THE UMPIRE STRIKES BACK: EXPANDING JUDICIAL DISCRETION FOR REVIEW OF ADMINISTRATIVE ACTIONS

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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 draws attention to what might be termed the backside of the judge as umpire metaphor, singling out considerations often associated with divergence from predictable decisionmaking 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.

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 be[4]—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

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. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

3. *See, e.g.*, RONALD A. CASS, THE RULE OF LAW IN AMERICA 4–5 (2001) [hereinafter CASS, RULE OF LAW] (discussing how "faithful adherence" to the fixed predictable rules is critical to ensuring the rule of law); F. A. HAYEK, THE ROAD TO SERFDOM 80–81 (1994); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) [hereinafter Scalia, *Law of Rules*].

4. *See* RONALD DWORKIN, LAW'S EMPIRE 52–62, 228–38 (1986) [hereinafter DWORKIN, 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") [hereinafter Ackerman, *Constitutional Politics*]. For additional discussions on the interpretive power of judges and different approaches to the interpretation and application of the law, see generally Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) [hereinafter Ackerman, *Storrs Lectures*]; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Forms of Justice*].

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-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.[8] But, in some

5. For an in-depth examination, critique, and analysis of the judge-as-umpire metaphor, see generally Theodore A. 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. COMMENT. 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 233, 248–256. 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 lawgivers.

6. *See* CASS, RULE OF LAW, *supra* note 3, at 7–12 (discussing factors important to the rule of law including predictability, clarity, and neutrality—qualities often associated with impartial observers such as umpires); *see also* LON L. FULLER, THE MORALITY OF LAW 56–57 (rev. ed. 1969) (noting that it is impossible to perfectly craft a system of law that "leave[s] no room for dispute" necessitating impartial resolution by judges); 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, 45–47 (2019) [hereinafter Cass, *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, at 685–88 (discussing the importance of impartiality).

8. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2418–19 (2018) (limiting judicial intrusion into motives of other branch officials); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 319, 321, 325 (2014) (explaining basis for statutory interpretation and rejecting agency approaches that would expand agency power to "tailor" express requirements of law); City of Arlington v. FCC, 569 U.S. 290, 305–07, 314 (2013) (granting deference to reasonable exercise of agency policy discretion not exceeding statutory bounds of authority, despite argument that agency was interpreting scope of its jurisdiction); Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–58 (2012) (denying deference to administrative interpretation of agency's regulation where

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*,[9] *Department of Commerce v. New York*,[10] and *Department of Homeland Security v. Regents of University of California*[11]—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 decisionmaking 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 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."[12] 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 assignment of separate powers (writ large).[13] At times, faithful adherence to the Constitution requires the judiciary to embrace doctrines that carry an

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it failed to give notice of a change from prior practice).

9. 139 S. Ct. 2400 (2019).

10. 139 S. Ct. 2551 (2019).

11. 140 S. Ct. 1891 (2020).

12. 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 afficionado 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!

13. *See* discussion *infra*, text at notes 64–88.

essential element of judgment.[14] Some of the increased discretion that will follow these decisions, however, is the nonessential result of misdirection.[15] 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 how each departs from previously established law.[16] 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.[17] 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).[18] To a significant degree, the Court's decision repackaged elements of prior Supreme Court decisions. Differences on how to present that package 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.

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14. *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) (providing examples of constitutional judgments the Supreme Court has had to make in the context of nondelegation) [hereinafter Cass, *Delegation Reconsidered*]; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 360–62, 376–78 (2002) [hereinafter Lawson, *Delegation*].

15. *See* discussion *infra*, text at notes 155–158, 193–211.

16. *See* Parts I–III, *infra*, text at notes 18–211.

17. *See* Part IV, *infra*, text at notes 212–265.

18. *See* discussion *infra*, text at notes 53–86.

