Maryland Law Review

Volume 80 | Issue 4 Article 3

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ABSTRACT

Can federal agencies lie about why they issue a rule—and should they be able to? In the recent case of Department of Commerce v. New York, *Chief Justice John Roberts's opinion for the Court upheld a district court ruling that the Department of Commerce's use of a pretextual explanation for its proposed addition of a citizenship question to the 2020 Census violated the Administrative Procedure Act ("APA"). The four liberal-leaning Justices joined the Chief Justice's decision on pretext, but they also would have found the rulemaking arbitrary and capricious on other grounds. The four conservative-leaning Justices dissented regarding pretext, stopping just short of saying that pretextual explanations are acceptable under the APA.*

The state of jurisprudence on pretext is now uncertain. Department of Commerce *left several questions unanswered, including precisely how courts are to determine whether an explanation is pretextual, how agencies might "fix" a rule remanded back to them on grounds of pretext, and whether the case's unique factual circumstances render the doctrine largely inapplicable to other contexts. The new doctrine presents an unpalatable choice for courts: require seemingly utopian candor from federal agencies tasked with implementing democratically-endorsed agendas, or permit evident falsehoods on the part of political agency heads. From a policy perspective, there are compelling arguments on both sides of the proposition. Allowing agencies to use pretextual explanations increases democratic control over the regulatory process by permitting increased political influence over the supposedly technocratic agencies. However, prohibiting pretextual explanations could improve both the substance and transparency of rulemaking.*

This Article argues that pretext doctrine should be understood as a reaction to the abuse of expertise, as originally technocratic agencies have been increasingly employed to achieve properly legislative political ends. The legal process should proceed as follows: When plaintiffs make an initial showing that the agency may have acted in bad faith, a reviewing court

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should authorize additional discovery, and overturn the agency action if the agency issued a pretextual explanation. The agency then automatically loses the presumption of regularity and the court should impose a higher standard of review if the agency tries to reissue a substantively identical rule. Evidence of pretext can and should rebut the ordinary deference courts show toward agencies. While care should be taken to craft a realistic pretext doctrine, the complexities of pretext review should not dissuade courts from trying to improve agency honesty.

INTRODUCTION

The issue is simply stated: Can agencies lie about why they take actions? If so, in what ways can they lie? Can they offer an explanation that was entirely irrelevant to the process? What if the decisionmaker was aware of the proffered rationale, but it seems very unlikely that it influenced their decision? The Administrative Procedure Act ("APA") allows judicial review of agency actions to ensure a reasoned decision-making process, but it does not explicitly place the motive of anyone involved in the process at issue.[1] Although lower federal courts have obliquely addressed the issue, the Supreme Court recently plunged into the fray in *Department of Commerce v. New York*.[2] The Court held that the Department of Commerce's addition of a citizenship question to the 2020 Census was based on a pretextual rationale, and therefore the agency's action violated the APA.[3]

Before *Department of Commerce*, the answer to "can agencies lie?" was a tacit "yes." While that answer may offend the naive, there has been a clear jurisprudential and policy explanation for it. Just as the law avoids inquiring too deeply into the mental state of jurors to preserve the democratic

1. *See* 5 U.S.C. § 706.
2. 139 S. Ct. 2551 (2019) (*Dep't of Com.*).
3. *Id.* at 2575–76.

legitimacy of jury trials,[4] allowing agencies to act pretextually preserves the President's ability to effect policy change through agencies ostensibly premised on non-democratic expertise and avoids the need for messy and penetrating inquiries into the mental state of agency decisionmakers.[5]

Judging by the outcome of *Department of Commerce*, the utilitarian calculus of agency mendacity appears to have shifted during the Trump administration. Courts historically countenanced agencies acting politically if the agency could produce a somewhat plausible alternative explanation.[6] However, a broad perception of agency ineptitude combined with the specifically implausible agency explanation in *Department of Commerce* left the judiciary in an ugly situation. If agencies can brazenly lie and courts are unwilling to acknowledge it, the public will rationally grow to distrust both federal agencies and the federal judiciary. People might reasonably object that citizens who lie under oath are perjurers, but agencies lying about their actions face no consequences. Open mendacity also presents a challenge to the constitutional balance of power because the agencies hold power granted by Congress based on their supposed expertise—if agencies lie about why they act, on what basis is the grant of power by Congress legitimate?

In a parallel development, with Congress largely unable to pass major legislation, ideologically-driven change in the federal government frequently originates with executive branch agencies. Upon taking office, presidents and their administrations already know what major regulatory actions they want to take; often, they have made specific campaign promises to take those actions.[7] When it comes time to actually issue the rule, the agency must

4. *See, e.g.*, Tanner v. United States, 483 U.S. 107, 115–16, 127 (1987) (declining to overturn a verdict returned by a jury whose members had consumed alcohol, marijuana, and cocaine during the trial and deliberations).

5. *See, e.g.*, United States v. Morgan, 313 U.S. 409, 420–22 (1941) (*Morgan IV*) (holding that an agency decisionmaker in a quasi-judicial setting should not be subject to inquiries into mental processes under most circumstances).

6. *See, e.g.*, Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1366 (D.C. Cir. 1985) (upholding an agency rule because the agency offered an "alternative rationale based on the confluence of independently improbable assumptions" despite the agency's analysis "bear[ing] every evidence of having been inserted as a make-weight by someone who had not the slightest idea what he was talking about").

7. See, for example, the repeal of the Clean Power Plan under President Trump's Environmental Protection Agency, 84 Fed. Reg. 32,520 (July 8, 2019). As a candidate, Donald Trump said at a rally: "I will eliminate all needless and job-killing regulations now on the books. . . . [That] also means scrapping the EPA's so-called Clean Power Plan which the government itself estimates will cost $7.2 billion a year. This Obama-Clinton directive will shut down most, if not all, coal-powered electricity plans in America. Remember what Hillary Clinton said? She wants to shut down the miners, just like she wants to shut down the steel mills." Tessa Berenson, *Read Donald Trump's Speech on Jobs and the Economy*, TIME (Sept. 15, 2016, 12:38 PM EDT), http://time.com/4495507/donald-trump-economy-speech-transcript/ (providing a transcript of Trump's remarks).

explain the reasons for its action.[8] In many cases, the agency offers an explanation that differs from the rationale put forth by the President or his advisors in a campaign setting or in private discussions and correspondence.[9] However, the APA created a judicial review process that requires, among other things, that agencies engage in a reasoned decision-making process.[10] Some courts have interpreted the APA's requirement as also requiring a disclosure of the actual reasons for the decision made.[11] Other courts have been satisfied as long as there existed *some* sufficiently rational explanation, even if other unspoken reasons seemed more central.[12]

The recent case *Department of Commerce v. New York* marked the Supreme Court's first clear foray into the issue of pretext. In a messy 5-4 split, the Court upheld a district court decision that invalidated and remanded the Department of Commerce's addition of a citizenship question to the 2020 Census.[13] Chief Justice John Roberts, joined in the controlling section by the Court's four liberal Justices, declared that the Department had offered a pretextual justification that rendered the underlying action invalid under the APA.[14] However, he stressed that courts should rarely allow discovery outside the administrative record to find the actual justification.[15] By

8. Department of Com. v. New York, 139 S. Ct. 2551, 2569 (2019) ("Our scope of review is 'narrow': we determine only whether the Secretary examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'").

9. Compare the EPA's stated rationale for repealing the Clean Power Plan, U.S. EPA, REGULATORY IMPACT ANALYSIS FOR THE REPEAL OF THE CLEAN POWER PLAN, AND THE EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS, at ES-2 (June 2019), https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf ("[T]he EPA concludes that even if the CPP were implemented, it would not achieve emission reductions beyond those that would be achieved in a business-as-usual projection."), with statements Donald Trump made during his campaign, Donald Trump, *Donald Trump Campaign Rally in Hilton Head, South Carolina*, C-SPAN (Dec. 30, 2015), https://www.c-span.org/video/?402610-1/donald-trump-campaign-rally-hilton-head-south-carolina&start=2138&transcriptQuery=hoax ("Obama's talking about all of this with the global warming and the—a lot of it's a hoax, it's a hoax. I mean, it's a money-making industry, OK? It's a hoax, a lot of it.") (emphasis omitted).

10. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) ("[T]he agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." (internal quotation and citation omitted)).

11. *See, e.g.*, New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 660 (S.D.N.Y. 2019) ("[T]he evidence is clear that Secretary Ross's rationale was pretextual — that is, that the real reason for his decision was something other than the sole reason he put forward in his Memorandum . . . .").

12. *See* Jagers v. Fed. Crop Ins. Corp., 758 F.3d 1179, 1185–86 (10th Cir. 2014) (holding that a subjective desire on the part of an agency for a particular outcome would not invalidate a rulemaking that had an objective explanation).

13. *Dep't of Com.*, 139 S. Ct. 2551, 2575–76 (2019).

14. *Id.*

15. *Id.* at 2574–75.

remanding, he also offered the Department an opportunity to present evidence of an alternative motive.[16] The four liberal Justices, unified in one opinion written by Justice Stephen Breyer, joined the pretext section to make it control the outcome of the case. But they focused much of their attention on arguing that the Department's decision was arbitrary and capricious on other grounds, regardless of whether it was pretextual.[17]

The conservative Justices openly disagreed with the Chief Justice on the facts of the case, but seemed to tacitly agree on doctrine, largely contenting themselves with dramatic declarations about how unprecedented a review for pretext would be.[18] Justice Clarence Thomas, writing for himself, Justice Neil Gorsuch, and Justice Brett Kavanaugh, opined that federal agencies are owed a "presumption of regularity" that normally precludes inquiry into whether their explanation is pretextual.[19] The conservative Justices' opinion consistently hedges, never quite ruling out the possibility of overruling a pretextual decision when it would be appropriate to overturn.[20] Justice Alito wrote separately, arguing that the APA did not apply to the question at hand at all. In dicta, however, he strongly condemned the idea of considering whether an agency rationale is pretextual.[21] He colorfully opined, "[w]hat Bismarck is reputed to have said about laws and sausages comes to mind."[22]

The Supreme Court's disagreement over whether agencies can act based on pretext digs up fundamental debates about the role of executive branch agencies. Are they technocratic instruments designed to enforce Congress's will in areas where Congress lacks technical knowledge or capacity?[23] Or are agencies an extension of the president's will—a sort of exoskeleton that can bring campaign promises to fruition?[24] Is it pointless to try to stamp out pretext when agencies literally do not have a singular intent and can practically never be wholly truthful about their reasons for acting?

I will argue that while there are serious philosophical questions to raise about pretext review, they are surmountable, and the doctrine itself is a

16. *Id.* at 2576.

17. *Id.* at 2584 (Breyer, J., concurring in part and dissenting in part).

18. *See, e.g.*, *id.* at 2576, 2579 (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. . . . Unsurprisingly, then, this Court has never held an agency decision arbitrary and capricious on the ground that its supporting rationale was 'pretextual.'").

19. *Id.* at 2578.

20. *See, e.g.*, *id.* at 2596 (Thomas, J., concurring in part and dissenting in part).

21. *Id.* at 2597–98 (Alito, J., concurring in part and dissenting in part).

22. *Id.* at 2597 (Alito, J., concurring in part and dissenting in part).

23. This is the general theory behind the "intelligible principle" of the nondelegation doctrine, discussed at length most recently in Gundy v. United States, 139 S. Ct. 2116 (2019).

24. This is the general theory behind the "unitary executive" principle most clearly outlined in Morrison v. Olson, 487 U.S. 654 (1988).

necessary corrective to the trend of agency politicization. With eyes open to the practical difficulties of pretext review, courts can and should develop a detailed doctrine to promote truthful explanations from agencies. Part I of this Article reviews the history of how federal courts have dealt with the issue, including recent Supreme Court decisions relating to Trump administration policies.[25] Part II discusses the theoretical and practical difficulties of judicial review of pretextual decision-making.[26] Part III addresses criticisms of pretext review and suggests ways in which the doctrine could evolve to rebut those criticisms.[27]

I. THE JUDICIARY'S RELATIONSHIP WITH PRETEXT

The state of jurisprudence on agency pretext was foggy before the Supreme Court's decision in *Department of Commerce*.[28] Agencies could not openly lie, it seems, but they could avoid most judicial oversight regarding pretext without much effort.[29] The messy split decision in *Department of Commerce* renders the precise state of pretext law unclear, but with a careful reading, we can discern the new rule of pretext. The Roberts pretext doctrine did not overturn precedent, but it essentially invented a new APA requirement largely divorced from the text of the APA itself. In so doing, it is unclear how much pretext doctrine will actually change agency behavior. In their opinions, the conservative Justices seem to fear that pretext review is a powder keg sitting beneath the walls of administrative law,[30] but the specific circumstances of *Department of Commerce* led skeptics to believe Chief Justice Roberts created pretext doctrine to solve one thorny case where the Trump administration was caught acting in an underhanded way.[31] Subsequent case law will determine whether this interpretation is correct, or if pretext doctrine charts a more moderate course.

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25. *See infra* Part I.

26. *See infra* Part II.

27. *See infra* Part III.

28. *See, e.g.*, Tummino v. Torti, 603 F. Supp. 2d 519, 547 (E.D.N.Y. 2009) (holding that FDA actions relating to emergency contraceptives were arbitrary and capricious because they were "not the result of reasoned and good faith agency decision-making", but not clarifying whether the agency's use of a pretextual justification was per se arbitrary and capricious).

29. *See, e.g.*, Ctr. for Auto Safety v. Peck, *supra* note 6 (upholding agency action that the court itself mocked for being uninformed).

30. *See* Department of Commerce v. New York, 139 S.Ct. 2551, 2583-84 (2019) (Thomas, J., dissenting) ("[T]he Court's decision enables partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction" and "could even implicate separation-of-powers concerns insofar as it enables judicial interference with the enforcement of laws.")

31. *See* Nicholas Bronni, *Census Symposium: Unusual Facts Make for Unusual Decisions*, SCOTUSBLOG (June 28, 2019), https://www.scotusblog.com/2019/06/census-symposium-unusual-

A. Pretext's Prologue: The Judiciary's Relationship with Agency Truthfulness

The pre-*Department of Commerce* jurisprudence relating to pretext dealt less with the genuineness of agency explanations than the circumstances in which courts should review evidence outside the administrative record.[32] These cases did not answer the question of whether agencies could give pretextual explanations, but tended to imply answers. One cannot avoid the impression that courts found it simply unseemly to question whether an agency decisionmaker had lied in offering an explanation for the agency's action.[33] Instead of directly questioning agency truthfulness, courts allowed an additional inquiry under some circumstances into whether the agency had included all evidence under consideration in the administrative record.[34] The leading Supreme Court case pushing lower courts to probe further into agency decision-making processes, *Citizens to Preserve Overton Park, Inc. v. Volpe*,[35] did not by any means prohibit pretextual decision-making; it merely held that, absent agency explanation, courts could inquire into the agency's actual rationale.[36] However, while the pre-*Department of Commerce* cases do not lend obvious support for inquiries into the truthfulness of a proffered agency explanation, they keep the door open to such an inquiry just enough to allow an eventual decision like *Department of Commerce*.[37]

B. Early Cases: The Morgan *Doctrine Suggests Pretext is Irrelevant*

Regulation has always engendered political opposition, but courts did not meaningfully address issues relating to the truthfulness of agency rationales until the middle of the twentieth century. Administrative law evolved under political pressure stemming from philosophical attacks on

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facts-make-for-unusual-decisions/ (arguing that *Department of Commerce* will likely have little precedential effect because of the unique circumstances of the case).

