

# NOTE

## RECONCEPTUALIZING PRETEXT’S ROLE IN ADMINISTRATIVE LAW

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“Then the rulers of the state are the only persons who ought to have the privilege of lying, either at home or abroad; they may be allowed to lie for the good of the state.”

– Plato. BENJAMIN JOWETT, *DIALOGUES OF PLATO: TRANSLATED INTO ENGLISH, WITH ANALYSES AND INTRODUCTION* 213 (2010) (quoting PLATO, *THE REPUBLIC*, bk. III, at 389c).

### I. INTRODUCTION

Fifteen years after Janet Jackson’s infamous wardrobe malfunction, Maroon 5’s lead singer Adam Levine exposed his bare chest during the 2019 Super Bowl halftime show.<sup>1</sup> Suppose that legions of offended citizens complained to the Federal Communications Commission (FCC) about Levine’s nudity<sup>2</sup> and that these complaints convinced the FCC to initiate an enforcement action against CBS. Further suppose that this enforcement action resulted in an order declaring that, contrary to previous FCC policy, the FCC would consider all future depictions of shirtless men indecent and subject to regulation under 18 U.S.C. § 1464.<sup>3</sup> Again suppose, and this may require the largest stretch of the imagination yet, that the courts accepted the FCC’s interpretation of § 1464 as reasonable under *Chevron*<sup>4</sup> deference<sup>5</sup> and that in a subsequent enforcement proceeding, the FCC articulated completely ra-

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<sup>1</sup> Elahe Izadi, *Adam Levine Exposed his Nipples During the Super Bowl Halftime Show, So Let’s Talk About Janet Jackson*, WASH. POST (Feb. 4, 2019), [https://www.washingtonpost.com/arts-entertainment/2019/02/04/adam-levine-exposed-his-nipples-during-super-bowl-halftime-show-so-lets-talk-about-janet-jackson/?utm\\_term=.0714b14d3612](https://www.washingtonpost.com/arts-entertainment/2019/02/04/adam-levine-exposed-his-nipples-during-super-bowl-halftime-show-so-lets-talk-about-janet-jackson/?utm_term=.0714b14d3612) [<https://perma.cc/BSG2-ALQW>].

<sup>2</sup> In actuality, only fifty-five people lodged formal complaints with the FCC. James Dator, *Here Are the 55 FCC Complaints About Adam Levine’s Super Bowl Halftime Show Nipples*, SBATION (Mar. 20, 2019, 11:33 AM), <https://www.sbnation.com/lookit/2019/3/20/18274182/adam-levine-nipples-fcc-complaints-super-bowl-halftime> [<https://perma.cc/AZS3-5KZR>]. Fifty-five is minimal compared to the 500,000 complaints the FCC received after Janet Jackson and Justin Timberlake’s performance. Izadi, *supra* note 1.

<sup>3</sup> 18 U.S.C. § 1464 (2018).

<sup>4</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>5</sup> The interpretation received *Chevron* deference because the FCC announced it in formal adjudication. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

tional reasons for its new policy<sup>6</sup> such that no court would strike down the agency action as arbitrary.<sup>7</sup> Finally, and I promise that the next “suppose” will be this Note’s last, suppose that evidence was released during the second enforcement action showing that the unarticulated but “real” reason behind the FCC’s changed policy was the agency’s belief that reducing nudity in entertainment would please President Trump by appealing to the valuable voting bloc of conservative Evangelicals.<sup>8</sup> Is the agency’s new interpretation and changed policy valid?

Following the Supreme Court’s recent decision in *Department of Commerce v. New York*,<sup>9</sup> a challenger seeking to invalidate the FCC’s change of policy would claim that the action is invalid under § 706(2)(A) of the Administrative Procedure Act (APA)<sup>10</sup> because the FCC’s justification for its change in policy was pretextual.<sup>11</sup> The argument would be that though the FCC has the power to regulate indecency on television and the FCC reasonably concluded that exposure to shirtless males harms children, there was “a significant mismatch between the decision the [agency] made and the rationale it provided.”<sup>12</sup> This argument would seem to require reversal of the

<sup>6</sup> These reasons consisted of predictions that in the absence of such a regulation, children would be harmed by increasingly common depictions of nudity on television.

<sup>7</sup> Also assume that the FCC acknowledged its changed interpretation and policy but was not required to justify why the agency’s new policy was superior to its old policy. See *FCC v. Fox Telev. Stations, Inc.*, 556 U.S. 502, 514–16 (2009). As administrative law aficionados may have realized, I derived this hypothetical’s facts primarily from *Fox*. See *id.* at 510–12, 517–20.

<sup>8</sup> By “real” reason, I mean that the policy’s political appeal was the most important factor in the FCC’s change in policy. For support for the idea that the FCC could believe that strictly interpreting indecency laws would appeal to Evangelicals and please President Trump, see Kevin DeYoung, *I Don’t Understand Christians Watching Game of Thrones*, THE GOSPEL COALITION (Aug. 8, 2017), <https://www.thegospelcoalition.org/blogs/kevin-deyoung/i-dont-understand-christians-watching-game-of-thrones/> [https://perma.cc/2EEX-LN76]; Alex Altman & Elizabeth Dias, *Why Trump Is Winning Over Christian Conservatives*, TIME (Jan. 22, 2016), <http://time.com/4189587/donald-trump-christian-conservatives/> [https://perma.cc/CP83-GRLX].

<sup>9</sup> 139 S. Ct. 2551 (2019).

<sup>10</sup> 5 U.S.C. § 706 (2018).

<sup>11</sup> 139 S. Ct. at 2575–76. A challenger could also argue that a reviewing court should strike down the order because the FCC’s actual motivation for its decision was political, see *Saget v. Trump*, No. 18-CV-1599, 2019 WL 1568755, at \*55 (E.D.N.Y. Apr. 11, 2019); cf. *Massachusetts v. EPA*, 549 U.S. 497, 533–35 (2007) (narrowly defining the relevant factors an agency can consider), or because the adjudication announced a prospective rule that the FCC should have enacted through rulemaking, see *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion). These claims are not this Note’s focus, however, and they would likely fail. See *Dep’t of Commerce v. New York*, 139 S. Ct. at 2573 (“Relatedly, 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.”); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”).

<sup>12</sup> *Dep’t of Commerce v. New York*, 139 S. Ct. at 2575.

FCC's adjudication because the only justification the FCC offered for its action was contrived.<sup>13</sup>

This Note argues that *Department of Commerce* is wrong and that the best reading of the APA does not forbid agencies like the FCC from justifying their actions with pretextual explanations. So long as an agency articulates a sufficiently reasonable justification, the agency's action should withstand arbitrariness review even if the agency's offered justification masks its true reasoning. Though this argument may be more palatable when applied to rulemaking, this Note argues that there is no obligation to avoid pretext in either rulemaking or adjudication. Furthermore, this Note seeks to demonstrate at least the reasonableness of the argument that agencies can—in a few, narrow instances—have rational and just reasons for offering contrived explanations. The Supreme Court was thus wrong to read a prohibition against pretext into the APA without express congressional approval.