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.[19] 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.[20] 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*.[21] The effect of federal regulations on the American economy is variously estimated as benefitting or costing the economy trillions of dollars per year.[22] While there is

19. *See generally*, Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 683–86, 716 (2021).

20. For information respecting federal rulemaking, see for example MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 1, 7, 19–20, 22–23 (2019). The annual number of rules promulgated has been in the 3,000 to 5,000 range since the mid-1980s. The pages devoted to rulemakings in the *Federal Register* account for something on the order of 40 to 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 to over 13,000 per year for 1941 to 1946 (the years leading up to adoption of the Administrative Procedure Act (APA)) and more than 83,000 per year for 2012 to 2016. *See id.* at 26–28. For discussions on Congress' recent productivity in passing federal legislation, see Susan Davis, *Congress Hits New Productivity Lows*, USA TODAY (Nov. 30, 2013, 7:06 AM), https://www.usatoday.com/story/news/politics/2013/11/30/unproductive-congress-record-low/3691993/; Michael Teitelbaum, *Congress Saw More Bills Introduced in 2019, But Few Passed*, ROLL CALL (Jan. 22, 2020, 6:31 AM), 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, 12:00 AM), http://www.bostonglobe.com/news/politics/2013/12/04/congress-course-make-history-least-productive/kGAVEBskUeqCB0htOUG9GI/story.html.

21. *See, e.g.*, *Reg Stats*, GEO. WASH. REGUL. STUD. CTR., https://regulatorystudies.columbian.gwu.edu/reg-stats (last visited Aug. 9, 2021). For a review of the evolution and current state of federal regulation, see generally CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE (2020).

22. *See* Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. REGUL. 233, 244–45 (1990) (examining different models employed to evaluate the economic impact of policy changes); Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809, 1819–22 (2017) (discussing cost-benefit analysis through the lens of environmental regulation); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L.

disagreement on the best calculation of rules' effects, there is no doubt that rulemaking today has an 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 about the 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.[23]

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.*[24] *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.[25] 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 the

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REV. 941, 950–54 (1999) (noting that cost–benefit analyses can be controversial when it comes to quantifying human impact). *See generally* CASS SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE (2014) (examining the difficulty, but importance, of including difficult to quantify values in regulatory cost–benefit analyses); CREWS, *supra* note 21, at 30–36 (examining the government's reported costs and benefits for regulatory rules and arguing that the official numbers fail to capture the actual costs).

23. 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 v. Wilke*, 139 S. Ct. 2400, 2412 (2019). 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*.

24. 325 U.S. 410, 414 (1945).

25. *Seminole Rock* set out the basic framework for the Emergency Price Control Act, which the Office of Price Administration (OPA) was responsible for enforcing. 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, 701–09 (1947) (providing an in-depth examination of the history of the OPA leading up to the *Seminole Rock* decision).

sale of crushed stone.[26] The 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.[27] It is 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 fits its decision that the agency correctly read and applied the regulation.[28]

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

> . . . [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.[29]

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 by 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).[30] The non-deferential part of the statement seems more in keeping with the Court's opinion.[31] But *Seminole Rock* came to be known instead for its

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

27. *See id.* at 412–18.

28. *See* Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, YALE J. REGUL.: NOTICE & COMMENT (Sept. 12, 2016), http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/ [hereinafter Bamzai, *Hart's Brief*] (noting that original drafts of the opinion conclude that the decision arose from the Court's own plain reading of the regulation); Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 548–49 (2018) [hereinafter Cass, 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 25, at 60–61; 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) (declaring the *Seminole Rock* opinion lacks any explanation as to why deference was appropriate to reach its conclusion).

29. *Seminole Rock*, 325 U.S. at 414.

30. *Id.* at 414.

