Administrative law has become the focal point of high-stakes debates about the power of the executive and its relationship to the courts. In the past few years, the Trump Administration has taken executive action that has been challenged in court, including claims under the Administrative Procedure Act\(^1\) (APA) and other aspects of administrative law.\(^2\) One prominent example is the Trump Administration’s attempt to add a citizenship question to the 2020 census. Last Term, in Department of Commerce v. New York,\(^3\) the Supreme Court held that the asserted reason for the decision to add the question was pretextual, and that the case should be remanded to the agency to develop a new justification.\(^4\) The Court had to face a question that has plagued its administrative law doctrine about what role political judgments can and should play in administrative law.\(^5\) The Court has used “hard look” review under the APA’s arbitrary and capricious standard in the past to implicitly take into account when a decision is excessively affected by politics.\(^6\) Here, though, the Court’s holding that the action was illegitimate was based not on the arbitrary and capricious standard but on pretext.\(^7\) That is, instead of implying that an illegitimate motivation had been at work, the Court made it clear that there was one. This is one way for courts to address the problem of political judgments, but the decision then seems limited to these particularly egregious facts.

The U.S. Constitution requires a census every ten years, and delegates to Congress the power to determine how this “[e]numeration” is conducted.\(^8\) In turn, Congress delegated census taking to the Secretary of Commerce through the Census Act.\(^9\) The information gathered through the census is used in several ways, including to “apportion representatives . . .[,] allocate federal funds to the States[,] and . . . draw

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\(^3\) 139 S. Ct. 2551 (2019).
\(^4\) Id. at 2575–76.
\(^6\) See Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: From Politics to Expertise, 2007 SUP. CT. REV. 51, 96–98.
\(^7\) Dep’t of Commerce, 139 S. Ct. at 2575–76.
\(^8\) U.S. CONST. art. I, § 2, cl. 3.
\(^9\) 13 U.S.C. § 141(a) (2012). The Census Bureau, within the Department of Commerce, helps the Secretary implement the census.
electoral districts.” The census has also included demographic questions, and on March 26, 2018, Secretary of Commerce Wilbur Ross released a memorandum stating that the 2020 census would include a question about whether each person is a citizen of the United States. Secretary Ross explained that the question was necessary so that the Department of Justice (DOJ) could implement the Voting Rights Act (VRA).

Several plaintiffs filed suits, and their cases were consolidated. They argued that the decision violated the APA, the Enumeration Clause of the Constitution, and, for the nongovernmental plaintiffs, the Due Process Clause. In November 2018, the district court held an eight-day bench trial and concluded that most of the plaintiffs had proved by a preponderance of the evidence that a citizenship question on the census would harm them. The district court found that Secretary Ross had “violated the APA in multiple independent ways,” but that the plaintiffs could not prove Secretary Ross violated the Due Process Clause, in part because the plaintiffs could not depose the Secretary himself to determine his intent. The federal government filed a petition for writ of certiorari before judgment in the Second Circuit, arguing that “because the case involved an issue of imperative public importance,” and the census needed to be ready for printing by the end of June 2019, the Supreme Court should take the case without appellate review. The Court granted the petition.

The Supreme Court affirmed in part, reversed in part, and remanded for further proceedings. Writing for a unanimous Court, Chief Justice Roberts first affirmed the district court’s determination that the plaintiffs had standing because they had shown that an undercount to the census would likely occur, and at least some of them would lose federal funds as a result. The Chief Justice’s opinion also held that the Enumeration Clause did not provide a basis to invalidate Secretary Ross’s

10 Dept of Commerce, 139 S. Ct. at 2561 (citing Wisconsin v. City of New York, 517 U.S. 1, 5–6 (1996)).
13 Memorandum, supra note 11. Previously, only a sample of households had been asked about citizenship, in part due to the agency’s concern that asking the question would significantly reduce response rates. Dept of Commerce, 139 S. Ct. at 2561–62.
15 Id.
16 Id. at 516.
17 Id.
18 Id. at 517.
19 Dept of Commerce, 139 S. Ct. at 2565.
20 Id.
21 Id.
decision.22 Because of both “the early understanding of and long practice under the Enumeration Clause,” the census can ask about citizenship.23 The Court has rejected challenges to the census where the census activity “bore a ‘reasonable relationship to the accomplishment of an actual enumeration.’”24 Chief Justice Roberts stated that the citizenship question’s constitutionality should not be measured by that standard, because it would “render every census since 1790 unconstitutional.”25

