC v. United States, 145 Fed. Cl. 583, 595–96 (2019) (citing *Department of Commerce* in support of plaintiff's allegation that the International Trade Administration acted in bad faith given its after-the-fact justifications and appearance that it already made a decision to award a government contract to plaintiff's competitor before actually reviewing the merits of the decision); Petition for a Writ of Certiorari at 18, Cowels v. FBI, 140 S. Ct. 1118 (2020) (No. 19-796), 2019 WL 7048756, at *18 (citing *Department of Commerce* to allege that the FBI's ineligibility determination was pretextual given the "significant mismatch" between the determination and written explanation provided by the FBI); Plaintiffs' Motion for a Preliminary Injunction at 6, 28, Doe #1 v. Trump (No. 3:19-cv-01743-SI), 2019 WL 8501287 (D. Or. Nov. 8, 2019) (claiming that the President's sweeping proclamation suspending the entry of immigrants who will financially burden the U.S. healthcare system was grounded in pretext given the "irrational and irregular" implementation of the proclamation).

experience tells us that significant decisions regarding hard look review do not fade. For example, many predicted that the holding in *Massachusetts v. EPA* would be confined to the specifics of that case, but *Massachusetts* has had significant influence on administrative law.[137] Thus, the final Part of this Note will explore the future application of *Department of Commerce*, its requirement for honest decisionmaking, and issues involving allegations of pretext by administrative officials. The goal of this Part is to provide a practical gloss on *Department of Commerce* and offer suggestions for agency officials seeking to avoid this issue and also for litigants seeking to raise it.

A. AVOIDING A FINDING OF PRETEXT AS AN ADMINISTRATIVE AGENCY

A thorough reading of *Department of Commerce* can yield three takeaways for agencies that want to avoid extra litigation and an adverse finding of pretext or dishonesty. These takeaways derive from specific areas of the decision to which the Court devoted attention and focus. After describing these three principles, this Section briefly evaluates the consequences for an agency should a court find unlawful pretext. Although this evaluation is based on *Department of Commerce*, it should apply to a broader set of agency decisions because it invokes more general principles of administrative law.

1. Congruence: A Rational Connection Is an Honest Connection

According to *Department of Commerce*, a good proxy for identifying honest reasoning is finding congruence or a "rational connection" between the factual evidence and the explanation given.[138] The agency failed to prove this congruence because the Court had extensive evidence (due to additional waves of record production at the district court) that the Census Bureau contrived the source of DOJ's request—it did not come from DOJ itself, but rather from officials at the Census Bureau.[139]

Congruence between an agency's factual evidence and the explanation it provides simply means—in this context—that the agency's record parallels its explanation. As explained in Part II, an important element of reasoned decisionmaking, or hard look review, is that the record supports the explanation and, in turn, the ultimate decision.[140] But the Court in *Department of Commerce* asked

137. *See* E-mail from Lisa Heinzerling, Professor, Georgetown Univ. L. Ctr., to Hannah Flesch (Apr. 23, 2020, 8:58 AM) (on file with author); *see, e.g.*, Watts, *supra* note 31, at 50–51.

138. *Dep't of Com.*, 139 S. Ct. at 2569 (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)). The Court's statement that it could not "ignore the disconnect between the decision made and the explanation given" may be a slight mischaracterization of what exactly the Court found to be incongruent. *Id.* at 2575. The decision to reinstate the citizenship question actually did match the explanation (because DOJ needed better citizenship data, and the Secretary found a way to obtain that data). *See id.* at 2569 ("The evidence before the Secretary supported that decision."). The incongruence, then, was between the explanation and the evidence supporting that explanation.

139. *See id.* at 2574.

140. *See supra* Part II.

for something simpler: that the agency give an honest account of what happened.

An agency must do the same if it wishes to satisfy this basic threshold of reasoned decisionmaking. It cannot misrepresent what happened or events as they occurred. Although it is true that the district court's order to supplement the record fit the "narrow exception to the general rule" that a reviewing court may not seek extra-record documentation, the additional documents sufficiently demonstrated that dishonesty occurred.[141] Accordingly, an agency that dutifully provides a full administrative record need only ensure that its contemporaneous explanation is an honest account of that record.[142] Thereafter, any decision made will be reviewed under the standard principles of reasoned decisionmaking.