31. *See* Cass, Auer *Deference*, *supra* note 28, at 547–49 (noting that much of the opinion focuses on the Court's own analysis of the regulation's meaning); Kenneth Culp Davis, *Scope*

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*,[32] came forty years after *Seminole Rock*.[33] Unlike *Seminole Rock*, *Auer* did not arrive in the 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.[34] Because different circuits of the U.S. Courts 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 brief to the Court, essentially explaining its views on the matter for the first time.[35]

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 delimi[t]' the scope of the exemption for executive, administrative, and professional employees."[36] 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

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of Review of Federal Administrative Action, 50 COLUM. L. REV. 559, 597–98 (1950) (focusing on the Court's own words explaining its own analysis of the regulation); Healy, *supra* note 28, at 639 (explaining that deference was not a determinate factor in the case); Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J. L. & PUB. POL'Y 87, 88 (2018) (classifying *Seminole Rock* as a classic legalist opinion); Stephenson & Pogoriler, *supra* note 28, at 1454 (finding that there was no discussion of administrative deference beyond the Court's ultimate conclusion). 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 28.

32. 519 U.S. 452 (1997).

33. Parts of this section are adapted from Cass, Auer *Deference*, *supra* note 28, 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.

34. *See* 29 U.S.C. § 213(a)(1) (2018); *Auer*, 519 U.S. at 454.

35. *Auer*, 519 U.S. at 461.

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

concluded that the same rule can apply to public sector employees as to private sector employees.[37] 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).[38]

After that, however, the Court seemed to depart from its *Chevron* regime, which limits deference to the discretion statutorily given.[39] 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.'"[40] 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.[41]

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37. *Id.* at 457–58.

38. *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring); Cass, Auer *Deference*, *supra* note 28, at 545–46; *see also* Healy, *supra* note 28, 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. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984). The relationship between *Auer* and *Chevron*, and broader deference questions is discussed, *infra*, text at notes 80–88.

39. *See* 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) [hereinafter Cass, *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); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–16 [hereinafter Scalia, *Judicial Deference*] (examining different justifications for *Chevron* 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* note 39, at 27) (explaining the role of the Court is to ensure that an administration has remained within the bounds of discretion granted by Congress).

40. *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))).

41. *See Smiley*, 517 U.S. at 740–41 (emphasizing that deference is accorded based on the degree of discretion afforded by Congress); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696–97 (1991) (noting that deference to an agency is only appropriate when Congress has delegated an appropriate degree of discretion); Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 157–58 (1991) (finding "that Congress did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them"); *see also* Aditya Bamzai, *The Origins of Judicial Deference to*

Recognition of the tension between *Auer* and principles underlying other decisions and doctrines explains why several Justices, prominently including *Auer*'s author, called for a retreat from *Auer*'s blanket rule of deference to agency own-rule interpretations.[42] In *Christopher v. SmithKline Beecham Corp.*,[43] the Court placed limitations on the *Auer* doctrine to prevent "unfair surprise" from changes in agency position.[44] 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 . . ."[45]

The cases cited for these propositions in the *Christopher* opinion almost entirely consisted of decisions rendered before *Auer*.[46] In other words, apart

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Executive Interpretation, 126 YALE L.J. 908, 924–25 (2017) (examining critiques of *Auer*'s expanded administrative deference); Healy, *supra* note 28, at 644 (critiquing *Auer* deference as mere "functionalism"); Aaron L. Nielsen, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 953–55 (2017) [hereinafter Nielsen, *Beyond*] (examining separation of power concerns raised by *Auer* deference); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 105–10 (2018) (summarizing arguments for narrowing *Auer*); Aaron Nielsen, *Reflections on* Seminole Rock*: The Past, Present, and Future of Deference to Agency Regulatory Interpretations*, YALE J. REGUL.: NOTICE & COMMENT (Sept. 12. 2016), http://yalejreg.com/nc/reflections-on-seminole-rock-the-past-present-and-future-of-deference-to-agency-regulatory-interpretations/ (positing that *Auer* deference creates opportunities for abuse by agencies).

42. *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. 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).

43. 567 U.S. 142 (2012).