32. *See* Travis O. Brandon, *Reforming the Extra-Record Evidence Rule in Arbitrary and Capricious Review of Informal Agency Actions: A New Procedural Approach*, 21 LEWIS & CLARK L. REV. 981, 991–94 (2017).

33. *See, e.g.*, *Morgan IV*, 313 U.S. at 421 ("[B]oth [judges and Cabinet officers charged by Congress with adjudicatory functions] are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.").

34. *See, e.g.*, Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989).

35. 401 U.S. 402 (1971).

36. *Id.* at 420.

37. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419–20 (1971), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977) (holding that, in the absence of formal agency findings, a court could order a review of the actual administrative record considered by the agency head when he made his decision in order to determine whether his actions violated the APA).

regulation and more nuanced demands for adequate process.[38] Early cases applied specific statutory requirements for particular kinds of rules, but generally did not look deeply into the motivations of agency decisionmakers. If a specific statute said that an agency had to consider a certain kind of evidence, and plaintiffs could show the agency had not made such a consideration, then the courts would intervene.[39] Courts generally left open the question of whether motivations mattered.[40]

From the emergence of a major regulatory state in the late nineteenth and early twentieth centuries up to the adoption of the APA in 1946, judicial oversight of agency rulemaking largely related to substance. An anti-regulation judiciary fought administrative power on philosophical and constitutional grounds. Various constitutional provisions and doctrines provided the main check on abusive agency rulemaking, most notably the nondelegation doctrine in *Panama Refining Co. v. Ryan*.[41] In *Panama Refining*, the Supreme Court held that Congress could not give the President legislative powers without clear guidance on how to use them.[42] Eventually, the constitutional attacks on regulation provoked political counterattacks against the Supreme Court by President Franklin Delano Roosevelt, leading to the Supreme Court stepping down from its substantive attack on the power to regulate in *West Coast Hotel Co. v. Parrish*.[43] Once President Roosevelt successfully pressured the Supreme Court to abandon constitutional doctrines against administrative rulemaking, resistance to regulatory expansion shifted to procedural grounds.[44]

Against a complicated factual background, the 1941 case *United States v. Morgan*[45] addressed the issue of pretext, though it framed the issue in terms of bias.[46] The Secretary of Agriculture had, pursuant to statute, set a maximum rate for services rendered by private agencies doing business at the

38. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905) (invalidating a regulation on baker's hours on grounds that it violated a common law right to freedom of contract protected in the due process clause); Morgan v. United States, 304 U.S. 1, 22 (1938) (*Morgan II*) (holding that a hearing held by the Secretary of Agriculture was procedurally defective).

39. *See Morgan II*, 304 U.S. at 22 (holding that a hearing held by the Secretary of Agriculture was procedurally defective).

40. *See, e.g.*, *Morgan IV*, 313 U.S. 409 (1941) (holding that there is a presumption of validity in the motive for an agency decision which can only be overcome by exceptional evidence).

41. 293 U.S. 388, 428 (1935).

42. *Id.*

43. 300 U.S. 379 (1937).

44. John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine"*, 73 OKLA. L. REV. 229 (2021).

45. *Morgan IV*, 313 U.S. 409 (1941).

46. *Id.* at 420–22.

Kansas City Stockyards.[47] The statute required the Secretary to provide a hearing for the agencies, and the Supreme Court had held in two previous cases that the Secretary: (a) had to hold a hearing; and (b) could not satisfy the procedural requirements by simply reading the agencies' testimonies.[48] In a third case, the Court held that the Secretary did not have to return excess payments made by the agencies until the Department of Agriculture held a new hearing to determine what the reasonable payment rate should have been.[49] The fourth case, the most relevant to the present discussion, came after the hearing that was the subject of the third case.[50] There, the Secretary sent a letter to the *New York Times* criticizing the Court's ruling in the second case, as well as the idea of returning money to the agencies.[51] The agencies argued that the letter showed the Secretary's bias because he wrote it before deciding the retroactive rates that would determine the agency's repayment obligations.[52] The Secretary formally denied harboring any bias.[53]

The Supreme Court held that the Secretary did not have to deny his bias because Congress had entrusted him to act as a judge.[54] According to the Court:

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.[55]

This case's assumption that agency decisionmakers, like judges, should not have their inner mental processes probed developed into a subset of the deliberative process privilege.[56] While we all may suspect that judges, like everyone else, can harbor bias, the *Morgan* doctrine argues that public trust in the legal system requires a presumption that judges will act impartially.[57]

47. *Id.* at 413.

48. Morgan v. United States (*Morgan I*), 298 U.S. 468, 477–79 (1936); *Morgan II*, 304 U.S. 1, 13–14 (1938).

49. United States v. Morgan (*Morgan III*), 307 U.S. 183, 197–98 (1939).

50. *Morgan IV*, 313 U.S. at 414.

51. *Id.* at 420.

52. *Id.* at 420.

53. *Id.* at 421.

54. *Id.* at 422.

55. *Id.* at 421.

56. *See generally* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989).

57. *See* McKay Coppins, *Is Brett Kavanaugh Out for Revenge?*, ATLANTIC (May 13, 2021), https://www.theatlantic.com/magazine/archive/2021/06/brett-kavanaugh-supreme-court/618717/

As developed through federal common law, the *Morgan* doctrine, stated succinctly, is: "current high-ranking government officials should not be subject to the taking of depositions absent extraordinary circumstances."[58] Most courts justified the doctrine as a way to avoid wasting the time of agency decisionmakers.[59] However, if there is a "showing of grounds to suspect bad faith or improper behavior not apparent from the administrative record," then such a deposition could be warranted.[60] Weighing the strength of evidence showing bad faith against concern for the time of agency decisionmakers suggests that the more senior the decisionmaker, the stronger the showing of bad faith or improper behavior must be in order to justify deposition.[61]

What sort of "bad faith or improper behavior" could justify deposing a high-ranking government official and, more specifically, examining his or her mental processes? Few cases address the issue at all, much less discuss it at length. One successful showing led a court to order deposition of the Comptroller of the Currency on the allegation that he had issued a branch certificate to a particular bank because of a "personal relationship."[62] Another successful case involved a prima facie showing that a specific law had been violated by the official claiming protection under *Morgan*.[63]

The *Morgan* doctrine can be read to either support or denigrate the idea of investigating pretext. On one hand, the doctrine creates a strong presumption against obtaining evidence about agency decisionmakers' mental processes. If one cannot obtain evidence about those processes, it is difficult to prove that the actual rationale differs from the agency's stated rationale. On the other hand, what is pretext if not a form of "bad faith"? If a plaintiff makes a prima facie showing that the agency is lying about the reason the decisionmaker made his decision, would that not be the sort of bad faith that would enable deeper investigation into the mental process?

There is an unspoken assumption here that if bad faith is shown and subsequent investigation finds strong bias, then that would provide grounds for invalidating the agency action in question. However, it is not clear from the terms of *Morgan* what the grounds for invalidating the action would have been. The specific statute in question in *Morgan* did not require an absence

(explaining that the Court itself is "invested in maintaining the perception that [its] work is done beyond the reach of rank politics").

58. United States v. Sensient Colors, Inc., 649 F. Supp. 2d 309, 316 (D.N.J. 2009).

59. Church of Scientology of Bos. v. I.R.S., 138 F.R.D. 9, 12 (D. Mass. 1990).

60. Cmty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983).

61. *Id.*

62. Union Sav. Bank of Patchogue, N.Y. v. Saxon, 209 F. Supp. 319, 319–320 (D.D.C. 1962).

63. Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200, 208 (4th Cir. 1964).

of bias. The Supreme Court later found that constitutional due process requires some level of impartiality, but that is a far cry from forbidding pretextual decision-making.[64] It is also noteworthy that *Morgan* involved a quasi-judicial agency activity, not a run-of-the-mill policy decision.[65] At the time of *Morgan*, courts were still a long way off from requiring impartiality as to policy, even if *Morgan* implied impartiality might be required in a tribunal-like setting.

C. The Administrative Procedure Act's Silence on Pretext

As courts moved away from constitutional arguments to curtail regulations, Congress increasingly took a more active role. If courts would not prevent overregulation on constitutional grounds, Congress could at least moderate executive power through process requirements.[66] Consequently, lawmakers in Congress wary of overregulation began pressing for set processes that would restrain the executive branch.[67] Five years after *Morgan*, Congress's work culminated in the passage of the APA in 1946.[68]

The APA statute does not discuss pretext in its text, but one can see hints at the concept. The relevant portion of the APA sounds simple on its face: a court reviewing an agency action shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[69] The legislative history from 1946 reveals very little discussion of the precise meaning of "arbitrary, capricious, [or] an abuse of discretion," let alone contemplation over whether it would include pretext.[70] In the House report accompanying passage of the APA, the Judiciary Committee stated: "It will . . . be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used."[71] Here, the Judiciary

64. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

65. *Morgan IV*, 313 U.S. at 422.

66. *See* Roni Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 209–11 (2016).

67. *Id.*

68. Pub. L. 79-404, 60 Stat. 237 (1946).

69. 5 U.S.C. § 706(2)(A) (2018).

70. *Id.*; *see generally, e.g.*, H.R. REP. NO. 1980 (1946) (House report contains no discussion of specific meaning of arbitrary and capricious); *Administrative Procedure: Hearings Before the H. Comm. on the Judiciary*, 79th Cong. (1945) (House Judiciary Committee hearings on the Administrative Procedure Act contain no discussion of the meaning of arbitrary and capricious); *Administrative Procedure Act: Proceedings in the H.R. & the S.*, 79th Cong. (1946) (House and Senate committee hearings on the APA contain no discussion of the meaning of arbitrary and capricious).

71. H.R. REP. NO. 1980, at 278.

Committee left open the possibility of "arbitrary" or "capricious" encompassing pretext as a form of "indirection."[72]

It should not be at all surprising that "arbitrary" and "capricious" encapsulate many different concepts. One meaning of "arbitrary" is "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will."[73] Another is "marked by or resulting from the unrestrained and often tyrannical exercise of power."[74] Yet another is "based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something."[75] There are three inconsistent ideas to define what "arbitrary" could mean: (1) random; (2) unreasonable; or (3) unilateral to the point of tyranny. "[C]apricious" also fails to help. The primary definition is "governed or characterized by caprice,"[76] which in turn is defined as "a sudden, impulsive, and seemingly unmotivated notion or action" or "a sudden usually unpredictable condition, change, or series of changes."[77] From those definitions, I take two shades of meaning relevant for a discussion of pretext: (1) a lack of clear reason; and (2) unpredictability. The very definition of "pretext" includes the concept that it is used "to cloak the real intention or state of affairs".[78] Offering a false explanation inherently makes the true explanation less clear.

Despite these arguments for connecting pretext review to arbitrary and capricious review, some courts that have held that the APA prohibits pretextual decision-making do not consistently point to any particular provision of the APA prohibiting pretext when they overturn agency actions.[79] But others have specified that pretext violates the prohibition against arbitrary and capricious actions.[80] A reasonable reader, coming to the APA for the first time, might think that a decision made on pretextual grounds is arbitrary. A simple analogy illuminates that interpretation—police

72. *Id.*

73. *Arbitrary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/arbitrary (last visited Feb. 25, 2021).

74. *Id.*

75. *Id.*

76. *Capricious*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/capricious (last visited Feb. 25, 2021).

77. *Caprice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/caprice (last visited Feb. 25, 2021).

78. *Pretext*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/caprice (last visited May 19, 2021).

79. *See, e.g.*, N.Y. v. Dep't of Com., New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 660, 647, 660 (S.D.N.Y. 2019) (discussing arbitrary and capricious review separately from pretext review).

80. *See, e.g.*, *Ctr. for Biological Diversity v. Kempthorne*, No. CV 07-0038-PHX-MHM, 2008 WL 659822, at *11 (D. Ariz. Mar. 6, 2008).

enforcement of speed limits. Virtually no one rigorously adheres to speed limits, so when police do strictly enforce the limits, it certainly seems pretextual. Indeed, Martin Luther King Jr. was once arrested for driving 30 miles per hour in a 25 mile per hour zone.[81] Given the historical context, we can be certain this was a pretextual arrest illustrating "arbitrary" power to punish whoever was disfavored by the police. The Supreme Court has not embraced that interpretation, however, and so pretext's connection to the APA remains undefined.

D. Overton Park and Its Progeny

Before *Department of Commerce*, the Supreme Court case that most directly dealt with pretext was *Overton Park*. It is consistently cited for the proposition that there can be an inquiry into the mental processes of agency decisionmakers upon a "strong showing of bad faith or improper behavior."[82] The ruling sticks out like a sore thumb in the administrative law canon against intruding into agency decision-making processes—so much so that Justice Thomas's partial concurrence in *Department of Commerce* hinted at his desire to overturn *Overton Park*.[83] While subsequent cases at lower levels narrowed *Overton Park* or stressed its limitations, it remained available as precedent for *Department of Commerce* nearly a half century later.[84]

While the facts of *Overton Park* make the case seem straightforward, under the surface, they present questions of agency motivation that dominate the discussion of pretext. The bare facts are as follows: The Secretary of Transportation decided that there was no feasible alternative to building a highway through Overton Park in Memphis, Tennessee.[85] There were no formal findings to support his decision; nothing by which a court could judge

81. *King Arrested for Speeding; MIA Holds Seven Mass Meetings*, STAN. UNIV.: MARTIN LUTHER KING, JR. RSCH. & EDUC. INST. (Jan. 26, 1956), https://kinginstitute.stanford.edu/encyclopedia/king-arrested-speeding-mia-holds-seven-mass-meetings.

82. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). *See, e.g.*, Kirsch v. Dep't of Consumer and Bus. Servs., 278 P.3d 104, 111 (2012).

83. Justice Thomas said in a footnote: "Insofar as *Overton Park* authorizes an exception to review on the administrative record, it has been criticized as having 'no textual grounding in the APA' and as 'created by the Court, without citation or explanation, to facilitate Article III review.' . . . The legitimacy and scope of the exception . . . is an important question that may warrant future consideration." Dep't of Com. v. New York, 139 S. Ct. 2551, 2579 n.5 (2019) (Thomas, J., concurring in part and dissenting in part) (internal citations omitted).

84. *See, e.g.*, Kunaknana v. Clark, 742 F.2d 1145, 1149 (9th Cir. 1984) (distinguishing the facts of the case from *Overton Park*'s general rule against post hoc rationalizations); Voyageurs Nat. Park Ass'n v. Norton, 381 F.3d 759, 766 (8th Cir. 2004) (stressing that extra-record evidence should not be allowed unless it is "the only way there can be effective judicial review).

85. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 406–08 (1971), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

whether the action was arbitrary or capricious.[86] The Department supplied affidavits *after the fact* stating a justification.[87] The Court held that the Department had to produce a record justifying its decision and, if it did not, litigants could depose the Secretary to establish what the actual decision-making process was.[88] Beneath the surface, state, local, and federal officials were trying to address a variety of political issues, including sociological factors surrounding the dislocation of people around the park.[89] Those sensitive factors most likely played a role in the Department's lack of an administrative record—those various considerations would (a) look bad if discussed on the record; and (b) force the federal government to weigh in on sensitive questions it would rather leave up to local and state officials.[90]

Overton Park was, to put it bluntly, a strange case, and its resolution raised more questions than answers regarding agency pretext. The Court ultimately remanded the case to the district court to decide whether a deposition was necessary.[91] The controlling opinion explicitly stated that post hoc rationalizations had "traditionally been found to be an inadequate basis for review."[92] However, a mere three paragraphs later, the Court clarified: "It may be that the Secretary can prepare formal findings including the information required by DOT Order 5610.1 that will provide an adequate explanation for his action. Such an explanation will, to some extent, be a '*post hoc* rationalization' and thus must be viewed critically."[93] One can reasonably infer from the second statement that a pretextual explanation could be acceptable, though it must be "viewed critically."[94] A frustrated reader in 2019 can be forgiven for wondering what "viewed critically" means in the context of post hoc rationalizations. Does the rationalization simply have to be extra compelling? By the very nature of a post hoc rationalization, it cannot be a *genuine* description of the thought process that went into the decision itself, so presumably there is no heightened standard for truthfulness of the post hoc rationalization as compared to something in the administrative record.

86. *Id.* at 408.

87. *Id.* at 409.

88. *Id.* at 420.

89. *See* Peter L. Strauss, *Administrative Law Stories: Citizens to Preserve Overton Park v. Volpe* 4, 30 (Columbia Law School Public Law & Legal Theory Working Paper Group Paper No. 05-85; Columbia Law & Econ. Working Paper No. 267, 2004), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2350&context=faculty_scholarship.

90. *Id.* at 28.

91. *Overton Park*, 401 U.S. at 420–21.

92. *Overton Park*, 401 U.S. at 419.

93. *Id.* at 420.

94. *Id.*

Lower courts frequently cite *Overton Park*, but generally have not expanded on its seeming disregard for pretextual explanations.[95] When upholding the action, courts cited *Overton Park* for the proposition that courts owe agencies a "presumption of regularity," a phrase that Justice Thomas's opinion would use in his *Department of Commerce* dissent.[96] Courts finding that agencies acted arbitrarily or capriciously tended to cite *Overton Park* for the proposition that courts could order augmentation of the administrative record, even absent evidence of bad faith on the part of the agency.[97] Some lower courts found opportunities to narrow *Overton Park*, some going so far as to implicitly approve of pretext.[98] The most explicit of these, *South Terminal Corp. v. Environmental Protection Agency*,[99] a First Circuit case from 1974, held that "[p]ossibly barring fraud and other extreme circumstances, the mental process by which the Administrator [of the EPA] reached his decision, if it is explained by the record, is not a proper subject for discovery."[100] So long as an agency produced a rationale, a court would not examine the decisionmaker's mental processes—in other words, pretext was acceptable. The D.C. Circuit endorsed that narrow reading of *Overton Park* in 1979.[101]

It is worth briefly noting that when courts describe pretext review as examining an agency decisionmaker's "mental processes", they are dramatically overstating the level of intrusion needed to evaluate whether a decision was pretextual. This framing makes it seem as if a court must know the inside of the decisionmaker's mind, a seemingly futile undertaking. Of course, one can actually detect pretext much more easily by looking at external indicia that a decision has already been made, or that the agency's stated justification was not its truthful rationale. For example, if documents emerge revealing that the decisionmaker directed subordinates to find a legally acceptable explanation, one need not be a psychologist to understand that the decisionmaker is seeking a pretext. Presumably, judges choose to

95. *See, e.g.*, City of Coll. Station v. U.S. Dep't of Agric., 395 F. Supp. 2d 495, 500 (S.D. Tex. 2005) (citing *Overton Park* for the proposition that courts should not accept post hoc rationalizations and should avoid evaluating the mental processes of decisionmakers).

96. *See, e.g.*, Movement Against Destruction v. Trainor, 400 F. Supp. 533, 546–47 (D. Md. 1975) (explaining that agency actors' actions "are entitled to a presumption of regularity").

97. *See, e.g.*, Sierra Club v. Zinke, No. 17-CV-07187-WHO, 2018 WL 3126401, at *3 (N.D. Cal. June 26, 2018).

98. *See, e.g.*, South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 675 (1st Cir. 1974).

99. 504 F.2d 646 (1st Cir. 1974).

100. *Id.* at 675.

101. National Courier Ass'n v. Board of Governors of the Federal Reserve System, 516 F.2d 1229, 2142 (D.C. Cir. 1975) ("Unless he has left no other record of the reasons for his decision, the mental processes of an administrator may not be probed.")

use the phrase "mental processes" as a rhetorical choice to underscore how difficult they would find something like pretext review to be.

A few lower courts took *Overton Park* as a signal to go much further in probing agency decisionmaking processes. The clearest example here is the D.C. Circuit in 1971, in another case involving then-Secretary of Transportation Volpe. In *D.C. Federation of Civic Associations v. Volpe*,[102] an influential member of the House of Representatives threatened to withhold funding for the District of Columbia rapid transit system unless Secretary Volpe approved a bridge construction project.[103] The Secretary approved the bridge, and several citizens associations and individual property owners in the District of Columbia sued, claiming that Secretary Volpe violated the APA by acting on political grounds rather than reasoned decision-making.[104] Secretary Volpe testified that his decision was not based solely on political pressures.[105] The D.C. Circuit nevertheless held that Secretary Volpe's decision was arbitrary and capricious because political reasoning "usurp[ed]" the legitimate considerations the statute required the Secretary to consider.[106] This represents one of the most extreme versions of pretext doctrine, whereby "the Secretary must reach his decision strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations."[107] That phrasing seems to indicate that the existence of a political motive violates the APA even if the agency had and offered a legitimate explanation. However, the facts of the case were that the Department had not made formal findings or a credible administrative record.[108] It is thus more accurate to describe the holding as forbidding political considerations from taking the place of a technocratic rationale based on statutorily mandated factors, even if the court's dicta went further.

E. Between Overton Park and Department of Commerce

Between *Overton Park* and *Department of Commerce*, district and circuit courts occasionally heard cases presenting issues that came very close to questions of pretext in the context of the APA. In particular, the Tenth Circuit case *Woods Petroleum Corp. v. U.S. Dep't of Interior*[109] squarely held

102. 459 F.2d 1231 (D.C. Cir. 1971).
103. *Id.* at 1236.
104. *Id.*
105. *Id.* at 1246.
106. *Id.* at 1246, 1248.
107. *Id.* at 1248.
108. *Id.* at 1237–38.
109. 18 F.3d 854 (10th Cir. 1994), *adhered to on reh'g sub nom.* Woods Petroleum Corp. v. Dep't of Interior, 47 F.3d 1032 (10th Cir. 1995).

that when a pretextual rationale was the "sole reason" for an agency action, it was "arbitrary and capricious conduct" and violated the APA.[110] On its face, the case directly answers the pretext question, but the details muddy the waters somewhat. Without diving too deeply into the facts of the case, it is worth noting that the Bureau of Indian Affairs issued guidelines dictating specific factors the Secretary of the Interior should consider before taking the action he did.[111] Because the Secretary did not consider those factors, the court, following earlier precedent, stated that the "presumption of . . . regularity" did not apply.[112] There is thus a case to be made that *Woods Petroleum* was not addressing a generic agency pretextual rationale, but a situation where the court was already according heightened scrutiny to the agency action.[113] That distinction may explain why the cases and briefs citing *Woods Petroleum* are generally limited to either specific law relating to cases involving federal land leases or Trump-era cases desperately searching for a semblance of precedent to cling to.[114]

Though few cases directly addressed whether an agency could use a pretextual explanation, some cases seemed to hint at the logic Justice Roberts would later employ in *Department of Commerce*. The most compelling of these is the 2008 Arizona district court case *Center for Biological Diversity v. Kempthorne*.[115] In that case, plaintiffs sued the U.S. Fish and Wildlife Service ("FWS") over its decision not to define the bald eagle population of the Sonoran Desert as a distinct population segment warranting protection under the Endangered Species Act.[116] The plaintiffs obtained emails in which FWS scientists said that their political superiors had "reached [a] policy call & we need to support [it]," and that their "[a]nswer has to be that its [sic] not a [distinct population segment] . . . [w]e have marching orders."[117] If that were not a clear enough indication of pretext, another email simply stated, "[w]e've been given an answer now we need to find an analysis that works . . . . Need to fit argument in as defensible a fashion as we can."[118] Unfortunately for the development of pretext doctrine, the plaintiffs did their job a little too well, and the court decided that there was "no information in

110. *Id.* at 859–60.

111. *Id.* at 858.

112. *Id.* at 859.

113. *Id.*

114. As of May 6, 2021, Westlaw lists five cases citing to *Woods Petroleum*. Two are Trump-era, two relate to land disputes with the Interior Department, and one is the Supreme Court's ruling denying certiorari in the *Woods Petroleum* litigation.

115. No. CV 07-0038-PHX-MHM, 2008 WL 659822 (D. Ariz. Mar. 6, 2008).

116. *Id.* at *1.

117. *Id.* at *11 (alterations in original).

118. *Id.* (alterations in original).

the FWS's files to refute" their arguments.[119] The court concluded that it could have "no confidence in the objectivity of the agency's decision-making process," but did not clearly specify whether the pretextual nature of the agency's rationale or the lack of an adequate explanation was the basis for that judgment.[120] The outcome of the case suggested a path for pretext review: If the agency's process is clearly aimed at generating a pretext, then it is inherently suspect and therefore arbitrary. However, the absence of viable evidence supporting the Agency's decision meant that the rule was arbitrary and capricious regardless of whether the process was pretextual, robbing this case of its potential doctrinal importance.

Other cases did not explicitly address pretext, but did restrict the role of politics in the agency decision-making process. In *Tummino v. Torti*,[121] for example, the Eastern District of New York remanded a rule back to the FDA after plaintiffs showed that the Agency had issued the rule to secure the Senate's confirmation of a nominee to become the Commissioner of the FDA.[122] The court held that political pressure "was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute."[123] That pressure meant that the FDA's decision "[w]as [n]ot the [r]esult of [g]ood [f]aith and [r]easoned [a]gency [d]ecision-[m]aking."[124] This decision is of limited utility because not every APA decision has statutorily mandated factors to consider, but the case's underlying reasoning is still important. When political impetus reaches a certain level, it causes the agency process to become inherently arbitrary and capricious. Pretext is then merely a symptom of an arbitrary and capricious process, and one would ordinarily expect that the reason for pretext is that the true underlying rationale is political.

Courts have also haltingly come to understand that deference to agencies can be conditional on the agencies acting in an aboveboard manner.[125] The most succinct summary of this point can be found in an unpublished 1999 district court opinion:

> If courts are to defer to agency expertise as instructed by *Marsh* then they must have confidence in the objectivity of the agency's decision making process. On the other hand, if the objectivity of

119. *Id.* at *12.

120. *Id.*

121. 603 F. Supp. 2d 519 (E.D.N.Y. 2009), *amended sub nom.* Tummino v. Hamburg, No. 05-CV-366 ERK VVP, 2013 WL 865851 (E.D.N.Y. Mar. 6, 2013).

122. *Id.* at 546.

123. *Id.* at 544.

124. *Id.*

125. *See, e.g.*, Am. Wildlands & Native Ecosystems Council v. U.S. Forest Serv., CV 97-160-M-DWM, 1999 U.S. Dist. LEXIS 22243, at *9–10 (D. Mont. Apr. 14, 1999).

> agency decision making is questionable then the rationale for deference to the agency is undermined and courts must then bring a more rigorous standard of review to bear. Otherwise there would be no check on the ability of an agency to circumvent environmental laws by simply "going-through-the-motions[.]"[126]

This point has no grounding in existing jurisprudence, but the concept of *conditional* deference to agency expertise arguably lies at the heart of pretext review.[127] There is little reason to defer to agency expertise if factors unrelated to expertise dominated the decision-making process.

F. Department of Commerce v. New York: Dawn of Pretext Review

Department of Commerce created, for the first time, a rule of pretext.[128] However, the factual predicate of the case and the political furor surrounding it was uniquely suited to a finding of pretext.[129] It is not yet clear if the specific set of facts created a rule ultimately applicable in only this case, or if pretext review will become an important new doctrine. The case revolved around Secretary of Commerce Wilbur Ross's decision to add a question about citizenship to the 2020 Census.[130] Chief Justice Roberts's opinion and the extreme facts found by the Southern District of New York at the trial court level make this case more the skeleton of a rule of pretext than a full-fledged doctrine.[131] Later sections of this Article will examine how the rule should be fleshed out. For now, *Department of Commerce* shows that while tough cases can make bad law, easy cases can make uncertain law.

1. The Roberts Rule of Pretext

To understand Roberts's rule, it is worth briefly examining the district court's ruling, which Roberts decidedly did not adopt. The district court's doctrinal rationale was simple: It ruled that Secretary Ross's decision was pretextual because "the rationale he provided for his decision was not his real rationale."[132] Judge Furman, the U.S. District Judge who presided over the case, asserted repeatedly that the Department had a duty to offer its actual

126. Am. Wildlands & Native Ecosystems Council v. U.S. Forest Serv., CV 97-160-M-DWM, 1999 U.S. Dist. LEXIS 22243, at *9–10 (D. Mont. Apr. 14, 1999).

127. *See id.*

128. Dep't of Com. v. New York, 139 S.Ct. 2551, 2574 (2019).

129. *See* Sarah Paoletti, *The Supreme Court Holds the Line on Truth over Pretext*, REGUL. REV. (July 15, 2019), https://www.theregreview.org/2019/07/15/paoletti-supreme-court-holds-line-truth-pretext/ (describing the high political stakes of the decennial Census).

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

131. New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 530–47 (S.D.N.Y. 2019).

132. *Id.* at 635.

rationale.[133] It is clear from reading the district court opinion that Judge Furman felt agencies must disclose the actual reason for their decision, not simply a rational basis that did not reflect the true decision-making process.[134] Judge Furman clarified that "a court cannot sustain agency action founded on a pretextual or sham justification that conceals the true 'basis' for the decision."[135] Adopting the district court's rule would have required a substantial revision to the existing APA judicial review process. Recall that the Supreme Court has repeatedly held that courts should not overturn agency action simply because the agency did not disclose all of its reasons for acting.[136] Requiring agencies to actually issue the truthful reason would upend decades of caselaw.[137]

The Roberts opinion is best understood as stepping back from the major changes the district court's rule would have wrought. Roberts, writing for himself and the four liberal justices who joined the pretext section of his analysis, found a way to rule that the sort of pretext involved in this case violated the APA, but established a doctrine vague enough that it could apply to almost no cases or almost all cases.[138] The opinion does not outline a clear rule, but one can be discerned from the Chief Justice's recitation of "settled" propositions.[139] The Roberts rule on pretext consists of a number of simple statements which appear facially contradictory, but which can be reconciled if considered with sufficient nuance. These statements are:

> (1) Courts may not reject an agency's stated rationale as arbitrary and capricious because the agency also had "unstated reasons" for acting.[140]

133. *See, e.g., id.* ("Similarly, if a plaintiff is able to prove that the agency's stated reasons for acting were not its 'real' reasons, then the plaintiff has proved that the agency's decision was not 'reasonably explained' as the APA requires it to be.").