Despite this seemingly provocative claim, this Note recognizes the severity of the problems that a ban on pretext aims to prevent—namely decisions made on the basis of characteristics like race—and argues that pretext should not be completely irrelevant when reviewing agency decisions. The Constitution and congressional statutes forbid agencies from considering certain factors when making decisions,<sup>14</sup> and an agency decision that violates these commands is invalid.<sup>15</sup> A showing of pretext can strengthen an inference that an agency has relied on a forbidden consideration and should be relevant to the question of whether a challenger has made a sufficient showing to merit discovery into the agency's decisionmaking process. However, the agency action should be invalid only if it was based on a forbidden consideration, not because of pretext. This Note's overall thesis, therefore, is that the Supreme Court should rethink its approach to administrative pretext and should instruct lower courts to consider pretext in the administrative law context in roughly the same way that courts consider pretext in the employment discrimination context, where pretext is relevant only for the purpose of strengthening an inference of discrimination.<sup>16</sup> This approach is more consistent with judicial precedents and better addresses the evil of biased decisionmaking.

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<sup>13</sup> See *id.* at 2575–76. I say that this claim “would seem to require” reversal because the majority opinion went to great lengths to limit its decision to the unusual and highly politicized facts of the case. See *id.* at 2575.

<sup>14</sup> See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001); *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955); *Fitzgerald v. Sec'y, U.S. Dep't of Veterans Affairs*, 121 F.3d 203, 206–07 (5th Cir. 1997) (applying employment discrimination principles to an administrative agency).

<sup>15</sup> *Whitman*, 531 U.S. at 471 & n.4.

<sup>16</sup> See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–48 (2000). In a sense, this Note's thesis can be summarized as a rejection of the phrase “[i]t's not the crime, it's the cover-up.” WATERGATE, MARRY FERRELL FOUNDATION, <https://www.maryferrell.org/pages/Watergate.html> [<https://perma.cc/QKB9-2CWP>]. The Constitution and APA are concerned with “crimes,” not cover-ups.

To support this thesis, Part II of this Note provides background information about the *Department of Commerce* decision and its ban on pretextual explanations. Part III argues that *Department of Commerce*'s conclusion that § 706 requires agencies to justify their decisions with completely truthful justifications contradicts precedent and creates a perverse incentive for agencies to justify their actions with more deceptive explanations. Part IV applies principles of employment discrimination law to administrative law and proposes an alternative framework for the inevitable future cases where petitioners ask courts to overturn agency decisions due to agency deception. A brief conclusion follows in Part V.

## II. DEPARTMENT OF COMMERCE: CASE DESCRIPTION

### A. Facts

The dispute in *Department of Commerce* centered on the 2020 United States census.<sup>17</sup> The Constitution's Enumeration Clause tasks Congress with ensuring that a census of the United States is taken every decade,<sup>18</sup> and Congress itself delegated this responsibility to the Secretary of Commerce.<sup>19</sup> The Census Bureau, an agency within the Department of Commerce, assists the Secretary of Commerce with this task.<sup>20</sup> Importantly for this case's purposes, almost every census between 1820 and 1950 asked every household about citizenship.<sup>21</sup> The Census Bureau had long resisted proposals to revive the practice of asking every household about citizenship out of fear that asking the question would lower response rates and distort the data.<sup>22</sup> The Census Bureau's stance changed, however, in March 2018 when Secretary of Commerce Wilbur Ross declared that the 2020 census would again ask all households whether each member was a United States citizen.<sup>23</sup> The agency justified restoring the citizenship question by claiming that the question provided information needed to enforce the Voting Rights Act (VRA).<sup>24</sup>

### B. Procedural History

Two groups of plaintiffs—one consisting of governmental actors like states and cities and one consisting of nongovernmental organizations—immediately challenged the agency's decision in the Southern District of New

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<sup>17</sup> Note, *Census Act—Review of Administrative Action—Judicial Review of Pretext—Department of Commerce v. New York*, 133 HARV. L. REV. 372, 372 (2019).

<sup>18</sup> U.S. Const. art. I, § 2, cl. 3; *Dep't of Commerce v. New York*, 139 S. Ct. at 2561.

<sup>19</sup> 13 U.S.C. § 141(a) (2012).

<sup>20</sup> *Dep't of Commerce v. New York*, 139 S. Ct. at 2561.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2562.

<sup>23</sup> *Id.*; *Census Act*, *supra* note 17, at 373.

<sup>24</sup> *Dep't of Commerce v. New York*, 139 S. Ct. at 2562 (quoting Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.)).

York.<sup>25</sup> The District Court consolidated the cases,<sup>26</sup> and both groups of plaintiffs argued that the agency's decision violated the APA and the Enumeration Clause.<sup>27</sup> The nongovernmental plaintiffs also argued that the decision violated the equal protection guarantee embedded in the Fifth Amendment's Due Process Clause.<sup>28</sup>

Both sets of constitutional challenges failed. The District Court dismissed the plaintiffs' challenge under the Enumeration Clause in large part due to the long history of using the census to obtain a wide variety of demographic information.<sup>29</sup> The District Court also rejected the nongovernmental plaintiffs' due process claim because there was insufficient evidence that a discriminatory purpose motivated the Secretary's decision.<sup>30</sup> The District Court held that there was not sufficient evidence of discriminatory animus even though the District Court took the unusual step of permitting discovery outside the administrative record.<sup>31</sup>

The plaintiffs' challenges under the APA, however, were successful. The District Court ruled that the agency's decision violated the APA in three ways.<sup>32</sup> First, the decision was not in accordance with law because it violated the Census Act's mandates (1) that the agency rely as much as possible on administrative records of citizenship information instead of on direct inquiries and (2) that the Secretary inform Congress of any plan to address citizenship in the census three years prior to asking the question.<sup>33</sup> Second, adding the citizenship question was arbitrary and capricious since the agency could have collected the data through more effective and less costly means.<sup>34</sup> Finally, and most importantly for this Note's purposes, the District Court concluded that Secretary Ross's decision violated § 706 because it was pretextual.<sup>35</sup>

In addition to appealing to the Second Circuit, the government filed a writ of certiorari asking the Supreme Court to hear the case immediately due

<sup>25</sup> *Id.* at 2563; *see also* *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 515, 528 (S.D.N.Y. 2019) (listing plaintiffs).

<sup>26</sup> *See id.* at 515.

<sup>27</sup> *Id.* at 528.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 766, 774, 800–01.

<sup>30</sup> *Id.* at 671.

<sup>31</sup> *See id.* at 530, 671. The District Court's ruling was emphatically not a finding that the Secretary's decision was free of discriminatory intent. The District Court strongly suggested that the plaintiffs could have met their burden had the Supreme Court not stayed the District Court's authorization of a deposition of Secretary Ross. *Id.* at 671.