44. *Id.* at 155–56.

45. *Id.* at 155 (internal citations omitted). The Court also notes that "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.'" *Id.*

46. In addition to citing Auer v. Robbins, 519 U.S. 452, 462 (1997), the *Christopher* citations included: Thomas Jefferson University v. Shalala, 512 U.S. 504, 515 (1994) (finding interpretations that conflict with prior positions are entitled to less deference); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (deferring to a regulation that is not "plainly erroneous or inconsistent"); and Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988) (holding deference inappropriate when based on a "convenient litigating

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.[47]

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*.[48] In *Auer*, the agency had not 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.[49] *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.[50] Both the character of the issue—one where its 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.[51]

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position"). 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*.

47. 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, JJ.).

48. *See* Bamzai, *Hart's Brief*, *supra* note 28; Cass, Auer *Deference*, *supra* note 28, at 550–51 (asserting that unique circumstances gave rise to an uncritical acceptance of a broad rule on deference); Healy, *supra* note 28 (noting that deference was not the key to the result in *Seminole Rock*); Nielsen, *Beyond*, *supra* note 41 (arguing that *Seminole Rock* deference undercuts the objectives of the APA); Walker, *supra* note 41 (examining arguments for narrowing *Auer* from academics and judges). The best-known attack on deference to 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 28, at 669. For a partial critique of the due process argument, see Cass, Auer *Deference*, *supra* note 28, at 561–63.

49. *See Auer*, 519 U.S. at 461 (discussing the interpretation set forth in the Secretary of Labor's amicus brief).

50. *See* Bamzai, *Hart's Brief*, *supra* note 28; Cass, Auer *Deference*, *supra* note 28, at 547–48; Stephenson & Pogoriler, *supra* note 28.

51. For a defense of deference on technical and scientific issues, see Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103–04 (1983) (noting that greater deference is appropriate when reviewing scientific findings rather than findings of fact); E. Donald Elliott, *U.S. Environmental Law in Global Perspective: Five Do's and Five Don'ts from Our Experience*, NAT'L TAIWAN U.L. REV., Mar. 2010, at 144, 161–63.

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.[52] 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."[53]

Last, the Court decided *Seminole Rock* in 1945—the year before the 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*."[54] That direction is fairly clear: courts decide issues of interpretation, including interpretation of agency actions (a term that encompasses rules as well as adjudications).[55] 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."[56] The *Auer* formulation does not ask the question that the APA makes central—has authority over the interpretation of the regulation at issue been committed to agency discretion by law?—but instead presumes a general commitment of discretion to the agencies on all issues of regulatory interpretation.[57]

B. Kisor's 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*[58]—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.[59] He secured a favorable ruling on eligibility for benefits on the VA's reconsideration, but the VA only granted benefits prospectively, not retroactively.[60] Kisor's

52. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 417 (1945) (describing the bulletin published simultaneously with the regulation).

53. Cass, Auer *Deference*, *supra* note 28, at 550.

54. Administrative Procedure Act, 5 U.S.C. § 706 (2018) (emphasis added).

55. *See* 5 U.S.C. § 551(13).

56. 5 U.S.C. § 701(a)(2).

57. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (deferring to agency interpretation unless it is "plainly erroneous or inconsistent with the regulation") (internal citation and quotation marks omitted).

58. 139 S. Ct. 2400 (2019).

59. *See* Kisor v. Shulkin, 869 F.3d 1360, 1361 (Fed. Cir. 2017) (describing the injuries Kisor sustained during military service).

60. *Id.* at 1364.

challenge to that decision centered on interpretation of a VA rule respecting the introduction of new evidence.[61] The Federal Circuit affirmed the rejection of that challenge after finding that the alternative constructions of the VA rule (Kisor's and the VA's) were both reasonable.[62] In those circumstances, the court said, *Auer* required it to support the VA's reading unless it was "plainly erroneous."[63]

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.[64] 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.[65] These messages dovetail with reasons for statutory grants of discretion to administrators.[66] 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.'"[67] The plurality also saw benefits of uniformity and political accountability from

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61. *Id.* at 1365.