134. *Id.* at 660 ("[T]he evidence is clear that Secretary Ross's rationale was pretextual — that is, that the real reason for his decision was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts. As the Court noted above, judicial review of agency action 'requires that the grounds upon which the . . . agency acted be clearly disclosed.'").

135. *Id.*

136. Dep't of Com. v. New York, 139 S.Ct. 2551, 2573 (2019).

137. *See, e.g.*, Jagers v. Federal Crop Insurance Corp., 758 F.3d 1179, 1185-86 (10th Cir. 2014) (holding that a subjective desire to adopt a rule does not invalidate a result if objective evidence supported the agency's conclusion).

138. Dep't of Com. v. New York, 139 S.Ct. 2551, 2576 (2019) ("[A]gencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.").

139. *Id.* at 2573–74.

140. *Id.*

(2) Agencies must "disclose the basis" for their decisions.[141]

(3) "[A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations" or other administration priorities.[142]

(4) Courts should only examine the actual "'mental processes of administrative decisionmakers'" if there has been a "'strong showing of bad faith or improper behavior.'"[143]

Statements (1) and (2) seem to be the most plainly at odds, but are not when one considers the distinction between a *basis* and a *reason*. The basis for an agency decision is the legal support on which the action is established.[144] The reason for the action is the cause that led to the effect of the rule's adoption.

Once one understands the distinction between "basis" and "reason," the *Department of Commerce* rule on pretext becomes much more intelligible. A court may examine "the mental processes of [the agency] decisionmakers" if there is "a strong showing of bad faith or improper behavior."[145] Once that showing has been made, the court can order discovery about the agency decisionmaker's process.[146] If the agency's stated reason played an "insignificant" role in the decision, it is a pretextual action, and therefore in violation of the APA.

While that rule may be doctrinally complicated, it is at least intelligible. The district court's rule was far simpler, but much further reaching—if the rationale is not truthful, the agency's action is invalid. Under that rule, if the stated rationale plays *some* role in the decision-making process, but is not the "main" reason for the action, the action can be overturned.

It is worth noting that the Roberts opinion does not spell this rule out. Indeed, the opinion includes dicta that seems to promise a stricter rule than it actually endorses. For example, Roberts wrote: "The reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would

141. *Id.*

142. *Id*.

143. *Id.* at 2753–74 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)).

144. *See Basis*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/basis (last visited May 20, 2021).

145. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

146. *Id.*

defeat the purpose of the enterprise."[147] The overall impression of this quote is that agencies have to be "genuine" in explaining their decisions, but Roberts made clear earlier that courts should not overturn an agency action if the agency has additional "unstated" reasons for acting.[148] One could read this dicta narrowly and keep it consistent with the overall rule by interpreting "genuine justifications" as "justifications that played a role in the decision."[149] That interpretation is, at best, strained and misleading, and at worst a politician-like attempt to say something true only in a very narrow sense. For example, a supervisor might fire an employee who refused his romantic advances upon finding out she also had a bad performance evaluation. The evaluation is relevant—the supervisor figured it would serve as an adequate justification—but it is hard to call it a "genuine" justification. There are other instances like this where Roberts's opinion never quite contradicts itself, but seems to overpromise the level of forthrightness to which courts will hold agencies.[150]

2. Easy Facts on Pretext, Arguable Facts on Substance

The district court's findings of fact made it relatively easy for the Roberts pretext doctrine to invalidate the Commerce Department's actions, even under an ill-defined rule. By contrast, declaring the citizenship question arbitrary and capricious on substance would have been more ideologically challenging and required a greater degree of trust in expertise than Chief Justice Roberts was comfortable with.[151]

Distilled down, the district court found that the Department had conspired to produce a fake justification, then testified to Congress that the fake justification was the only reason for the action. After producing an administrative record for its decision, the Department filed a supplemental memorandum in court to change incorrect assertions in the administrative record.[152] That supplemental memorandum made it easy to justify additional discovery into the actual reasons for the decision.[153] The subsequent additional discovery produced a torrent of embarrassing emails and other

147. *Id.* at 2575–76.

148. *Id.* at 2573, 2575.

149. *Id.* at 2575.

150. *See, e.g.*, *id.* at 2575 ("[T]he decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA," suggesting that the proffered explanation must adequately explain the action taken.).

151. *See* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 7 (2019) (describing the Roberts Court's distrust of administrative power).

152. New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 547 (S.D.N.Y. 2019).

153. *Id.* at 548.

documents showing the conscious development of a pretextual rationale, even when the case was pending before the Supreme Court.[154]

In the district court's telling, Secretary of Commerce Wilbur Ross announced on March 26, 2018 that he would add a citizenship question to the 2020 Census in response to a December 12, 2017 request from the Department of Justice for better citizenship data to help it enforce Section 2 of the Voting Rights Act ("VRA") of 1965.[155] The Secretary "testified before Congress, under oath, that DOJ's request was the 'sole[]' reason for his decision."[156] Then, in a "Supplemental Memorandum," the Secretary said he began considering "whether to reinstate a citizenship question" soon after his appointment.[157] He also said that he and his staff already thought the citizenship question could be warranted and "inquired whether the Department of Justice . . . would support, *and if so would request*, inclusion of a citizenship question."[158]

This supplemental memorandum led the court to authorize further discovery, which found that the Secretary and his aides had gone to "extraordinary lengths" to "generate a request for the question."[159] Ross had reportedly requested a citizenship question as early as March 10, 2017 and then sent a follow up email in May asking why nothing had been done.[160] One of the Secretary's aides "set out to find a 'legal rationale'" regardless of whether it was the actual reason for acting.[161] Those efforts included advising and ghostwriting for DOJ personnel completely separate from enforcement of the VRA.[162] After Attorney General Jeff Sessions directed DOJ personnel to send the VRA request letter, he then prohibited DOJ personnel from meeting with Census Bureau personnel to discuss alternative ways to obtain citizenship data other than a citizenship question on the Census.[163]

All of the above points to the VRA explanation being pretextual, but does not necessarily prove that the VRA explanation would otherwise be arbitrary or capricious, which was why Chief Justice Roberts had to reach the pretext question in the first place. The liberal Justices pointed to additional

154. *See* Hansi Lo Wang, *Emails Connect Census Official with GOP Strategist on Citizenship Question*, NPR (June 15, 2019, 4:16 AM ET), https://www.npr.org/2019/06/15/732669380/emails-connect-census-official-with-gop-strategist-on-citizenship-question.

155. *Dep't of Com.*, 351 F. Supp. 3d at 515.

156. *Id.* at 664.

157. *Id.* at 547–48.

158. *Id.* at 548 (alterations in original).

159. *Id.* at 663.

160. *Id.* at 549–50.

161. *Id.* at 551.

162. *Id.* at 555.

163. *Id.* at 556, 557.

evidence suggesting the Census Bureau itself argued against adding a citizenship question, which would increase costs significantly and yield worse data.[164] Meanwhile, DOJ's request for data to enforce the VRA could be met in other ways.[165] However, Chief Justice Roberts believed that the Secretary could have still preferred the citizenship question to enforce the VRA because it would have reduced the number of people for whom the Census Bureau would have to estimate citizenship due to a lack of other available public records.[166] The Census Bureau claimed it could develop a model to estimate the citizenship of that population accurately, but Chief Justice Roberts pointed out that it did not yet have such a model.[167] Thus, in Chief Justice Roberts's view, the Secretary could have decided a model might not work, and thus a citizenship question was warranted.[168]

One can sense from the opinion how uncomfortable Chief Justice Roberts was with the idea of declaring a citizenship question arbitrary and capricious. To do so would seem to flout common sense—how can a court find it totally unreasonable to ask a citizenship question when many other countries do so, the United States itself did so for many years, and the democratically-accountable administration has clearly made immigration enforcement an issue of paramount importance?[169] Against all that is the thin reed that experts at the Census Bureau claimed they could do the stated job of VRA enforcement better with a statistical model, something the average citizen can barely wrap their mind around.[170] Even if the experts are right, as seems quite likely from the facts, a Republican-appointed judge unfamiliar with statistics siding with agency experts over traditional common sense is unlikely to the point of futility.

The easy facts on pretext and difficult facts on substance made this an ideal case for pretext doctrine. In its supplemental memorandum, the Department admitted that it had not told the whole truth about the development of its rationale, a seemingly obvious showing of bad faith in the original rulemaking.[171] With that bad faith showing, the district court could inquire into the Department's actual decision-making process. The timeline of events in this case showed that the VRA rationale came well after the

164. Dep't of Com. v. New York, 139 S.Ct. 2551, 2590–91 (2019).

165. *Id.*

166. *Id.* at 2569–70.

167. *Id.* at 2570.

168. *Id.* at 2570–71.

169. *See* Dep't of Com. v. New York, 139 S.Ct. 2551, 2596 (2019) (Alito, J., concurring in part and dissenting in part).

170. *Id.* at 2570.

171. New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 547–48 (S.D.N.Y. 2019).

Secretary had effectively made up his mind.[172] The sole stated reason thus did not appear to play any role in the Department's decision. Ergo, under the Roberts doctrine, the rationale was pretextual, and the rulemaking was invalid.

3. The Thomas Opinion

Setting rhetoric aside, Justice Thomas, joined by Justices Gorsuch and Kavanaugh, disagreed on two factual points made in the Roberts opinion: (1) that there had been an adequate showing of bad faith to justify an inquiry into the Secretary's decision-making process;[173] and (2) that the Department's stated rationale played no role in the actual decision-making.[174] While Justice Alito wrote a separate opinion, it is of little consequence to the question of pretext, so I will focus my analysis on the Thomas opinion.[175]

On the first point, Justice Thomas could not quite bring himself to say that there was *no* bad faith in the Commerce Department's process.[176] The evidence presented was simply not a "strong showing."[177] What would constitute a strong showing is never explained. The single most important sentence in understanding why Justice Thomas found no bad faith is a bit of grumpy dicta:

> Echoing the din of suspicion and distrust that seems to typify modern discourse, the Court declares the Secretary's memorandum "pretextual" because, "viewing the evidence as a whole," his explanation that including a citizenship question on the census would help enforce the Voting Rights Act (VRA) "seems to have been contrived."[178]

The *cri de coeur* here expresses a simple point: If people were more trusting, as they should be, the Court would not have made such an erroneous ruling. Justice Thomas *trusted* Secretary Ross sufficiently that he believed the evidence presented in this case should not have triggered an examination of pretext.

172. *Id.*

173. *Dep't of Com.*, 139 S.Ct at 2580.

174. *Id.* at 2581.

175. Justice Alito, writing only for himself, seems to have filed a separate opinion for two reasons: (1) to emphasize the policy arguments for asking a citizenship question; and (2) to argue that the APA should not apply to this particular agency action because the statute explicitly empowers the Secretary of Commerce to decide which questions to include on the Census. *Id.* at 2597–98 (Alito, J., concurring in part and dissenting in part). Neither point is particularly important for purposes of this article.

176. *See id.* at 2580 (Thomas, J., concurring in part and dissenting in part) ("This evidence fails to make a strong showing of bad faith or improper behavior.").

177. *Id.*

178. *Id.* at 2576.

To Justice Thomas, the evidence that the Secretary already decided to add a citizenship question could be explained away with three rebuttals: (1) Ross's emails showed an inclination to add a citizenship question rather than a decision; (2) Ross subsequently changed agency policy to use additional methods of data collection; and (3) the presumption of regularity ordinarily owed to agencies requires resolving any uncertainty in favor of the agencies.[179] Unless the presumption of regularity means judges can never review for pretext—and Thomas remains barely agnostic on that point—Justice Thomas's disagreements with Chief Justice Roberts are factual, not doctrinal.

Justice Thomas's argument that there was no evidence that the Department's stated rationale played no role at all in the actual decision-making is mystifying if taken practically. However, it makes more sense if viewed philosophically. From a practical standpoint, the district court found that the VRA rationale played no role at all in the actual decision-making.[180] The Court reviewed that factual determination under the "clearly erroneous" standard.[181] Justice Thomas's opinion cited no evidence that VRA enforcement *did* factor into the Secretary's decision, so it is difficult to see where the district court was "clearly erroneous."

From a more philosophical perspective, deciding whether some factor played a role in a decision depends on when exactly the decision is made. If the decision is made when the Secretary signs off on the final printing of the rule, then the pretextual rationale will always play a significant role—the Secretary probably would not have signed the rule unless he thought it could survive legal scrutiny, so he did *consider* the rationale as part of his decision. This is the essence of Justice Thomas's point that Secretary Ross changed the plan slightly late in the process, after the VRA rationale was supplied to him.[182] In that way, the VRA rationale affected the final decision to print the rule. On the other hand, if the "decision" is made when the Secretary was *irrevocably* committed to taking the action, that is truly an impossible moment to determine. This is a problem we will examine more fully later in the Article, but for now it suffices to observe that an agency cannot truly commit to an action in any way other than issuing the final rule.[183]

Justice Thomas's opinion attacked the idea of pretext doctrine mainly through tone rather than clear disagreement. At several points, he used rhetoric suggesting that he thought courts should not examine pretext, but he

179. *Id.* at 2581–83.

180. New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 660 (S.D.N.Y. 2019).

181. *Dep't of Com.,* 139 S.Ct at 2565.

182. *Id.* at 2582.

183. *See infra* Part I.F.4.

never quite said they should not. He noted: "For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale."[184] He criticized the Court's "unprecedented departure from our deferential review of discretionary agency decisions."[185] With consequentialist reasoning of the sort he ordinarily criticizes, he worried that the decision "would transform administrative law" and lead to "an endless morass of discovery and policy disputes not contemplated by the [APA]."[186] As for actual discussion of pretext doctrine, Justice Thomas said: "Under 'settled propositions of administrative law' . . . pretext is virtually never an appropriate or relevant inquiry for a reviewing court to undertake."[187] In terms of literal meaning, "virtually never" is synonymous with "sometimes, but rarely." Therefore, Justice Thomas tacitly agreed with Chief Justice Roberts's pretext doctrine by restating it with different emphasis.