<sup>32</sup> *See id.* at 635. The opinion states that Secretary Ross's action violated the APA in four separate ways, but because two of those ways are separate violations of the Census Act, *id.*, it is simpler to group the violations into three categories. *See Dep't of Commerce v. New York*, 139 S. Ct. at 2571 (discussing the two alleged Census Act violations together).

<sup>33</sup> *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d at 635.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

to its public importance and the need to have the census finalized prior to June.<sup>36</sup> The Supreme Court granted the petition.<sup>37</sup>

### C. Supreme Court's Analysis

Adding to the “lore” of famous decisions handed down near the end of June,<sup>38</sup> Chief Justice Roberts announced the Supreme Court’s decision in *Department of Commerce* on June 27, 2019—the last day of the term.<sup>39</sup> The Supreme Court’s opinion was fractured. All Justices agreed that the plaintiffs had standing, seven Justices agreed that the APA did not foreclose judicial review, but only five Justices agreed on the merits.<sup>40</sup> The Justices also split into two contingents on the merits, with Chief Justice Roberts providing the crucial swing vote.<sup>41</sup>

In the part of the opinion joined by all the Justices appointed by Republican presidents, the Supreme Court denied the claims that the Secretary’s decision was unconstitutional, arbitrary, and in violation of the Census Act.<sup>42</sup> The Court’s explanation for why the decision was not arbitrary was lengthy, technical, and critical of those who would “second-guess[ ] the Secretary’s weighing of risks and benefits.”<sup>43</sup> The Supreme Court concluded that although the Secretary departed from the Census Bureau’s recommendation not to add the citizenship question, the Secretary was still entitled to the presumption of technical expertise that justifies so much of the current administrative regime.<sup>44</sup>

This is where a normal administrative law case would have ended. The Court concluded that the agency’s action was constitutional, rational, consistent with statutory law, and was not made on the basis of forbidden consider-

<sup>36</sup> Note, *Census Act*, *supra* note 17, at 373.

<sup>37</sup> *In re Dep’t of Commerce*, 139 S. Ct. 16, 16–17 (2018).

<sup>38</sup> Stephen Wermiel, *SCOTUS for Law Students: The End of the Term*, SCOTUSBLOG (June 18, 2016), <https://www.scotusblog.com/2016/06/scotus-for-law-students-the-end-of-the-term/> [<https://perma.cc/5Z4W-3C3N>].

<sup>39</sup> Mike Hayes, Elise Hammond and Christina Kline, *Supreme Court Issues Major Rulings on Last Day*, CNN (June 27, 2019, 5:30 PM), <https://www.cnn.com/politics/live-news/supreme-court-opinions-june-27-2019/index.html> [<https://perma.cc/2PTL-6DAB>].

<sup>40</sup> *See Dep’t of Commerce v. New York*, 139 S. Ct. at 2561.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 2567, 2571, 2573. Like the District Court, the Supreme Court held that reinstating the citizenship question did not violate the Enumeration Clause because of the long tradition of using the census to collect citizenship information. *See id.* at 2567. Unlike the District Court, the Supreme Court held that the Census Act did not require the Department of Commerce to avoid directly asking about citizenship simply because another method of acquiring the data may be effective. *Id.* at 2572. The Supreme Court also held that the Secretary complied with the Census Act’s reporting requirements even though the Secretary’s initial disclosure did not mention the citizenship question and that any noncompliance was harmless error. *Id.* at 2573.

<sup>43</sup> *Id.* at 2571; *see also id.* (“It is not for us to ask whether [Secretary Ross’s] decision was ‘the best one possible’ or even whether it was ‘better than the alternatives.’” (quoting *FERC v. Elec. Power Supply Ass’n.*, 136 S. Ct. 760, 782 (2016))).

<sup>44</sup> *Id.* at 2569–71.

ations.<sup>45</sup> Nevertheless, in a part of the opinion joined by Chief Justice Roberts and all the Justices appointed by Democratic presidents, the Court ruled that the Secretary's decision violated § 706 of the APA because the Secretary's explanation for reinstating the citizenship question was pretextual.<sup>46</sup> As Justice Thomas noted in an opinion that dissented from this conclusion, "For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale."<sup>47</sup>

The Supreme Court's conclusion that pretext violates the APA is narrower than it first appears. The Court explained that courts may not invalidate an agency's explanation "simply because the agency might also have had other unstated reasons."<sup>48</sup> In a win for those who see agencies' connection to a politically-accountable President as a powerful reason for deference,<sup>49</sup> Chief Justice Roberts also declared that a court may not reject an agency's action "solely because it might have been influenced by political considerations or prompted by an Administration's priorities."<sup>50</sup> Instead, the agency's explanation violated the APA because "the VRA enforcement rationale—the sole stated reason—seems to have been contrived."<sup>51</sup>

The Supreme Court justified its conclusion that the APA must ban at least the type of pretext that occurs when an agency does not believe in any of its justifications on the grounds that permitting pretextual justifications would render judicial review "an empty ritual."<sup>52</sup> The Court's argument is that the public and courts cannot effectively scrutinize an agency's actions if an agency offers rationales that the agency itself does not believe.<sup>53</sup> Hence, even though the Department of Commerce's decision to reinstate the citizenship question was rational and substantively valid, the Supreme Court af-

<sup>45</sup> In other words, the plaintiffs did not provide enough evidence to show that the decision was made on the basis of forbidden characteristics. *Id.* at 2571. Whether this is true remains hotly contested. Cristian Farias, *Is There Racist Intent Behind the Census Citizenship Question*, *NEW YORKER* (June 26, 2019), <https://www.newyorker.com/news/news-desk/is-there-racist-intent-behind-the-census-citizenship-question-wilbur-ross> [<https://perma.cc/5JFQ-FB9Y>].

<sup>46</sup> *Dep't of Commerce v. New York*, 139 S. Ct. at 2555, 2576.

<sup>47</sup> *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part).

<sup>48</sup> *Id.* at 2573 (citing *Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1185–86 (10th Cir. 2014)).

<sup>49</sup> *See, e.g.*, Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 8 (2009); *cf.* *Sherley v. Sebelius*, 689 F.3d 776, 784–85 (D.C. Cir. 2012) ("[A]s an agency under the direction of the executive branch, the NIH must implement the President's policy directives to the extent permitted by law." (internal citations omitted)). *But see* Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 *DUKE L.J.* 1811, 1815–16 (2012).

<sup>50</sup> *Dep't of Commerce v. New York*, 139 S. Ct. at 2573.

<sup>51</sup> *Id.* at 2575. The VRA justification was contrived because "[the] evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; . . . and adopted the Voting Rights Act rationale late in the process." *Id.* at 2574.

<sup>52</sup> *Id.* at 2576.