62. *Id.* at 1366–68.

63. *Id.* at 1368.

64. Kisor v. Wilkie, 139 S. Ct. 2400, 2410–11 (2019).

65. *Id.*

66. For discussions on different approaches to striking the appropriate balance of deference and delegation to administrative agencies, see generally 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 (2007); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) [hereinafter Mashaw, *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); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (1983) [hereinafter Sunstein, *Hard-Look*]. *See also* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. REGUL. 283, 308, 312 (1986) (arguing that *Chevron* strikes an appropriate balance for judicial review of agency decisions).

67. *Kisor*, 139 S. Ct. at 2413.

Auer deference, ascribing interests in those benefits to Congress and supposing that this further explains a presumed congressional intention to confer discretion on agencies to interpret their own rules.[68]

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.[69] The opinion declares that judges must "exhaust all the 'traditional tools' of statutory construction" before deciding that the application of a rule is a matter "more of policy than of law."[70] The agency construction must be an exercise of lawful policy discretion (an inquiry into "the character and context" of the administrative decision).[71] 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.[72]

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.[73] 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.'"[74] That "caricature," however, was the *Auer* test, at least prior to *Christopher*.[75] 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

68. *Id.* at 2413–14.

69. *See* Aditya Bamzai, *Deference and Interpretive Discretion:* Gundy, Kisor, *and the Formation of and Future of Administrative Law*, 133 HARV. L. REV. 164, 189–90 (2019) [hereinafter Bamzai, *Interpretive Discretion*]; Ronald A. Cass, *Deference After* Kisor, REGUL. REV. (Jul. 10, 2019), https://www.theregreview.org/2019/07/10/cass-deference-after-kisor/ [hereinafter Cass, *After* Kisor].

70. *Kisor*, 139 S. Ct. at 2415.

71. Cass, *After* Kisor, *supra* note 69; *Kisor*, 139 S. Ct. at 2416.

72. Cass, *After* Kisor, *supra* note 69; *see Kisor*, 139 S. Ct. at 2416–18 (detailing the new standard for reviewing an agency interpretation of its own regulation).

73. *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).

74. *Id.* at 2415 (internal citations omitted).

75. *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012) (narrowing *Auer*'s application), discussed *supra*, text at notes 43–46.

which it is not entirely dead but is almost completely devoid of all that once made it alive.[76]

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 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*.[77] This comes under the heading of "doth protest too much, methinks."[78]

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.[79]

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*.[80] 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?[81]

Second, as some writings have emphasized, the original assumption was wrong, not because the cases are unrelated but because the actual

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76. *See Kisor*, 139 S. Ct. at 2425–26 (Gorsuch, J., concurring in judgment) (describing the majority opinion as granting *Auer* a stay of execution); Cass, *After* Kisor, *supra* note 69.

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

78. WILLIAM SHAKESPEARE, HAMLET, act iii, sc. 2, line 221.

79. *Auer* is often a target for criticism because it permits agencies to interpret regulations that they themselves issue, raising separation of powers concerns. *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. 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 28, at 618; Nielsen, *Beyond*, *supra* note 41; Walker, *supra* note 41.

80. *See Talk Am., Inc.*, 564 U.S. at 68 (Scalia, J., concurring); Walker, *supra* note 41, at 106.

81. 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.*, 564 U.S. at 68 (Scalia, J., concurring). He added, "But it is not." *Id.*

relationship is quite different.[82] *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.[83] Understood this way, *Chevron* also 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.[84] 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 made clear that the law's commitment did not have to be

82. *See, e.g.*, Cass, Auer *Deference*, *supra* note 28 (detailing the true nature of the relationship between *Chevron* and *Auer*); Walker, *supra* note 41, at 110 (arguing that *Auer*'s domain differs from *Chevron*'s and requires, at a minimum, that agency formalized procedures limit *Auer*'s application to make deference appropriate). *See also* Manning, *supra* note 28 (arguing that *Chevron*'s deference rests on predicates that are contrary to assumptions behind *Seminole Rock*'s assertion that formed the basis for *Auer* deference).

