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The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Actions

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Judicial Review after Kisor and the Census Case



ANTONIN SCALIA
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Ronald A. Cass*

Abstract

Judges' work often is analogized to that of umpires, enforcing the rules of the game neutrally and impartially—most famously by John Roberts in his confirmation hearing to become Chief Justice of the United States. Just as often, commentators disparage the analogy as inapt, because it fails to capture the influence of factors apart from law-as-written on judicial decisions. Justice Oliver Wendell Holmes's much earlier aphorism about great cases and hard cases attention to what might be termed the backside of the judge as umpire metaphor, singling out considerations often associated with divergence from predictable decision-making based on principles inherent in previously adopted rules.

Three notable recent decisions of the U.S. Supreme Court respecting judicial review of administrative actions—Kisor v. Wilkie, Department of Commerce v. New York, and Department of Homeland Security v. Regents of University of California—provide examples of the gap between aspiration and actuality for the judge as umpire metaphor. And in all three, the deciding vote was cast by Chief Justice Roberts.

This Article explores the decisions of the Court in Kisor, Department of Commerce, and Homeland Security, and ways in which those decisions depart from prior law on judicial review and create additional discretion for the courts at the expense of other branches of government. The Article also explores reasons for the attraction of the judge as umpire metaphor and flaws in arguments against it—even though the legal system still leaves room for the umpire to strike back.

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Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath ...¹

— John G. Roberts, Jr.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgement.²

— Oliver Wendell Holmes, Jr.

¹ CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR., TO BE CHIEF JUSTICE OF THE UNITED STATES: HEARING BEFORE THE S. COMM. ON THE JUDICIARY, 109TH CONG. 55 (2005) (statement of John G. Roberts, Jr., J.).

² *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

Introduction

The judge-as-umpire metaphor, famously employed by John Roberts in his confirmation hearing to be Chief Justice, captures an important aspect of the rule of law. Judges, who wield retrospective power (the power to punish people for past behavior as opposed to the legislature's prospective, rulemaking power), are supposed to implement faithfully the rules laid down by the legislature.³ They are supposed to act predictably and consistently, not surprisingly and creatively. Judges who see their job the way academics at times have described it—to make the law the best it can be⁴—are engaged in a self-conscious effort to change legal rules, not to apply them. The judge-as-umpire metaphor has been criticized, even ridiculed, in academic writing, and more commonly has been disparaged as a fantasy, something that even if ideal, cannot possibly be achieved in the real world.⁵ Yet, the endeavor at the core of the judge-as-umpire metaphor is critical to a functioning rule of law.⁶ If the judge can change the rules at will, the laws made through prescribed processes by the people elected to make them no longer govern. In that world, ordinary citizens are subject to the whims of one or a small group of officials, with the same prospects for bias and inconstancy that attain if the umpire can enlarge or contract the strike zone to favor or punish a particular team or a specific liked or disliked player.⁷

Over the past several years, the Supreme Court's decisions respecting review of administrative actions have been broadly consistent with the judge-

³ See, e.g., RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 2–19 (2001) (RULE OF LAW); F. A. HAYEK, *THE ROAD TO SERFDOM* 80–81 (1994); MICHAEL OAKESHOTT, *The Rule of Law*, in *ON HISTORY AND OTHER ESSAYS* 1, 1 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) (*Law of Rules*).

⁴ See RONALD DWORKIN, *LAW'S EMPIRE* 52–62, 228–38 (1986) (LAW'S EMPIRE); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 455 (1989) (“the challenge is to build a constitutional order more just than the one we have inherited”) (Constitutional Politics); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (*Storrs Lectures*); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 BU L. REV. 204 (1980); Owen Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991); Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (*Forms of Justice*).

⁵ See, e.g., Theodore McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007); Jon D. Michaels, *Baller Judges*, 2020 WIS. L. REV. 411 (2020); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENTARY 701 (2007). More nuanced objections to the conceit of entirely dispassionate rulemaking through adjudication or to the notion of case-based adjudication as a neutral, unbiased vehicle for rulemaking are noted in passing, *infra* text at notes 207, 221–229. These objections, however well-conceived analytically, largely are peripheral, not central, to the core issues respecting the goal of judges behaving more as umpires than law-givers.

⁶ See CASS, *supra* note 3, at 7–12; LON L. FULLER, *THE MORALITY OF LAW* 38–81 (rev. ed., 1969); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10, 14–15 (1971); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 45–49 (2019) (*Nationwide Injunctions*); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 670–71, 682–84 (1995); Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 685–86, 689–90, 692 (2016); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14–17, 19 (1959).

⁷ See, e.g., Kavanaugh, *supra* note 6.

as-umpire metaphor. The Court has moved toward separating the responsibilities of the different branches of government in line with constitutional commands and has instructed lower courts to avoid overstepping judicial bounds in several important respects. But, in some high-profile cases, the Court also has added novel elements to its rules, effectively granting judges new powers to depart from the normal, predictable bounds of review. Its decisions in three cases in particular—*Kisor v. Wilkie*,⁸ *Department of Commerce v. New York*,⁹ and *Department of Homeland Security v. Regents of University of California*¹⁰—illustrate the potential for significantly expanding the ambit of judicial discretion. Together, these decisions, in varying degrees, redefine the scope of (and rationale for) review for agency rule interpretation, the nature of so-called arbitrary-capricious review, and the requirement for explaining and supporting executive actions that rescind or revise prior executive action. Each decision contains some thoughtful instructions on how to approach judicial decision-making in specific settings, yet each also branches out in ways that are hard to square with the metaphor of a narrow, law-bound judicial authority.

These cases, and what they say about the Supreme Court’s approach to central questions of administrative law, are the focus of this Article. Aspects of each of the three cases—and central parts of the Court’s decision in two of them—look more in line with Oliver Wendell Holmes’s famous epigram about hard cases and great cases than with Chief Justice Roberts’s umpire metaphor. Two of the three cases involved issues that resonated with highly visible, public, political discourse—in other words, the sort of issue that defines “great cases.” And the twists and turns in the exposition of each case look as if concerns about the political implications of the decisions influenced the outcomes.

The decisions do not show that the Court has been expanding categorically its *role* respecting disposition of matters central to the administrative state, but each of these decisions on review of administrative action opens avenues that can enlarge the *discretion* of the Court. Together, *pace* “Star Wars,” they might be bundled under the heading “The Umpire Strikes Back.”¹¹ Some of the enhanced discretion the decisions accord to judges may be a consequence of improving the fit between legal doctrine (*writ small*) and constitutional

⁸ 139 S. Ct. 2400 (2019).

⁹ 139 S. Ct. 2551 (2019).

¹⁰ 140 S. Ct. 1891 (2020).

¹¹ Of course, any resemblance to a similar sounding segment of the famed “Star Wars” film series is entirely coincidental and not in any way intended to signal the approval of any Star Wars writer, producer, director, or actor (or cast and crew members, for that matter) to anything said here. Unless a stray associate of the film projects happens to be a closet aficionado of judicial review decisions, writings, and debates—in which case, that individual (or those individuals) would seriously need to rethink their basic life choices, including career and locale!

assignment of separate powers (writ large).¹² At times, faithful adherence to the Constitution requires judicial embrace of doctrines that carry an essential element of judgment.¹³ Some of the increased discretion that will follow these decisions, however, is the nonessential result of misdirection.¹⁴ Whatever explains the expansion of judicial discretion that these decisions produce, it is important to recognize and to cabin the degrees of freedom the decisions have introduced into judicial review.

This Article begins with descriptions of the three administrative law cases—*Kisor*, *Department of Commerce*, and *Homeland Security*—including explanations of the ways in which each departs from previously established law.¹⁵ Following those discussions, the Article returns to the underlying rationale for critiquing these decisions. Part IV uses the judge-as-umpire metaphor to explore how much judges can, and why they should, treat their task as elaborating binding and relatively fixed legal rules.¹⁶ Despite thoughtful arguments respecting the limits on determinate rules and on rule applications based on precepts of neutrality and generality, judges and justices should aspire to umpire-like behavior—and should do better than *Kisor*, *Department of Commerce*, and *Homeland Security*.

I. *Kisor* and Deference: Moving Together in Different Directions

Kisor v. Wilkie, the first of the three judicial review cases recently decided by the Supreme Court, addresses a question respecting the division of authority between courts and agencies in the federal government: when questions arise respecting interpretation of a rule adopted by an agency, should courts defer to an agency's interpretation and, if so, in what circumstances? The Court divided on the answer to that question, but moved in a direction that, broadly speaking, all of the justices endorsed (moving away from a strongly stated rule of deference to agency interpretations).¹⁷ To a significant degree, the Court's decision repackaged elements of prior Supreme Court decisions. Differences on how that package should be presented and, thus, how the Court should resolve the issue presented directly in the *Kisor* case, however, went beyond the particular components of the governing rule, as explained below.

¹² See discussion *infra*, text at notes 57–80.

¹³ See, e.g., Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 193–96 (2017) (*Delegation Reconsidered*); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 360–62, 376–78 (2002) (*Delegation*).

¹⁴ See discussion *infra*, text at notes 142–145, 169–186.

¹⁵ See Parts I–III, *infra*, text at notes 17–186.

¹⁶ See Part IV, *infra*, text at notes 187–238.

¹⁷ See discussion *infra*, text at notes 54–80.

A. *Locating Rule Interpretation Authority: Roots of Deference*

Although administrative agencies accomplish a huge amount of their work through informal means, rulemaking—announcement of general rules to guide the agency’s internal functioning and to impose obligations on private individuals and entities—occupies an increasingly important place in federal governance.¹⁸ In contrast to the roughly 200 to 400 laws passed by Congress, the federal administrative agencies adopt approximately 3,000 to 5,000 final rules each year.¹⁹ These rules encompass a wide array of regulations, restrictions, and commands on disparate subjects and occupy more than 180,000 pages in the Code of Federal Regulations.²⁰ The effect of federal regulations on the American economy is variously estimated as benefitting or costing the economy trillions of dollars per year.²¹ While there is disagreement on the best calculation of rules’ effects, there is no doubt that rulemaking today has enormous practical impact.

With so many rules covering so many pages and so many more rules forthcoming on a regular basis, it is no surprise that there are regular disputes

¹⁸ See, e.g., Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. (2020) (forthcoming) (*Rulemaking*). Parts of this Section draw on that article.

¹⁹ For information respecting federal rulemaking, see, e.g., Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Rulemaking, and Pages in the Federal Register* 1, 7, 19–20, 22–23 (Cong. Research Serv., Sep. 2019) (*Counting Regulations*). The annual number of rules promulgated has been in the 3,000–5,000 range since the mid-1980s. The pages devoted to rulemakings in the Federal Register account for something on the order of 40–50 percent of Federal Register pages. See *id.*, at 19–20 (although in some years the percentage is as low as 25 percent). And the number of Federal Register pages has grown on a relatively steady trajectory from under 3,000 pages in 1936 and an average of less than 4,000 pages per year from 1936 to 1940 (the year before the Attorney General’s Committee Report (see U.S. ATTORNEY GEN.’S COMM. ON ADMIN. PROCEDURE, FINAL REPORT, S. DOC. NO. 77-8 (1941)) to over 13,000 per year for 1941 to 1946 (the years leading up to adoption of the APA) and more than 83,000 per year for 2012 to 2016. See *id.*, at 26–28. For information respecting federal legislation, see, e.g., Susan Davis, *This Congress Could be Least Productive Since 1947*, USA TODAY, Aug. 15, 2012, available at <http://usatoday30.usatoday.com/news/washington/story/2012-08-14/unproductive-congress-not-passing-bills/57060096/1>; Michael Teitelbaum, *Congress Saw More Bills Introduced in 2019, But Few Passed*, ROLL CALL, Jan. 22, 2020, available at <https://www.rollcall.com/2020/01/22/congress-saw-more-bills-introduced-in-2019-than-it-has-in-40-years-but-few-passed/>; Matt Viser, *This Congress Going Down as Least Productive*, BOSTON GLOBE, Dec. 4, 2013, available at <http://www.bostonglobe.com/news/politics/2013/12/04/congress-course-make-history-least-productive/kGAVEBskUeqCB0htOUG9GI/story.html>; Shawn Zeller, *Divided Government Will Pose an Obstacle to Lawmaking in 2019, But Few Passed*, ROLL CALL, Jan. 23, 2019, available at <https://www.rollcall.com/2019/01/03/divided-government-will-pose-an-obstacle-to-lawmaking-in-2019/>.

²⁰ See, e.g., George Washington Regulatory Studies Center, *Reg Stats: Total Pages Published in the Code of Federal Regulations (1950–2019)*, Jul. 9, 2020, available at <https://regulatorystudies.columbian.gwu.edu/reg-stats>. For a review of the evolution and current state of federal regulation, see, e.g., CLYDE WAYNE CREWS, JR., *TEN THOUSAND COMMANDMENTS, 2020: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE* (2020).

²¹ See, e.g., Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. REG. 233, 244–45 (1990); Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809, 1819–22 (2017); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 950–54 (1999). See generally CASS SUNSTEIN, *VALUING LIFE: HUMANIZING THE REGULATORY STATE* (2014); Clyde W. Crews, Jr., *The Unknowable Costs of Regulation and Intervention*, in CREWS, *supra* note 20, at 40–43.

about rules' meaning. When those disputes arrive in court, how much should the judges rely on their own reading of a rule and how much should they defer to the agency's interpretation? Prior to *Kisor*, two Supreme Court decisions laid down the Court's governing test on rule interpretation, modified somewhat by other decisions.²²

1. *Seminole Rock's* Uncertain Foundation

The first significant statement of judicial deference to an agency's own construction of its rules came in *Bowles v. Seminole Rock & Sand Co.*²³ *Seminole Rock* involved a challenge to a decision of the Office of Price Administration (OPA), an agency created to manage economic issues related to the country's engagement in World War II.²⁴ The decision chose one of three alternative metrics for assessing what price was charged at a certain point for particular products and applied that metric to one of *Seminole Rock's* contracts for sale of crushed stone.²⁵ The Supreme Court critically examined the regulation at issue and the choices available for its application in the case at hand, emphasizing repeatedly its own reading of the rule.²⁶ It is, in fact, striking how many times, how many ways, and how emphatically the Court's opinion stresses the way its own construction of the regulation and underlying statute fit its decision that the agency correctly read and applied the regulation.²⁷

Despite the Court's focus on interpreting for itself the meaning of the OPA regulation, the opinion also contains this comment:

²² The plurality opinion in *Kisor* quotes the statement in *United States v. Eaton*, 169 U.S. 331, 343 (1898), that "interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them, is entitled to the greatest weight," *Kisor*, 139 S. Ct. at 2412. It relies on this statement as precedent for the later statement of deference in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). It is hard to see that this statement in *Eaton* was anything more than a makeweight, tossed off in passing and in no way relied on for the Court's decision, which rested clearly on the Court's own reading of the law and Department of State regulations respecting a technical issue of construction. It appears that the *Eaton* precedent, to the extent it can be construed as one, sat unnoted as a statement on deference until *Kisor*.