Chief Justice Roberts then addressed the statutory claims. As a threshold matter, he determined that the Secretary’s decision was judicially reviewable.26 He concluded that the Census Act did not commit decisions about the census to the sole discretion of the Secretary, and the APA’s committed-to-agency-discretion exception should be a limited one.27 Chief Justice Roberts held that Secretary Ross’s action was not arbitrary or capricious, because in choosing to add a citizenship question to the census, the Secretary made a reasonable decision between policy alternatives in the face of uncertainty.28 That is, the Secretary should have been able to make the judgment that the tradeoff between a lower response rate and more complete citizenship data was acceptable.29 The Court explained that both the district court and Justice Breyer’s dissenting opinion erred by substituting their judgment for that of the agency in concluding that the Secretary should not depart from the recommendations of the Census Bureau.30

The Court also found that the Secretary’s action did not violate §§ 6(c) or 141(f) of the Census Act, reversing the district court.31 The Court determined that the Secretary did not violate § 6(c) by opting for gathering census information through direct inquiries.32 The Court distinguished the statistics described in § 6(c) from “census-related

22 Id. at 2566–67. The Court focused on the Enumeration Clause because the Secretary could not exercise more power than the clause allows (for an enumeration of the population). Id. The Chief Justice was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh.
23 Id. at 2567.
24 Id. at 2566 (quoting Wisconsin v. City of New York, 517 U.S. 1, 20 (1996)).
25 Id. at 2567.
26 Id. at 2569. He was joined by Justices Thomas, Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh.
27 Id. at 2568.
28 Id. at 2570–71. He was joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh.
29 Id.
30 Id. at 2571. The Census Bureau had suggested using administrative records alone instead of using both the records and asking a citizenship question. Id. at 2569.
31 Id. at 2571–73.
32 Id. at 2572. 13 U.S.C. § 6(c) (2012) reads: “To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) [any other department, agency, or establishment of the Federal Government, or the District of Columbia] or (b) [States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies] of this section instead of conducting direct inquiries.” (Emphasis added.)
citizenship data” and ruled that it was within the Secretary’s discretion to ask directly for citizenship. The Secretary also did not violate § 141(f), which lays out the congressional reporting requirements about the Secretary’s intentions for the census. The Court found that the Secretary’s March 2018 memorandum sufficed as an explanation for the citizenship question, and that any error was harmless.

Finally, Chief Justice Roberts affirmed the district court’s finding that the Secretary’s decision was pretextual and should be remanded to the agency. Four principles governed this holding. First, an agency “must ‘disclose the basis’ of its action.” Second, courts are “ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record.” Third, courts cannot reject an agency’s “stated reasons for acting . . . because the agency might also have had other unstated reasons” or a “policymaking decision [by the agency] solely because it might have been influenced by political considerations or prompted by an Administration’s priorities.” Fourth, if there is a “strong showing of bad faith or improper behavior,” courts may inquire into the minds of decisionmakers.

Ultimately, the Court held that although “no particular step in the process stands out as inappropriate or defective,” the district court was correct in finding that the citizenship question “cannot be adequately explained” by the justification attributed to DOJ. The Secretary had made repeated requests to agencies that they ask for citizenship information, and Commerce staff ultimately provided much of the language of the request to DOJ. There was a “disconnect” between the decision and the explanation that the Court “cannot ignore.”

Justice Thomas concurred in part and dissented in part. He argued that the Court’s finding of pretext had the potential to “transform administrative law,” but also manifested “an administration-specific
He stated that, first, the Court’s use of pretext did not reflect the law governing judicial review or the presumption of regularity; second, the Court should not have gone “beyond the administrative record to evaluate pretext”; and third, even going outside the record, “that evidence still fails to establish pretext.”

He closed by observing that the decision should be read “as an aberration.”

Justice Breyer concurred in part and dissented in part. He agreed with the Court’s finding of pretext, but dissented from the Court’s finding that the Secretary’s decision was not arbitrary and capricious. The Secretary ignored the effect that adding the question would have on responsiveness to the census; he arbitrarily concluded that adding the question was worth even diminished responsiveness; and the reason the Secretary provided was “unconvincing,” especially because there were better ways of obtaining the data.