2. Outsourcing Expertise

Secondly, agencies should be careful to avoid (what this Note calls) "outsourcing" their reasoned-explanation requirement to another agency. Although it is common for agencies to consult others when making decisions, DOJ's request to the Census Bureau suggested that the latter could not come up with a reasoned justification on its own. A new agency head may "come into office with policy preferences and ideas, . . . sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy."[143] But the level of coordination, uniformity, and specificity between DOJ and the Commerce Department raised suspicion in both the lower court and in the Supreme Court.[144]

As discussed in Part II, administrative agencies apply their unique expertise when crafting regulations and tackling regulatory problems.[145] In one sense, the Census Bureau staff did just that—it analyzed data and models indicating how adding citizenship to the decennial census would affect response rates and the overall accuracy of the census.[146] The problem was that this expertise was premised on a falsehood—DOJ did not need or request enhanced citizenship data to

141. *Dep't of Com.*, 139 S. Ct. at 2573–75.

142. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978). In *Department of Commerce*, Justice Thomas explained in dissent that his interpretation of pretext occurs in the small number of cases where the administrative record establishes that an agency's stated rationale did not factor at all into the decision. *See Dep't of Com.*, 139 S. Ct. at 2579 (Thomas, J., concurring in part and dissenting in part). The majority did not hold this view; even though the administrative record did factor into the stated rationale, it was not enough to overcome the threshold requirement that an agency give an honest explanation. *See id.* at 2575–76 (majority opinion).

143. *Dep't of Com.*, 139 S. Ct. at 2574; *see* City of Tacoma v. Fed. Energy Regul. Comm'n, 460 F.3d 53, 75 (D.C. Cir. 2006).

144. *See Dep't of Com.*, 139 S. Ct. at 2575 (describing how Commerce staff shopped around for a request by another agency before landing on DOJ, and that once they landed on DOJ, the letter from DOJ "went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency"); New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 663 (S.D.N.Y. 2019).

145. *See supra* notes 30–60 and accompanying text.

146. *See Dep't of Com.*, 139 S. Ct. at 2570.

enforce the VRA.[147] Thus, the data and expertise, arguably the source of legitimacy for bureaucratic governance, did not actually govern the decision.

Because outsourcing expertise or searching for a rationale from another agency is a potential indication of impermissible pretext, an agency should do its best to apply its knowledge and expertise to the issue at hand before seeking assistance from another agency. If another agency's assistance is needed, that help should work in conjunction with—not as a substitute for—the original agency's expertise.

3. Multiple-Stated Reasons

Finally, an agency seeking to avoid an adverse finding of pretext should ensure that it has multiple reasons for its decision. Political motivations or other unstated reasons are permissible in administrative decisionmaking (so long as the agency analyzed the issue with facts and in accordance with any statutory factors).[148] The issue for Secretary Ross and the Commerce Department was not necessarily the type of reason, but that they gave only one reason (the VRA rationale). Once the Court found that this reason had been contrived, there was nothing else to support the decision.[149]

To avoid this issue (in the context of pretext), an agency should have at least two *stated* reasons for its decision.[150] Not only would this give a reviewing court an additional basis to grant deference to an agency's decision, it would also indicate to a court that the agency honestly reasoned through its decision. Take, for example, *FCC v. Fox Television Stations, Inc*., a case where the FCC stated at least three different reasons for its choice to enforce the Public Telecommunications Act of 1992 against broadcasters who used fleeting expletives on air.[151] The totality of these "good" reasons persuaded the Court that the FCC believed in its new policy.[152] The FCC did not have to demonstrate that the reasons for the new policy were actually

147. In its brief, the Government argued that it "cannot possibly be arbitrary and capricious for a Cabinet Secretary to pay respectful attention to such formal requests" from another agency. Brief for the Petitioners, *supra* note 69, at 36. The Government thus argued from the premise that the Secretary's reasoning was honest, and that the explanation did match the evidence in the record. *Id*. at 15.

148. *See supra* notes 83–84 and accompanying text.

149. *See Dep't of Com*., 139 S. Ct. at 2575–76.