<sup>53</sup> *Id.* at 2575–76.

firmed the District Court's decision to remand the action back to the agency.<sup>54</sup>

In an opinion concurring with every part of the majority's opinion except the majority's pretext analysis,<sup>55</sup> Justice Thomas argued that the APA does not prohibit pretextual explanations.<sup>56</sup> Justice Thomas also argued that even if the majority's interpretation of the APA was correct, Secretary Ross's explanation for reinstating the citizenship question was not pretextual.<sup>57</sup> In an opinion concurring with every part of the majority's opinion except its analysis of the action's substantive validity, Justice Breyer argued that reinstating the citizenship question was arbitrary, capricious, and an abuse of discretion because the citizenship question would distort population data.<sup>58</sup> Justice Alito's opinion argued that reinstating the citizenship question was not judicially reviewable because it was a matter committed to agency discretion.<sup>59</sup>

### III. DEPARTMENT OF COMMERCE'S INTERPRETATION OF § 706 WAS WRONG

Contrary to the Supreme Court's ruling in *Department of Commerce*, the best interpretation of § 706 of the APA does not prohibit pretextual explanations. This conclusion is true even if the ban on pretext is applied only when an agency does not believe its sole offered justification. *Department of Commerce*'s conclusion that the APA must prohibit certain types of pretext both contradicts judicial precedent and is counterproductive from a policy perspective. The Supreme Court should consequently reconsider its approach to administrative pretext and adopt a different framework going forward.

<sup>54</sup> *Id.* at 2576.

<sup>55</sup> *Id.* at 2555.

<sup>56</sup> *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part) ("The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law.").

<sup>57</sup> *Id.* at 2582 (Thomas, J., concurring in part and dissenting in part) ("I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web . . . [But the] evidence suggests, at most, that the Secretary had *multiple* reasons for wanting to include the citizenship question on the census."). Justices Gorsuch and Kavanaugh joined Justice Thomas's opinion. *Id.* at 2576.

<sup>58</sup> *Id.* at 2592 (Breyer, J., concurring in part and dissenting in part) ("How can an agency support the decision to add a question to the short form, thereby risking a significant undercount of the population, on the ground that it will improve the accuracy of citizenship data, when in fact the evidence indicates that adding the question will harm the accuracy of citizenship data? Of course it cannot."). Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's opinion. *Id.* at 2584.

<sup>59</sup> *Id.* at 2597 (Alito, J., concurring in part and dissenting in part) ("To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons.").

A. Department of Commerce *Contradicts Precedent*1. Department of Commerce *Abandons the Morgan IV Principle*

It is a fundamental principle of administrative law that courts must ordinarily assess the validity of agencies' actions by reviewing the reasons that agencies give rather than by speculating about agencies' true motivations.<sup>60</sup> This principle traces its roots back to 1907, when Justice Holmes balked at "cross-examin[ing] with regard to the operation of their minds" members of a state board of equalization and assessment.<sup>61</sup> The principle is most commonly tied to *United States v. Morgan (Morgan IV)*,<sup>62</sup> in which Justice Frankfurter similarly recoiled at the idea of inquiring into the mind of an agency decisionmaker.<sup>63</sup> Justice Frankfurter famously wrote, "We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.'" <sup>64</sup> Though the Court decided these cases before the APA's enactment in 1946, the principle that a reviewing court should ordinarily review an agency's justification without regard to what the agency actually believed has persisted.<sup>65</sup>

As Justice Thomas argued in his separate opinion in *Department of Commerce*, the Court's holding that pretext constitutes a violation of the APA contradicts this *Morgan IV* principle.<sup>66</sup> Under the majority's rationale, lower courts are required to abandon the axiom that courts should not inquire into an agency's subjective motivations and must instead directly ask whether an agency is being honest about its reasons for an official action.<sup>67</sup> Since nearly every agency decision involves coordination between several stakeholders with divergent and often conflicting priorities, *Department of*

<sup>60</sup> E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1490–91 (1992).

<sup>61</sup> See *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585, 593 (1907); see also Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 721 (1975) (stating Justice Holmes "expressed revulsion" at the idea of inquiring into the subjective thoughts of agency decisionmakers).

<sup>62</sup> 313 U.S. 409 (1941).

<sup>63</sup> See *id.* at 442.

<sup>64</sup> *Id.* (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938)).

<sup>65</sup> See, e.g., *Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014) ("[We] reject Appellants' argument that we should overturn the agency's GFP determination based on the agency's subjective motivations."); *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) (collecting cases applying the *Morgan IV* principle); *Kent Corp v. NLRB*, 530 F.2d 612, 620 (5th Cir. 1976) ("Kent is trying to probe the mental processes and motives of the individual decision-maker, rather than to question the objective legal validity of the institutional decision. In the circumstances of this case, this effort is inconsistent with a basic principle of administrative law."). Indeed, the *Morgan IV* principle undergirds much of the reasoning in the seminal case of *Securities & Exchange Commission v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943), in which the Supreme Court refused to look beyond the official record to determine the validity of an agency's action, see *id.* at 88.

<sup>66</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2579–80 (2018) (Thomas, J., concurring in part and dissenting in part).

<sup>67</sup> See *id.* at 2575.

*Commerce* has opened the door to nearly every agency decision being challenged on the grounds that the agency's explanation for its decision does not reflect the agency's true motivation.<sup>68</sup> Exacerbating the problem is the fact that agency heads often enter office with predetermined policy goals that need to be substantiated with legal explanations.<sup>69</sup> Hence, *Department of Commerce's* ban on pretext makes it very likely that lower courts are going to be inundated with requests to abandon a principle that has served as a central pillar of administrative law for over 100 years.

## 2. Department of Commerce's Reasons for Abandoning the Morgan IV Principle Are Unpersuasive

In fairness to the *Department of Commerce* majority, the *Morgan IV* principle is not absolute.<sup>70</sup> The rule that courts must ordinarily not inquire into the minds of an agency decisionmaker is in tension with the Constitution's prohibition on discrimination against particular groups,<sup>71</sup> as well as the fact that Congress sometimes forbids agencies from considering specific factors when making decisions.<sup>72</sup> Courts must therefore occasionally look beyond the official record to determine whether an agency has complied with an independent constitutional or statutory requirement. The petitioners in *Department of Commerce* asked the District Court to engage in this very type of inquiry, as they alleged that Secretary Ross reinstated the citizenship question to intentionally undercount racial minorities.<sup>73</sup> Inquiring into an agency's deliberations to determine if the agency violated the Constitution or some other independent statutory requirement constitutes a well-accepted and limited exception to the *Morgan IV* principle.

There are several problems with claiming that this exception supports the *Department of Commerce* opinion. Unlike cases in which courts have considered an agency's subjective beliefs to determine if the agency considered a forbidden factor, the District Court had already found that the evidence did not support the conclusion that the Secretary's decision was biased,<sup>74</sup> and the Supreme Court did not overturn this finding.<sup>75</sup> Hence, the Supreme Court's opinion is consistent with *Morgan IV* only if the APA contains an independent sincerity requirement. As Justice Thomas noted, however, the Supreme Court had never before interpreted the APA as requiring

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<sup>68</sup> See *id.* at 2580 (Thomas, J., concurring in part and dissenting in part).