Justice Alito concurred in part and dissented in part, arguing that the Secretary’s decision was not judicially reviewable. Neither the statute nor any other provision had a standard that courts could apply to review the Secretary’s decision. Therefore, the decision should be considered one that is typically committed to agency discretion by law.

In this case, the Court had to face a question that has dogged its administrative law doctrine about what role political judgments can and should play in agency action. The Court has used “hard look” review under the APA’s arbitrary and capricious standard to take into account when a decision is excessively affected by politics. Justice Breyer’s opinion took this approach, and described the factors that led to his decision. But the Court’s holding was nominally based not on the arbitrary and capricious standard but on pretext. The Court concluded that there was

45 Id.
46 Id. at 2579–81.
47 Id. at 2584.
48 Id. (Breyer, J., concurring in part and dissenting in part). Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.
49 Id.
50 Id. at 2587; see also id. at 2590 (“The upshot is that the Secretary received evidence of a likely drop in census accuracy . . . and he received nothing significant to the contrary.”); id. at 2592–93.
51 Id. at 2590.
52 Id. at 2594.
53 Id. at 2597 (Alito, J., concurring in part and dissenting in part). He joined other parts of the opinion in the alternative. Id. at 2606 n.15. Justice Thomas assumed that the Secretary’s decision was subject to judicial review but noted that Justice Alito “made a strong argument.” Id. at 2577–78 n.2 (Thomas, J., concurring in part and dissenting in part).
55 See, e.g., Kagan, supra note 5, at 2382 (arguing that hard look review should be relaxed where presidential involvement is evident).
an illegitimate motivation at work, rather than just pointing to a mismatch between the evidence and the action. This is one way for courts to address the problem, but the Court’s holding seems limited to these particularly egregious facts. This is particularly true because the finding of pretext was followed by a remand to the agency — a puzzling result, except for the fact that the circumstances of the case meant that the agency would not come up with a new pretextual justification.

The question what kinds of political judgments are allowed in administrative decisionmaking is important, and it is one that the Court has grappled with before. One of the strengths of agencies’ interpretation of statutes is that agencies can bring policy views — within the agency or of the President — to bear on their discretionary interpretation of statutes. But agencies cannot take actions that are excessively politically driven, and it can be difficult for courts to figure out which types of political judgments are acceptable and which are arbitrary and capricious. Actions may be impermissibly political where “presidential influence . . . is inconsistent with the agency’s legal constraints; . . . prompts the agency to ignore its [expert] conclusions”; or if the President is not acting in service of the public interest. If the President pressures an agency to protect an industry’s economic wellbeing where the statute allows for considering economic factors, it may be challenging to disentangle the President’s motivation (for example, if the industry hurt the environment and supported the President for reelection).

“Hard look” arbitrary and capricious review provides an opportunity for courts to determine if an administrative judgment is impermissibly inflected by politics. In State Farm, for example, the Court found that a decision by the National Highway Traffic Safety Administration to withdraw a regulation that required passive restraints in cars was

57 See Christopher F. Edley, Jr., Administrative Law: Rethinking Judicial Control of Bureaucracy 194 (1990); Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 COLUM. L. REV. 1749, 1765 (2007) (arguing that Chevron “recognized that politics is a permissible basis for agency policymaking”); Kagan, supra note 5, at 2373; see also Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 110 YALE L.J. 2, 7 (2009) (arguing that there should be more attention paid to “exploring whether political factors ought to be allowed to validly explain agency rulemaking decisions as a normative matter”). But see Nina A. Mendelson, Disclosing “Political” Oversight of Agency Decision Making, 108 MICH. L. REV. 1127, 1130 (2010) (suggesting that “presidential, or executive, influence on an agency decision is not clearly good or bad”).

58 Mendelson, supra note 57, at 1141, 1145 (describing how “[c]ertain types of presidential pressure seem clearly out of bounds,” including “influence that is aimed at achieving some goal other than service to the public interest”); Watts, supra note 57, at 53–54 (noting that courts are not, generally, “willing to embrace raw politics, crass political horse trading, or pure partisanship as factors that could help to legitimize an agency’s decision”).