150. An argument agencies have made is that a court may not reject an agency's stated reasons for acting because the agency might also have had other *unstated* reasons. *See* Brief for the Petitioners, *supra* note 69, at 41–42 (citing Jagers v. Fed. Crop Ins. Corp., 758 F.3d 1179, 1186 (10th Cir. 2014)). Otherwise, inquiring into other reasons the agency may have had "represent[s] a substantial intrusion into the workings of other branches of government." *Id*. at 41 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977)). The Supreme Court reaffirmed these principles. *See Dep't of Com*., 139 S. Ct. at 2573; FCC v. Fox Television Stations, Inc., 556 U.S. 502, 518–19 (2009); Sierra Club v. Costle, 657 F.2d 298, 408–10 (D.C. Cir. 1981). Here, however, I draw a distinction between stated and unstated reasons, suggesting that agencies include more than one of the former.

151. *See Fox Television Stations, Inc*., 556 U.S. at 517.

152. *Id*. at 515.

better; it only needed to show that it believed them "to be better, which the conscious change of course adequately indicate[d]."[153]

The consequences of failing to provide multiple-stated reasons are more readily seen in the lower courts. For example, in *Woods Petroleum Corp. v. United States Department of Interior*, the Interior Secretary provided one sole reason for rejecting a communitization agreement between Indian tribes and oil and gas companies, which the court characterized as pretextual for an ulterior motive.[154] The Secretary failed to provide any additional reasons for his decision and also failed to "accord any significant weight" to factors prescribed by judicially imposed guidelines.[155] Thus, once the court determined that the pretext infected the Secretary's only reason, the Secretary's decision constituted arbitrary decisionmaking and could not stand.[156]

In sum, although no agency is required to provide more than one stated reason for its decision, a reviewing court would find it easier to determine that the agency engaged in honest decisionmaking if the agency presented it with multiple-stated reasons for the decision.

4. Consequences of a Pretextual Finding by a Reviewing Court

Finally, an agency should note that if a reviewing court determines that the agency failed to engage in reasoned and honest decisionmaking, it has grounds to remand to the agency for additional investigation or explanation.[157] Although the agency will get a second opportunity to come up with a better explanation,[158] it will not be so simple or easy to stick with the same decision if the underlying facts and data do not support the decision.[159] In *Department of Commerce*, the

153. *Id.*

154. 18 F.3d 854, 859 (10th Cir. 1994).

155. *Id.* at 858.

156. *Id.* at 859–60. The court also stated that "[i]f the only deficiency in the Secretary's actions were an inadequate analysis and discussion of all relevant factors, [it] might contemplate a remand for further consideration consistent with [its] opinion." *Id.* at 859. But given that the sole reason provided was pretextual, the court instructed the district court to reverse the Secretary's decision and granted other declaratory relief. *Id.* at 860.

157. *See* 5 U.S.C. § 706(2); Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1555–56 (2014); *see also* Camp v. Pitts, 411 U.S. 138, 143 (1973) (determining that if the agency's finding cannot be sustained by the administrative record, the agency's decision must be vacated and remanded for more consideration); Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 255 (2017) ("With rare exceptions, agency actions that contravene the APA are invalidated and returned to the agency."); Ronald M. Levin, *Judicial Remedies*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 251, 251 (Michael E. Herz et al. eds., 2d ed. 2015) ("[A] reviewing court will set aside agency action that does not meet the standards described, instead of mandating a specific disposition of its own design.").

158. *See* Walker, *supra* note 157, at 1556, 1561–79 (describing the separation-of-powers values inherent in the remand rule, giving executive agencies the ability to decide questions of fact, policy, application of law to fact, or law when such questions fall within an area delegated to an agency).

159. *See* Bagley, *supra* note 157, at 263 ("Rectifying the mistake may be no mean feat . . . . In the meantime, the agency action will be put on hold—delayed, often for years, as the agency decides how to respond." (footnote omitted)); Buzbee, *supra* note 33, at 1417 n.365 (describing how agencies on remand could offer correct views of the law and engage with relevant facts and policy); Jerry L. Mashaw

Court's remand to the Census Bureau to come up with a better explanation ultimately proved fatal given that the census needed to be printed within months of the decision.[160] Even without the pressure of time, however, going back to revise a rule or decision with the required explanation may be tedious or not worth the time and effort because of other administrative priorities.[161]