<sup>69</sup> *Id.* at 2574 (majority opinion).

<sup>70</sup> See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>71</sup> See, e.g., *USDA v. Moreno*, 413 U.S. 528, 534 (1973); *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955).

<sup>72</sup> See, e.g., *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 471 (2001); *Fitzgerald v. Sec'y, U.S. Dep't of Veterans Affairs*, 121 F.3d 203, 206–07 (5th Cir. 1997).

<sup>73</sup> *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 806–07 (S.D.N.Y. 2018).

<sup>74</sup> *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 671 (S.D.N.Y. 2019).

<sup>75</sup> See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) (affirming the citizenship question's substantive validity).

honesty.<sup>76</sup> The majority nevertheless concluded that the APA does contain such a requirement and justified this conclusion by claiming that accepting contrived reasons would render judicial review “an empty ritual” and defeat the purpose of requiring agencies to justify their actions with explanations.<sup>77</sup>

Three points belie these arguments. First, *Department of Commerce's* ban on pretext is strikingly underinclusive. If accepting contrived explanations renders judicial review ineffective, why does *Department of Commerce's* ban on pretext apply only to instances where an agency's sole justification is pretextual?<sup>78</sup> Agencies are more than capable of masking their true reasons for an action by lying through omission.<sup>79</sup> In fact, the politically accountable nature of agency decisionmakers makes such deception common.<sup>80</sup> What is so different about deliberately false explanations and truthful but deceptively incomplete explanations that makes judicial review ineffective when applied to the former but effective when applied to the latter?<sup>81</sup> As every second-semester, third-year law student is undoubtedly aware, both forms of deception can constitute grounds for denying an application to join the bar.<sup>82</sup>

Furthermore, even if it were possible to distinguish between deliberate falsehoods and lies of omission—perhaps upon some practical recognition that judges have only so much ability to police agencies' lack of candor—the Supreme Court's ban on pretext is still underinclusive because it does not prohibit deliberate falsehoods.<sup>83</sup> *Department of Commerce's* rule allows an agency to announce deliberately false explanations so long as the explanations include at least one reason the agency does believe, even if that reason is not what truly motivated the agency's decision.<sup>84</sup> Hence, *Department of Commerce's* rule's underinclusive nature casts severe doubt on the majority's assertion that its rule is critical to ensuring effective judicial review.

The second fact that undermines *Department of Commerce's* judicial review justification for its interpretation of the APA is that constitutional law

<sup>76</sup> See *id.* (Thomas, J., concurring in part and dissenting in part).

<sup>77</sup> *Id.* at 2575–76.

<sup>78</sup> See *id.*

<sup>79</sup> Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1097–98 (2010).

<sup>80</sup> See *Dep't of Commerce v. New York*, 139 S. Ct. at 2575 (stating “a typical case” is one “in which an agency may have both stated and unstated reasons for a decision”); accord Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1128 (2010); see also Watts, *supra* note 49, at 6 (“Agencies today generally try to meet their reason-giving duties under *State Farm* by couching their decisions in technocratic, statutory, or scientific language, either failing to disclose or affirmatively hiding political factors that enter into the mix.”).

<sup>81</sup> See Benjamin Franklin, *Poor Richard Improved, 1758*, <https://founders.archives.gov/documents/Franklin/01-07-02-0146> [<https://perma.cc/FL7N-AV2D>] (“Half the Truth is often a great Lie.”).

<sup>82</sup> See *In re De Maria*, 726 Fed. App'x. 48, 52–53 (2d Cir. 2018).

<sup>83</sup> See *Dep't of Commerce v. New York*, 139 S. Ct. at 2575.

<sup>84</sup> See *id.* at 2579 (Thomas, J., concurring in part and dissenting in part) (noting that the ban on pretext will apply “only in [an] infinitesimally small number of cases”).

cases often permit pretextual explanations. In the Executive Branch context, for instance, the Supreme Court has ruled that courts should not inquire into an officer's subjective motivations to determine if the officer had probable cause to arrest an individual.<sup>85</sup> The Supreme Court has stated with regards to the Legislative Branch that "it is entirely irrelevant for constitutional purposes" whether Congress defends its legislation with pretextual justifications.<sup>86</sup> Finally, the Supreme Court argued in *Morgan IV* itself that scrutinizing a judge's ruling to determine if the judge's explanation was sincere would be "destructive of judicial responsibility."<sup>87</sup> If the Supreme Court can review the actions of all three branches of government without inquiring into the decisionmakers' subjective motivations, why does judicial review always require asking what an agency believes?<sup>88</sup>

Third, permitting pretextual explanations does not defeat the purpose of the APA's reason-giving requirement because requiring agencies to justify their actions serves a purpose other than determining what the agencies believe. Requiring agencies to announce explanations for their actions is deliberation-enhancing as "[a] decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat."<sup>89</sup> The APA's requirement that agencies offer rational explanations for their actions thus serves an important purpose even if the APA does not require agencies' explanations to be sincere.

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<sup>85</sup> See, e.g., *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) ("[An officer's] subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); see also *United States v. Evans*, 581 F.3d 333, 342-43 (6th Cir. 2009) (applying *Whren* principle to federal officers).

<sup>86</sup> *FCC v. Beach Commc'ns., Inc.*, 508 U.S. 307, 315 (1993); see also *Ex parte McCordle*, 74 U.S. 506, 514 (1868) ("We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."). A distinction between the legislative context and the administrative context is that Congress, unlike administrative agencies, does not have to offer explanations for its actions. *Beach Commc'ns., Inc.*, 508 U.S. at 315. These cases nonetheless demonstrate that judicial review is possible without questioning sincerity.

<sup>87</sup> *United States v. Morgan*, 313 U.S. 409, 422 (1941); see also *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904) ("[A judgment] ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision."). For interesting scholarship arguing that "judicial 'subversion' or lying is far more common than is openly acknowledged," see Paul Butler, *When Judges Lie (And When They Should)*, 91 MINN. L. REV. 1785, 1785 (2007).

<sup>88</sup> Indeed, considering that Chief Justice Roberts joined an opinion that stated, "At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), it is reasonable to wonder whether Chief Justice Roberts's declaration that a ban on pretext is necessary for effective judicial review is itself a pretextual explanation. Of course, it could also be the case that Chief Justice Roberts believes that several types of constitutional violations are effectively unreviewable.

<sup>89</sup> Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180 (1992).

In sum, *Department of Commerce's* inquiry into the sincerity of Secretary Ross's explanation for reinstating the citizenship question contradicts the broad *Morgan IV* principle that courts should not inquire into an agency's decisionmaking process. Although *Morgan IV* contains an exception for determining if the agency has complied with federal law, the Supreme Court has never before interpreted the APA as requiring sincerity,<sup>90</sup> and the contention that the APA must contain such a sincerity requirement to effectuate judicial review is unpersuasive. The Supreme Court should therefore reconsider its approach to administrative pretext and adopt a framework that better accords with its precedents.