59 Mendelson, supra note 57, at 1141.

60 See id. at 1145.


arbitrary and capricious.\textsuperscript{63} The policy change had taken place immediately after a presidential transition, and was viewed as a policy choice that was friendly to the automobile industry.\textsuperscript{64} Concurring in part and dissenting in part, then-Judge Rehnquist argued that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal . . . of its programs and regulations.”\textsuperscript{65} He wanted to create more space for courts to allow agencies to make decisions based on politics, stating that an agency “is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”\textsuperscript{66}

In subsequent cases, too, the Court seemed to take political judgments into account through the arbitrary and capricious standard of review. In \textit{Massachusetts v. EPA},\textsuperscript{67} the Court ruled that the EPA’s refusal to decide if greenhouse gases cause or contribute to climate change was arbitrary and capricious, noting that the agency’s policy judgments “have nothing to do with” that question, and did not “amount to a reasoned justification for declining to form a scientific judgment.”\textsuperscript{68} Professors Jody Freeman and Adrian Vermeule argue that the Court was expressing “increasing worries about the politicization of administrative expertise,”\textsuperscript{69} and that the Court’s opinion was “tinged with underlying suspicion about politically motivated executive usurpation of judgments normally left to experts.”\textsuperscript{70} Two years later, the Court addressed the issue in \textit{FCC v. Fox Television Stations, Inc.},\textsuperscript{71} this time declining to apply rigorous hard look review to an agency action that changed how many times an expletive could be uttered before the television station would be fined.\textsuperscript{72} In dissent, Justice Breyer stated that the law governing the decisions of administrative agencies “grants those in charge of . . . agencies broad authority to determine relevant policy,” but “does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences.”\textsuperscript{73}

In \textit{Department of Commerce}, the Court was similarly faced with an administrative decision inflected with political judgment. Adding the citizenship question could be linked to several policy goals, including reducing census participation by noncitizens to argue that stricter
immigration policies have been successful, altering the basis on which funds are awarded within and between states, and changing the population base for redistricting.74 Some of the plaintiffs were concerned with how undercounting immigrant populations could diminish their representation.75 The district court, expressing its skepticism about the reasons for which the citizenship question was added, ordered the depositions of two federal officials.76 The justification that the administration did give — that the immigration data was necessary for the enforcement of the VRA — did not fit the policy.77

The Court could have, then, taken the State Farm approach and used arbitrary and capricious review to find that the agency decision was impermissibly political. Justice Breyer’s opinion did so: he found that the Secretary failed to adequately consider the evidence that a citizenship question would reduce the accuracy of the census.78 Therefore, the Secretary failed to “adequately explain” why a citizenship question was necessary, and there was no rational connection between the evidence presented and decision made.79

Justice Breyer also went one step further, implicitly developing a loose framework to decide that an agency action fails arbitrary and capricious review because of the agency’s political purposes. He cited three factors that contributed to his finding: “the nature and importance of the particular decision, the relevance and importance of missing information, and the inadequacies of a particular explanation in light of their importance.”80 He makes progress, then, toward answering the question how courts should systematically strike down actions for being too politically influenced.

Instead of making the decision within the arbitrary and capricious standard, though, the Court based its decision on a finding of pretext, acknowledging the overtly political nature of the decision.81 In finding the policy valid under arbitrary and capricious review, Chief Justice Roberts rejected the idea that decisions should be invalidated because they were motivated by political judgments.82 He emphasized that “[i]t is hardly improper for an agency head to come into office with policy preferences and ideas,” and he explained that, here, each individual step made sense as part of the administrative decisionmaking process.83 But

75 Dep’t of Commerce, 139 S. Ct. at 2565.
76 Id. at 2564.
77 See id. at 2575; see also Levitt, supra note 74, at 1385.
78 Dep’t of Commerce, 139 S. Ct. at 2593 (Breyer, J., concurring in part and dissenting in part).
79 Id.
80 Id. at 2585.
81 See id. at 2575 (majority opinion).
82 Id. at 2573.
83 Id. at 2574; see id. at 2575.
he finally concluded that the agency’s justification was unsupported by the evidence, and that it was “contrived.”