B. HOW LITIGANTS MAY RAISE CLAIMS OF PRETEXT IN AGENCY DECISIONMAKING

Litigants seeking to challenge administrative decisions as arbitrary and capricious based on pretext face an uphill climb against the presumption of regularity afforded to Executive Branch officials.[162] Additionally, if agencies pile on more documentation to comfort suspicions of pretext, they may use that additional documentation to dress up their true motivations in technocratic terms.[163] Finally, litigants often only have circumstantial, rather than direct, evidence to prove pretext.[164] Nonetheless, the basic requirement of honesty in reasoned decisionmaking can be a potentially powerful tool to deter dishonest conduct from agency officials and normalize the expectation of honesty among them. Litigants can also now argue in future cases that pretext is a sufficient, independent ground to remand a decision to an agency.[165] It may be too early at the time of this Note's

& David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REGUL. 257, 295 (1987) ("The idea that an agency can or will quickly turn to remedying the factual or analytic defects in its remanded rule is surely naive, however minor those problems might appear in the abstract.").

160. Associated Press, *2020 Census to Be Printed Without Citizenship Question*, FED. NEWS NETWORK (July 3, 2019, 7:01 AM), https://federalnewsnetwork.com/agency-oversight/2019/07/lawyer-census-to-be-printed-without-citizenship-question/ [https://perma.cc/WJN2-HAV4]; *see* Petition for a Writ of Certiorari Before Judgment at 28, Dep't of Com. v. New York, 139 S. Ct. 2551 (2019) (No. 18-966), https://www.scotusblog.com/wp-content/uploads/2019/01/2019-01-25-Commerce-CBJ-petn.pdf [https://perma.cc/NL83-NDBZ].

161. *See* Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 302 (2005) (discussing that one-third of rulemaking cases in the D.C. Circuit between 1985 and 1995 indicated that agency action in response to the remand took longer than five years); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 414 (2000) (identifying criticism of a case where hard look review strained agency resources).

162. *See Dep't of Com.*, 139 S. Ct. at 2579 (Thomas, J., concurring in part and dissenting in part). The presumption of regularity in judicial review reflects respect for a coequal branch of government whose officers are charged with "faithfully execut[ing]" the laws of the United States. *Id.* at 2579–80 (alteration in original) (quoting U.S. CONST. art. II, § 3; and then citing United States v. Morgan, 313 U.S. 409, 422 (1941)). It applies when litigants seek extra-record evidence and an additional probe into the agency's decisionmaking process. *See id.* at 2573–74 (majority opinion). Litigants traditionally rebut this presumption upon a "strong showing of bad faith or improper behavior" by agency officials. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

163. *See* Nou, *supra* note 97 (quoting Watts, *supra* note 31, at 40). This could potentially increase the phenomenon identified by Thomas O. McGarity and Wendy Wagner that agencies manipulate expertise and science to achieve predetermined and politically motivated outcomes. *See generally* McGarity & Wagner, *supra* note 114.

164. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

165. *See* Walker, *supra* note 75 (noting how the *Department of Commerce* majority opinion "seems to go beyond hard look review by not just examining the reasons stated but also inquiring into whether those reasons are 'genuine,' as opposed to 'more of a distraction,'" and anticipating that the opinion will

writing to empirically test whether these predictions will be borne out. However, I provide here three substantive suggestions for litigants looking to raise an issue of pretext. These suggestions are loosely based on appellate briefs and trial court documents filed in the last few years that cite to *Department of Commerce*. After presenting these examples, I briefly evaluate the normative benefits of honest decisionmaking and why the requirement is good for administrative law.

1. Moving to Complete the Administrative Record on the Basis of Honest Decisionmaking

As exemplified by *Department of Commerce*, a complete administrative record will help reveal whether an agency's decision was impermissibly based on pretext because litigants and reviewing courts will be able to see whether documents in the record match the explanation given.[166] If litigants suspect that an agency has not provided the full administrative record, a motion to complete the record will benefit from discussion of *Department of Commerce*. Not only will a discussion provide a case-in-point, but it will provide a compelling justification for granting a request to complete the administrative record. A reviewing court cannot evaluate an agency's claim of reasoned decisionmaking without first confirming that the agency's explanation honestly matches with the evidence in the record.[167]

2. Other Avenues for Finding Additional Agency Documentation

A court may decide to deny a motion to complete the administrative record, in which case a litigant may try to seek information through the Freedom of Information Act[168] (FOIA) and Government Accountability Office (GAO) reports. The FOIA provides a tool for individual citizens and groups who seek government records otherwise put out of reach by exceptions in the APA.[169] If an agency receives a valid FOIA request, it has twenty business days to determine whether to comply with the request and must immediately notify the requester of its determination and the reasons for that determination, as well as the requester's right to appeal an "adverse determination" within the agency.[170] Exempt from required disclosures are several categories of government documents, including

be quoted by litigants challenging administrative actions "for decades to come" (quoting *Dep't of Com.*, 139 S. Ct. at 2575–76)).