4. Loose End: When is an Agency Decision "Made" for Purposes of Pretext?

The more one examines Chief Justice Roberts's opinion, the harder it is to explain how the Department's action could be pretextual but not arbitrary and capricious. How could a decision based on no legally sufficient factor *not* be arbitrary and capricious? The heart of the apparent discrepancy seems to be inconsistency over what specific decision is being reviewed in either pretext doctrine or arbitrary and capricious review. Chief Justice Roberts concluded that the Department's VRA explanation was pretextual because the email evidence indicated that the Secretary had effectively already made up his mind and was merely seeking cover for it.[188] In that interpretation of the facts, the decision to adopt the Census question was made at a point when the VRA explanation did not even exist. Presumably, *that* decision was made without consideration of relevant facts because it seemed to predate the Department's consideration of VRA enforcement.[189] The Court has established that failure to consider relevant facts is arbitrary and capricious.[190] However, Chief Justice Roberts's opinion held that adding the Census question was not arbitrary and capricious because the VRA

184. *Id.* at 2576.
185. *Id.*
186. *Id.*
187. *Id.* at 2579.
188. *Dep't of Com.*, 139 S.Ct at 2575.
189. *See id.*
190. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

explanation was sufficient.[191] That analysis suggests that the relevant decision was the Department's publishing of the final rule in the *Federal Register*. Justice Thomas also used the Department's publishing of the final rule as the moment of decision to argue that the VRA explanation was not pretextual.[192]

There is not necessarily a clear right or wrong answer for which decision is more important. However, evaluating pretext based on the final decision to publish would defeat the purpose of pretext review. There is some value in choosing the final decision to sign off on and publish the rule—it is a clearly identifiable moment, and it is the only one that actually triggers regulatory consequences.[193] However, that moment is not particularly relevant in determining actual motives. Indeed, it would be difficult for an agency to ever run afoul of a rule against pretext if the only measuring moment was the final filing—the agency would have its pretext in hand when it issues the rule. Arguably, an agency head who openly orders a subordinate to concoct a fake explanation prior to the actual issuance of the order would be acceptable because he at least considered the pretextual explanation prior to the "decision." Pretext doctrine only really makes logical sense if we think the *real* decision was made before the pretext was devised.

It could be that arbitrary and capricious review and pretext review are focused on different things and thus different decision points should be evaluated. If one conceives of arbitrary and capricious review as observing the formalities of rulemaking and pretext review as getting at harder to perceive process fouls, it would make sense for the former to focus on the final decision and the latter to survey the process as a whole. Regardless of the decision point chosen, future cases will have to make clear which is being evaluated.

5. Loose End: What is the Statutory Basis for Pretext Review?

A first-semester law student reading Chief Justice Roberts's opinion would struggle to answer a simple question: What specific provision of law is Chief Justice Roberts alleging that the Department of Commerce violated?[194] As discussed above, the APA does not explicitly cover "pretext,"

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

192. *Id.* at 2580.

193. *See* "A Guide to the Rulemaking Process," Office of the Federal Register, at 11, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

194. Indeed, the *Harvard Law Review*'s case summary asserts confidently that the basis of the decision was *not* the arbitrary and capricious standard, though the Roberts opinion never clearly states that. *See Census Act—Review of Administrative Action—Judicial Review of Pretext*—Department of Commerce v. New York, 133 HARV. L. REV. 372 (2019), https://harvardlawreview.org/2019/11/department-of-commerce-v-new-york/.

and seemingly the only logical provision that would apply is judicial review of agency actions that are "arbitrary, capricious, [or] an abuse of discretion."[195] The district court in *Department of Commerce*, however, found that the decision to add a citizenship question rather than collect data through "more effective and less costly means" was arbitrary and capricious, and *independently* found that the decision was pretextual.[196] The court organized various arbitrary and capricious violations in one section of the decision, and fielded the pretext argument in a separate section.[197] The pretext section cites no specific statutory basis for ruling the citizenship question invalid, but does cite Supreme Court cases from 1943 and 1962 for the proposition that "judicial review of agency action 'requires that the grounds upon which the . . . agency acted be clearly disclosed.'"[198] Chief Justice Roberts's opinion held that the Secretary's decision was "not arbitrary and capricious," but upheld the district court's ruling on pretext.[199] Justice Thomas's dissent noted that the Supreme Court has "never held an agency decision arbitrary and capricious on the ground that its supporting rationale was 'pretextual.'"[200]

This loose end may ultimately prove more interesting for its political implications than for its effect on cases. Why does it matter what specific part of the APA was violated if the ultimate outcome remains the same? As with a murder mystery, we can attempt to answer this question by examining motives. Why would the district court separate pretext from arbitrary and capricious review? One possible reason is that courts endlessly restate how deferential arbitrary and capricious review is.[201] If "pretext" is not a subset of arbitrary and capricious review, then the agency does not necessarily warrant the same deference in the pretext analysis. Setting pretext apart allows the Court to uphold the pretext holding without flouting the high deference normally paid to agencies. The Court also then has a middle ground between finding the action arbitrary and capricious and upholding it altogether.

Chief Justice Roberts faced a different set of incentives for separating pretext and arbitrary and capricious review. As described above, this case

195. 5 U.S.C. § 706(2)(A); *see supra* notes 69–77 and accompanying text.

196. New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 635 (S.D.N.Y. 2019).

197. *Id.* at 514.

198. *Id.* at 660 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962)).

199. Dep't of Com. v. New York, 139 S. Ct. 2551, 2572–74 (2019).

200. *Id.* at 2579.

201. The Chief Justice himself characterized it as "deferential," and Justice Thomas used precisely the same word, citing previous cases. *Id.* at 2575 (majority opinion); *id.* at 2576 (Thomas, J., concurring in part and dissenting in part).

not only presented a bad set of facts for the Department, but also a tough set of facts for a Republican appointee. The Chief Justice may have wanted to reverse the agency action in this case because of how egregious it was, without forbidding a citizenship question in the future. Making a ruling based on pretext also limits the precedential impact of this case. Arbitrary and capricious review, after all, applies to virtually every administrative law case. The relatively newfangled pretext review only triggers where there is a showing of bad faith, something that has more often been an issue during the Trump administration.[202] This theory is essentially what Justice Thomas was suggesting when he said the Court was applying "an administration-specific standard."[203]

6. Loose End: How Can an Agency Fix a Rule Struck Down for Pretext?

While the rule on pretext emerging from *Department of Commerce* is not prohibitively difficult to discern, at least three messy problems are evident in the ruling: (1) what is the ultimate remedy for a pretextual agency action; (2) realistically, how can we ever be certain that a consideration played *no* role in agency decision-making; and (3) does the Roberts pretext doctrine provide the *best* practicable rule? The latter two questions are complicated enough that they will be addressed at length later in the Article,[204] but the first is an immediate practical issue in the *Department of Commerce* case.

In *Department of Commerce*, the Court ultimately remanded the case back to the Department for further development of the administrative record, which comports with the ordinary result when plaintiffs win an APA arbitrary and capricious claim against an agency.[205] There are exceptions to the general rule, however. If a court finds that the record does not support an agency's decision, but the record is "fully developed," there is no point in remanding.[206] This raises the pertinent issue for pretext analysis: What is the point in remanding? In a somewhat similar 2009 district court case, the court justified remanding to the agency for further consideration because there was a new agency head who could, presumably, clear up the issue of pretext.[207]

202. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018).

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

204. *See* Part II.A.

205. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

206. *See Sierra Club v. EPA*, 346 F.3d 955, 963 (9th Cir. 2003) (internal citation omitted).

207. Tummino v. Torti, 603 F. Supp. 2d 519, 549 (E.D.N.Y. 2009), *amended sub nom. Tummino v. Hamburg*, No. 05-CV-366 ERK VVP, 2013 WL 865851 (E.D.N.Y. Mar. 6, 2013). The court also cited the expertise of the agency in question (the FDA) as a reason to remand, though that factor obviously did not prevent the court from remanding in the first place. *Id.*

It is easier to recite the current status of the citizenship question litigation than to explain what the agency can or cannot do now. The controlling opinion for *Department of Commerce* affirmed the ruling of the district court on pretext. The federal government conceded at the district court level that if the decision was ruled pretextual, it "would be a basis for" relief under the APA.[208] The rule has been remanded back to the Department to provide a non-pretextual rationale.[209] Practically speaking, it is too late to add a citizenship question to the 2020 Census, so the issue is moot. However, if there is to be a logical doctrine of pretext, a court will eventually have to decide what, if anything, an agency can do to cure a rule overturned under pretext doctrine.

6.1. Option 1: Agency Can Reissue the Rule Immediately with a Minimal Additional Paper Trail

Chief Justice Roberts and the four other conservative justices have already declared the Department's stated rationale acceptable except for the pretext problem.[210] However, pretext is only examined if there has been a previous showing of bad faith in the rulemaking process. The Department could, in theory, put all the discovery from the first rulemaking into a new administrative record, add an explanation that it has now thoroughly considered the matter, cite a few pieces of new evidence, and add a citizenship question again. It would be difficult to see where the showing of bad faith would come from in that case. In essence, the Secretary would be declaring: "This explanation was originally pretextual, but I have considered it thoroughly, and for this new rulemaking, it is the true, accurate reason why I am taking this action." President Trump could have even replaced Wilbur Ross with a new Secretary to thoroughly disinfect the original pretext problem.

Recall that in *Department of Commerce*'s lower court proceedings, Judge Furman stated that "there is no basis in the record to conclude that Secretary Ross 'actually believe[d]' the rationale he put forward, . . . and a solid basis to conclude that he did not."[211] On a hypothetical second go-around, the Secretary could simply state repeatedly that he viewed VRA enforcement as crucial. He could ask for detailed memos on the subject of VRA enforcement. He could engage in theater sufficiently elaborate such that any judge would be forced to admit there is at least *some* basis to conclude the Secretary actually believed the VRA enforcement rationale.

208. *New York v. Dep't of Com.*, 351 F. Supp. 3d 502, 635 (S.D.N.Y. 2019).

209. *Id.* at 673.

210. *Dep't of Com.*, 139 S. Ct. at 2571, 2576–77, 2596,

211. *Id.* at 664 (internal citation omitted).

While this might seem a cynical response to the pretext ruling, there is no obvious reason it would not suffice. Given that five justices have approved the stated rationale for the citizenship question, it seems obvious that VRA enforcement played *some* role in the agency's final publication of the citizenship question. If a new rulemaking begins with the VRA enforcement rationale already in hand, the explanation is not obviously pretextual under the Roberts doctrine. This option also mirrors what happens to most rules remanded to agencies for arbitrariness: Agencies usually end up achieving the same goal after remand; they simply have to go through the regulatory process again and remedy whatever procedural defect led to the remand in the first instance.[212]

6.2. Option 2: Agency Can Reissue the Rule Eventually if it Cites a Different Explanation

Courts could be strict and decide that a rule based on a pretextual rationale cannot be re-issued soon after being rejected. Applied to the *Department of Commerce* case, the pretext doctrine might have prohibited the Trump Commerce Department from simply using the same voting rights explanation for a citizenship question on the Census, but a future presidency (or agency head) not tainted by bad-faith process could use that explanation. While this precise scenario has not arisen, in at least one case, a court found the replacement of an agency head a relevant step in curing a bad-faith process.[213]

While it would be difficult to enforce strict boundaries on such a doctrine, it would also not be difficult for a hypothetical future Trump Commerce Department to avoid the doctrine's teeth. The Thomas and Alito opinions both hint that a national security explanation for a citizenship question would pass muster.[214] With a minimal amount of competence, the Department could ask the FBI or CIA for data on crimes or espionage activities by foreigners in the United States, note that citizenship data could be useful in more efficiently distributing funding for anti-espionage law enforcement or preventing crimes by non-citizens, and reissue the rule.

Like Option 1, Option 2 raises questions about the purpose of pretext review. Effectively, it would be a penalty of time, not substance. The agencies would have to jump through some paperwork hoops to reach a

212. William S. Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?* 60 (Draft Paper, 1998), https://ssrn.com/abstract=140798.

213. *See* Tummino v. Torti, 603 F. Supp. 2d 519, 549 (E.D.N.Y. 2009).

214. Dep't of Com. v. New York, 139 S. Ct. 2551, 2581, 2596 (2019) ("No one disputes that it is important to know how many inhabitants of this country are citizens.").

predetermined conclusion later than they would have if the courts had not reviewed for pretext in the first place.

6.3. Option 3: The Agency Cannot Reissue the Rule

The Roberts pretext doctrine, as applied by lower courts, could prevent an agency from issuing a substantively identical rule that has been previously disqualified on grounds of pretext, even if it offers a different rationale the second time around.[215] This is obviously the most draconian possible outcome, but consider that the other two options discussed essentially lead to the agency putting the same rule in place after conducting a paperwork exercise. A competent agency would be able to issue a new administrative record and avoid the bad faith indicia the district court uncovered in the case of the citizenship question. One could argue that the only way to give the doctrine teeth is to prevent agencies from easily remedying the flaws identified in court.

The problem with this approach is that it explicitly allows courts to overturn good, substantively justified policies simply because the agency acted in an underhanded way at some point in the past. The courts would be depriving the country at-large of the benefits of whatever policy is being considered. Of course, if agencies had resorted to pretextual rationales for the rule, it is more likely that the rule itself would not bring tremendous benefits—if there were obvious benefits, why not just cite those as the rationale in the first place? Nevertheless, to the extent an agency rule would be justified but for pretext, there is likely some cost to judicial intervention.[216]

Lower courts have not yet made significant progress in sketching out a rule of pretext, but it seems likely that various lower courts would choose all of the possible options.[217] However, it will take quite some time before a clear split emerges simply because of the cumbersome rulemaking and judicial review process. In *Department of Commerce*, the Court's ruling came over two years after the Secretary started asking his staff to come up with some rationale for a citizenship question that would survive judicial

215. This would be similar to the consequences of an agency action being overturned by the Congressional Review Act. The agency is barred from re-issuing the same rule. *See* 5 U.S.C. §§801–8.

216. *See Dep't of Com. v. New York*, 139 S. Ct. at 2571 (expounding on the downside of substituting a court's judgment for an agency's).

217. Courts addressing pretext in cases since 2019 have mostly done so in the course of authorizing additional discovery, not in actually disposing of a case. *See, e.g.*, Sweet v. Devos, No. C 19-03674 WHA, 2020 WL 6149690, at *10 (N.D. Cal. Oct. 19, 2020) (authorizing expedited discovery); *see also* Cook Cty., Illinois v. Wolf, 461 F. Supp. 3d 779, 795 (N.D. Ill. 2020), *motion to certify appeal denied*, No. 19 C 6334, 2020 WL 3975466 (N.D. Ill. July 14, 2020) (authorizing additional discovery because of the suspicion of pretext).

scrutiny.[218] Putting aside the fact that the proximity of the 2020 Census made new action virtually impossible, if another agency facing a similar decision on pretext had to come up with a new rule, it might take another two years to reach a final litigation outcome. Even if that agency takes less time for its rulemaking the second time around, a new president might come into office and scuttle the effort anyway.[219]

II. WHAT PRETEXT ACTUALLY MEANS AND WHY IT MATTERS

It may seem strange that one can discuss the case law around pretext in agency rulemaking without fully understanding what "pretext" would mean in this context or why anyone should worry about it in the first place. As we have seen, the concept is new enough that its contours have not been defined in any meaningful way by the courts.[220] Now that the Supreme Court has ruled that pretext *can* violate the APA, litigants will map the borders of pretext in subsequent cases. By thoroughly examining the meaning now, we can foresee where courts may eventually draw those borders. The single largest, seemingly insurmountable, philosophical problem with agency pretext is that an entire organization rarely has a unified reason for its action. The President, the agency head, the political staff, and the career staff at an agency all may have different reasons for acting, creating complicated mixtures of legitimate and illegitimate rationales.[221] Some agency practices that seem like obvious examples of pretextual reasoning are more pernicious than others. Ultimately, my proposed solution is to find impermissible pretext only where there is strong evidence that the impetus for change came from the higher echelons of agency authority for reasons unrelated to the legally acceptable explanation supplied from lower political and career staff.

A. What is "Pretext" for Agencies?

Establishing exactly what we mean by "pretext" for agencies is far more complicated than what it means for an individual. The word "pretext" is loaded with connotations, but simply denotes "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of

218. *Dep't of Com. V. New York*, 139 S. Ct. at 2574 (describing the Secretary's efforts as beginning when he entered office, which was in January 2017).