### B. Department of Commerce *Is Mistaken as a Matter of Policy*

In addition to contradicting precedent, *Department of Commerce's* interpretation of the APA is also counterproductive from a policy perspective.<sup>91</sup> *Department of Commerce's* rule does not effectively prevent deceptive justifications or biased decisionmaking, and the rule also imposes significant costs on the regulatory system. The Court was consequently mistaken to read a selective ban on pretext into the APA, particularly without explicit congressional instruction.

#### 1. Department of Commerce's *Ban on Pretext Is not Effective*

To fully understand the reasons for *Department of Commerce's* declaration that agencies cannot justify their actions with entirely pretextual explanations, it is important to appreciate the context in which the Court announced its opinion. From the so-called "Muslim ban"<sup>92</sup> to the rescission

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<sup>90</sup> See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) (Thomas, J., concurring in part and dissenting in part); see also *Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1185–86 (10th Cir. 2014) (rejecting claim that the APA requires sincerity).

<sup>91</sup> I would normally look to a statute's text to determine its meaning before examining policy considerations, see *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004), but *Department of Commerce* did not consider § 706's text when concluding it prohibits entirely pretextual explanations, *Dep't of Commerce v. New York*, 139 S. Ct. at 2573–76. The APA's text provides an additional strong reason for disagreeing with *Department of Commerce's* interpretation of the APA since § 706's text mirrors the language the Supreme Court used when reviewing legislation under the due process clauses prior to the APA's enactment. Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 429–30 (2009); see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 320 (1936) (separate opinion of Hughes, C.J.) ("If in fixing prices, due process is violated by arbitrary, capricious or confiscatory action, judicial remedy is available."). As discussed above, the Supreme Court's review of legislation did not inquire into sincerity. *Supra* note 86. I nevertheless relegate this argument to this pithy footnote because the APA's text's unimportance in *Department of Commerce* is typical of administrative law cases, Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 809–10 (2018), and the Supreme Court has explicitly held that the APA provides more protections than the Constitution, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983).

<sup>92</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2401 (2018) ("Plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns

of the Deferred Action for Childhood Arrivals (DACA),<sup>93</sup> petitioners have claimed that several of the Trump Administration's most important policies are discriminatory. The reinstated citizenship question at issue in *Department of Commerce* was regarded similarly,<sup>94</sup> and several scholars have criticized the Supreme Court for its reluctance to rigorously search for discriminatory motivations.<sup>95</sup> When viewing the case from this perspective, it is plausible that *Department of Commerce's* ruling rests on the understandable desire to narrow the *Morgan IV* principle and better police discriminatory agency actions.

I agree with this impulse, but the rule the Supreme Court announced in *Department of Commerce* will not prevent biased decisionmaking. *Department of Commerce's* selective ban on pretext is far too narrow and difficult to apply for it to have any hope of seriously deterring discriminatory agency actions. As explained above, *Department of Commerce's* conclusion that the APA does not require agencies to be completely honest but does forbid agencies from announcing explanations they do not believe in at all is extremely narrow.<sup>96</sup> An agency that seeks to enact a policy for discriminatory reasons will still be able to develop some explanation for its action that seems reasonable and that the agency decisionmaker appears to believe in.

In addition to being narrow, the Supreme Court's rule is also difficult to apply as it is exceedingly challenging to determine when an agency does not believe the reasons it announces. In fact, *Department of Commerce's* rule is so difficult to apply that the Supreme Court could not clearly articulate why it applied in *Department of Commerce*.<sup>97</sup> The majority admitted that the agency's deliberative process was typical of agency decisionmaking and that "no particular step in the process [stood] out as inappropriate or defective."<sup>98</sup> The Court nonetheless held that, "viewing the evidence as a whole," the agency's explanation was contrived.<sup>99</sup> This loose, totality-of-the-circum-

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about vetting protocols and national security were but pretexts for discriminating against Muslims.").

<sup>93</sup> *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1028 (N.D. Cal. 2018).

<sup>94</sup> *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 664–65 (S.D.N.Y. 2019).

<sup>95</sup> *E.g.*, Engy Abdelkader, *Muslim Americans: Do US Democratic Institutions Protect Their Religious Liberty*, 26 *ASIAN AM. L.J.* 52, 107–08 (2019); Kaelyne Yumul Wietelman, *Disarming Jackson's (Re)Loaded Weapon: How Trump v. Hawaii Reincarnated Korematsu and How They Can Be Overruled*, 23 *ASIAN PAC. AM. L.J.* 43, 44–45 (2019); Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 *COLUM. L. REV.* 2147, 2202–04 (2019); Jessica A. Clarke, *Explicit Bias*, 113 *Nw. U. L. REV.* 505, 509–10 (2018); Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 *SUP. CT. REV.* 213, 229–30 (2018).

<sup>96</sup> *Supra* notes 78–84 and accompanying text.

<sup>97</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574–75 (2019). Justice Thomas argued that the evidence did not even come close to demonstrating that Secretary Ross's explanation for reinstating the citizenship question was contrived. *Id.* at 2581 (Thomas, J., concurring in part and dissenting in part).

<sup>98</sup> *Id.* at 2574–75 (majority opinion).

<sup>99</sup> *Id.* at 2575.

stances inquiry does not give lower courts much guidance on when they should invalidate agency explanations due to pretext.

It is also significant that the Supreme Court justified its conclusion that the agency's sole explanation was contrived with material the parties unearthed in extra-record discovery.<sup>100</sup> It is unclear whether the Court would have reached the same conclusion without the extra-record material, yet the Supreme Court criticized the District Court for granting the extra discovery.<sup>101</sup> The *Department of Commerce* opinion goes to great lengths to make it clear that lower courts should not follow the District Court's lead and order such elaborate discovery,<sup>102</sup> but without a willingness to order extra discovery, lower courts will never be able to effectively apply the majority's selective ban on pretext.<sup>103</sup> As a result, if the majority's unstated goal for its selective ban on pretext was to better police discriminatory decisionmaking, that goal will go unmet.

Of course, it is possible that the majority viewed offering deliberately false agency explanations as inherently evil and was attempting only to curb agency pretext. Unfortunately, *Department of Commerce's* ruling does not further even this modest policy goal. As I have explained ad nauseum at this point, the underinclusivity of *Department of Commerce's* selective ban on entirely false explanations does not prevent agencies from obscuring their true reason for acting or from announcing partially false explanations.<sup>104</sup> More importantly, the remedy the Supreme Court announced in *Department of Commerce* creates a perverse incentive for agencies to justify their actions with additional pretextual explanations. The *Department of Commerce* majority concluded that reinstating the citizenship question was substantively valid but nonetheless remanded the decision back to the agency due to pretext.<sup>105</sup> Although this was not possible in *Department of Commerce* since the government had to finalize the census in June,<sup>106</sup> applying the Supreme Court's remand remedy to other pretextual agency explanations will result in the agency announcing another pretextual explanation for its decision.<sup>107</sup> *Department of Commerce* did not explain how a lower court is supposed to

<sup>100</sup> *Dep't of Commerce v. New York*, 139 S. Ct. at 2574.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (calling the District Court's award of extra-record discovery "premature" and agreeing with the government "that the District Court should not have ordered extra-record discovery when it did"); see also *id.* at 2575 (noting that courts should rarely award such extensive discovery).