²³ 325 U.S. 410, 414 (1945).

²⁴ The basic framework for the Act is set out in *Seminole Rock*, 325 U.S. at 413–16. See also Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 55–59 (2015); Helen B. Norem, *The "Official Interpretation" of Administrative Regulations*, 32 IOWA L. REV. 697, 701–10 (1947).

²⁵ See *Seminole Rock*, 325 U.S. at 414–15.

²⁶ See *id.* at 412–18.

²⁷ See, e.g., Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the Seminole Rock Opinion*, NOTICE & COMMENT (Sept. 12, 2016), <http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/> [<https://perma.cc/CLR4-DTWQ>] (*Hart's Brief*); Ronald A. Cass, *Auer Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 548–49 (2018) (*Auer Deference*); Michael P. Healy, *The Past, Present, and Future of Auer Deference: Mead, Form, and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 639 (2014); Knudsen & Wildermuth, *supra* note 24, at 60; John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 619 (1996); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1454 (2011).

... a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. ... [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter. In this case, the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.²⁸

This statement mixes the notion of deference to administrators' interpretation of their agency's rules with the observation that the justices will assess the legality of an administrative action applying a rule by reference both to "the plain words of the regulation" (which implies non-deferential judicial construction) and to relevant administrative interpretations of the rule (which implies some degree of deference). The non-deferential part of the statement seems more in keeping with the Court's opinion.²⁹ But *Seminole Rock* came to be known instead for its statement of deference. Other aspects of the case that make it singularly ill-suited as the basis for a broad rule of deference are discussed below.

2. *Auer's Expanded Statement of Deference: Beyond Seminole Rock*

The next significant case, *Auer v. Robbins*,³⁰ came forty years after *Seminole Rock*.³¹ Unlike *Seminole Rock*, *Auer* did not arrive in the Supreme Court as a direct challenge to an agency's rule interpretation but as a dispute over the application of a provision of the Fair Labor Standards Act (FLSA) respecting overtime pay (particularly, the exemption for certain classes of employees) and a regulation adopted by the Department of Labor that was based on its reading of the FLSA.³² Because different circuits of the U.S. Court of Appeals had divided over issues central to *Auer* respecting the way different parts of the FLSA and Department of Labor rule might apply to public employees (in *Auer*, municipal police sergeants and a lieutenant), the Supreme Court requested the Department's views on the application of its regulation to public employees. The Department obliged, filing an *amicus*

²⁸ 325 U.S. at 414.

²⁹ See, e.g., Cass, *Auer Deference*, *supra* note 27, at 547–49; Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 597–98 (1950); Healy, *supra* note 27, at 639; Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J.L. & PUB. POL'Y 87, 88 (2018); Stephenson & Pogoriler, *supra* note 27, at 1454. Professor Bamzai's research into the government's brief, written by Professor Henry Hart (then on leave from his academic post), reveals the same ambivalence, making both the plea for deference and the argument that the government's interpretation was the correct interpretation based on traditional legal tools of construction. See Bamzai, *Hart's Brief*, *supra* note 27.

³⁰ 519 U.S. 452 (1997).

³¹ Parts of this section are adapted from Cass, *Auer Deference*, *supra* note 27, which presents a more detailed description of the *Auer* decision and its fit with prior doctrine on deference to agency decisions, deference respecting statutory interpretation, and due process considerations.

³² See 29 U.S.C. § 213(a)(1) (2012); *Auer*, 519 U.S. at 454.

brief to the Court, essentially explaining its views on the matter for the first time.³³

After setting out the relevant provisions and explaining their evident application in the case, the Court stated that “[t]he FLSA grants the Secretary [of Labor] broad authority to ‘defin[e] and delimit[]’ the scope of the exemption for executive, administrative, and professional employees.”³⁴ It also observed that the FLSA does not provide specific direction on the question at issue in *Auer*, found the Department’s regulation a reasonable implementation of the law, and declared that it also was reasonable for the Secretary to have concluded that the same rule can apply to public sector employees as to private sector employees.³⁵ To this point, the Court’s opinion in *Auer* appeared to be a straightforward application of the *Chevron* rule that gives deference to reasonable administrative applications of a law to the extent that the administrator has been given discretion under that law (explicitly or implicitly).³⁶

After that, however, the Court seemed to depart from its *Chevron* regime, which limits deference to the discretion statutorily given.³⁷ Instead, the Court reached back to the statement in *Seminole Rock* that when there is doubt about the application of an administrative regulation, the agency’s reading of the regulation is “controlling unless ‘plainly erroneous or inconsistent with the regulation.’”³⁸ Although the Secretary’s explanation of the rule seemed entirely consistent with the regulation—both with its language and its apparent underlying rationale—the Court’s unrestricted statement of the deference due to administrative interpretations was out of keeping with many of the Court’s prior statements respecting the basis for and degree to which courts give deference to administrative decisions.³⁹

³³ *Auer*, 519 U.S. at 461.

³⁴ *Id.* at 456 (third and fourth alterations in original) (quoting 29 U.S.C. § 213 (a)(1)).

³⁵ *Id.* at 457–58.

³⁶ See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring); Cass, *Auer Deference*, *supra* note 27, at 545–46. See also Healy, *supra* note 27, at 634. The *Chevron* rule is derived from, or at the very least has an eponymous relation to, the Supreme Court’s decision in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The relationship between *Auer* and *Chevron*, and broader deference questions is discussed, *infra*, text at notes 72–80.

³⁷ See, e.g., *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996); Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1314–15 (2015) (*Deference*); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 742–43 (2002); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25–27 (1983); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–14, 516 (*Judicial Deference*); Robert Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 106–07 (1944) (*cited in Monaghan, supra*, at 27).

³⁸ *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

³⁹ See, e.g., *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991); *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144 (1991). See also Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE

Recognition of the tension between *Auer* and principles underlying other decisions and doctrines explains why several justices, prominently including *Auer*'s author, called for retreat from *Auer*'s blanket rule of deference to agency own-rule interpretations.⁴⁰ In *Christopher v. SmithKline Beecham Corp.*, the Court placed limitations on the *Auer* doctrine to prevent “unfair surprise” from changes in agency position.⁴¹ It drew on prior cases for a list of examples where *Auer* deference was not appropriate, including:

... when the agency's interpretation is “plainly erroneous or inconsistent with the regulation,” . . . [,] when there is reason to suspect that the agency's interpretation “does not reflect the agency's fair and considered judgment on the matter in question” [which] might occur when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a “convenient litigating position,” or a “*post hoc* rationalizatio[n]” advanced by an agency seeking to defend past agency action against attack . . .”⁴²

The cases cited for these propositions in the *Christopher* opinion almost entirely consisted of decisions rendered before *Auer*.⁴³ In other words, apart from the exceptions noted in *Auer* itself, the Court in *Christopher* reflected justices' unease with *Auer* by modifying its categorical rule of deference to avoid some of its most problematic potential applications.⁴⁴

Academic commentary also reflected unease with *Auer*, in part by emphasizing the difference between the circumstances that gave rise to *Seminole Rock* and those surrounding *Auer*.⁴⁵ In *Auer*, the agency had not

L.J. 908, 924–27 (2017); Healy, *supra* note 27, at 644; Aaron L. Nielsen, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 953–55 (2017) (*Beyond*); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 105–10 (2018) (*Literature Review*); Aaron Nielsen, *Reflections on Seminole Rock: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, NOTICE & COMMENT (Sept. 12, 2016), <http://yalejreg.com/nc/reflections-on-seminole-rock-the-past-present-and-future-of-deference-to-agency-regulatory-interpretations/> [https://perma.cc/Z8Z4-QLEJ].

⁴⁰ See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part); *id.* at 615–16 (Roberts, C.J., concurring); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

⁴¹ 567 U.S. 142, 155–56 (2012).

⁴² *Id.* at 155–56 (2012) (internal citations omitted). And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation “does not reflect the agency's fair and considered judgment on the matter in question.”

⁴³ In addition to citing *Auer*, 519 U.S. at 462, the *Christopher* citations included: *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988). The Court also cited a case decided the prior term, *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011), which quoted from *Auer*.

⁴⁴ Interestingly, the justices who joined together to provide four-fifths of the votes in the *Kisor* majority (and all of the votes for the parts of the lead opinion that represented only a plurality), dissented in *Christopher*. See *Christopher*, 567 U.S. at 169 (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, J.J.).

⁴⁵ See, e.g., Bamzai, *Hart's Brief*, *supra* note 39; Cass, *Auer Deference*, *supra* note 27; Healy, *supra* note 27; Nielsen, *Beyond*, *supra* note 39; Walker, *supra* note 39. The best-known attack on deference to

interpreted the provision at issue much less applied it to the specific setting in the case or to a similar setting. As already noted, the agency's one effort at interpretation came in the Supreme Court case itself.⁴⁶ *Seminole Rock*, in sharp contrast, although not a case in which the Court in fact deferred to the agency's interpretation, was an ideal case for deference. The issue was a technical one respecting why particular contract terms and industry practices fit the war-time pricing rule adopted by OPA.⁴⁷ Both the character of the issue—one where experience with the nature of the industry and its contracts helps inform judgment on selection among the alternative tests on pricing—and the fact that it was part of a war-time program aimed at enhancing domestic resources available for the war effort argued in favor of deference.⁴⁸

Moreover, the agency had issued its interpretation simultaneously with the adoption of the regulation, and it had published the interpretation together with the regulation itself.⁴⁹ Put differently, the timing and dissemination of the rule interpretation at issue in *Seminole Rock* was “the functional equivalent of having made the agency interpretation part of the rule itself.”⁵⁰

Last, *Seminole Rock* was decided by the Supreme Court in 1945—the year before passage of the Administrative Procedure Act (APA). Notably, the APA provides that a court reviewing agency action “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”⁵¹ That direction is fairly clear: courts decide issues of interpretation, including interpretation of agency actions (a term that encompasses rules as well as adjudications).⁵² The one caveat in the APA's judicial review provisions is that courts defer “to the extent that . . . agency action is committed to agency discretion by law.”⁵³ The *Auer* formulation does not ask the question that the APA makes central—has authority over interpretation of the regulation at issue been committed to agency discretion by law?—but instead presumes a

an agency's interpretations of its own rules, however, did not address the difference between *Seminole Rock* and *Auer*, as it was written prior to *Auer* and broadly challenged the doctrine announced in *Seminole Rock* on due process grounds that would prohibit deference in virtually all settings. See Manning, *supra* note 27. For a partial critique of the due process argument, see Cass, *Auer Deference*, *supra* note 27, at 561–63.

⁴⁶ See *Auer*, 519 U.S. at 461.

⁴⁷ See, e.g., Bamzai, *Hart's Brief*, *supra* note 39; Cass, *Auer Deference*, *supra* note 27; Stephenson & Pogoriler, *supra* note 27.

⁴⁸ For a defense of deference on technical and scientific issues, see, e.g., *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 104 (1983); E. Donald Elliott, *U.S. Environmental Law in Global Perspective: Five Do's and Five Don'ts from Our Experience*, 5 NAT'L TAIWAN U.L. REV. 144, 161–63 (2010); [OTHER]. Additional arguments based on special considerations for price regulation are presented in Norem, *supra* note 22.

⁴⁹ See *Seminole Rock*, 325 U.S. at 417.

⁵⁰ See Cass, *Auer Deference*, *supra* note 27, at 550.

⁵¹ 5 U.S.C. § 706 (2018) (emphasis added).

⁵² See 5 U.S.C. § 551(13) (2018).

⁵³ 5 U.S.C. § 701 (2018).

general commitment of discretion to the agencies on all issues of regulatory interpretation.

B. *Kisor Roles: Changing the Rules on Who Decides*

1. De-Simplifying *Auer*

The Supreme Court considered a head-on challenge to the *Auer* doctrine in *Kisor v. Wilkie*⁵⁴—and attacked it from all sides. *Kisor* contested a decision of the Department of Veterans Affairs (VA) denying him benefits for an injury suffered in his service during the Vietnam War. He secured a favorable ruling on eligibility for benefits on the VA’s reconsideration, but the VA only granted benefits prospectively, not retroactively. *Kisor*’s challenge to that decision centered on interpretation of a VA rule respecting the introduction of new evidence. The Federal Circuit affirmed rejection of that challenge, after finding that the alternative constructions of the VA rule (*Kisor*’s and the VA’s) were both reasonable.⁵⁵ In those circumstances, the court said, *Auer* required it to support the VA’s reading unless it was “clearly erroneous.”⁵⁶

The lead opinion from the Supreme Court, written by Justice Elena Kagan (some parts as the opinion for the Court and other parts as a plurality opinion for herself and Justices Ginsburg, Breyer, and Sotomayor), initially explores some of the settings in which agency rules concern complex, technical issues.⁵⁷ The plurality’s messages in this part are that government agencies deal with many difficult matters, that the rules needed to regulate behavior are frequently ambiguous, and that deference to experts often provides a better basis for decision. These messages dovetail with reasons for statutory grants of discretion to administrators.⁵⁸ For that reason, the opinion states that *Auer* flows from a presumption that Congress intended to have agencies, not courts, resolve most issues respecting rule ambiguity and that this presumption “stems from the awareness that resolving genuine ambiguities often ‘entail[s] the exercise of judgment grounded in policy concerns.’”⁵⁹ The plurality also saw benefits of uniformity and political accountability from *Auer* deference, ascribing interests in those benefits to Congress and

⁵⁴ 139 S. Ct. 2400 (2019).

⁵⁵ *Kisor v. Shulkin*, 869 F.3d 1360, 1366–68 (Fed. Cir. 2017).

⁵⁶ *Id.* at 1368.

⁵⁷ *Kisor*, 139 S. Ct. at 2410–11.

⁵⁸ See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (*Prodelegation*); Gillian E. Metzger, *Foreword: The 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 86–87 (2017); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987) (*Response to Lowi*); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (*Hard-Look*). See also Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. REG. 283, 308, 312 (1986).