219. President Biden has already withdrawn several Trump-era rules. *See, e.g.*, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, Federal Register, 86 FR 24303 (May 6, 2021), https://www.federalregister.gov/documents/2021/05/06/2021-09518/independent-contractor-status-under-the-fair-labor-standards-act-flsa-withdrawal.

220. *See supra* Part I.

221. *See* Dep't of Com. v. New York, 139 S. Ct. at 2573 (stating that agency policymaking decisions can be affected by political considerations or presidential interest without violating the APA).

affairs."[222] Black's Law Dictionary offers: "A false or weak reason or motive advanced to hide the actual or strong reason or motive."[223] When applied to an individual, a "pretext" is merely a specific kind of lie, specifically a lie about the reason the individual took an action. The concept of pretext presupposes that individuals can meaningfully discern their "true" reason or reasons for taking an action. While some scientists might contest that assertion,[224] many areas of criminal and civil law have already established doctrines for discerning an individual's reasons for acting.[225] An agency writ large does not have the same unified will as an individual. While agencies do offer a clear stated rationale for rules, it is not clear how one would identify a "true" rationale.

The following five scenarios illustrate the difficulty in discerning pretext in agency actions:

Scenario 1. A President wants to damage a political rival who owns a coal mining company. He directs the Environmental Protection Agency ("EPA"), in explicit terms, to create a rule that would hurt the rival's company. The EPA Administrator comes up with an idea for a rule and directs her staff to produce a cost-benefit analysis. The analysis shows the rule would be beneficial. The Administrator decides to issue the rule. EPA's various *Federal Record* publications make no mention of the presidential directive.

Scenario 1 is the most straightforward example imaginable, but even this scenario has room for ambiguity. The "action" that must be explained is the issuance of the rule. By common understanding and dictionary definition, the EPA's explanation for why it took the action is a pretext—it does not disclose the true motivation. Intuitively, we know the *true* reason is that the President ordered the EPA to issue the rule, and the Administrator knew she was taking the action for illicit reasons. There is a nagging unknown in this scenario, however: the cost-benefit analysis gave a potentially independent reason to issue the rule. It is indeterminate whether the president's order by itself caused the Administrator to issue the rule, or whether the subsequent analysis caused the Administrator to issue the rule. We might surmise that the analysis was influenced by a desire to obtain a certain outcome, a situation

222. *Pretext*, Miriam Webster Online (last visited May 20, 2021), https://www.merriam-webster.com/dictionary/pretext.

223. *Pretext*, BLACK'S LAW DICTIONARY (11th ed. 2019).

224. *See, e.g.*, Kerri Smith, *Brain Makes Decisions Before You Even Know It*, NATURE (Apr. 11, 2008), https://www.nature.com/news/2008/080411/full/news.2008.751.html.

225. To take one obvious example, the difference between first and second-degree murder in many jurisdictions hinges on the offender's motive. *See, e.g.*, VA. CODE ANN. § 18.2-32 (2020) (defining first degree murder as "willful, deliberate, and premeditated killing" and second degree murder as all other kinds of murder).

that true scientists work painstakingly to avoid. However, we do not know at the outset if EPA would have ultimately taken the same action if the analysis had come out differently.

It is not clear under the Roberts doctrine announced in *Department of Commerce* whether this would constitute an example of pretext that would violate the APA.[226] First, a litigant would need to find evidence of bad faith by the EPA. Note that the EPA did not necessarily show bad faith here—the President did when he ordered the EPA to hurt his rival's company. The Administrator simply came up with an idea and had an analysis drawn up. Assuming that a court would find bad faith in the process, the court could authorize investigation of the Administrator's mental state. If the court found that the Administrator felt justified in issuing the rule based on the cost-benefit analysis, it would not matter under the Roberts doctrine whether she *also* acted because the President told her to.

Scenario 2. The Secretary of Homeland Security feels a deep moral obligation to help victims of a hurricane in another country. She assigns her staff to devise a rationale for why granting victims of a hurricane Temporary Protected Status in the United States is in the national interest.[227] Her staff comes up with a national security justification that plays no role in the Secretary's decision. When asked by Congress why she offered the aid, she offers only the national security explanation.

Scenario 2 is essentially a benign pretext, which raises the question of whether a pretext must be nefarious to warrant scrutiny. On one hand, excusing this scenario's explanation as benign raises thorny moral and methodological problems. Immigration opponents frequently rail against Temporary Protected Status;[228] to them, the action would not seem benign at all. Allowing judges to decide for themselves what motivations are benign is, at best, anti-democratic. At worst, it gives a judge's moral intuitions the force of law. On the other hand, punishing benign pretexts raises a fair question: What motivations are *not*, at some level, pretextual? The scenario stipulates that the head of the Agency feels a moral compulsion to help victims of natural disasters. But what if she developed that moral intuition by seeing through years of experience that the benefits of aid outweigh the costs? After all, if morality is a coarsely calibrated cost-benefit analysis, why

226. *See supra* Part I.F.1.

227. Temporary Protected Status protects a foreign national from removal from the United States and makes them eligible for employment authorization. *See Temporary Protected Status*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/humanitarian/temporary-protected-status (last accessed May 20, 2021).

228. *See, e.g.*, Andrew R. Arthur, *'Temporary' Protected Status: The Biggest Misnomer in Immigration*, CTR. FOR IMMIGR. STUD. (October 31, 2017), https://cis.org/Arthur/Temporary-Protected-Status-Biggest-Misnomer-Immigration.

should it be disqualifying if her moral hunch is subsequently confirmed by a more rigorous analysis? One can resolve this dilemma only by a complicated hierarchy of pretexts, where venal pretexts like personal gain receive closer scrutiny than seemingly benign pretexts.

This is one of the hardest scenarios to evaluate under the Roberts doctrine from *Department of Commerce*. Could there truly be a showing of *bad faith* in a case like this, which would be the prerequisite to even entertaining a pretext allegation? I could not find any case like this, most likely because few people would sue an agency for acting on a humanitarian impulse. However, if offering deliberately misleading explanations counts as "bad faith," then such an action could be invalidated on pretext grounds.

Scenario 3. An opportunistic politician secured her party's nomination for President by promising to do something about climate change despite having no personal feelings one way or the other on the subject. Once elected President, she directs the EPA to write a rule limiting carbon emissions. The EPA writes an exhaustive justification for the action and conducts a thorough cost-benefit analysis and citing hundreds of authoritative scientific studies suggesting the action is necessary to avert catastrophe.

This scenario blurs the lines of personal and public motivations. At one level, the opportunistic politician's motivation is venal and personal—she wants to maintain power by issuing the rule. However, maintaining an alliance of disparate interest groups is essentially the function of a politician in a democratic system. Functionally, there is no difference between a principled politician whose views happen to align with enough interest groups to constitute a majority and a pandering politician who manages to satisfy enough interest groups to constitute a majority. The EPA's explanation is obviously pretextual in the sense that neutral rationale did not originally motivate the action, but it is not at all clear whether we should consider this a "benign" pretext.

The role of "bad faith" in the Roberts doctrine and its predecessors plays a key role here. If bad faith is simply misstating the rationale for why something happened, then this action could be reviewed on pretext grounds. If judges are allowed to decide for themselves that certain motives do not constitute bad faith, then pretext would not enter into the picture. Of course, that outcome would open up another can of worms—what motivations do not count as "bad faith"? Are judges allowed to be more sympathetic to a cause that experts generally champion—like action on climate change—than base, populist actions like a citizenship question on the Census?

Scenario 4. The President appoints a popular figure with little expertise to serve as Secretary of the Interior. Career employees at the Department of the Interior inform the Secretary that they have conducted careful research

and think the Department should disallow the use of jet skis on waterways within parks owned by the federal government. The Secretary has no opinion on the subject, but issues the suggested order because he does not want to antagonize the career employees.

Like Scenario 3, this set of facts lays bare difficult ambiguities with motivations, but in a subtle manner. An initial question emerges: Whose motivation actually matters for determining whether an explanation was pretextual? The Secretary is the actual decisionmaker, and there are several equally true ways to describe his motivation: (a) he issued the rule for venal personal gain because he wanted to curry favor with the career employees; (b) he relied on the expert opinion of career employees in exactly the technocratic way one would theoretically want; and (c) he acted randomly in that he did not particularly care what the rule was, just whether the career employees liked it. If we look to the agency writ large instead of the actual decisionmaker, we might be able to fashion a coherent explanation. The Department's motive as an organization was the ostensibly neutral, expert opinion of the career employees—their opinion drove the Secretary. Note that this way of looking at the problem only works if we view the Department's employees as faceless automatons. If the record revealed that the expert career employees had their own motivations for their recommendations, the entire pretext discussion would begin anew, but even further removed from the actual decisionmaker.

The Roberts doctrine does not offer a clear answer on this scenario. First, there is the same question raised in previous scenarios as to whether there could be a showing of "bad faith." Assuming there is such a showing, the second question is whether the public rationale played a role in the decision, and the answer is a resounding "it depends." Did the Secretary consider the rationale, or did he merely consider the fact that his career staff had recommended it? Is there some requirement that the decisionmaker have an understanding of the *substance* of the rationale rather than simply the identity of the people who recommended it? This may seem like a contrived scenario, but agency decisionmakers make many decisions based on the advice of career staff for the obvious reason that the career staff know far more about the nuts-and-bolts of the issue area.

Scenario 5. The President appoints a conscientious scientist to serve as Administrator of the EPA. News reports indicate a chemical in a lawn care product called RoundDown may cause cancer. The Administrator tells his underlings to conduct a detailed study on whether the chemical should be banned. He fully intends to follow their recommendation. On the day their report is due, the President tweets, "I never liked RoundDown because the company that makes it once sued my company. I am hereby ordering EPA

to ban RoundDown. Take that, losers!" Right after the administrator reads the tweet, he opens the report and learns that the EPA staff recommended banning RoundDown.

This is the true nightmare scenario philosophically. If the action proceeds, it is very difficult for anyone to credibly believe agency justifications. Legally speaking, the Administrator issues the rules, not the President, so theoretically his opinion is not relevant.[229] But that is a very thin reed in the real world, where the President can remove almost all officers in the federal government for virtually any reason whatsoever. If he does not want to remove an officer, he can practically eliminate their authority through public shaming or controlling access to resources.[230] Indeed, the unitary executive theory suggests that all inferior officers of the government must be exercising the President's will. If the EPA Administrator is not implementing the President's will, where did the Administrator derive the power to execute the law?

It seems obvious that there is bad faith occurring in this scenario, but it would depend on how courts view the role of the President in administrative decision-making. In theory, the EPA Administrator does not have to follow the President's orders, but the President can also simply remove the Administrator whenever he wants. Perhaps it would be more accurate to say that the President *strongly recommends* that the EPA take an action. If we focus on why the Administrator takes action, there is presumably a record in this scenario indicating that the Administrator is acting, at least in part, based on the legal rationale. Under the Roberts doctrine, if the legal rationale plays at least *some* role in the decision-making process, then the rule stands even if there are other unspoken reasons.[231] However, one could imagine a more difficult scenario where the EPA is in the middle of evaluating the facts when the President orders the EPA to take action.

To summarize, these scenarios present a number of conceptual difficulties with "pretext." First, what decision are we seeking the true explanation for—the decision to embark upon making a rule, or the decision to issue a final rule? Second, should we consider an explanation pretextual if there is *any* alternative consideration not disclosed by the agency, even a seemingly moral one? Third, does any hidden rationale constitute bad faith, including a decisionmaker's potential apathy or deference to career

229. This is why the discussion in *Department of Commerce* focused on the Secretary's motivations, not the President's.

230. *See, e.g.*, Dan Mangan and Kevin Breuninger, *Trump Tweets: 'Disgraceful' that Sessions Kicked Surveillance Probe to Obama Appointee*, CNBC (Feb. 28, 2018) (noting the President's public criticism of his Attorney General).

231. *See supra* Part I.F.1.

employees? Finally, can a true, acceptable explanation be rendered pretextual through the interjection of a political actor such as the President or an agency head?

A common law of "pretext" could emerge where judges answer at least some of these questions. Perhaps agency action will be considered pretextual only if the actual *dominant* motivation is *unacceptably* unrelated to the legal motivation. With that many layers of imprecise verbiage, however, finding pretext might simply indicate that a judge strongly disagrees with the underlying motivation.

III. THE ARGUMENT AGAINST PRETEXT DOCTRINE

As the above scenarios illustrate, there are major philosophical ambiguities in pretext doctrine. That may explain why administrative law has been around for about a century without ever addressing the idea of pretext. Given that courts did not feel a need for it until now, we must critically examine why the doctrine is necessary. Some scholars argue that the Trump administration was uniquely incompetent or villainous.[232] The dissenters in *Department of Commerce* seemed to indicate that there should be no pretext doctrine, at least not one imposed by the courts alone.[233] Even the four liberal justices who signed on to Chief Justice Roberts's pretext analysis indicated they would have held that the citizenship question was arbitrary and capricious regardless of whether it was pretextual.[234] One could thus read *Department of Commerce* as showing that only one Justice thought a pretext doctrine was necessary to decide the outcome of the case.

A. If There's an Otherwise Adequate Legal Rationale, Why Should We Care About the Actual Rationale?

Those who think federal courts should not examine agency rationales for pretext can muster a strong, simple argument. At best, pretext doctrine punishes the country at-large for the thought crimes of the agencies. At worst, the doctrine is so vague as to invite reversal of virtually any rule a court disagrees with. The following premises are largely uncontroversial:

Agencies have expertise in their issue area.

232. *See, e.g.*, Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1669–86 (2019).

233. Dep't of Com. v. New York, 139 S.Ct 2551, 2579 (2019) ("We have never before found *Overton Park*'s exception satisfied, much less invalidated an agency action based on 'pretext.'").

234. *Id.* at 2584.

> Agencies have democratic legitimacy stemming from their connection to an elected President and confirmation of high officials by an elected Senate.
>
> Courts do not have expertise in agency issue areas.
>
> An agency rule that is not arbitrary or capricious under current doctrine must have a rational basis.

Pretext doctrine would be aimed only at rules that are otherwise not arbitrary or capricious—rules that would survive APA review as it currently stands. Reversal of a justified rule means adoption of a status quo that agencies have reason to believe is worse than the new rule. A court reversing on grounds of pretext also does not necessarily believe that the status quo is a better policy than the new rule. Of course, we might suspect that a judge reversing on grounds of pretext also does not believe in the policy under review, but in theory the doctrine does not require the judge to believe more in the status quo.

A famous thought experiment called the "philosophical zombie" asks how we know other people have consciousness. How would we, as external observers, differentiate between other people having consciousness and other people merely operating by automated processes of the brain?[235] The point is that we could not tell from our external vantage. For our present inquiry about pretext, one can similarly ask: What difference do we see between an agency that has a rich inner life of nefarious motives and an agency that issues the same rule with the same rationale, but actually believes the rationale? As discussed earlier in the various potential scenarios of pretext, the extent to which an agency has a unified rationale in the first place is debatable. Yet even if agencies have a "real" rationale that is not publicly endorsed, so long as they are adopting justified rules, it seems like it would be in the country's interests to allow the rule to stand.[236]

Logically, the objection to pretext must be that we want agencies to do the right thing for the right reasons, but that sort of philosophical objection almost never shows up in law because it is usually pointless. For example, we do not ask if someone obeying the speed limit is doing so out of fear of punishment or an admirable desire to promote safety. To care about the motivation of someone doing the right thing is both utopian and totalitarian.