83. *See* 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) (describing the scope of the Court's authority as originally intended in *Chevron*); Cass, Auer *Deference*, *supra* note 28, at 537–39 (discussing the Court's scope of review of agency discretion under the APA); Cass, *Deference*, *supra* note 39, at 1314–15; Krotoszynski, *supra* note 39, at 742–43; 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* ADMIN. L. STORIES 398, 398–402 (Peter L. Strauss ed., 2006); Scalia, *Judicial Deference*, *supra* note 39, 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, 1145, 1149–50 (2012).

84. *See* Beermann, *supra* note 83, at 790 (interpreting *Chevron* as a departure from the APA); 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) (arguing for a more nuanced analysis in step-two of *Chevron* to ensure agencies remain within their statutory authority); 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) [hereinafter Cass, *Worth the Candle?*]; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 131 (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.J. 611, 656 (2020); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 310–12 (1988).

express but instead could be inferred from ambiguity or silence on an issue that generally falls within the implementing agency's policy domain.[85]

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*.[86] 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.[87] The majority opinion in *Kisor*, while faulted (rightly) by the Justices concurring in the judgment for its complexity and possible tension with the APA,[88] 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*[89] presented a more direct 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."[90] The decision for the Court was

85. *See* Scalia, *Judicial Deference*, *supra* note 39, at 516. The concepts of "original *Chevron*," see Beermann, *supra* note 83, 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* Beermann, *supra* note 83, at 782–83 (offering that *Chevron*'s inconsistent and unpredictable application by the courts as a reason to overrule the doctrine); Cass, *Deference*, *supra* note 39, at 1300–01, 1328–29 (arguing *Chevron* has been applied inconsistently and led to less judicial constrain of agency discretion); Cass, *Worth the Candle?*, *supra* note 84, at 68 (explaining that *Chevron* is rarely clearly stated and there is even disagreement as to how many steps its application entails); Duffy, *supra* note 84, at 193–94 (identifying *Chevron*'s inconsistency with the APA); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 7 (2017) (calling *Chevron* "needlessly confusing [and] complex").

86. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring in judgment) (expressing concern that permitting agencies to both make and interpret their rules threatens the rule of law); Cass, Auer *Deference*, *supra* note 28, at 553.

87. *See* Cass, Auer *Deference*, *supra* note 28, at 553–59 (making the case for deference to agency rules when supported by statutory interpretation).

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

89. 139 S. Ct. 2551 (2019).

90. 5 U.S.C. § 706(2)(A).

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.[91]

A. The Census, Citizenship, and Reviewability

The U.S. Constitution requires a decennial census as the basis for the apportionment of the House of Representatives.[92] The census clause provides that Congress will determine the manner in which the census will be taken,[93] and Congress has assigned various administrative officers to supervise and conduct the census.[94] 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"[95] 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.[96] 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.[97] 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),[98] the basic orientation of the census has remained relatively constant.[99]

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),[100] census

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91. For a more extensive treatment of the issues discussed in this part, see generally 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) (emphasis added) [hereinafter Cass, *Motive*].

92. 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 Fourteenth Amendment changed the manner in which individuals are counted. U.S. CONST. amend. XIV, § 2.

93. U.S. CONST. art. 1 § 2, cl. 3.

94. The original authorization assigned collection of census information to the marshals in the judicial districts. *See* Census Act of 1790, ch. 2, § 1, 2 Stat. 101 (1970).

95. 13 U.S.C. § 141(a).

96. 13 U.S.C. § 5.