166. *See Dep't of Com.*, 139 S. Ct. at 2574.

167. *See id.* For examples of how parties applied *Department of Commerce*, see Plaintiff-Intervenors' Motion to Compel Completion of the Administrative Record at 9, California v. Azar, No. 3:19-cv-02552-VC (N.D. Cal. Dec. 26, 2019), 2019 WL 8113851 and Plaintiff's Reply in Support of Motion to Compel Supplementation & Completion of the Administrative Record at 4, 8, Sharks Sports & Ent. LLC v. Fed. Transit Admin., No: 18-cv-04060 LHK (N.D. Cal. Dec. 27, 2019), 2019 WL 8113825.

168. 5 U.S.C. § 552.

169. *See* 5 U.S.C. §§ 551–59, 702–06; DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46238, THE FREEDOM OF INFORMATION ACT (FOIA): A LEGAL OVERVIEW 1 (2020) (citing legislative history evincing congressional intent to provide the public with access to government information not covered or exempted by the APA).

170. 5 U.S.C. § 552(a)(6)(A)(i); *see* SHEFFNER, *supra* note 169, at 15–17.

those privileged by deliberative process.[171] While the information sought by FOIA requests is disclosed based on the responses of the agency (and may result in its own litigation in cases of adverse determination), GAO reports can provide additional information. They are also publicly available and carefully document agency decisionmaking.[172]

3. Looking for Prejudged Uniformity

With a full administrative record (or additional documentation), litigants should examine whether there is evidence of prejudged uniformity among officials both inside and outside of the agency. The additional documentation provided at the district court in *New York v. United States Department of Commerce* indicated how political appointees in the Commerce Department coordinated with DOJ to arrive at the predetermined decision to add citizenship to the census.[173] A litigant should watch for similar occurrences, flagging for the court not that an agency official had a predetermined decision,[174] but that the decisionmaking process resulted in an unusual level of specificity and uniformity. After all, reasoned decisionmaking assumes that an agency at least tried to wrestle with the evidence and considered alternatives.[175] Evidence which suggests that an agency made an end around in its duty to undergo reasoned decisionmaking may help uncover pretextual reasoning.[176]

CONCLUSION

Dishonest and contradictory conduct by administrative agencies and their leaders undermine the public's confidence that its government is acting in the public's interest. It also prevents the public from meaningfully participating in the administrative process, which is a hallmark of the APA. The Court's holding in *Department of Commerce v. New York* now grounds the normative ideal of honest decisionmaking in the existing framework of judicial review under the hard look review standard. This is a normative good for administrative governance because the administrative state derives its legitimacy from the public's trust in either its expertise, accountability, or a mix of both. Although other areas of the law have more established mechanisms to handle dishonesty by public officials, *Department of Commerce* provides a pathway for administrative law to catch up.

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171. 5 U.S.C. § 552(b)(5).

172. *See What GAO Does*, GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/about/what-gao-does/ [https://perma.cc/PER8-PAX4] (last visited Jan. 7, 2022).

173. *See* 351 F. Supp. 3d 502, 542 (S.D.N.Y. 2019).

174. Recall that the *Department of Commerce* majority affirmed this tenet of administrative law: "It is hardly improper for an agency head to come into office with policy preferences and ideas . . . ." Dep't of Com. v. New York, 139 S. Ct. 2551, 2574 (2019).

175. *See supra* Section II.A.

176. In *Cowels v. FBI*, petitioners for a writ of certiorari argued that the FBI's determination as to a piece of evidence's eligibility for the CODIS DNA profile system was pretextual because it was based on blind acceptance of a record from the Commonwealth of Massachusetts, rather than based on the FBI's own internal investigation. Petition for a Writ of Certiorari, *supra* note 136, at 15, 18.