⁵⁹ *Kisor*, 139 S. Ct. at 2413.

supposing that this further explains a presumed congressional intention to confer discretion on agencies to interpret their own rules.⁶⁰

The *Kisor* majority does not, however, simply accept *Auer* as is—or more accurately, as was. Instead, the majority opinion preserves courts’ primacy in legal interpretation, making the issues on which courts defer matters of policy.⁶¹ The opinion declares that judges must “exhaust all the ‘traditional tools’ of statutory construction” before deciding that application of a rule is a matter “more of policy than of law.”⁶² The agency construction must be an exercise of lawful policy discretion (an inquiry into “the character and context” of the administrative decision).⁶³ And it must be a reasonable exercise of discretion that rests on the agency’s expertise, is taken by a suitable official, reflects “a fair and considered judgment” of the agency, and does not cause unfair surprise.⁶⁴

While some of these factors reiterate considerations accepted in pre-*Auer* cases and reprised in *Christopher*, together they dramatically alter the *Auer* test. Both Chief Justice Roberts, concurring, and Justice Gorsuch, along with three colleagues concurring in the judgment, underscore this point.⁶⁵ The majority does not admit that it is substantially changing *Auer*. Its discussion of the structure of the *Auer* test begins with the statement that the Court’s “most classic formulation of the test—whether an agency’s construction [of its rule] is ‘plainly erroneous or inconsistent with the regulation’—may suggest a caricature of the doctrine, in which deference is ‘reflexive.’”⁶⁶ That “caricature,” however, was the *Auer* test, at least prior to *Christopher*.⁶⁷ The result, as the justices concurring in the judgment and others have pointedly observed, is to preserve the *Auer* doctrine in name only, a zombie-like creature that inhabits a place in which it is not entirely dead but is virtually completely devoid of all that once made it alive.⁶⁸

2. Reconstruction Projects: *Auer* and *Chevron*

Under the heading of “things aren’t what they seem,” the lead opinion in *Kisor* combines its misleading description of the *Auer* doctrine with a

⁶⁰ *Id.*, 139 S. Ct. at 2413–14.

⁶¹ See, e.g., Aditya Bamzai, *Deference and Interpretive Discretion: Gundy, Kisor, and the Formation of and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019) (*Interpretive Discretion*); Ronald A. Cass, *Deference After Kisor*, REG. REV., Jul. 10, 2019, available at <https://www.theregreview.org/2019/07/10/cass-deference-after-kisor/> (*After Kisor*).

⁶² *Kisor*, 139 S. Ct. at 2415.

⁶³ Cass, *After Kisor*, *supra* note 61. See *Kisor*, 139 S. Ct. at 2416.

⁶⁴ Cass, *After Kisor*, *supra* note 61. See *Kisor*, 139 S. Ct. at 2416–18.

⁶⁵ *Kisor*, 139 S. Ct. at 2424–25 (Roberts, C.J., concurring); *id.*, at 2425–26 (Gorsuch, J., concurring in judgment). See also *id.*, at 2448–49 (Kavanaugh, J., concurring in judgment).

⁶⁶ *Id.*, 139 S. Ct. at 2415 (citations omitted).

⁶⁷ See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012), discussed *supra*, text at notes 41–44.

⁶⁸ See *Kisor*, 139 S. Ct. at 2425–26 (Gorsuch, J., concurring in judgment); Cass, *After Kisor*, *supra* note 61.

thoughtful move toward a reformulated *Chevron* doctrine. The Chief Justice’s brief concurrence, beyond its observation that little separates the majority and separately concurring justices, takes pains to note that *Kisor* was not a case about *Chevron* deference and should not be taken as addressing *Chevron*.⁶⁹ This comes under the heading of “doth protest too much, methinks.”⁷⁰

Certainly, the Chief Justice is correct that *Auer* and *Chevron* are separate doctrines that address distinct settings. This understanding underlies much of the criticism of *Auer*, including criticism by Justice Scalia, *Auer*’s author.⁷¹

The doctrines, however, are linked in two ways. First, *Auer* in part was predicated (or, at least, was defended) on the assumption that deference to agency rule interpretation was simply an easier case for the same sort of deference represented by *Chevron*.⁷² The thought was: if courts defer to agencies on their implementation of statutes, believing that the agency is better situated to understand the nuances of an ambiguous instruction’s application in settings that administrators face with some regularity, wouldn’t deference be even more sensible in the application of ambiguous rules?⁷³

Second, as some writings have emphasized, the original assumption was wrong, not because the cases are unrelated but because the actual relationship is quite different.⁷⁴ *Chevron*, at least as originally conceived, simply confirmed the understanding that courts interpret the law and when statutes grant discretion to an administrator, check that exercise of discretion not for correctness but for abuse of discretion.⁷⁵ Understood this way, *Chevron* also

⁶⁹ *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring); *id.* at 2449 (Kavanaugh, J., concurring in judgment).

⁷⁰ See WILLIAM SHAKESPEARE, *HAMLET*, act iii, sc. 2, line 219.

⁷¹ See, e.g., *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part); *id.* at 615–16 (Roberts, C.J., concurring); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring); Manning, *supra* note 27; Nielsen, *Beyond*, *supra* note 39; Walker, *supra* note 39.

⁷² See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring); Walker, *supra* note 39, at 106.

⁷³ That is the reason that Justice Scalia, referring to the *Auer* setting, said: “on the surface, [*Auer* deference] seems to be a natural corollary—indeed, an *a fortiori* application—of the [*Chevron*] rule that we will defer to an agency’s interpretation of the statute it is charged with implementing.” *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring). He added, “But it is not.” *Id.*

⁷⁴ See, e.g., Cass, *Auer Deference*, *supra* note 27; Walker, *Literature Review*, *supra* note 39, at 110. See also Manning, *supra* note 27.

⁷⁵ See, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 781–87 (2010); Cass, *Auer Deference*, *supra* note 27, at 537–39; Cass, *Deference*, *supra* note 37, at 1314–15; Krotoszynski, *supra* note 37, at 742–43 (2002); Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 3–5 (2013); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398, 398–402 (Peter L. Strauss ed., 2006); Scalia, *Judicial Deference*, note 37, at 512–14, 516; Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143 (2012).

is consistent with the APA and with pre-APA decisions, in contrast with an understanding of the case as authorizing agencies to exercise primacy in construing ambiguous statutes for reasons apart from statutory commitment of implementing discretion to the agencies.⁷⁶ The question for *Chevron* deference is whether and to what degree the law commits discretion to an agency. *Chevron*'s departure from prior law consisted of using different language—the famous *Chevron* two-step—and making clear that the law's commitment did not have to be express, but instead could be inferred from ambiguity or silence on an issue that generally falls within the implementing agency's policy domain.⁷⁷

For deference on rule interpretation, the question is decidedly *not* whether a rule is ambiguous. It is inconceivable that courts could infer a delegation of discretion from ambiguity or silence in an agency's rule: after all, that would amount to believing that an agency could delegate additional degrees of discretion *to itself*.⁷⁸ Instead, courts should look to the relevant authorizing statute to see if the law that governs the agency's actions commits the particular decision on interpretation and implementation of the regulation to the agency's discretion.⁷⁹ The majority opinion in *Kisor*, while faulted (rightly) by the justices concurring in the judgment for its complexity and possible tension with the APA,⁸⁰ still provided potential for moving *Chevron* as well as *Auer* toward better ground. Overruling *Auer* would have been a simpler step, but *Kisor* manifestly did not leave the law where it was.

II. Department of Commerce: Confusing Roles and Tests

While *Kisor* was a case about the scope of agency discretion respecting interpretation, *Department of Commerce v. New York* presented a more direct

⁷⁶ See Beermann, *supra* note 75, at 790; Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 262–63, 266–67 (1988); Ronald A. Cass, *Is Chevron's Game Worth the Candle? Burning Interpretation at Both Ends*, in LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds., 2016) (*Worth the Candle?*); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 131, 189–211 (1998); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 472–73 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 187–90 (1992); Kristin E. Hickman & David Hahn, *Categorizing Chevron*, 81 OHIO ST. L. REV. (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693132, at 48–52; Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 310–12 (1988).

⁷⁷ See Scalia, *Judicial Deference*, note 37, at 516. The concepts of “original *Chevron*,” see Beermann, *supra* note 75, at 784–85, 793–94, have not always governed later applications of its test. This is part of the reasoning behind calls for abandoning *Chevron*. See, e.g., Beermann, *supra* note 75, at 782–83, 788–94; Cass, *Deference*, *supra* note 37, at 1300–01, 1328–29; Cass, *Worth the Candle?*, *supra* note 76; Duffy, *supra* note 76, at 193–94; Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 7 (2017).

⁷⁸ See *Kisor*, 139 S. Ct. at 2439 (Gorsuch, J., concurring in judgment); Cass, *Auer Deference*, *supra* note 27, at 553.

⁷⁹ See Cass, *Auer Deference*, *supra* note 27, at 553–59.

⁸⁰ See *Kisor*, 139 S. Ct. at 2432–37, 2443–48 (Gorsuch, J., concurring in judgment).

question respecting judicial review of the exercise of delegated discretion. The case challenged an action committed to the Secretary of Commerce's discretion by law, asserting that it violated the APA's provision providing for relief against acts that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸¹ The decision for the Court was notable both for what it found did *not* rise to that standard and for what it found *did* meet that standard—and, most of all, for the internal conflict between the two parts of the Court's opinion addressing the matter.⁸²

A. *The Census, Citizenship, and Reviewability*

The U.S. Constitution requires a decennial census as the basis for apportionment of the House of Representatives.⁸³ The census clause provides that Congress will determine the manner in which the census will be taken,⁸⁴ and Congress has assigned various administrative officers to supervise and to conduct the census.⁸⁵ The present version of the Census Act directs the Secretary of Commerce to conduct the census "in such form and content as he may determine"⁸⁶ and authorizes the Secretary to "determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses" provided for by law.⁸⁷ The census historically has been used not merely to count the population for apportionment but also to gather information that may be useful to the government in other ways.⁸⁸ While questions have been added, removed, or shifted among different components of the census (which now consists of a basic form, supplemental forms, surveys, and interviews),⁸⁹ the basic orientation of the census has remained relatively constant.⁹⁰

Although occasionally the subject of political dispute and frequently providing information that has political implications (particularly with respect to the allocation of federal funds that are tied to population),⁹¹ census administration rarely has been a matter of high drama since the Civil War

⁸¹ 5 U.S.C. § 706(2)(A) (2018) (emphasis added).

⁸² For a more extensive treatment of the issues discussed in this part, see Ronald A. Cass, *Motive and Opportunity: Courts' Intrusion into Discretionary Decisions of Other Branches: A Comment on Department of Commerce v. New York*, 27 GEO. MASON L. REV. 401 (2020) (*Motive*).

⁸³ U.S. CONST. art. I, § 2, cl. 3 (providing that direct taxes and representatives in the House shall be determined by a decennial "enumeration" of the population). The manner in which individuals are counted was changed by the 14th Amendment. *See id.* amend. 14, § 2.

⁸⁴ *Id.* at art. I, § 2, cl. 3.

⁸⁵ The original authorization assigned collection of census information to the marshals in the judicial districts. *See* 1790 Census Act, ch. 2, § 1, 2 Stat. 101.

⁸⁶ 13 U.S.C. § 141(a) (2018).

⁸⁷ 13 U.S.C. § 5 (2018).

⁸⁸ For discussion of information-gathering uses of the census, see *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2561–62 (2019) (*Dep't of Commerce*).

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See* Michael P. Murray, *Census Adjustment and the Distribution of Federal Spending*, 29 DEMOGRAPHY 319, 319 (1992).

era.⁹² That is particularly true for census questions that provide information about the population but that do not define who counts or dictate how to make the count.⁹³ The lack of strong, predictable political investment in the conduct of the census—at least, over long periods of time—no doubt explains the commitment of control over its design and implementation to administrators.⁹⁴

One question traditionally asked in the census concerns citizenship. Questions respecting citizenship, birth, and nationality were requested by Thomas Jefferson on behalf of the American Philosophical Society.⁹⁵ With rare exception, the census has gathered information about citizenship or place of birth of those surveyed, including all but one census between 1820 and 2000.⁹⁶ In thirteen of the fourteen censuses between 1820 and 1950, every household was asked about this.⁹⁷ From 1960 to 2000, a citizenship question appeared on a subset of census forms, but in 2010 it was removed from the forms and assigned to a related survey that covered less than three percent of the population.⁹⁸

Shortly after coming into office with the new administration in 2017, Commerce Secretary Wilbur Ross began exploring whether to reinstate a citizenship question to the primary census form.⁹⁹ While the Secretary was

⁹² The founding generation's argument over how to count slaves—with Southern states that had large numbers of slaves seeking full inclusion of slaves in the census count and Northern states seeking to exclude them altogether, arguments concluding in the infamous three-fifths compromise, see, e.g., JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 246–51 (Gaillard Hunt & James Brown Scott eds., Oxford Univ. Press 1920) (debates of July 13, 1787)—had obvious political importance. Arguments respecting the census, and especially respecting the details of census questions and census-taking mechanics, rarely have risen to public note for many decades.

⁹³ Since the 1960s, changes in judicial doctrine respecting how voting districts are drawn have introduced line-drawing opportunities that make the population count more critical to allocation of particular representatives. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962). At the same time, the extent of the redistricting freedom given to controlling political coalitions also frees politicians from reliance on more traditional limitations tied to census counts. See generally GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002) (describing the nature and consequences of the reapportionment decisions, including their effects on reducing interparty competition, increasing incumbency advantage, and also increasing the probability and durability of Democrats' prospects of controlling Congress).

⁹⁴ See, e.g., NAT'L RSCH. COUNCIL, *THE BICENTENNIAL CENSUS: NEW DIRECTIONS FOR METHODOLOGY IN 1990*, at 2-3 (1985). The emergence of new political controversies in the 1990s and 2000s largely remained a relatively low-visibility matter. See, e.g., Kenneth Prewitt, *The U.S. Decennial Census: Political Questions, Scientific Answers*, 26 *POPULATION & DEV. REV.* 1 (Mar. 2000), available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1728-4457.2000.00001.x> (addressing issues such as appropriate sampling techniques).