<sup>103</sup> *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 668 (S.D.N.Y. 2019) ("Indeed, it would be nearly impossible to 'smoke out' discriminatory purpose if 'litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true intent and purpose.'" (quoting *New York v. U.S. Dep't of Commerce*, 345 F. Supp. 3d 444, 452 (S.D.N.Y. 2018))).

<sup>104</sup> *Supra* notes 78–85 and accompanying text.

<sup>105</sup> *Dep't of Commerce v. New York*, 139 S. Ct. at 2576.

<sup>106</sup> *Id.* at 2565.

<sup>107</sup> See *Census Act*, *supra* note 17, at 380.

review an agency's new justification for an action if a court had already invalidated a justification for being pretextual, but it is clear that the review into the agency's sincerity will be largely farcical. *Department of Commerce's* ban on pretext is thus ineffective at both policing discriminatory agency actions and preventing pretextual explanations.

## 2. Department of Commerce's *Selective Ban on Pretext Imposes Significant Costs*

*Department of Commerce's* selective ban on pretext also imposes significant costs on the regulatory system. These costs initially stem from the considerable uncertainty the Supreme Court's ban on pretext creates, as it is not clear what circumstances will merit its application.<sup>108</sup> Moreover, *Department of Commerce's* holding encourages an agency to justify its decisions with as many reasons as possible in the hopes that the agency's action will withstand scrutiny even if a reviewing court finds some of the agency's explanations pretextual.<sup>109</sup> The ruling thus adds to the ossification problem that leads agencies either not to pursue actions that would otherwise benefit society or to spend resources justifying their substantively valid actions when the agency could have better spent those resources furthering societal good in some other way.<sup>110</sup>

Finally, it is arguable whether pretextual explanations are inherently bad,<sup>111</sup> and it is at least plausible that permitting an agency to justify its decision with entirely pretextual explanations could reduce political discord. Consider, for instance, a situation similar to the introductory hypothetical where President Trump directs an agency's decisionmakers to pursue some action.<sup>112</sup> Requiring the agency decisionmakers to justify their action by cit-

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<sup>108</sup> *Id.* at 381 (“[T]he 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.”).

<sup>109</sup> Remember, the administrative state is premised largely on the idea that administrative agencies have technical expertise that they cannot easily convey to reviewing courts. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field . . .”). There may be many situations where an agency’s actual motivations would withstand arbitrariness review but are too costly to fully explain because the motivations are grounded in tacit expertise or are otherwise too complex. Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1369 (2016); see also Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary & Capricious Review*, 90 WASH. U. L. REV. 141, 187 (2012) (“The problem judicial review of technical determinations poses . . . is that the courts might not even know enough to understand what data and inquiries are truly relevant.”).

<sup>110</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263–64 (2001) (describing ossification problem); see also *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 99 (1943) (Black, J., dissenting) (“That [the agency] did not unduly parade fact data across the pages of their reports is a commendable saving of effort . . .”). But see Gersen & Vermeule, *supra* note 109, at 1369 (arguing there is no ossification problem).

<sup>111</sup> See *infra* note 123 (offering an example of a well-intentioned pretextual explanation).

<sup>112</sup> *Supra* notes 1–8 and accompanying text; see also *Sherley v. Sebelius*, 689 F.3d 776, 779–80, 784–85 (D.C. Cir. 2012) (describing National Institute of Health’s expansion of stem cell research after President Obama passed an Executive Order encouraging this expansion).

ing President Trump's instruction instead of permitting them to articulate technical justifications that are entirely rational but the decisionmakers do not personally believe in could needlessly increase hostility from Democrats toward the agency's rule. Similar considerations have led Kahan to argue in the criminal law context that judges should justify their sentencing decisions using empirically-based deterrence theories even if judges do not believe in those theories as technical justifications reduce political controversy and give courts' decisions an aura of technical legitimacy.<sup>113</sup> Several other scholars have also argued that pretextual governmental explanations can, in some circumstances, advance the common good better than honest governmental explanations.<sup>114</sup> In light of the country's growing political divide and vitriol for members of the opposing political party,<sup>115</sup> it is not unreasonable to believe that complete honesty about the reasons for Executive Branch officials' actions may not always be the best policy for promoting national cohesiveness.<sup>116</sup>

*Department of Commerce's* holding consequently increases uncertainty, encourages agencies to waste resources, and denies agencies the ability to exercise their expert judgment regarding when it would be better to announce a reasonable technical explanation that the agency does not believe

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<sup>113</sup> Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999) ("Consistent with Stephen Holmes's defense of classical liberalism, I want to suggest that the real significance of deterrence theory lies not in what it says but in what it stops us from saying. Just as the moral idiom of 'self-interest' displaces an illiberal idiom that focuses on glory, so the rhetoric of deterrence displaces an alternative expressive idiom that produces incessant illiberal conflict over status.").

<sup>114</sup> E.g., Tung Yin, *National Security Lies*, 55 Hous. L. REV. 729, 735 (2017) (recognizing "the executive branch's need to mislead or deceive in certain conditions due to national security concerns"); Butler, *supra* note 87, at 1787 (suggesting that "'judicial subversion' or lying—is far more common than is openly acknowledged . . . and is occasionally justified"); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1310 (1995) ("I argue that judges—especially life-tenured appellate judges, such as those sitting on the U.S. Supreme Court and Courts of Appeals—may regularly forgo candor under the principles of logic and prudence and still retain their political legitimacy and institutional integrity.").

<sup>115</sup> See Katherine Schaeffer, *Far More Americans See 'Very Strong' Partisan Conflicts Now than in the Last Two Presidential Election Years*, PEW RES. CTR. (Mar. 4, 2020), <https://www.pewresearch.org/fact-tank/2020/03/04/far-more-americans-see-very-strong-partisan-conflicts-now-than-in-the-last-two-presidential-election-years/> [<https://perma.cc/5J43-PVCP>] ("About nine-in-ten Americans (91%) say that conflicts between the party coalitions are either strong or very strong, according to a Pew Research Center survey in January. About seven-in-ten (71%) say these conflicts are very strong. The perception of these partisan divisions far overshadows that of conflicts between other groups in American society."); Dante Chinni & Sally Bronston, *Americans Are Divided Over Everything Except Division*, NBC (Oct. 21, 2018, 9:00 AM), <https://www.nbcnews.com/politics/first-read/americans-are-divided-over-everything-except-division-n922511> [<https://perma.cc/JQ9D-K4FJ>].