In so doing, the Chief Justice acknowledged the impermissible political judgments that had contaminated an otherwise legitimate decision. He seemed to accept that the agency action did not match its justification, but not that it failed arbitrary and capricious review as a result. Yet by finding that the action was pretext-motivated, he relied on the unacceptable political motivation instead of giving the agency another chance to show why it was interested in enforcing the VRA. That is, the Court found that the Secretary examined the right information and explained his decision adequately, including a connection between the facts on the record and the choice the Secretary made. But then, the Court determined that there was a “significant mismatch between the [Secretary’s] decision . . . and [his] rationale”: while the decision could have been made reasonably, the reasons on which the agency claimed it was acting were not the real reasons. This is inconsistent with the nominal separation between pretext and arbitrary and capricious analysis that the Chief Justice presented. On arbitrary and capricious, the Chief Justice said that the decision was supported by the record before the Secretary, but on pretext, that the decision could not be “adequately explained” by DOJ’s interest in enforcing the VRA.

Even assuming that the pretext analysis is part of the Chenery I framework, as the Chief Justice suggested, the remedy proposed by the Court — a remand to the agency — is puzzling. Chenery seems to presume good faith on the part of the agency: that there are reasons besides those developed for litigation by agency lawyers that the agency head should explain. But the Court attributed bad faith to Secretary Ross by finding that his stated reason for adding the question was pretextual. This implies that he had another, illegitimate motivation that he was not willing to state for the purposes of the litigation. By remanding to the agency, then, the Court seemed to be inviting another pretextual justification — not the VRA justification, and yet not his true motivation, either.

The holding is perhaps better understood on the basis of the unusual facts of the case. Because of the questionnaire’s June deadline, there would effectively be no remand. And, importantly, the Court could

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84 Id. at 2575.
85 Id. at 2571.
86 Id. at 2575.
87 Id.
89 See Dep’t of Commerce, 139 S. Ct. at 2573 (citing Chenery I).
90 See Ronald M. Levin, “Vacation” at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 DUKE L.J. 291, 367 (2003) (“Chenery serves to ensure that statutory discretion will be exercised by senior administrative officials, rather than by agency staff. . . .”).
91 Dep’t of Commerce, 139 S. Ct. at 2565.
avoid distinguishing between politics and policy, or implementing a more severe hard look review. More than being a simple policy judgment, the decision to add the citizenship question seemed to be overtly partisan. As the opinions recognized, the consequences of the case had the potential to change America’s democracy. Adding the question would also exacerbate racial disparities in the census. This partisan problem became more plain after the case was briefed and argued, when a Republican operative’s hard drive revealed the plan for the question was to give Republicans an electoral advantage through partisan gerrymandering. And the action comes from an administration that has vowed to take a hard line against immigrants, including through the Travel Ban and its current border detention policies. A holding on the basis of pretext on a short timeframe, then, not only allowed the Court to avoid more clearly explaining the distinction between impermissible political and permissible policy judgments in a hyperpartisan opinion, but also allowed it to avoid entering a new era of more stringent hard look review, as it could have if it had ruled the action arbitrary and capricious.

Department of Commerce provided an opportunity for the Court to clarify how its review of agency activity takes political judgments into account. Chief Justice Roberts did not use arbitrary and capricious review to weigh the role of interest group lobbying or political priorities. Instead, he found that there was pretext, making explicit that the administrative process was legitimate, except for the illegitimate political judgment that tinged it. Justice Breyer’s opinion, though, began to develop a framework for courts’ determination of impermissible political motivation. Still, his discussion, as well as the majority opinion, seemed to be specifically addressed to the egregious facts of the case and the time pressure surrounding it. It is unlikely, then, that the Court will continue to make decisions that name the overtly political — or partisan — judgment operating in the background. Even more problematically, the inability of the Court to explain how and why this particular judgment was impermissible does nothing to define the contours of the Court’s review going forward. Thus, there is no reason to think Department of Commerce will be a basis to subject other administrative decisions to similarly searching review.

92 See id.; see also id. at 2585 (Breyer, J., concurring in part and dissenting in part).
93 See Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents at 3, Dep’t of Commerce, 139 S. Ct. 2551 (No. 18-966).
96 See Jacob Gersen & Adrian Vermeule, Thin Rationality Review, 114 MICH. L. REV. 1355, 1406 (2016) (describing how courts since State Farm have not applied rigorous hard look review).