⁹⁵ See *Dep't of Commerce*, 139 S. Ct. at 2596 (Alito, J., concurring in part and dissenting in part) (citing CAROLL D. WRIGHT, *HISTORY AND GROWTH OF THE UNITED STATES CENSUS* (prepared for the Senate Committee on the Census), S. Doc. No. 194, 56th Cong., 1st Sess., 19 (1900)).

⁹⁶ See *Dep't of Commerce*, 139 S. Ct. at 2561–62; *id.* at 2596 (Alito, J., concurring in part and dissenting in part).

⁹⁷ *Id.* at 2561.

⁹⁸ *Id.* at 2561–62.

⁹⁹ *Id.* at 2564, 2574.

inclined toward that course of action, officials in the Department's Census Bureau were opposed to it, fearing it would decrease the response rate to the census, particularly among non-citizens.¹⁰⁰ Both Secretary Ross and other Department of Commerce officials discussed with officials in other agencies, including the Department of Justice, whether citizenship information would be helpful to the other departments' missions.¹⁰¹ Subsequently, the Department of Justice requested reinstatement of a citizenship question to the census as potentially helpful to its mission enforcing the Voting Rights Act (VRA).¹⁰² Officials at the Census Bureau, continuing to oppose inclusion of the citizenship question, prepared a memorandum containing alternative options for securing the requested information. Ross asked the Bureau to examine an additional option, but after reviewing the Bureau's analysis issued a memorandum announcing his decision to reinstate a question respecting citizenship on the main 2020 census form.¹⁰³

A coalition of states, municipalities, and organizations interested in citizenship issues filed suit in the Southern District of New York challenging the Secretary's decision.¹⁰⁴ Among other things, plaintiffs urged the court to find that the Secretary's decision to reinstate the citizenship question was arbitrary and capricious and an abuse of his discretion.¹⁰⁵ Plaintiffs asserted that the Secretary had not adequately explained or justified his decision, that he had ignored the advice of experts in the Census Bureau, and that his real motivation in reinstating the citizenship question was political rather than

¹⁰⁰ *Id.* at 2561–62; *id.* at 2586–87 (Breyer, J., concurring in part and dissenting in part).

¹⁰¹ *Id.* at 2574.

¹⁰² *Id.* at 2562.

¹⁰³ *Id.* at 2562–63.

¹⁰⁴ As noted in Cass, *Motive*, *supra* note at 408, “the lead plaintiffs were a group of eighteen states—fifteen with Democrat administrations and three states that have predominantly (two of them overwhelmingly) Democratic political registrations, Democrat attorneys general, and (mostly) Republican governors who have been vocal critics of President Trump.” The states are listed in *New York v. Department of Commerce (SDNY Decision)*, 351 F. Supp. 3d 502, 528 (S.D.N.Y. 2019). For current political party affiliations of state governors and attorneys general, see *Partisan Composition of Governors*, in *Encyclopedia of American Politics*, BALLOTPEdia, <https://perma.cc/AT4K-ZEYB>; see also Rod Boshart, *Iowa's Tom Miller About to Become Longest-Serving State Attorney General Ever*, THE GAZETTE (Jan. 3, 2020), <https://perma.cc/74DU-HTF8>; LORI KOLANI & BERNARD NASH, COZEN O'CONNOR, THE STATE AG REPORT (2020), <https://perma.cc/T6E7-XTDC>. For relevant commentary about the Trump administration, see, e.g., Zack Budryk, *GOP Massachusetts Governor Calls Trump Tweets “Shameful,” “Racist,”* THE HILL (July 15, 2019, 10:54 PM), <https://perma.cc/N8EZ-U862> (reporting remarks by Massachusetts Governor Charlie Baker criticizing President Trump); Nik DeCosta-Klipa, *Charlie Baker Says Trump's Refugee Ban “Will Not Make the Country Safer,”* BOSTON.COM (Jan. 29, 2017), <https://perma.cc/W3CQ-HUGW> (same); Donald Judd, *Maryland Gov. Larry Hogan Hits Trump Over Mueller Report as He Mulls 2020 Challenge*, CNN POLITICS (Apr. 23, 2019, 11:10 PM), <https://perma.cc/9XQH-5YVT> (reporting remarks by Maryland Governor Larry Hogan criticizing President Trump); John Rydell, *Governor Hogan Discusses Trump Travel Ban, City Schools Deficit*, FOX45 NEWS (Feb. 16, 2017), <https://perma.cc/TB6D-KKGR> (same).

¹⁰⁵ See *Dep't of Commerce*, 139 S. Ct. at 2563, 2567. Plaintiffs also asserted that the decision failed to meet statutory requirements and violated the Enumeration Clause of the Constitution and the Due Process and Equal Protection Clauses of the 14th Amendment. *Id.* at 2563–64; *SDNY Decision*, 351 F. Supp. 3d at 635–54, 664–71.

being intended actually to gain better information for VRA enforcement.¹⁰⁶ The district judge, on request from plaintiffs, ordered more information provided to supplement or complete the administrative record, agreed to permit plaintiffs to depose Secretary Ross and other officials to determine the motivation for the Secretary's action, and ultimately, in a lengthy opinion, accepted virtually all of the plaintiffs' contentions.¹⁰⁷

At the outset, the Court confronted the question whether the Secretary's action was reviewable under the APA. The Court agreed that it was, finding that the law provided sufficient constraints on the exercise of the Secretary's discretion to provide guidance for review.¹⁰⁸ This conclusion drew a sharp dissent from Justice Alito:

[T]he relevant text of § 141(a) "fairly exudes deference" to the Secretary. And no other provision of law cited by respondents or my colleagues provides any "meaningful judicial standard" for reviewing the Secretary's selection of demographic questions for inclusion on the census.¹⁰⁹

Justice Alito's point was that the Constitution had assigned virtually unlimited authority to the Congress over the details of the census, what to ask and how to collect the information. Congress, with only a few exceptions, had similarly conferred discretion over those details to the Secretary. As a result, there was little room for the Court to superintend how the Secretary exercised that discretion.¹¹⁰ The majority, while finding enough direction to proceed, acknowledged the broad discretion enjoyed by Secretary Ross.¹¹¹ That understanding informs—or should inform—the Court's analysis of contentions respecting review under the APA.

B. *Discretion, Arbitrary-Capricious Review, and Motives*

The heart of the plaintiffs' complaint is that Ross's decision was arbitrary and capricious.¹¹² The principal assertions in support of that contention are that the Secretary failed to provide a reasonable basis for his decision, rejected the advice of experts at the Census Bureau, was influenced by political considerations, and provided an explanation that did not reveal his

¹⁰⁶ See *Dep't of Commerce*, 139 S. Ct. at 2563–64; *SDNY Decision*, 351 F. Supp. 3d at 515.

¹⁰⁷ See *Dep't of Commerce*, 139 S. Ct. at 2563–67; *SDNY Decision*, 351 F. Supp. 3d at 515.

¹⁰⁸ *Dep't of Commerce*, 139 S. Ct. at 2568–69.

¹⁰⁹ *Dep't of Commerce*, 139 S. Ct. at 2603 (Alito, J., concurring in part and dissenting in part) (citing *Webster v. Doe*, 486 U.S. 592, 600 (1988)) (citations omitted). Justices Thomas, Gorsuch, and Kavanaugh agreed with the substance of Justice Alito's argument, but assumed for purposes of deciding the other issues in the case that review was available. *Dep't of Commerce*, 139 S. Ct. at 2577 n.2 (Thomas, J., concurring in part and dissenting in part).

¹¹⁰ See *Dep't of Commerce*, 139 S. Ct. at 2597–2603 (Alito, J., concurring in part and dissenting in part).

¹¹¹ See *id.*, 139 S. Ct. at 2568.

¹¹² The four different terms used in the APA provision generally referenced as providing for review of discretionary actions—commonly referred to as “arbitrary and capricious” or “arbitrary, capricious” review—actually denotes four different forms of errors that agencies can commit in exercising discretion. For an explanation of the different meanings of these terms, see, e.g., Cass, *Motive*, *supra* note 82, at 421.

real motivation for deciding to reinstate a question respecting citizenship on the main census form.¹¹³

1. Reasonable Basis vs. Right Reason

The majority opinion in *Department of Commerce* takes an approach to arbitrary, capricious review that, for the most part, is respectful both of the exercise of discretion by a coequal branch of government and of the breadth of discretion conferred on the Secretary. Chief Justice Roberts's opinion does not ask whether Secretary Ross chose the best, wisest, or most cost-effective approach to gaining information about citizenship, nor does it ask whether that information was essential to some specific government mission.¹¹⁴ Those are not the legally established tests for assessing discretionary government action.¹¹⁵ The test simply is whether the administrator has made a reasoned judgment within the scope of the discretion committed by law.¹¹⁶ As Roberts's opinion declares, "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.'"¹¹⁷ All of the policy-based reasons given in Justice Kagan's opinion in *Kisor* for lawmakers to grant discretion to administrators over specific determinations and for courts to defer to those discretionary administrative judgments support the sort of deferential standard adopted by the APA and used by the majority in *Department of Commerce*.¹¹⁸

More important, deferential review of the exercise of legally committed discretion is consistent with the constitutional assignment of power to the branches of government. The Framing generation included many people expressing concern about the possibility that a life-tenured judiciary would be free to follow personal views, invading personal liberties and ignoring

¹¹³ See *Dep't of Commerce*, 139 S. Ct. at 2569–76; *id.* at 2579–83 (Thomas, J., concurring in part and dissenting in part); *id.* at 2584–96 (Breyer, J., concurring in part and dissenting in part).

¹¹⁴ See *Dep't of Commerce*, 139 S. Ct. at 2569–71.

¹¹⁵ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 511–14 (2009); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 989 (2005); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–47 (1996).

¹¹⁶ Much of the opinion for the Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), suggests that the more intrusive standard of review associated with that case was part of an exercise in the interpretation of law rather than in the exercise of discretion in the law's implementation. See *id.* at 410–13, 415–16.

¹¹⁷ See *Dep't of Commerce*, 139 S. Ct. at 2569 (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹¹⁸ For explanations of benefits that can be associated with administrative decision-making in various contexts, see, e.g., JERRY MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 163–78 (2018) (relating rulemaking, participation, reason-giving, and legitimacy); Diver, *supra* note 58; Epstein & O'Halloran, *supra* note 58; Freeman & Vermeule, *supra* note 58; Mashaw, *Prodelegation*, *supra* note 58; Metzger, *supra* note 58, at 86–91; Pierce, *Response to Lowi*, *supra* note 58; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992); Sunstein, *Hard-Look*, *supra* note 58.

constitutional and statutory restrictions on their powers.¹¹⁹ The men who wrote and advocated ratification of the Constitution were aware of those risks, but urged the people to trust that the assignment of separate and competing powers among the branches, insulation of the judiciary from direct political influence, and limitations on the scope of decisions that could be presented to the courts would limit the risks.¹²⁰

The Constitution's separation of powers among the branches is consistent with the Court's recognition in *Department of Commerce* that administrative exercises of discretion are not compromised because political views of the incumbent administration influences policy choices.¹²¹ As the majority opinion states:

[A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power." Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).¹²²

This is the reason that the APA specifies narrow bases for setting aside discretionary agency action—specific ways in which actions can violate basic predicates of rationality and reasonableness—that are tantamount to undermining statutory directions.¹²³

The same understanding of constitutionally assigned powers supports the opinion's recognition that politically-responsible officials are not bound to follow the recommendations of agency staff. Despite the emphasis placed in Justice Breyer's opinion on the divergence between Secretary Ross's decision and the views of Census Bureau officials,¹²⁴ the majority opinion appreciates that assignment of discretionary policy-making authority to the President and executive branch officials as a rule is not a delegation of authority to self-contained bodies of experts carefully insulated from all democratic controls.¹²⁵ Unsurprisingly, long-term government employees

¹¹⁹ See BRUTUS NO. XI (Jan. 31, 1788), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 293–98 (Ralph Ketcham ed., Penguin Books 1986) (ANTI-FEDERALIST PAPERS).

¹²⁰ See, e.g., THE FEDERALIST NOS. 37, 47–48, 51 (James Madison); *id.* at NOS. 78–80 (Alexander Hamilton); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 524, 536–47 (1969). On the centrality of concerns with discretionary governmental authority, both in the United Kingdom and the United States, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 4–8 (2014). On historical understanding of the importance of limiting the scope of judicial review, see 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100–06 (Henry Reeve trans., Schocken Books 1961) (1835).

¹²¹ See *Dep't of Commerce*, 139 S. Ct. at 2573.

¹²² *Id.* (citations omitted).

¹²³ See, e.g., Cass, *Motive*, *supra* note 82, at 421.

¹²⁴ *Id.* at 2561–62; *id.* at 2584–95 (Breyer, J., concurring in part and dissenting in part).

¹²⁵ See, e.g., Cass, *Motive*, *supra* note 82, at 425–27.

frequently participated in shaping agency positions that incoming politically appointed officers want to change—which explains the perception of embedded staff as a primary impediment to new policy initiatives.¹²⁶ Giving special weight to staff views would run contrary to traditional rules for review, counter to understandings of the constitutional role of the President, and against interests in democratic accountability.¹²⁷

Limiting judicial freedom to second-guess agency policy decisions does not negate concern over delegations of expansive authority to agencies. Many judges and scholars have expressed dismay at the nature and breadth of discretionary power devolved to administrators.¹²⁸ These expressions reveal legitimate concerns over derogations of constitutional structures, and it is certainly possible as a matter of practical judgment to believe that more intrusive judicial review would provide a second-best solution to problems of excessive delegation.¹²⁹ Arguments of this sort, however, open a door to substituting judicial governance for constitutional governance.¹³⁰ This solution is contrary to the rule of law—misconstruing a legal standard in order to compensate for courts' failure to enforce a constitutional standard—and lacks an obvious mechanism for establishing limits to the judicial

¹²⁶ See Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 185–87, 216–19 (1978); James Q. Wilson, *The Dead Hand of Regulation*, 25 PUB. INT. 39, 48 (1971). See also Cass, *Motive*, *supra* note 82, at 425–26.

¹²⁷ Cass, *Motive*, *supra* note 82, at 425–27. See also Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 582–84 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001). But see Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009).

¹²⁸ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2138–40 (2019) (Gorsuch, J., dissenting); *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 57–66 (2015) (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1040–41 (2007) (*Running Riot*); Cass, *Delegation Reconsidered*, *supra* note 13; Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 478–91 (2016); Gary Lawson, *Delegation*, *supra* note 13; Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2165–81 (2004) (*Rethinking*); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1506–25 (2015); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 359 (1987) (*Constitutional Purposes*); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–26, 1229–34 (1985) (*Substance*); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, at 996–98, 1002–03 (2018) (*As-Applied*). See generally HAMBURGER, *supra* note 120 (describing the background and history of American and continental laws' limitations on unchecked administrative power).