97. For discussion of information-gathering uses of the census, see Dep't of Com. v. New York, 139 S. Ct. 2551, 2561 (2019).

98. *See id.* at 2561–62.

99. *See id.* (observing that the census' basic form as a questionnaire containing demographic questions has remained constant, though the specific questions asked have varied).

100. *See* Michael P. Murray, *Census Adjustment and the Distribution of Federal Spending*, 29 DEMOGRAPHY 319, 319 (1992) (discussing how state and local governments dependent on federal funds have an interest in how that census count is done).

administration rarely has been a matter of high drama since the Civil War era.[101] 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.[102] 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.[103]

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.[104] With rare

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101. 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 for example 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) (reporting on the debates of July 13, 1787 regarding the census question)—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.

102. 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, 556, 577 (1964) (stating that states must make an "honest and good faith effort" in apportioning their districts but recognizing exactness is not a workable requirement); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that, to the extent practically possible, no individual's vote should be worth more than another's); Gray v. Sanders, 372 U.S. 368, 374–75 (1963) (holding that state regulation of electoral processes constitute state action under the Fourteenth Amendment); Baker v. Carr, 369 U.S. 186, 237 (1962) (holding that state distribution of representatives is reviewable under the Equal Protection Clause of the Fourteenth Amendment). 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 increasing the probability and durability of Democrats' prospects of controlling Congress).

103. *See, e.g.*, NAT'L RSCH. COUNCIL, THE BICENTENNIAL CENSUS: NEW DIRECTIONS FOR METHODOLOGY IN 1990, at 2–3 (1985) (exemplifying how the technical administration of the census has often been the central focus). The emergence of new political controversies in the 1990s and 2000s largely remained a low-visibility matter. *See, e.g.*, Kenneth Prewitt, *The U.S. Decennial Census: Political Questions, Scientific Answers*, 26 POPULATION & DEV. REV. 1, 8–9 (2000) (addressing issues such as appropriate sampling techniques).

104. Dep't of Com. v. New York, 139 S. Ct. 2551, 2596 (2019) (Alito, J., concurring in part and dissenting in part) (citing CARROLL D. WRIGHT, HISTORY AND GROWTH OF THE UNITED STATES CENSUS, S. Doc. No. 56-194, at 19 (1900)).

exceptions, the census has gathered information about citizenship or place of birth of those surveyed, including all but one census between 1820 and 2000.[105] In thirteen of the fourteen censuses between 1820 and 1950, every household was asked about this.[106] 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.[107]

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.[108] While the Secretary was 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.[109] 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.[110] 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).[111] Officials at the Census Bureau, continuing to oppose the inclusion of the citizenship question, prepared a memorandum containing alternative options for securing the requested information. [112] 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.[113]

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.[114] Among other things, plaintiffs

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

106. *Id.* at 2561.

107. *Id.* at 2561–62.

108. *Id.* at 2564, 2574.

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

110. *Id.* at 2574. Both the District Court and the majority of Justices concluded that the Secretary made up his mind to reinstate a citizenship question "well before" receiving the DOJ's request. *Id.* at 2574–75.

111. *Id.* at 2562.

112. *Id.* at 2562–63.

113. *Id.* at 2562–63.

114. As noted in Cass, *Motive*, *supra* note 91, 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

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.[115] 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 being intended actually to gain better information for VRA enforcement.[116] The district judge, on request from plaintiffs, ordered that more information be 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.[117]

At the outset, the Court confronted the question of 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