<sup>116</sup> To be clear, I do not intend for this argument to be taken as a broad rejection of the benefits of governmental transparency. I merely describe the claim, originally made by scholars such as Plato, Kahan, and Butler, that pretextual governmental explanations may sometimes further society's welfare more than honest governmental explanations. If this claim is accepted as reasonable, then it is reasonable to believe that Congress could have intended for the APA to permit agencies to occasionally articulate rational but pretextual explanations for the agencies' actions. Thus, rather than being a full-throated endorsement of governmental deception, this argument is meant as a simple endorsement of judicial restraint.

instead of a divisive political explanation. Policy considerations therefore demonstrate that the Court should not have read a prohibition against pretext into § 706 of the APA, particularly without explicit congressional instruction.

#### IV. PRETEXT'S PROPER ROLE IN ADMINISTRATIVE LAW

Though I disagree with the approach the Court adopted in *Department of Commerce*, I agree that pretext should not be entirely irrelevant in administrative law. The *Morgan IV* principle that courts should not inquire into the subjective reasons for an agency's actions has always contained an exception for determining whether the agency's decision was the product of discriminatory animus,<sup>117</sup> and I agree with the scholars who have criticized courts' unwillingness to accept credible allegations that discrimination has influenced official government decisions.<sup>118</sup> I thus applaud the *Department of Commerce* majority's willingness to innovate in an attempt to better constrain biased decisionmaking.<sup>119</sup>

That being said, I do not believe that using pretextual explanations as a proxy for discriminatory animus is the best way to achieve this goal. The pretext-as-proxy approach simply encourages agencies to stuff their explanations with more reasons for their actions and complicates the overall inquiry without better enabling courts to police discriminatory decisionmaking. I instead advocate that the Supreme Court return its focus to the traditional inquiry of whether an agency made its decision on the basis of forbidden characteristics. To better enable courts to truly answer this question, however, I also urge that the Supreme Court hold that a pretextual explanation makes it more likely that an agency's decision is biased and that pretext is relevant to the question of whether a challenger has made a strong enough showing to overcome the presumption of regularity to which agencies are entitled.<sup>120</sup>

My proposed approach is similar to the one the District Court adopted,<sup>121</sup> but it differs in that while a showing of pretext may be sufficient to award extra-record discovery, it is not sufficient to invalidate an agency action under the APA.<sup>122</sup> This approach is also similar to the ones used by courts in the employment discrimination context, where courts have recog-

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<sup>117</sup> See *supra* notes 70–73 and accompanying text; see also *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 806–07 (S.D.N.Y. 2018) (inquiring into motives to determine discriminatory purpose).

<sup>118</sup> *Supra* note 95.

<sup>119</sup> Assuming, of course, that this goal was an unstated reason for the majority's holding.

<sup>120</sup> See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

<sup>121</sup> See *New York v. U.S. Dep't of Commerce*, 345 F. Supp. 3d 444, 452–53 (S.D.N.Y. 2018).

<sup>122</sup> Because pretext is not a violation of the APA, agencies should also be afforded the opportunity to explain why their pretextual explanations are not proof of discriminatory animus.

nized that pretextual explanations make discrimination's presence more likely but have nonetheless held that pretext does not violate Title VII.<sup>123</sup> Just as courts have recognized in the employment discrimination context that a pretextual explanation for an employee's termination can be innocent or even well-intentioned,<sup>124</sup> courts should make this same recognition in the administrative context.

Increasing courts' willingness to award discovery has several advantages over putting more pressure on agencies to justify their actions with non-pretextual explanations. The most important advantage is that unlike the Supreme Court's holding in *Department of Commerce*, this proposed approach is consistent with past administrative and constitutional law precedents<sup>125</sup> and does not announce an entirely new interpretation of the APA that neither the APA's text<sup>126</sup> nor policy considerations support.<sup>127</sup> Courts could also more easily apply this proposed approach due to the familiarity they have with the framework in the employment discrimination context, and this easier application would create more predictability and certainty in litigation. Furthermore, because this approach adopts a broader definition of pretext that includes lies of omissions, it does not create an additional incentive for agencies to pack their explanations with as many reasons as possible to avoid a finding of pretext. Finally, this approach still permits agencies to use their expertise to identify the rare instances in which benevolent pretextual explanations may further the public interest more than honest explanations.

Attempting to prevent discriminatory decisions while recognizing agencies' presumption of regularity is in many ways an intractable problem,<sup>128</sup> and I do not want to imply that my approach is a panacea. Though a broader definition of pretext would make this task easier, courts will still struggle to determine when an agency's explanation is pretextual. Similarly, as the facts of *Department of Commerce* demonstrate, awarding extra-record discovery is not a guarantee that there will be evidence of discrimination.<sup>129</sup> Acceptance of my approach would also probably result in agencies spending more resources producing discovery in protracted litigation.

<sup>123</sup> See, e.g., *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 514–15, 524 (1993).

<sup>124</sup> See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (“Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory.”). For instance, consider a case where an employer falsely tells an employee that the employee is being laid off due to budget cuts even though the employee is really being terminated due to incompetence. The employer’s explanation is pretextual, but that does not prove discrimination or even ill-will.

<sup>125</sup> *Supra* Part III.A.

<sup>126</sup> *Supra* note 91.

<sup>127</sup> *Supra* Part III.B.

<sup>128</sup> See Landau, *supra* note 95, at 2149–50 (describing the problem’s difficulty).

<sup>129</sup> *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 530 (S.D.N.Y. 2019) (finding insufficient evidence of discrimination even after awarding extra-record discovery). Of course, it is also entirely possible that there was simply no discriminatory motivation to find in this case.

While I recognize these costs' severity, I do not believe they outweigh the benefits of giving plaintiffs greater ability to produce discovery they need to show discriminatory decisionmaking. The Fifth and Fourteenth Amendments' equal protection guarantees are fundamental promises in our constitutional system that have not yet been realized.<sup>130</sup> Adopting a framework that will better achieve their goals should be regarded as not only a good idea but instead a constitutional commandment.

## V. CONCLUSION

The Supreme Court recently held that agencies violate the APA when they announce entirely pretextual justifications.<sup>131</sup> Respectfully, I argue that this decision was erroneous. The Supreme Court had never before interpreted the APA as conveying a sincerity requirement,<sup>132</sup> and the Court's explanation for why the APA must forbid certain types of deceptive justifications was unpersuasive. Courts can review a pretextual explanation's reasonableness just as well as they can review an honest explanation's reasonableness, and the majority's narrow definition of pretext demonstrates the Court's lack of commitment to its interpretive conclusion. *Department of Commerce*'s narrow definition of pretext is also part of why the case's holding will not be effective at preventing either biased decisionmaking or pretextual explanations. The Supreme Court should therefore limit its future review of agencies' actions to the traditional questions of whether agencies' proffered explanations are sufficient and whether agencies relied on forbidden factors rather than whether agencies believe the reasons they have announced. Though pretext should serve as circumstantial evidence of discriminatory intent that can be sufficient for an award of extra discovery, it should be irrelevant to determining compliance with the APA.

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<sup>130</sup> See *supra* note 95.

<sup>131</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

<sup>132</sup> *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part).