¹²⁹ For various iterations of the relation between the nondelegation doctrine and other doctrines, including the mode of review and the construction of statutory directions, see, e.g., Bamzai, *Interpretive Discretion*, *supra* note 61, at 172–76; Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849 (2019); John F. Manning, *The Nondelegation Doctrine as a Canon of Constitutional Avoidance*, 2000 SUP. CT. REV. 223 (2000); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Wurman, *As-Applied*, *supra* note 128.

¹³⁰ This essentially is the same argument that is engaged more generally under the headings of non-interpretivist versus interpretivist methodologies for judicial decision-making. See, e.g., Saikrishna Prakash, *Unoriginalism's Law without Meaning*, 15 CONST. COMMENTARY 529 (1998); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (*Originalism*).

adventurism it authorizes.¹³¹

2. New Divining Tool: Probing the Decisionmaker's Mind

When it came to consideration of the allegation that the Secretary's stated reasons for his decision were merely a pretext, rather than the actual explanation for his decision, the Court's opinion reads quite differently. It is as if the opinion was patterned on an Agatha Christie novel where the surprise ending reveals an unpredictable twist based on considerations hidden from the unsuspecting reader.¹³²

In rejecting the challenge to Secretary Ross's decision as based on improper political considerations, Chief Justice Roberts's opinion declared that "inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided."¹³³ The Chief Justice's opinion for the Court in *Trump v. Hawaii* the preceding Term had made a similar point, rejecting a request to inquire into the motives behind a presidential proclamation restricting entry into the United States.¹³⁴

The Court's *Department of Commerce* opinion, however, did not in fact close the door on that inquiry. Instead, it turned out that the inquiry into motive was merely precluded by one side of a set of sliding doors. The Court repeated a dictum from *Citizens to Preserve Overton Park, Inc. v. Volpe*¹³⁵ that, despite the usual rule against looking into a decision maker's thinking, inquiry into the mental processes of an administrative decision maker might be permitted where there is a "strong showing of bad faith or improper behavior."¹³⁶ The *Department of Commerce* majority went on to find that additional filings by the Government to supplement the initially-filed administrative record contained information supporting the accusation that Secretary Ross had something in mind other than the need to gather information useful to enforcement of the Voting Rights Act.¹³⁷ The Court then upheld the extra-record discovery, decided that the Secretary's action was based on undisclosed reasons, and concluded that the statement of reasons given to the court below did not provide a suitable basis for judicial review.¹³⁸ In other words, the majority concluded that the actual motivation for the decision was a suitable ground for setting aside its just-reached

¹³¹ See discussion and sources cited at text and notes at notes 221–237 *infra*.

¹³² A humorous version of this complaint is at the heart of the 1976 Neil Simon-Robert Moore film "Murder by Death."

¹³³ *Dep't of Commerce*, 139 S. Ct. at 2573 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)).

¹³⁴ 138 S. Ct. 2392, 2415–20 (2018).

¹³⁵ 401 U.S. 402 (1971).

¹³⁶ *Dep't of Commerce*, 139 S. Ct. at 2574 (quoting *Overton Park*, 401 U.S. at 420).

¹³⁷ See *id.* at 2574–76.

¹³⁸ See *id.* at 2574–76.

finding that the Secretary’s decision was reasonable—not because the motivation was improper, but because it differed from the stated justification.

Years earlier, in the *Morgan IV* case—the fourth case to make it to the Supreme Court in a long-running fight over application of Department of Agriculture regulations to the Morgan Sheep Company¹³⁹— the Court had emphatically rebuffed efforts to determine the Secretary of Agriculture’s personal thinking respecting a specific agency decision and why the Secretary rejected staff recommendations in the case.¹⁴⁰ In *Morgan II*, the Court had declared that it is “not the function of the court to probe the mental processes of the Secretary.”¹⁴¹ In *Morgan IV*, Justice Frankfurter, writing for the Court, explained that, just as a judicial decision should speak for itself, so should an administrative decision.¹⁴² He added that after-the-fact inquiry into the thinking of a judge would be “would be destructive of judicial responsibility,” adding that “[j]ust as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.”¹⁴³

The Court’s decision in *Department of Commerce*, if taken at face value, is a repudiation of the reasoning of *Morgan IV*. In one respect, it goes further than the inquiries rebuffed in the *Morgan* cases. As Justice Thomas says, “[f]or the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency’s otherwise adequate rationale.”¹⁴⁴ Yet, it is not clear that Chief Justice Roberts’s opinion will prove a precedent for future cases. Although four other justices joined his opinion with respect to invalidation of the Secretary’s decision as pretextual, none of those justices agreed that the Secretary’s action could be upheld on its stated basis.¹⁴⁵ None of the remaining justices agreed that it was appropriate to inquire into the Secretary’s thinking beyond what was stated in his contemporaneous explanation.

III. *Department of Homeland Security: How to Make Change*

The third piece of the trilogy of recent judicial review cases, *Department of Homeland Security v. Regents of University of California*, addresses a decision by the Department of Homeland Security under the Trump Administration to repeal a rule revising immigration law enforcement adopted (pursuant to presidential direction) during the immediately

¹³⁹ See *United States v. Morgan (Morgan IV)*, 313 U.S. 409, 416–21 (1941); *United States v. Morgan*, 307 U.S. 183, 198 (1939); *Morgan v. United States*, 304 U.S. 1, 22 (1938) (*Morgan II*); *Morgan v. United States*, 298 U.S. 468, 482 (1936).

¹⁴⁰ *Morgan IV*, 313 U.S. at 421–22.

¹⁴¹ *Morgan II*, 301 U.S. at 18.

¹⁴² *Morgan IV*, 313 U.S. at 421–22.

¹⁴³ *Id.* at 422.

¹⁴⁴ *Dep’t of Commerce*, 139 S. Ct. at 2576 (Thomas, J., concurring in part and dissenting in part).

¹⁴⁵ See *id.* at 2586–95 (Breyer, J., concurring in part and dissenting in part).

preceding Obama Administration.¹⁴⁶ As with the two cases discussed above, *Homeland Security* alters a rule of judicial review.

A. *Making Change: Forward and Back*

During President Obama's Administration, the Department of Homeland Security (DHS) issued a memorandum creating a program called Deferred Action for Childhood Arrivals (DACA). The program conferred temporary, but renewable, lawful presence status on certain illegal alien residents who arrived in the United States as children.¹⁴⁷ Approximately 1.7 million such residents became eligible to avail themselves of that status under DACA.¹⁴⁸ Those qualifying for the program became eligible to work legally in the United States and also became eligible for both federal and state benefit programs.¹⁴⁹

Two years later, the Secretary of DHS in another memorandum expanded the set of people eligible for DACA and extended the period of deferment (the period during which illegal aliens under this program are treated as lawfully present in the United States).¹⁵⁰ At the same time, DHS created a related program named Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).¹⁵¹ DAPA potentially made another 4.3 million illegal aliens lawfully present and eligible for the same work status and other benefits as individuals covered by DACA during the period for which they would be covered.¹⁵²

The two programs were highly controversial, not least because they followed years of efforts to secure passage of legislation amending immigration law to address concerns about illegal aliens who had come to the United States as children and had lived, attended school, and grown up knowing no other home than this country.¹⁵³ Before those efforts resulted in failure, President Obama had indicated his sympathy for this particular class of illegal aliens along with his regret that questions respecting their status and treatment could only be addressed by a change in law.¹⁵⁴ A lawsuit filed

¹⁴⁶ 140 S. Ct. 1891 (2020) (*Dep't of Homeland Security*).

¹⁴⁷ *See id.* at 1899–1900; *id.* at 1918 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁴⁸ *See id.* at 1918, 1920 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁴⁹ *See id.* at 1901–02; *id.* at 1918 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁵⁰ *See id.* at 1902.

¹⁵¹ *See id.*; *id.* at 1920 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁵² *See id.* at 1902; *id.* at 1920 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁵³ Justice Thomas's opinion in Department of Homeland Security states that more than two dozen attempts were made to address the issues through legislation. *See id.* at 1918.

¹⁵⁴ *See, e.g.,* Glenn Kessler, *Obama's Royal Flip-Flop on Using Executive Action on Immigration*, WASH. POST (Nov. 18, 2014), available at <https://www.washingtonpost.com/news/fact-checker/wp/2014/11/18/obamas-flip-flop-on-using-executive-action-on-illegal-immigration/>; Michael D. Shear, *For Obama, Executive Order on Immigration Would Be a Turnabout*, N.Y. TIMES (Nov. 17, 2014),

by twenty-six states asserted, among other things, that DAPA was contrary to the Immigration and Nationality Act (INA) and that if it were lawful under the INA, it still have to be promulgated through notice-and-comment rulemaking under the APA.¹⁵⁵ The district court and the court of appeals found those complaints about DAPA's legality persuasive, granting injunctive relief on the claims' likely success, and an equally divided Supreme Court affirmed.¹⁵⁶ As a result, DAPA never went into effect.

After President Trump took office, bringing an Administration with very different priorities on immigration issues than his predecessor's, DHS rescinded the DAPA memo. A few months later, Attorney General Sessions advised the Acting Secretary of DHS that DACA had similar legal deficiencies to DAPA, both with respect to its lack of authorization under INA and its lack of procedural compliance with the APA.¹⁵⁷ Acting Secretary Duke promptly rescinded the DACA memoranda, noting the legal questions surrounding the program, evidenced by the court decisions and the Attorney General's advice.¹⁵⁸

Again, a collection of states and groups opposed to the policy represented by the rescission filed suit, this time in various federal district courts.¹⁵⁹ Two courts issued nationwide injunctions expecting that plaintiffs would succeed on the claim that the rescission was arbitrary and capricious, and one district court found Secretary Duke's explanation of her reasons for rescission insufficient but stayed the effect of its ruling to provide time for DHS to reissue its memorandum.¹⁶⁰

Secretary Nielsen, who had succeeded Duke, issued a memorandum explaining why Duke's decision was correct. Nielsen gave as her reasons not only the findings of courts and the Attorney General but also a preference for avoiding implementation of programs likely to raise serious legal questions (which has implications for DHS enforcement and resources) and, additionally, a set of policy considerations that she concluded militated in favor of rescission and outweighed competing concerns such as harm from

available at <https://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html>.

¹⁵⁵ See *Dep't of Homeland Security*, 140 S. Ct. at 1902. The states joined as plaintiffs in the DAPA litigation were essentially the political opposing numbers to the states suing in *Dep't of Commerce* over the reinstatement of a census question respecting citizenship on the main census form. See discussion *supra* at note 104. The states joined in the challenge to DAPA were Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin. See *Texas v. United States*, 86 F. Supp. 3d 591, 591 n.1 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (2015), *aff'd* by equally divided Court, sub nom. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

¹⁵⁶ *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (2015), *aff'd* by equally divided Court, sub nom. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

¹⁵⁷ See *Dep't of Homeland Security*, 140 S. Ct. at 1903.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* at 1903–04.

individuals' and entities' reliance on the program.¹⁶¹ The district court that had stayed enforcement of its ruling found that the Nielsen memorandum did not cure any of the deficiencies of the Duke memorandum.¹⁶²

B. *Raising the Bar for Explaining Change*

From a common-sense standpoint, *Homeland Security* looks like an easy case. One presidential administration acted without legislative direction and without adopting a rule to change immigration enforcement policy, and the succeeding presidential administration used exactly the same form of action to repeal that policy and return to the prior enforcement policy. Even without questions respecting DACA's legality, this seems a simple case for rejecting challenges to DHS's action. This is how four justices saw the matter. If adoption of the DACA policy was illegal (substantively or because it was accomplished by memorandum without rulemaking process), there is no ground for continued enforcement.¹⁶³ If it was lawfully adopted as a matter of administrative discretion over enforcement, a similar method of decision should suffice to rescind it.¹⁶⁴

Moreover, the Court's precedents respecting changing policy choices for matters that lie within administrators' discretion broadly support that view. In general, the Court has recognized that agency discretion to make policy choices within a set domain includes discretion to change agency policy.¹⁶⁵ As the Court said in its *Brand X* decision, "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'"¹⁶⁶ Similarly, the Court's decision in *Federal Communications Commission v. Fox Television Stations, Inc.*, explained that an agency that is adopting a change in policy "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better."¹⁶⁷ On occasion, the Court has deemed a

¹⁶¹ *See id.* at 1904.

¹⁶² *See id.* at 1904–05.

¹⁶³ *See Dep't of Homeland Security*, 140 S. Ct. at 1921–26 (Thomas, J., concurring in the judgment in part and dissenting in part). Justice Thomas's opinion was joined by Justices Alito and Gorsuch.

¹⁶⁴ *See id.* at 1926–31 (Thomas, J., concurring in the judgment in part and dissenting in part); *id.* at 1932 (Alito, J., concurring in the judgment in part and dissenting in part); *id.* at 1932–36 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

¹⁶⁵ *E.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 511–15 (2009) (generally deferring to agency policy changes if accompanied by statement of reasons) (*Fox Television Stations*); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 989 (2005) (granting agencies freedom to change policy and act "inconsistent[ly]" if accompanied by statement of reasons) (*Brand X*); *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–47 (1996) (validating reasonable agency regulation as broadly within agency authority in context where statute was consistent with grant of agency discretion).

¹⁶⁶ *Brand X*, 545 U.S. at 981 (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996)).

¹⁶⁷ *Fox Television Stations*, 556 U.S. at 514 (emphasis in original).

change in policy beyond the scope of an agency's statutory authority, but that is a different question than whether it has abused its discretion on matters that lie within the ambit of statutorily conferred discretion.¹⁶⁸

The majority in *Homeland Security* took a different tack. Its assessment of whether the rescission of the prior Administration's policy rests on two legs. The first leg is that judicial evaluation of agency action must rest on contemporaneous explanations for the action, not later rationalizations of it.¹⁶⁹ The second leg is that the explanation must not only give reasons for the action but must also demonstrate that the administrator considered the available options and made a reasoned choice among them.¹⁷⁰ Neither of those provides a leg to stand on in this case.