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235. *Philosophical Zombie*, WIKIPEDIA, https://en.wikipedia.org/wiki/Philosophical_zombie (last visited July 19, 2019).

236. *Cf.* Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1366 (D.C. Cir. 1985) (upholding agency action despite clear shortcomings of the agency's explanation).

Of course, an individual can do the right thing in service of a crime—think of a bank robber driving the speed limit away from the scene of his crime. However, the bank robber's motivation for following the law does not provide an independent ground for prosecution in that case.

One example where motivation matters when performing an otherwise unobjectionable official act is bribery of public officials, which federal law prohibits even if the action performed might have an independent justification.[237] However, the bribery statute requires a bad act (seeking or accepting something of benefit) in addition to the otherwise justifiable official action. Returning to the philosophical zombie analogy, one can externally distinguish between an agency official conducting ordinary agency business and an agency official performing the same action because of a bribe. The official does *something* in addition to the action—he receives or asks for payment. Unless the agency decisionmaker confesses to offering a pretextual rationale at the moment she makes the decision being reviewed, there is no external manifestation to distinguish them from an agency decisionmaker acting with a non-pretextual rationale. Pretext doctrine thus appears to be designed in a way that is uniquely bad for the country. It is a philosophically muddled idea that only matters in cases where the agency action is otherwise justified.

B. Can Pretext Doctrine Be Applied in a Non-Arbitrary Manner?

Assume for the sake of argument that there are some rules that should be reversed even if they have adequate legal justification. Before agreeing that we should have a doctrine to identify and reverse those rules, we should have some confidence that we can (a) identify those rules; (b) identify *only* those rules (i.e., generate few if any false positives); and (c) provide sufficiently clear guidance so as to be reliably useful for every federal district court in the country. The Roberts pretext doctrine suggests that a rationale is pretextual if it plays an "insignificant" role in the actual decision-making process. There are two layers of vagueness involved in this concept: (1) the inherent uncertainty as to when consideration becomes significant; and (2) what kinds of consideration should count for assessing significance.

The first layer of vagueness is easy to understand—in any but the most extreme cases, significance or insignificance is purely contextual, necessarily defined in relation to a particular judge's preconceived notions about the case at hand. Consider a rule where the agency decisionmaker received a briefing on the legal rationale before issuing the final rule, but emailed every day about the allegedly "true" rationale for the rule (for example, its political

237. Bribery of Public Officials and Witnesses, 18 U.S.C. § 201.

impact). How is a judge to know whether the legal rationale played a significant role? Does the agency decisionmaker need some contemporaneous documentation that they listened attentively to the briefing and found it useful? Anyone who has ever briefed a superior knows that they sometimes completely ignore briefings, but other times have encyclopedic recall of a minute detail. How is one to know whether the legal rationale played a significant role?

The second layer of vagueness is subtler, pertaining more to what counts toward a particular rationale playing a "role." Imagine a situation in which an agency decisionmaker says something like: "Thank God there turned out to be a sufficient independent rationale for my action; I also dislike someone who will be disadvantaged by my agency's action." In one sense, the legal rationale played no role in the agency head's decision since he just wanted to use it to justify the action. However, the fact that there *was* a justification played a hugely important role—the quote suggests the decisionmaker would not have taken the action without the legal justification. The legal rationale is simultaneously pretextual *and* indispensable to the rulemaking process.

Some amount of vagueness can be settled through federal common law establishing what constitutes a "significant" role. However, a concept as riddled with vagueness as "significant" roles in decision-making might allow every court virtually unlimited latitude to uphold or reverse any rule at will. These are the sorts of outcomes Justice Thomas warned against in his partial dissent in *Department of Commerce*.[238]

C. Realpolitik: Is Pretext Doctrine Simply a Fig Leaf for Filtering Out Procedurally Awful Trump Administration Actions?

The hoary admonition that hard cases make bad law might have reasonably applied to judicial oversight of the Trump administration. Chief Justice Roberts may have rightly intended *Department of Commerce* to rectify one specific situation as surgically as possible by creating a circumscribed doctrine that future administrations can easily avoid now that they are on notice. Indeed, this account jibes well with the rumor that Chief Justice Roberts originally planned to vote to overturn the lower court ruling against the Department, but changed his vote at the last minute when new email evidence established beyond a reasonable doubt that the VRA

238. *Dep't of Com.*, 139 S.Ct at 2576 (Thomas, J., dissenting) ("[I]f taken seriously as a rule of decision, this holding would transform administrative law. . . . Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the [APA].")

explanation was pretextual.[239] Roberts's opinion remanded the citizenship question back to the Department, but one could support the outcome of *Department of Commerce* and still think pretext doctrine should be a one-off solution to a problem unique (so far) to the Trump administration.

The argument from realpolitik is really two separate propositions. One is that *Department of Commerce* itself presented a uniquely important case with a particularly ugly agency process. The specific outcome of *Department of Commerce* was more important than a run-of-the-mill Supreme Court case because the Census dictates the apportionment of democratic power at the federal level. The Department acted with such bad faith that judicial review of agency action would appear toothless and corrupt to the average citizen if the Court did not overturn the rule. By dodging this particular bullet, the Court has bought the country ten more years to cool down and step back from the Stalingrad-esque total war between Republicans and Democrats, where every norm is shattered and even the Census is just another tool to extract political advantage.

The other, slightly broader realpolitik argument is that the Trump administration created the need for new rules of judicial review of agency action. One can view this argument as not being *against* pretext doctrine per se, but rather an acknowledgment that pretext doctrine will likely only affect extremely shoddy, dishonest rulemakings. As briefly discussed earlier, Justice Thomas alleged in his partial dissent that *Department of Commerce* created an "administration-specific standard."[240] In his view, any administration might run afoul of the pretext rule, but it was only being applied against the Trump administration. However, one could argue instead that the pretext rule has always existed, but it was only recently unearthed because the Trump administration was uniquely incompetent.[241]

The common thread in these two arguments is that pretext doctrine, having been conjured into existence, can now be retired—or, at least, it could have been retired at the end of the Trump administration on January 20, 2021. While there is no need to overturn the doctrine, one could argue it should not be read as creating new onerous rules for agencies in future administrations. If the Trump administration was uniquely incompetent, it stands to reason that future administrations could avoid violating pretext doctrine even if the doctrine was not tailor-made for *Department of Commerce*. For example, courts could interpret the requirement that the legal rationale play a

239. *See* Samuel Estreicher, *"Pretext" and Review of Executive Decisionmaking in the Citizenship Census Question Case*, VERDICT (July 9, 2019), https://verdict.justia.com/2019/07/09/pretext-and-review-of-executive-decisionmaking-in-the-citizenship-census-question-case.

240. *Dep't of Com.*, 139 S.Ct at 2576–77 (Thomas, J., concurring in part and dissenting in part).

241. *See e.g.*, Glicksman & Hammond, *supra* note 232, at 1669.

significant role as meaning only that the agency decisionmaker be aware of the legal rationale before making her decision. Mere awareness could be proven by the agency decisionmaker ever having discussed the issue at hand in the legal rationale at some point. In *Department of Commerce*, by contrast, there was no evidence that the Secretary had ever considered enforcement of the VRA by the time he ordered his underlings to find an acceptable rationale for inclusion of a citizenship question on the Census.

D. The Argument for Pretext Doctrine

Notwithstanding the objections raised above, there is, in fact, a purpose in punishing agencies for pretextual explanations: deterring agencies from abusing the deference accorded based on their expertise.[242] The quick and dirty model of how agencies fit into the federal government is that Congress delegated its power in specific areas to agencies whose expertise allow them to make better and faster judgments than Congress.[243] The APA and similar laws allow judges a check on the power of agencies, with the understanding that courts should ordinarily defer to agencies because of their expertise.[244] Because the agencies have greater expertise than the courts, agencies necessarily have the ability to "sell" certain rules to the courts that are not actually based on expertise.

This is analogous to the relationship between a car owner and a mechanic. A problem, familiar to any car owner, is that mechanics can abuse their expertise to sell unnecessary repairs to an ignorant owner. Similarly, Judges, like car owners, cannot detect when they are being deceived. Agencies, like mechanics, can abuse this information mismatch by deceptively claiming actual expertise. Pretext doctrine is a way to address the cases where a court has external evidence that the agency was not basing its decision on actual expertise.[245] In the mechanic analogy, pretext doctrine addresses the narrow range of cases where the car owner overhears one mechanic saying to another, "I bet you can sell the car owner a new set of tires too if you say the tires look rough." Under arbitrary and capricious review without the pretext doctrine, one would simply ask if the mechanic had some basis for saying the tires looked rough, and whether the tires looking rough is correlated with needing new tires. Analogically, pretext

242. This is akin to the exclusionary rule in criminal law, where the draconian sanction of totally excluding relevant evidence is meant to deter police misconduct. *See* Mapp v. Ohio, 367 U.S. 643, 655–57.

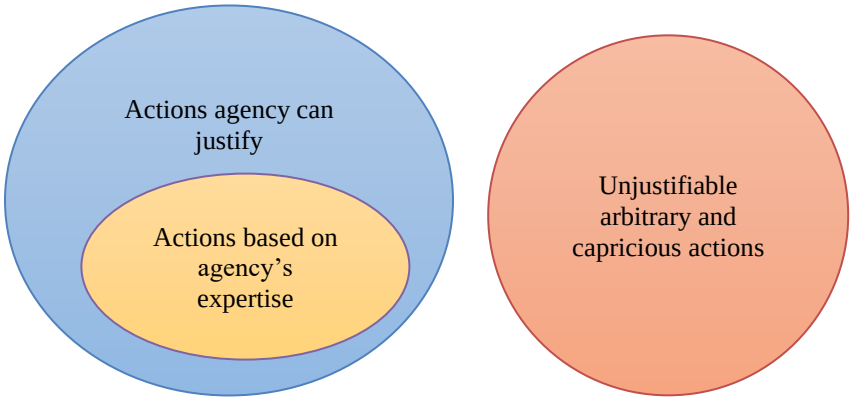
243. *See e.g.*, Eric Schlabs, *The Problem with Delegation*, REGUL. REV. (Dec. 2, 2015), https://www.theregreview.org/2015/12/02/schlabs-problem-with-delegation/.

244. *See, e.g.*, Fox v. Clinton, 684 F.3d 67, 75 (D.C. Cir. 2012).

245. *See, e.g.*, *Dep't of Com.*, 139 S.Ct at 2574.

doctrine allows the owner (the judge) to distrust the advice of the mechanic even if the tires do look rough. Just as it would be foolish for a car owner to ignore evidence of abuse by a mechanic, it would be foolish of courts *not* to use extrinsic evidence of bad faith to calibrate their deference to agencies. The owner can still take the tires, but at the very least he should accord less deference to the mechanic's opinion than he otherwise would have.

Figure 1: Identifying Actions Where Pretext Review is Helpful



1. Pretext Doctrine is a Necessary Correction to the Trajectory of Arbitrary and Capricious Review

To understand why pretext doctrine is necessary, we must first understand what function it would fill that is not currently served by arbitrary and capricious review. Over the decades, since arbitrary and capricious review first came about, courts have slowly abstracted it away from looking into the real process by which the agency decision was made. They have turned it into a box-checking exercise, showing the agency at least pretended to listen to public comment and was aware of the empirical reality of the issue at hand. This is perhaps unsurprising: Any bureaucracy over time begins to sanctify habitual activities as rituals long after the activity has ceased to fulfill its original role.[246] Pretext review, whether viewed as an amendment to arbitrary and capricious review or a totally different doctrine, forces judges in extreme cases to consider what process the agency actually followed to reach a decision.

Arbitrary and capricious doctrine evolved pursuant to the incentives facing courts and agencies, with the result that the doctrine examines an

246. Michael A. Diamond, *The Social Character of Bureaucracy: Anxiety and Ritualistic Defense*, 6 POL. PSYCH. 663, 669–71 (1985).

idealized agency decision-making process. The APA explicitly directs courts to examine whether agency activities are arbitrary and capricious.[247] Courts naturally look at the data and documents relied upon by the agency—the so-called administrative record. Once simple in concept, the administrative record, predictably, took on a life of its own. As agencies became aware that the "record" was what they would be judged on, they began not to produce a record at all, which in turn created cases like *Overton Park*.[248] In *Overton Park*, the Court encouraged agencies to create a record—if the agency failed to produce a record, courts could order the deposition of senior officials or other probing measures to get at the truth.[249] Forced to produce a record, agencies began to produce reams of data and empirical arguments. Courts grew accustomed to relying on the administrative record, creating an evidentiary problem: How would one truly know whether the administrative record was complete and documented the true decision-making process? While there are doctrines allowing for augmentation of the record, they only come into effect on some sort of showing of bad faith, which creates a chicken-and-egg problem for litigants. How can one find evidence of bad faith to justify further discovery without the court authorizing additional discovery in the first place? And, without pretext doctrine, even if there was bad faith, what would be the ultimate goal of this additional discovery?

Faced with the difficult task of determining when an administrative record is complete, courts have grown complacent, largely accepting the agency's produced administrative record.[250] Able to confine their review to the record, courts focus arbitrary and capricious review on whether the record itself seems to put forward a sufficient case—regardless of whether it is really a record of the agency's true decision-making process.[251] That normalizing of the "record" runs deep in administrative law and creates an atmosphere of artificiality, where agencies act for political reasons but feign detached expertise. This phenomenon has generated dozens of law review articles either calling for acceptance of political justifications or calling for maintenance of apolitical records.[252] These arguments ignore an even more fundamental question: whether agencies should be allowed to produce

247. 5 U.S.C. § 706(2)(A).

248. *See generally* 401 U.S. 402 (1971).

249. *Id.* at 420.

250. *See, e.g.*, Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 5–6 (2018) (describing the historical evolution of the administrative record).

251. Indeed, some courts went so far as to look beyond the administrative record to later court filings to discern a possible agency explanation. *E.g.*, Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1361 (D.C. Cir. 1985).

252. *See generally, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

anodyne-but-fictional accounts of why rules are adopted. The normalization of the "record" explains how a purported foe of the administrative state like Justice Thomas could note with incredulity in *Department of Commerce* that the Court was taking the radical step of asking for the actual rationale from the agency.[253] It is also unsurprising that appellate judges, accustomed to accepting a fact record from lower courts that roughly correspond to underlying truth, were quick to accept judicial review largely confined to the record.

The smoothing out of arbitrary and capricious review into a tidy process where agencies produce a record and judges happily restrict their review to that record allows agencies to fake a higher level of expert guidance than they actually offer. Pretext doctrine, whether conceived as a standalone doctrine or a new aspect of arbitrary and capricious review, grounds judicial review of agency action in the actual process agencies used to generate the rule. It inherently requires looking beyond the record, and in so doing weakens the ability of agencies to abuse their expertise.