The concern about *ex post* rationalization is a significant one in settings where a process required for decision (rulemaking or adjudication) provides the essential background and record for administrative action.¹⁷¹ That, however, was not the setting for *Homeland Security*, where both the initial actions creating DACA and the action rescinding it were entirely informal processes. Moreover, as Justice Kavanaugh observes, the government's argument in *Homeland Security* did not ask the Court to consider new explanations offered to justify its position in litigation.¹⁷² Instead, it asked the Court to consider the reasons given in the Nielsen memorandum, issued nine months after the Duke memorandum in response to the district court's request for DHS to reconsider the first memorandum and provide a fuller explanation.¹⁷³ The majority declined to consider the Nielsen memorandum, as Secretary Nielsen did not say that she was issuing a new decision but rather cast her memorandum as an explanation of the Department's position.¹⁷⁴ This seems a bit like playing "mother may I"—you have to use just the right words if you want to move forward.

While ignoring the explanations for the rescission given in the Nielsen memorandum, the majority opinion takes an unusually intrusive approach to evaluating the reasoning of the Duke memorandum. After conceding that DHS was bound by the legal view of the Attorney General that DACA was not lawful,¹⁷⁵ the opinion asserts that Acting Secretary Duke erred by not

¹⁶⁸ See, e.g., *Food & Drug Adm'n v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131–56 (2000) (rejecting the agency's assertion of jurisdiction to regulate tobacco use as inconsistent with the meaning of the governing law). For a review of limits on administrators' discretion, especially respecting enforcement decisions, see, e.g., Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016).

¹⁶⁹ *Dep't of Homeland Security*, 140 S. Ct. at 1907–10.

¹⁷⁰ See *id.* at 1910–15.

¹⁷¹ See, e.g., *Michigan v. EPA*, 576 U.S. 743 (2015); *Bowen v. Amer. Hosp. Ass'n*, 476 U.S. 610 (1986); *Camp v. Pitts*, 411 U.S. 143 (1973). Chief Justice Roberts's opinion in *Homeland Security* relies on these cases. See *Dep't of Homeland Security*, 140 S. Ct. at 1907–09.

¹⁷² See *id.* at 1933–34 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

¹⁷³ See *id.* (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

¹⁷⁴ See *id.* at 1908–09.

¹⁷⁵ *Id.* at 1910.

realizing that the illegality found by the federal courts whose decisions were affirmed by the Supreme Court was limited to “the ‘Secretary’s decision’ to grant ‘eligibility for benefits’—including work authorization, Social Security, and Medicare—to unauthorized aliens on ‘a class-wide basis.’”¹⁷⁶ The opinion went on to explain that this limited focus of the lower courts left open to DHS options to decide to eliminate the part of the DACA program that provided for access to the specified benefits for all DACA enrollees but not to rescind the overall program. In the Court’s view, Acting Secretary Duke could have redesigned the program to eliminate the class-based access to benefits that was legally objectionable without rescinding the program.¹⁷⁷ Not only *could* she have done that, she had the obligation to consider the options available before rescinding the program. Failure to do so, in the Court’s judgment, rendered her decision arbitrary and capricious.¹⁷⁸

The version of arbitrary-capricious review used by the majority in *Homeland Security* leans heavily on the Supreme Court’s *State Farm* decision.¹⁷⁹ *State Farm* is regarded as the high-water mark for intrusive (“hard look”) judicial review of discretionary decision-making.¹⁸⁰ Apart from the analytical differences between *State Farm* and other Supreme Court precedents on arbitrary-capricious review,¹⁸¹ the circumstances that gave rise to *State Farm* are particularly inapposite as a precedent for *Homeland Security*. The decision reviewed in *State Farm* followed more than 60 rulemaking notices and proceedings and was issued as the conclusion to yet another rulemaking proceeding.¹⁸² Unlike the DACA program—which was adopted by memorandum without any rulemaking proceeding, or indeed any similar process, and rescinded in similar manner—the background proceedings for *State Farm* had gathered, analyzed, and relied on considerable evidence.¹⁸³ This was true both for the decision being

¹⁷⁶ *Id.* at 1911 (quoting *United States v. Texas*, 809 F.3d 134, 170 (2015), *aff’d* by equally divided Court, *sub nom.* *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam)).

¹⁷⁷ *Id.* at 1911–15.

¹⁷⁸ *See id.* at 1914–15.

¹⁷⁹ *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983) (*State Farm*). The majority decision in *Homeland Security* references *State Farm* at least a dozen times. *See Homeland Security*, 140 S. Ct. at 1910–15.

¹⁸⁰ *See, e.g.*, RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 137–46 (8th ed. 2020); Sunstein, *supra* note 119. *See also* Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 879–80, 909–10 (2020). *State Farm* did explain that changes in agency policy are to be assessed under the same standard as initial adoption of agency policy, 463 U.S. at 42–45, but also stated that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Id.* at 42. For a defense of “hard look” review as consistent with the APA, see Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 849 (2018).

¹⁸¹ *See, e.g.*, *Fox Television Stations*, 556 U.S. at 511–15; *Brand X*, 545 U.S. at 981, 989; *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–47 (1996); *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983); *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 778 (1978).

¹⁸² *See State Farm*, 463 U.S. at 34–40.

¹⁸³ *See id.* at 35–39.

overturned and for the decision being reviewed.¹⁸⁴ In that context, a more intrusive form of judicial review may be more justified.

The majority's decision in *Homeland Security*, thus, introduces extra degrees of flexibility for courts reviewing agency exercises of discretion in two ways. First, by harking back almost two decades to a decision that has not set the pattern for arbitrary-capricious review in recent years, the decision permits courts to choose between the *State Farm-Homeland Security* standard and the far less onerous standard used as in cases such as *Brand X* and *Fox Television Stations*.¹⁸⁵ Second, the Court does not provide guidance on how to choose which of these review standards to use, doubtless because the most obvious way to distinguish when to choose which standard to apply would favor a standard in *Homeland Security* that was more accommodating to the administrative exercise of discretion. In other words, it would favor a different outcome in the case. On its face, this looks less like the work of an umpire and more like the response of someone faced with a publicly notable case who feels the gravitational pull of public opinion—in other words, a great case.¹⁸⁶

IV. Judges, Umpires, Aspirations, and Decisions

At this point, it may be helpful to review the underlying debate about what task the courts should be performing when engaged in judicial review. The basic goals for this task that underlie the criticisms in Parts I through III above—fidelity to law, consistency with prescribed rules, and respect for the

¹⁸⁴ See *id.*

¹⁸⁵ Of course, decisions exercising judicial review of administrative decisions can be characterized different ways. So, for example, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), reviewed a change in a Department of Labor rule respecting overtime pay requirements under the Fair Labor Standards Act (FLSA). The Department's interpretation of the rule and underlying FLSA provision had been relatively stable for decades, finally initiated a rulemaking proceeding to codify judicial decisions and agency practice. Shortly afterward (following a change in presidential Administration), the Department changed course. The Supreme Court held the new decision of the agency required explanation, which it said was entirely absent from the agency's action issuing a new rule that took the opposite approach to what had been agency practice and the proposal issued at the start of the rulemaking. *Encino Motorcars* can be seen as consistent with the less intrusive standard of review represented by cases such as *Brand X*, or as a move toward more intrusive review. See CASS ET AL., *supra* note 180, at 166. Similarly, the spread of executive actions across a range of disparate sorts of issues and forms of action opens avenues for looking at executive acts in different ways, seeing some categories of action as more deserving of deference than others. See, e.g., Cary Coglianese & Christopher S. Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587 (2016). Despite these caveats, the description of *Homeland Security* above is at least a sensible portrayal of the decision and its departure from recent Supreme Court norms.

¹⁸⁶ The goal for this Article is not to plumb the psyche or motivation behind decisions of any of the justices. The evidence that justices are generally law-bound in their decisions, see, e.g., CASS, *RULE OF LAW*, *supra* note 3, at 64–65 86–97, is persuasive that any pull away from what seems the better result tends to be a result of methodological differences that have purchase when cases turn on application of relatively undefined or conflicting legal rules. That said, some scholars have suggested other explanations for particular justices' decisions. See, e.g., Jonathan H. Adler, *Anti-Disruption Statutory Construction*, 38 CARDOZO L. REV. 101 (2016) (proposing that Chief Justice Roberts, at least in certain cases, is motivated by an “anti-disruption principle”).

roles of courts and the other branches of government—are well-understood among those who decide cases, or who practice, study, and function under the strictures of law. Nonetheless, a substantial body of well-respected academic commentary casts doubt on fundamental predicates for the traditionally accepted understanding of judicial review’s role. This Part briefly reprises the bidding on this score, using the metaphor of the judge as umpire as its reference point.

A. *From Solomon to Separated Powers*

Prior to the development of modern notions of personal autonomy, of consent (real or fictive) as the basis for government, and of separated powers as pillars of the rule of law, rulers were expected at once to make law and to apply it to their subjects. The notion of Solomonic wisdom celebrates the ability of a ruler to blend moral judgment, perceptiveness about human nature, and an ability to craft decisions to fit each case’s peculiar circumstances.¹⁸⁷

With the advent of conceptions of the state based on democratic assent and the acceptance of legally limited governmental powers, rulers were not supposed to be omnipotent dispensers of justice according to their own lights. Instead, they were to exercise specifically authorized powers in particular ways, with certain tasks allocated to officials specially chosen to fit one or another power’s needs.¹⁸⁸

Beginning at least with Magna Carta, that division of powers included the requirement that laws be made by the requisite lawmaking authority in advance of their application to individuals and that individual applications of the laws be placed in the hands of a suitable body separated from the control of the executive.¹⁸⁹ This is the origin of the concept of due process: general laws written by the legislative authority in advance of the acts regulated by the law and then applied by judicial authority composed in ways that increase the likelihood of law’s neutral implementation.¹⁹⁰ It also is the origin of protections that are conceptually derivative of due process, such as the

¹⁸⁷ See, e.g., Joseph Allegretti, *Rights, Roles, Relationships: The Wisdom of Solomon and the Ethics of Lawyers*, 25 CREIGHTON L. REV. 1119 (1991). Reverence for Solomonic wisdom sometimes is limited to lauding the way the particular case is decided, other times to applauding the implicit rule that emerges from the individual decision. For a thoughtful commentary on the potential gains and—perhaps larger—risks of case-based rulemaking, see, e.g., Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (*Cases*); Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases*, in REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 45–70 (Daniel P. Kessler ed., 2011).

¹⁸⁸ See, e.g., CHARLES DE SECONDAT DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 185–223 (Dublin ed., G. & A. Ewing & G. Faulkner 1751) (orig. 1748).

¹⁸⁹ See, e.g., J. Roland Pennock, *Introduction*, in NOMOS XVIII: DUE PROCESS xv, xvi–xix (J. Roland Pennock & John W. Chapman, eds., 1977) (NOMOS XVIII); Thomas M. Scanlon, *Due Process*, in NOMOS XVIII, *supra*, at 93–125.

¹⁹⁰ See, e.g., Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679–1726 (2012).

prohibitions on ex post facto laws and bills of attainder as well as rights to trial by jury.¹⁹¹

Due process is the corollary of separated powers, a structure of government—and assignment of spheres of decisional authority—that greatly facilitates governmental decisions’ congruence with the rule of law.¹⁹² Moreover, due process’s requirement of different official positions for lawmaking and law application—under terms of appointment and of conditions for employment suited to those tasks—implies that these functions are to be distinctive. Judges, thus, are not to be lawmakers any more than lawmakers are to be engaged in writing rules that amount to making individual applications of the law.¹⁹³

While this concept of structural separation of powers is most readily envisioned as calling for different people exercising each power, it does not necessarily prohibit specific individuals from performing more than one function. In England, for example, Parliament served as the lawmaking body and, with the judging function exercised at the highest level by the Law Lords, as the supreme judicial body as well.¹⁹⁴ In the United States, however, the English practice gave way to a stricter separation of people as well as of functions.¹⁹⁵ This embodiment of separated powers responded to the Framers’ concerns about the practical consequences of placing the different powers of government in the same hands. In James Madison’s words:

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.¹⁹⁶

Madison elaborated on this, saying that the “separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty” and that the “division of the government into separate and distinct departments,” together with the

¹⁹¹ See, e.g., THE FEDERALIST NO. 84 (Alexander Hamilton).

¹⁹² See, e.g., Chapman & McConnell, *supra* note 190.

¹⁹³ See, e.g., Chapman & McConnell, *supra* note 190, at 1671–72; Manning, *supra* note 27.

¹⁹⁴ This allocation of authority existed for centuries, but was abolished in 2009 when power was transferred from Law Lords who are members of the House of Lords to a Supreme Court of the United Kingdom. See, e.g., Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543 (2014).

¹⁹⁵ See, e.g., Chapman & McConnell, *supra* note 190, at 1671–72 (explaining evolution from Parliament and many pre-Independence state legislatures serving also as supreme judicial authorities to a stricter separation of legislative from judicial competences). For additional reflections on the essence of the separation of powers and on the variety of institutional arrangements that might serve the essential functions of such separation, see generally Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

¹⁹⁶ THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

division of power between state and national governments, provided a critical protection for both democratic governance and individual rights.¹⁹⁷

B. *Separating Authority: Deviation and Objection*

Embracing the concept of separated powers does not magically surmount difficult questions respecting how to distinguish and separate the different powers. James Madison also commented on this, observing that “that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.”¹⁹⁸ Chief Justice John Marshall similarly confessed difficulty in locating “the precise boundary” between the legislative power and the executive and judicial powers, calling it “a subject of delicate and difficult inquiry.”¹⁹⁹

The difficulty of dividing the powers cleanly informed practices that appeared to test understandings of those powers. It is well understood, at least at the most general level, that government powers can be separated into “its three great provinces,” but each branch of government at times has exercised authority that is not at the core of its competence.

Congress, as the repository of the national legislative power under the Constitution, has responsibility for making laws of general application (including the critical policy choices necessary for governance).²⁰⁰ This authority stands in distinction to the tasks of implementing and applying the laws in specific instances, the provinces of the executive branch²⁰¹ and the judicial branch (so far as needed to decide disputes about law).²⁰² Yet Congress also historically has enacted an array of private bills, laws specifically admitting individuals into the country or otherwise providing recognition or benefits to them.²⁰³ Singling individuals out for special *punishment* was a concern of the Framing generation; granting special *privileges* was not.²⁰⁴ And considerations that motivated passage of private bills could be conceived as the functional equivalent of considerations that inform more generic lawmaking, with the accretion of private bills forming a body of law similar to the results of common law practice.

¹⁹⁷ See THE FEDERALIST NO. 51 (James Madison). See also THE FEDERALIST NOS. 37–51 (James Madison), NOS. 67–73, 78–80 (Alexander Hamilton).

¹⁹⁸ THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

¹⁹⁹ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

²⁰⁰ See U.S. CONST. art. I, § 1; THE FEDERALIST NOS. 45–48 (James Madison).

²⁰¹ See U.S. CONST. art. II, § 1; THE FEDERALIST NOS. 67–77 (Alexander Hamilton).

²⁰² See U.S. CONST. art. III, § 1; THE FEDERALIST NOS. 78–80 (Alexander Hamilton).

²⁰³ See, e.g., James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 NYU L. REV. 101 (2010).

²⁰⁴ In fact, as the Supreme Court decided in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), even legislative decisions with retroactive adverse consequences for specific, identified individuals were not deemed to violate the legislatures’ domains so long as they did not create new crimes or impose enhanced criminal penalties.

Similarly, courts can function in ways that test the boundaries of separated powers and of the concepts that support separation. The essence of due process and of the rule of law is that general rules govern private conduct and private rights, that these rules are knowable in advance, and that their application is predictable based on the content of the law.²⁰⁵ That is, application of rules can be predicted by reference to something internal to the rules themselves—to principle, not attributes such as a person’s relationship to the official applying the rule or the official’s affiliation with (or antipathy to) a person’s political party or religion. To promote principled, neutral decision-making, courts generally are insulated against direct influence from politically-selected officials, an insulation at the federal level that is supported by life-tenure and irreducible pay for judges.²⁰⁶ Yet, when judges make common law decisions or common-law-like determinations, as occurs in the exposition of particular requirements of open-textured laws such as the Sherman Act, they are engaged in forms of rulemaking as well as deciding specific cases.²⁰⁷

Commentators have objected to judicial decision-making—as relevant to discussion here—principally on two incompatible grounds.

One complaint, which could be labeled the “Not-a-Player” complaint, is that judicial rulemaking can become unmoored from decision-making based on externally (legislatively) given rules, which is supposed to be the domain of courts.²⁰⁸ This criticism views judging at its core to be an umpire-like endeavor, with non-compliant judges mistaking their role for that of the legislature²⁰⁹—even though rulemaking by the legislature through specially prescribed processes for enacting law constitutes the *sine qua non* for due process requirements that private conduct only be bound by the law of the land.²¹⁰ Put in colloquial terms, the complaint is that judges should (but fail

²⁰⁵ See, e.g., RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 89–90 (1998); CASS, *RULE OF LAW*, *supra* note 3, at 2–19; FULLER, *supra* note 6, at 38–81; HAYEK, *supra* note 3, at 80–81; OAKESHOTT, *supra* note 3, at 1; Scalia, *Law of Rules*, *supra* note 3, at 1179–80.

²⁰⁶ See U.S. CONST. art. III, § 1; THE FEDERALIST NOS. 78–79 (Alexander Hamilton).

²⁰⁷ See, e.g., Schauer, *Cases*, *supra* note 187 (focusing primarily on common law and constitutional adjudication); Schauer & Zeckhauser, *supra* note 187 (noting both common law adjudication and adjudication of statutory questions, and specifically addressing antitrust cases).

²⁰⁸ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1991); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Guttmann ed., 1997); Gary Lawson, *Reflections of an Empirical Reader (or Could Fleming Be Right this Time?)*, 96 BU L. REV. 1457 (2016); Prakash, *Unoriginalism*, *supra* note 130; Scalia, *Originalism*, *supra* note 130.

²⁰⁹ See, e.g., SCALIA, *supra* note 208, at 22–23, 37–47; Kavanaugh, *supra* note 6; [CITES]. See also Lawrence B. Solum, *Originalist Methodology*, 94 U. CHI. L. REV. 269 (2017) (explaining the bases for originalism as well as the functions performed and implications of its components) (*Originalist Methodology*).

²¹⁰ See, e.g., Magna Carta, ch. 39 (1215); WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 1:136, 3:129–38 (4th ed. 1771) (1765) (COMMENTARIES); EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 2:45–51 (1797) (orig. 1642) (INSTITUTES); Chapman & McConnell, *supra* note 190. This fundamental requirement of due process is antecedent to, though related to, the Constitution’s

to) see themselves as umpires, not players, and should stick to that limited vision of their job.

A radically different complaint—indeed, one that is almost diametrically opposed to the first complaint—is that judges almost invariably *cannot* behave like umpires and generally *should not* try to do that.²¹¹ Call this the “Umpire Mirage” complaint. The central arguments for the positive side of the Umpire Mirage complaint are that language is sufficiently indeterminate and questions concerning the application of rules to specific conduct and circumstances are sufficiently complex that rule interpretation and application necessarily require a basis in *policy*—that is, in considerations that cannot be internal to the rule.²¹² The positive critique is joined with a normative critique, asserting that law should not be governed by decision-rules reflecting values that are time- and place-bound and that do not represent actual consent of people whose interests are at stake today.²¹³

C. *Complaints’ Considered: Judging’s Core and Edges*

Each complaint has its difficulties, but the weaknesses of the two complaints are not at all equal. Criticisms of both are examined briefly here.

1. Not-a-Player’s Problems: A Matter of Degree

The problem with the Not-a-Player complaint is one of measurement. The complaint isn’t that *any* degree of judgment in judicial decision-making is fatal to the conceit that judges interpret and apply law but do not make it. Instead, it is that *too much* room for judgment allows judges to cross over from judging to lawmaking.²¹⁴ The test that the Not-a-Player criticism

assignment of the legislative power to Congress and its specification of personnel and processes (notably bicameralism and presentment) intended to make lawmaking more consonant with the Framers’ vision of public good. *See, e.g.*, THOMAS E. SULLIVAN & TONI M. MASSARO, *THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* 16–17 (2013). The essential elements of due process also were included in the United States Constitution before adoption of a due process clause. *See, e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton); Gary S. Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment’s Due Process of Law Clause*, 2017 BYU L. REV. 611 (2018).

²¹¹ *See, e.g.*, DWORKIN, *LAW’S EMPIRE*, *supra* note 4; McKee, *supra* note 5; Michaels, *supra* note 5; Siegel, *supra* note 5.

²¹² *See, e.g.*, McKee, *supra* note 5; Michaels, *supra* note 5; Siegel, *supra* note 5; Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 19, 24, 60–62, 66 (1984); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 818, 823–24 (1983).

²¹³ *See, e.g.*, DWORKIN, *LAW’S EMPIRE*, *supra* note 4; Brest, *supra* note 4; Fiss, *Forms of Justice*, *supra* note 4; [ADD CITES].

²¹⁴ *See, e.g.*, SCALIA, *supra* note 208, at 17–18, 22–23. This charge has been leveled against judges using methodologies often regarded as more constraining as well as against judges using more open-ended methodologies. *See, e.g.*, William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 95 MICH. L. REV. 1509 (1998) (reviewing SCALIA, *supra* note 208, arguing that textualist methodology is both less determinate and more contestable than its advocates assert); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (preferring a more formalistic to a more contextual version of textualism on this ground).

requires, in other words, rests on a judgment about where to locate a line that cannot rest simply on the declaration that judging and lawmaking differ.

The observation that rule application frequently involves an element of judgment, hence, does not defeat the Not-a-Player complaint.²¹⁵ Consider, for example, the role of a referee in a football game who must identify the spot where a play ends, marking how far the team on offense has advanced the ball. Imagine a play where a receiver catches a pass near the sideline, is tackled, and the momentum of the two players takes them both out of bounds. The referee runs across the field to the spot where he thinks the ball crossed the out-of-bounds plane, marks that spot, and then has other officials measure how close or far that is from the spot needed for a first down. That measurement could show that the team made or failed to make the first down by a matter of an inch or two. Identifying the place where the ball crossed the out-of-bounds plane—an equally critical component of the decision—is clearly and inevitably a matter of judgment.²¹⁶ Yet, no one would propose that the referee should do something other than make a sincere effort to determine as accurately as possible where the ball crossed the out-of-bounds line and to make the same effort for every player and every team. No one, in other words, would suggest that the referee instead make the call that the official thinks would make the game “the best it can be.”²¹⁷

Concerns about how one can keep the judgment aspect of decision-making within acceptable bounds, however, offer more significant grounds for questioning how far one can go with the Not-a-Player complaint than the simple assertion that rule-making and rule-application differ. The Not-a-Player complaint requires a way to assess *how much* room for judgment by those who interpret and apply laws is *too much*, and no proponent of stricter bases for judging (originalism, textualism, and the like) has a clear, simple, determinate test for that.²¹⁸

²¹⁵ See, e.g., Solum, *Originalist Methodology*, *supra* note 209.

²¹⁶ This example illustrates the difference between judgments that may vary as an inevitable part of cognitive difficulty in perceiving matters critical to a rule’s application and judgments that vary with the choices made by rule appliers respecting how they want to resolve difficulties in rule-application. See, e.g., Cass, *Nationwide Injunctions*, *supra* note 6, at 46–47 (distinguishing “decisional vibration” (tied to cognitive differences) from “decisional difference” (tied to choices for rule-application)). For a careful treatment of the broader range of cognitive and judgmental inputs to rule-application, see generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) (PLAYING BY THE RULES).

²¹⁷ Different versions of this best-it-can-be plea to improve the substantive content of rules as part of rule-application have been advanced in the context of legal decision-making. See, e.g., DWORKIN, *LAW’S EMPIRE*, *supra* note 4, at 52–62, 228–38; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977); Ackerman, *Constitutional Politics*, *supra* note 4, at 455; Ackerman, *Storrs Lectures*, *supra* note 4; Michaels, *supra* note 5.

²¹⁸ See, e.g., Cass, *Delegation Reconsidered*, *supra* note 13, at 151–61 (arguing in favor of a test requiring judgment on the nature of the delegation from Congress to agencies); Lawson, *Delegation*, *supra* note 13, at 353–55 (same); Merrill, *Rethinking*, *supra* note 128, at 2165–81 (same); Schoenbrod, *Substance*, *supra* note 128, at 1224–26, 1229–34 (same).

Concerns about tests that are matters of degree rather than of kind were central to much of Justice Antonin Scalia's jurisprudence, including his objection to efforts to reinvigorate the nondelegation doctrine. While dissenting on other grounds in *Mistretta v. United States*, Justice Scalia wrote:

Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle, but over a question of degree.²¹⁹

He went on to say that, given the difficulty of determining how much assignment of authority to others is too much (along with recognition that Congress is better suited than the courts to decide what is necessary for effective governance), "it is small wonder that [the courts] have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."²²⁰

2. Umpire Mirage's Problems: Of Leaps and Faith

Considering the second, Umpire Mirage, complaint—that language and law are inherently indeterminate and that the sort of judgment inevitably required for rule-application should be informed by judges' moral values—should help clarify the importance of the Not-a-Player complaint and the practical significance of its limitations. The Umpire Mirage complaint fails on two scores. First, it exaggerates the problem of indeterminacy and, hence, the significance of its complaint about efforts of judges (or encouragement by others for judges) to behave as umpires. Second, it offers a solution that depends on both conceptual and practical leaps of faith, not adequately justified by its proponents.

a. *Indeterminacy and Practicality*

The indeterminacy point is almost certainly true—but mainly in a trivial way. Of course, there are possible questions (sometimes serious questions) respecting meaning in many contexts, but we live in a world of rules that are well understood and commonly obeyed.²²¹ Children who are told to "make your bed" in the morning understand that they are being told to straighten the sheets and covers, not to get lumber and a hammer and construct a bed. Posted speed limits really don't require explanation, even if enforcers

²¹⁹ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 415–16 (Scalia, J., dissenting) (explaining that the non-delegation doctrine, properly conceived, requires evaluation of whether Congress gave another branch of government too great a degree of authority).

²²⁰ *Id.* at 416.

²²¹ See, e.g., SCHAUER, *PLAYING BY THE RULES*, *supra* note 216, at 191–96 (providing a careful analysis of the degree to which linguistic indeterminacy affects operation of rules that constrain legal and other decision-making); Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 283, 285–86 (1989); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463, 466–67, 495–97 (1987) (*Indeterminacy Crisis*).

generally give some leeway around the posted maximum to reduce enforcement costs. Students are told that they need certain numbers of credits to graduate and that they need to meet or surpass a minimum grade point average. None of these rules is a matter of great conflict or misunderstanding. Students also understand what rules against cheating on exams mean, even if some are still tempted to cheat and, when caught, argue that their behavior truly didn't amount to a violation of the rule.

The same is true of a very large proportion of other legal rules, even of rules that are subjects of legal proceedings. Consider the rules at issue in appellate cases. This select group of cases comprises less than one-half of one percent of the broader pool of filed cases and roughly three percent of civil cases that are litigated to judgment, which are only a tenth of the total civil cases filed—in other words, appellate cases are about three-tenths of one percent of the cases filed.²²² One would expect that appealed cases would be especially likely to involve conflicts about the meaning of the rules at issue. That is almost certainly true as compared to the broader class of legal rules. Yet, here, too, the number and seriousness of questions respecting rule meaning are easily exaggerated. One review of a randomly selected set of appellate cases in a wealthy, populous venue revealed almost no serious questions respecting laws' meaning—generating dissent in only two out of 760 decisions.²²³

Of course, there are high-profile cases that appear to have relatively weak grounding for legal decision, given the open-textured nature of the legal rule at issue in such cases and the absence of uncontroversial conventions for resolving questions about its meaning.²²⁴ There are reasons for concern that the number of such cases and the politically-freighted nature of considerations that come into play in their resolution may be increasing.²²⁵ Yet, on most of the circuits of the U.S. Court of Appeals, a remarkably strong degree of consensus remains the norm, including circuits that have been described by well-regarded academics as especially influenced by politics.²²⁶

²²² CASS, RULE OF LAW, *supra* note 3, at 61–62.

²²³ *Id.* at 78–79.

²²⁴ Yet even in settings where one would expect to see that on a regular basis, there are many cases that do not fit that mold or that, for other reasons, lead judges and justices of strikingly different political inclinations and judicial methodologies to view them similarly. *See, e.g.*, CASS, RULE OF LAW, *supra* note 3, at 72–97; Vicki C. Jackson, *Cook v. Gralite: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299 (2001); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

²²⁵ *See, e.g.*, Cass, *Nationwide Injunctions*, *supra* note 6, at 52–57.