2. Pretext Review Helps Guide Agencies Back to an Expertise-Based Model of Administration

Abuse of agency expertise emerges from the inherent principal-agent problem between Congress and the administrative agencies. Congress tasked agencies with perceiving and acting upon truth, founded on the actual data the agencies can gather about the real world and the impact of federal policies. However, Congress has a typical principal-agent problem: It has different information and interests from the agencies. How does it really know whether the agencies are acting consistent with Congress's interests as manifested by the laws Congress has passed? How does it know that the agencies are acting upon the best information? The problem is rendered more complicated by the fact that agencies really have multiple principals:

253. One might wonder why conservative judges and justices seem less inclined to demand truth from agencies given the ideological hostility of conservatives to the administrative state. While warranting more than a footnote's worth of analysis, one possible explanation is a conservative distrust of expertise in any form. A good agency, to a conservative theorist, is not one making the best technical judgments, but one that reliably does little and seeks to relinquish what authority it does have. That may explain why, for example, the Trump administration appointed so many politicians and former lobbyists as agency heads rather than individuals with relevant scientific expertise in the field in question. For example, former Texas Governor Rick Perry served as Secretary of Energy, to be succeeded by former lobbyist Dan Brouilette. *See* Cecelia Smith-Schoenwalder, *Trump Announces Replacement for Energy Secretary Rick Perry*, U.S. NEWS & WORLD RPT. (Oct. 18, 2019, 4:26 PM), https://www.usnews.com/news/national-news/articles/2019-10-18/trump-picks-dan-brouillette-to-replace-energy-secretary-rick-perry. Under the preceding Obama administration, the position was held in succession by two Nobel-laureate physicists.

Congress and the President, as represented by his political appointees. In the modern era, agency nominees largely sail through the confirmation process as long as the party controlling the Senate is the same as the party controlling the White House, removing one of the main ways Congress can manage the principal-agent dilemma. Pretext review removes one way in which agencies can pretend to serve their congressional principal while actually serving the executive principal.[254]

Originally, agencies were a way to offload technical decisions from Congress to agencies. They are now one of the primary means of effectuating partisan ends because it is increasingly difficult to get legislation through Congress.[255] Now that the agencies are viewed as tools of the President, commentators feel a need to defend executive prerogatives.[256] This is crucially important for understanding the impetus for pretext theory. Courts will never have the technical expertise of agencies. The democratic legitimacy of agencies arises from Congress's delegation of power to them, a gift that was premised on the agencies' technocratic nature. A doctrine of pretext is an important tool for preventing agencies—or, more properly, Presidents—from abusing that power.

Some critics of the regulatory state look askance at agency claims of expertise.[257] To those critics, there is no such thing as neutral expertise, only shrouded political preferences or selfish desire to aggrandize power. These critiques have a kernel of philosophical truth: Even career employees at agencies have political views, and they can have an interest in accumulating power through regulation. However, critics of agencies take this basic truth, divorce it from any empirical assessment of agency bias, and then effectively conclude that there should be no limits on agency politicization because of the unitary executive model.[258] If a democratically elected president uses agencies to advance his policies, these critics argue, we need not worry about

254. Congress has increasingly lost control over agencies in recent decades. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 928 (1983) (striking down a legislative veto on immigration decisions).

255. *See* Derek Willis and Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018, 10:00 AM), https://www.propublica.org/article/how-congress-stopped-working.

256. *See, e.g.*, Elena Kagan, *supra* note 252, at 2246.

257. *See, e.g.*, Victor Davis Hanson, *Civilization Requires Collective Common Sense*, NAT'L REV. (Sept. 24, 2020), https://www.nationalreview.com/2020/09/coronavirus-policing-wildfires-effective-response-requires-collective-common-sense/#slide-1 (arguing that common sense was superior to agency expertise in combating the coronavirus pandemic).

258. *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 31 (D.C. Cir. 2016) (describing executive agencies as "perfectly constitutional" but independent agencies as a "greater threat to individual liberty because they operate free of the President's supervision and direction.").

whether the agencies are drawing on any real knowledge to inform their actions.[259]

The critics who distrust expertise for fear of bias ultimately create a more open, pernicious bias. It is not hard to see why: If the experts do not direct policy at the agencies, the only thing left to fill the vacuum of power is brute politics. This dynamic explains why the heads of virtually every major rulemaking agency under President Trump were former elected officials or lobbyists.[260] Experts can certainly be biased, but they are *less* biased than elected officials. If that policy concern is not sufficiently persuasive, perhaps respect for the will of Congress would suffice. After all, expertise is the model Congress endorsed for the agencies in the first place.[261] One can examine the legislative history for any of the administrative agencies and find no end to justifications based on the need for expertise.[262] It is much tougher sledding to find members of Congress advocating that agencies should reflect the will of the executive rather than expertise in their particular field.

3. Contra Justice Thomas, the Downside Risk is Limited

The potential for increased litigation in arbitrary and capricious review does not immediately imply that courts should apply pretext doctrine. What if, as Justice Thomas alleged in his opinion, litigants swamp courts with pretext-based challenges to virtually all agency actions? Pretext is certainly something litigants can claim against virtually any agency action. But consider that arbitrary and capricious review is also something litigants can use against virtually any agency action.[263] The increased burden on judicial

259. *Id.* (describing executive agencies as "accountable to the President" and observing that "[t]he President in turn is accountable to the people of the United States for the exercise of executive power in the executive agencies").

260. Consider, for example, Secretary of Agriculture Sonny Perdue, Secretary of Energy Dan Brouillette, Administrator of the Environmental Protection Agency Andrew Wheeler, and Secretary of the Interior David Bernhardt.

261. *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1404 (2013) ("By the mid-1930s, Congress had authorized agency action to exercise discretion under broad and imprecise statutory directives . . . . To justify broad and unstructured delegations to agencies under the New Deal, supporters of the expanded administrative state proposed the expertise model.")

262. *See, e.g.*, Hearing on Nomination of Attorney General Scott Pruitt to be Administrator of the U.S. Env't Protection Agency Before the Comm. on Env't and Pub. Works, 115th Cong. 1, 20 (2017) (statement of Scott Pruitt, EPA Administrator Nominee) ("The agency must be committed to using its expertise in environmental issues not to end run Congress, but rather to implement its direction, so that Congress may decide the proper policies for our Nation, and the EPA can go about the business of enacting effective regulations that survive legal scrutiny.").

263. There are exceptions, of course, but the universe of agency actions unreviewable under the APA for arbitrary and capricious review is presumably coterminous with agency actions

resources would come about not from the claims themselves, but from the presumed increase in discovery for plaintiffs alleging pretext. As the doctrine currently stands, litigants must make a showing of bad faith to obtain that additional discovery. That part of administrative law predates pretext review.[264] Pretext review only changes the scenario where additional discovery beyond the agency record reveals that the agency used pretextual reasoning. In that case, the agency's action can be remanded or overturned.

Opponents of pretext review claim that the influx of pretext claims could swamp agencies and courts, but forget that most major agency actions are already subject to litigation.[265] If there is no evidence of bad faith, the claims will not meaningfully increase the workload of courts or agencies. If litigants claim that every minor agency action is pretextual, they presumably will not have evidence of bad faith, and thus would not be able to drag proceedings out any further than they could already under arbitrary and capricious review. And, of course, if litigants can produce evidence of bad faith in a wide variety of agency actions, our concern should not be the administrative burden of additional discovery, but rather how we can induce agencies to act more often on proper rationales.

4. Next Steps in Refining Pretext Doctrine

The foregoing discussion showed that pretext doctrine can fill an important hole in regulatory law, but it remains to be seen whether courts can actually fashion a workable doctrine from the outline laid out by Chief Justice Roberts in *Department of Commerce*. To avoid the pitfalls identified by the dissenters in *Department of Commerce*, pretext doctrine must become more specific—either through more precise wording of the central tenets or through federal common law applying the doctrine to specific kinds of cases. Courts will have to narrow the doctrine to allow a less-than-perfect mind-meld between agency decisionmakers and the legal rationales generated by their subordinates. At the same time, if the doctrine is going to deter future agencies from abusing the decision-making process, it will have to be broad enough that agencies actually fear judicial review on grounds of pretext.

The Roberts doctrine contains several points of vagueness, but that is not unusual for the first ruling in a major new doctrine. Consider an analogy

unreviewable for pretext. If subsequent cases find pretext to be a subset of arbitrary and capricious review, this problem happily disappears. If not, courts will have to decide where the boundaries lie.

264. *See* Citizens to Protect Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

265. *See* Margot Sanger-Katz, *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, N.Y. TIMES (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html (describing thirty major deregulatory actions by the Trump administration challenged in court).

to *District of Columbia v. Heller*,[266] the 2008 Second Amendment case that first recognized an individual right to keep and bear arms.[267] The case did not create a clear test to determine whether a particular restriction on gun ownership violated that individual right, but provided a foundation for other courts to build upon, including the Supreme Court itself in future cases.[268] Similarly, *Department of Commerce* should be seen not as a completed doctrine, but as a starting point.

E. What an "Insignificant" Role for the Stated Rationale Means

As discussed above, an "insignificant" role for the legal rationale is vague on its face. However, it is not difficult to see how courts could make the rule more specific through archetypal cases. Building a common law around the definition of "insignificant" will likely be easier than coming up with a precise *a priori* definition. For example, an "insignificant" role could be proven by showing that the decision had already been made before the pretextual reason was brought to the attention of the decisionmaker. This is, essentially, the *Department of Commerce* scenario, where the Secretary and his immediate subordinates were documented to be searching around for a legal rationale and then extracted it from the DOJ through a tortuously political process.[269] One can imagine several other common evidentiary scenarios where the courts could find insignificance of the pretextual reason:

First, the decisionmaker could state in an email that they want to adopt the rule regardless of whether the pretextual reason is true. For example, the decisionmaker could say something like, "Find out if this rationale is true, and if it is not, find another one."

Second, the decisionmaker could state a reason for the action that is inconsistent with the pretextual rationale. This did not arise in the *Department of Commerce* scenario, but one could envision an email where the Secretary said he wanted a citizenship question to lower apparent minority population totals in Democrat-leaning districts for apportionment

266. 554 U.S. 570 (2008).

267. *Id.* at 635.

268. Admittedly, the Supreme Court has not yet done so, but it may do so in the near future. Lower courts have certainly engaged with *Heller*, though most often those courts decline to extend *Heller*'s ruling to prohibit any particular firearm regulation. The few exceptions have not resulted in major policy changes. *See, e.g.*, Tyler v. Hillsdale Cty Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016) (finding that barring a person who once briefly had a mental illness from ever owning a firearm violated the Second Amendment). The Supreme Court also granted certiorari for a Second Amendment case in the coming term. *New York State Rifle & Pistol Assoc. v. Corlett*, No. 20-843, 2021 WL 1602643, at __ (U.S. Apr. 26, 2021).

269. *See supra* Part I.F.

purposes. That would fly in the face of the VRA enforcement rationale the Court found to be pretextual.

Third, the President or presidential advisors could direct the decisionmaker to adopt a particular course of action. This is perhaps the most controversial, but recall that it would only come into play in a situation where bad faith has been shown. If the President directed the agency decision-maker to adopt a rule for reasons totally unrelated to the eventual pretextual reason, that could warrant reversal or remand on pretext grounds.

The above list is, of course, not exhaustive, but should suffice to illustrate how courts can approach a theoretically difficult concept like pretext. The key is not to come up with a definition rigorous enough to satisfy a philosopher, but rather to identify certain problematic situations through the natural experience of common law and apply the label pretext to them.

F. Using the "Bad Faith" Requirement to Avoid Pretext Review Becoming Overinclusive

Recall the many marginal scenarios discussed earlier where a case could be made that an agency acted pretextually, but not in a malevolent way.[270] One such example involved an agency decisionmaker having already effectively made up their mind on a rule based on a substantively similar rationale to the one the agency came up with later, but without having seen the actual data and results of the agency's study. Few would want pretext review to reverse or remand that kind of rulemaking, but it is difficult to come up with an easily applied definition of pretext that would not include those benign instances.

The "bad faith" requirement can go a long way towards weeding out the thorny philosophical problems that could arise in pretext review. For example, one of the key questions raised above is whether one can "count" the legal rationale as significant if it only factored into the rulemaking for legal purposes—in other words, if the decisionmaker only considered the legal rationale because they knew they needed legal cover. It seems obvious that if pretext rationale is to mean anything, merely seeking out a legal rationale for purposes of surviving judicial review cannot suffice. Upon reflection, however, it is clear there are some situations where a rule probably should not be overturned on these grounds. Earlier in this article, I discussed the possibility of an agency head with a relatively benign use of pretext, where an underlying desire to do something charitable was masked by an irrelevant legal rationale.[271] One can also imagine a situation where the

270. *See supra* Part II.A.

271. *See supra* Part II.A.

agency decisionmaker had already made up their mind about what to do, but had the agency generate a fully fleshed out legal rationale. For example, the EPA Administrator may have already made up their mind to regulate carbon dioxide emissions on public health grounds, and the agency's cost-benefit analysis stressed the cost of alternative mitigation measures (for example, building seawalls). The "bad faith" requirement protects these innocent uses of what might be considered "pretext," while allowing reversal and remand of pernicious instances.

III. CONCLUSION

As with many new concepts, pretext review defies easy understanding, lacks precise definitions, and appears menacing to those skeptical of change. A strong analogy could be made to flight, the exact scientific underpinnings of which are still in debate to this day.[272] However, just as flight has become a fundamental part of everyday life despite our incomplete understanding of it, pretext review can become a vital part of administrative law even if the philosophical conundrums about decision-making are not easily resolvable. Pretext review should be seen as a helpful evolution of arbitrary and capricious doctrine to address the politicization of agency expertise—a particular problem that, while not new, has steadily evolved into a more dangerous phenomenon.

While the debate over agency politicization reached a new intensity under President Trump, the issue will linger on in future presidencies. Any high school civics student can describe the foundation of the U.S. federal government and the split between legislative and executive power. Congress makes the law; the President enforces the law. Agencies, to be blunt, ruin this paradigm. Congress, beset by the technical onslaught of modernity, delegates specific powers to agencies. For example, Congress has neither the time nor the expertise to precisely set policy relating to the assignment of broadcast spectrum, so it passed a broad law that allows the Federal Communications Commission to handle the details. In this paradigm, agencies are drone legislatures, capable of independent action but following a course established by controllers in Congress. Pretext review helps solve the principal-agent dilemma between Congress and agencies by making it harder for agencies to act based on political rationales endorsed by the executive branch rather than the specific criteria endorsed by Congress.

One broad objection to the idea of pretext review is that it is utopian to expect agencies to be immune from politics and act only upon neutral

272. Ed Regis, *No One Can Explain Why Planes Stay in the Air*, SCI. AM. (Feb. 1, 2020), https://www.scientificamerican.com/article/no-one-can-explain-why-planes-stay-in-the-air/.

technocratic grounds. This objection stinks of resignation and decline. Ultimately, the only thing that keeps an institution honest is the belief of its members and clients that it should be so. If we expect agencies to act politically, they will eventually do so, and the very voices complaining that we can expect nothing more will be the first to proclaim that it was inevitable. While pretext review cannot cure all that ails the federal regulatory system, it is at least a step away from fatalistic acceptance of politicization. If it is utopian to expect neutral expertise, it is at least preferable that courts nudge agencies toward utopia rather than dystopia.