²²⁶ *See, e.g.*, CASS, RULE OF LAW, *supra* note 3, at 35–45, 72–97, 150–51; *The District of Columbia Circuit: The Importance of Balance on the Nation's Second Highest Court: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. On the Judiciary*, 107th Cong. 45–54 (2002) (statement of Ronald A. Cass, Dean of Boston University School of Law) (noting unanimity of results in more than 98 percent of decisions from the D.C. Circuit, a court often described as deciding highly politicized cases and reflecting political influence on the judiciary); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358–60 (1998) (providing a similar argument based on experience as a member of that court); Kavanaugh, *supra* note 6. *But see* Richard L. Revesz,

Even the U.S. Supreme Court generally fits the pattern of relatively law-bound judging. Each Term, the Court selects a remarkably small set of the most significant cases for which legal authorities are the least clearly directive,²²⁷ but it consistently reaches unanimity more often than any other outcome and decides the great majority of its cases with lopsided majorities.²²⁸ The point is not that considerations apart from text and precedent never affect judicial decisions; rather, it is that the times they do are far more exceptional, and the degree to which they do generally more modest, than common parlance—certainly, what is common among lawyers, law professors, and the legal commentariat—would suggest.²²⁹

b. *Article III Philosopher-Kings: Norm-Choosing Judges*

The normative side of the Umpire Mirage argument is even more flawed. Despite the carefully developed arguments in favor of particular normative

Environmental Regulation, Ideology, and the D.C. Circuit, 83 VA. L. REV. 1717, 1717–21 (1997) (arguing that politically connected ideology of judges plays a significant role in D.C. Circuit decisions).

²²⁷ See, e.g., Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742 (1964); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2005). The Court hears annually less than 1/1,000,000th of the caseload of U.S. courts, and it chooses cases in significant measure because they raise issues on which the circuits of the U.S. Court of Appeals have reached different judgments. See CASS, RULE OF LAW, *supra* note 3, at 63–65. See also H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 251 (1991) (noting the importance of circuit splits in certiorari decisions); STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE (11th ed. 2019) (same); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1721 n. 445, 1721–22 (2000) (same).

²²⁸ See, e.g., CASS, RULE OF LAW, *supra* note 3, at 64–65. During the Court's 2019 October Term, more than one-third of the Court's decisions were unanimous, and two-thirds had two or fewer dissenting votes. See *Supreme Court Cases, October Term 2019–2020*, BALLOTEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2019-2020 (cases and votes listed on site, calculation by author). See also STEPHEN J. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 110 (2005).

²²⁹ This includes some cases routinely discussed as evidence that political influences dominate Supreme Court decision-making. Perhaps the best examples are two U.S. Supreme Court decisions on the merits of constitutional challenges to vote re-counting following the presidential election contest in 2000 between George W. Bush and Al Gore. The votes of the justices on the merits of these cases were, respectively, 9–0, in the first decision, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam), and 7–2 in the second, *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). Despite the strong consensus among Justices (whether appointed by Republican or Democratic Presidents), the decisions—especially the decision in *Bush v. Gore*, where the justices divided 5–4 on the question of the appropriate remedy—continue to be criticized as “politically influenced.” See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407–10 (2001); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1093–95 (2001); Margaret Jane Radin, *Can the Rule of Law Survive Bush v. Gore?*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 110, 114–22 (Bruce Ackerman ed., 2002); Jonathan Chait, *Yes, Bush v. Gore Did Steal the Election*, N.Y. MAG. (Jun. 25, 2012), <https://perma.cc/RD88-7VZU>; Sanford Levinson, *Return of Legal Realism*, NATION (Dec. 22, 2000), <https://perma.cc/26QD-A83G>; Elspeth Reeve, *Just How Bad Was Bush v. Gore?*, ATLANTIC (Nov. 29, 2010), <https://perma.cc/C9XY-A6MY>; Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Dec. 6, 2010), <https://perma.cc/9GFQ-DBHG>. On the decisions' effect (or lack of effect) on the outcome of the 2000 election, see CASS, RULE OF LAW, *supra* note 3, at 95–97, 193 n.95; Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 98, 100–01 (Cass R. Sunstein & Richard A. Epstein eds., 2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 2–3.

visions of the law, at bottom the argument against efforts to understand and implement the meaning of the rules laid down in a long-accepted hierarchy of governance institutions depends on the belief that letting judges embrace their own values will produce a better, more just world.²³⁰ Of course, that belief also rests on the assumption that judges' moral values will replicate the moral values of the academic critic.²³¹

Notwithstanding the hopes of scholars that right-thinking (or more often, in colloquial parlance, left-thinking) judges will follow the views of scholars laying out their vision of good values and outcomes, any system that asks judges to ground their decisions in *personally* attractive views of what is good rather than externally generated *legal* rules is built on sand—both with respect to the normative basis for the system and its consequences. Normative values of liberty and autonomy are widely accepted, but asking unelected, politically-insulated, lifetime-appointed judges to use their own normative values to guide applications of law is not obviously likely to advance these norms.²³² Judges in some systems, including the American legal system, can play a role in protecting liberty and in safeguarding participatory opportunities consonant with interests in autonomy,²³³ but it is difficult to imagine people willingly giving coercive, supervening power to judges freed from bonds of external rules generated through mechanisms more representative of popular will. To the contrary, the point of having a constitution is to set up a structure of government that will endure, to bind the future in ways that will protect autonomy and liberty.²³⁴ Every readily

²³⁰ See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION* (1996); DWORKIN, *LAW'S EMPIRE*, *supra* note 4; Ackerman, *Constitutional Politics*, *supra* note 4; Ackerman, *Storrs Lectures*, *supra* note 4; Brest, *supra* note 4; Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 *MERCER L. REV.* 525 (1993); Michaels, *supra* note 5; Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 *U. PA. L. REV.* 962 (1973); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 *STAN. L. REV.* 767 (1969); Siegel, *supra* note 5. See also CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020).

²³¹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 44–55 (1980); Ronald A. Cass, *Quality and Quantity in Constitutional Interpretation: The Quest for Analytic Essentials in Law*, 46 *EUR. J.L. & ECON.* 183, 195–97 (2018); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269 (1997).

²³² See, e.g., SCALIA, *supra* note 208; Robert A. Burt, *What Was Wrong with Dred Scott, What's Right About Brown?*, 42 *WASH. & LEE L. REV.* 1, 17–18 (1985); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Mary Ann Glendon, *Comment*, in SCALIA, *supra* note 208, at 95, 112–14; McConnell, *supra* note 231; Prakash, *supra* note 130; Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 920 221, 243–49 (1973).

²³³ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 253–69 (2004); CASS, *RULE OF LAW*, *supra* note 3, at xii–xiii, 1–3, 54–59; ELY, *supra* note 231 (1980); FULLER, *supra* note 6, at 96–106; HAYEK, *supra* note 3, at 80–81; MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER VALUES* 384, 387–89, 390–91 (1991).

²³⁴ See, e.g., SCALIA, *supra* note 208, at 13, 37–47. Justice Scalia put the point succinctly: “a constitution[’s] whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot take them away.” *Id.* at 40.

accessible source of information about constitution-making and popular demands for procedural mechanisms for governance, going back to Magna Carta, is inconsistent with assent to a return to government by philosopher kings with no claim to divine ordination or possession of special, superior moral judgment.²³⁵

Further, freeing judges from more confining, externally generated, legal rules no doubt would exacerbate problems associated with indeterminacy. Loosening the bonds of legal rules is sure to reduce the predictability of legal decisions—and, hence, the certainty with which people can make decisions about their lives consistent with expectations about legal consequences. A judicial system with less confining legal rules invites the mixing of political or politically-inflected views of judges with each interpretive task and undermines the rule of law, which has been critical to development of individual values and of liberty.²³⁶ Complaints about politicized judging may exaggerate the extent of the problem today, but encouraging judges to rely more on their own moral intuitions and less on legal texts and interpretive approaches that constrain judicial departure from widely understood and historically grounded textual meanings cannot be thought to improve the situation.

At best, advocates of non-interpretivist approaches must rely on a comparative judgment. These advocates must weigh gains from some decisions that embrace what a given scholar sees as better normative values (hence, better outcomes) against losses associated either with the embrace of less attractive normative values (assessed from the scholar's vantage) or the costs of less certainty about the outcomes they favor. As some thoughtful scholars have found, even relatively straightforward application of legal rules may give rise to questions implicating complicated judgments.²³⁷ And urging judges to think of their enterprise in terms of judgments less bound by traditional legal materials and rules weakens professional commitments that

²³⁵ See generally THE FEDERALIST NOS. 45–48 (James Madison), 78–80, 84 (Alexander Hamilton); BRUTUS NO. XI (Jan. 31, 1788), reprinted in THE ANTI-FEDERALIST PAPERS, *supra* note 119, at 293–98; BLACKSTONE, COMMENTARIES, *supra* note 210, at 1:136, 3:129–38; COKE, INSTITUTES, *supra* note 210, at 2:45–51; MONTESQUIEU, *supra* note 188; DE TOCQUEVILLE, *supra* note 120, at 100–06; Chapman & McConnell, *supra* note 190; James Madison, *Notes on the Ratification Convention Debates* (Aug. 27, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., rev. ed., Yale Univ. Press 1966) (reporting Madison's comment respecting the Constitution's limitation of federal courts' authority only to making decisions "of a Judiciary nature").

²³⁶ See, e.g., BARNETT, *supra* note 205, at 89–90; CASS, RULE OF LAW, *supra* note 3, at 2–19; FULLER, *supra* note 6, at 38–81; HAYEK, *supra* note 3, at 80–81; OAKESHOTT, *supra* note 3, at 1; Scalia, *Law of Rules*, *supra* note 3, at 1179–80.

²³⁷ See, e.g., SCHAUER, PLAYING BY THE RULES, *supra* note 216; Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191 (1994) (exploring justification for applying a rule that is not quite right for a given setting where such application is better consequentially than recognizing its exceptional nature and, thereby, encouraging individual demands for exception to the general rule).

likely explain much of the legal certainty and law-boundedness the current legal system exhibits.²³⁸

In the end, complaints about the metaphor of judges as umpires stake out exaggerated claims respecting both the metaphor's positive and normative defects.

Conclusion: Administrative Law When Umpires Fail

The trilogy of recent judicial review cases at the center of this Article—*Kisor*, *Department of Commerce*, and *Homeland Security*—do not show the Supreme Court as an institution dominated by justices who are unconcerned with doing the umpire's job. Rather, they show that at least some umpires—perhaps one umpire—also seem to be concerned by the way the crowd will perceive a call.

The positive in these cases is that the Court generally recognizes the division between the courts' role and administrative agencies' role. *Kisor* certainly explains the division properly, separating interpretation of legal texts from exercises of delegated policy discretion in a manner that may portend an improvement not only in the *Auer* doctrine but in the Court's *Chevron* jurisprudence as well. Likewise, much of the *Department of Commerce* decision rests on a conception of the courts' limited role in reviewing discretionary administrative action, including recognition that political judgments have a place in the exercise of administrative discretion and that the views of long-term staff do not merit an expertise preference over those of more politically accountable officers.

Yet, each of the three cases also fails to yield a simple, clear determination to guide future action by administrators and judges. *Kisor* fails to articulate a clear recognition of why the *Auer* doctrine was wrong, instead leaving it hollowed out but formally alive as a reformulated and much more complicated doctrine. In addition, the complications of the new "*Auer*" doctrine do not rest simply on inquiry into the one thing that should matter: whether the relevant statute granted the administrator discretion over the judgment being reviewed. The *Department of Commerce* decision is a misdirection play. It finds that, because the Secretary's decision was based on a valid reason, adequately explained, it was not arbitrary or capricious. Then, pulling a rabbit from the judicial hat, the Court announces that the Secretary's decision was, after all, arbitrary and capricious (or probably was) because it was based on a pretext. In opening a door to inquiries into administrators' motivation, the Court fails to explain clearly when this is an appropriate course of action, how courts should evaluate how much weight a particular motivation had in persuading the administrator to act, or what avenues remain open to agencies once a decision has been deemed pretextual.

²³⁸ See, e.g., CASS, RULE OF LAW, *supra* note 3, at 65–69.

Finally, *Homeland Security* artificially limits what reasons the courts will consider in ways that are certain to prolong litigation over a policy judgment that lies within administrative discretion. And it deploys a newly reinvigorated “hard look” approach to evaluating such judgments—all without recognizing that this is precisely the sort of case in which increasingly intrusive judicial review is out of place.

The legal grounding for each decision is questionable. All three cases stretch or misapply key precedents. *Kisor* treats the doctrine articulated in *Auer* as simply a misstatement of—well, of the *Auer* doctrine. It rewrites the doctrine and sends it back into battle. Maybe. *Department of Commerce*’s twist is ostensibly predicated on a line in *Overton Park*, a case decided by a judgment on interpretation of the law, not on review of the Secretary of Transportation’s exercise of discretion. To the extent that the question there was whether the Secretary followed the law’s requirement, it lay at the opposite end of legally justified deference from *Department of Commerce*, where the Secretary’s discretion was nearly unbounded. And *Homeland Security* rests on the Court’s reading of *State Farm* without evident appreciation of how inapposite that precedent is for the setting that was before the Court, much less why the Court has been using different, more deferential standards for arbitrary-capricious review.

Worst of all, each of the three cases increases the options for judicial review, expanding the discretion enjoyed by judges to accept administrative decisions with little explanation or to require great detail from administrators, to decide which administrative explanations to consider and how to consider them, and to decide as well whether to credit administrative explanations at all or to plumb for deeper motivations of the administrator. Each of these expansions of judicial discretion decreases the predictability of judicial review. These decisions move the law away from encouraging judges to act as umpires—to follow understandable rules in predictable ways—and instead provide judges options for basing decisions on more complex, more subjective, less predictable bases. They enable judges to determine whether established legal rules should be set aside, largely as a result of the judge’s own suspicions respecting individual, official decisionmakers. In opening paths away from more determinate, less politicized standards, the cases—at least two of them—seem to reflect belief that some matters are too important to be governed by ordinary law.

Great cases, as Holmes said, make bad law. But great jurists do not. Everyone who cares about the law should insist on recognition of the limited role of judges. Judicial review should reinforce the division of authority among the branches of government, not undermine it. The law and the standards articulated for its application should be clear enough to guide those who are subject to it and to make it more difficult for judges to veer off course when weak rules and strong public pressures combine. Umpires should not strike back, even if that means a fan favorite strikes out.