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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*, BALLOTPEDIA, https://ballotpedia.org/Partisan_composition_of_governors (last visited Aug. 9, 2021); Lori Kolani & Bernard Nash, *Meet the State AGs*, STATE AG REPORT, https://www.stateagreport.com/guide-to-state-attorneys-general/ (last visited Aug. 9, 2021). For relevant commentary about the Trump Administration, see Zack Budryk, *GOP Massachusetts Governor Calls Trump Tweets "Shameful," "Racist,"* HILL (July 15, 2019, 10:54 PM), https://thehill.com/homenews/state-watch/453219-gop-massachusetts-governor-calls-trump-tweets-shameful-racist?rl=1 (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://www.boston.com/news/politics/2017/01/29/charlie-baker-says-trumps-refugee-ban-will-not-make-the-country-safer (reiterating Charlie Baker's opposition to the refugee ban imposed by former President Trump); 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://www.cnn.com/2019/04/23/politics/larry-hogan-criticizes-trump-2020/index.html (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://foxbaltimore.com/news/local/governor-hogan-discusses-trump-travel-ban-city-schools-deficit (expressing concern over former President Trump's travel ban).

115. *See Dep't of Com.*, 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 Clause of the Fifth Amendment (notably including an equal protection component analogous to the Equal Protection Clause of the Fourteenth Amendment). *Id.*; *SDNY Decision*, 351 F. Supp. 3d at 515, 528.

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

117. *See Dep't of Com.*, 139 S. Ct. at 2564–65; *SDNY Decision*, 351 F. Supp. 3d at 515–17.

of the Secretary's discretion to provide guidance for review.[118] 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."[119] Justice Alito's point was that the Constitution had assigned virtually unlimited authority to Congress over the details of the census, such as 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.[120] The majority, while finding enough direction to proceed, acknowledged the broad discretion enjoyed by Secretary Ross.[121] 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 Secretary Ross's decision was arbitrary and capricious.[122] 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 real motivation for deciding to reinstate a question respecting citizenship on the main census form.[123]

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118. *See Dep't of Com.*, 139 S. Ct. at 2568–69.

119. *Id.* at 2603 (Alito, J., concurring in part and dissenting in part) (citing Webster v. Doe, 486 U.S. 592, 600 (1988)) (internal 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. *Id.* at 2577 n.2 (Thomas, J., concurring in part and dissenting in part).

120. *See id.* at 2597–603 (Alito, J., concurring in part and dissenting in part).

121. *See id.* at 2568–69 (majority opinion).

122. 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 for example Cass, *Motive*, *supra* note 91, at 421.

123. For an examination of the competing positions staked out by the Justices regarding these claims, see *Dep't of Com.*, 139 S. Ct. at 2569–76; *id.* at 2579–83 (Thomas, J., concurring in part and dissenting in part); *id.* at 2584–95 (Breyer, J., concurring in part and dissenting in part).

1. Reasonable Basis vs. Right Reason

The majority opinion in *Department of Commerce* takes an approach to arbitrary and capricious review that, for the most part, is respectful both of the exercise of discretion by a coequal branch of government and 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 gain information about citizenship nor does it ask whether that information was essential to some specific government mission.[124] Those are not the legally established tests for assessing discretionary government action.[125] The test simply is whether the administrator has made a reasoned judgment within the scope of the discretion committed by law.[126] 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.'"[127] 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*.[128]

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124. *See id.* at 2569–71 (stating that the choice among "reasonable policy alternatives" was up to the discretion of the Secretary and disagreeing with that portion of the district court's ruling).

125. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513–14 (2009) (holding that an agency's change in policy is not subjected to a heightened review beyond whether it was based on relevant data and satisfactorily explained); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 989 (2005) (holding that a reversal of agency policy is still assessed under *Chevron*); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744–45 (1996) (asking only whether the agency interpretation is a reasonable one, not the best one).

126. 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.

127. *See Dep't of Com.*, 139 S. Ct. at 2569 (quoting Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

128. For explanations of benefits that can be associated with administrative decisionmaking in various contexts, see generally JERRY MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 163–78 (2018) (relating rulemaking, participation, reason-giving, and legitimacy); Epstein & O'Halloran, *supra* note 66 (touching on the benefits of delegation); Freeman & Vermeule, *supra* note 66 (discussing agency expertise); Mashaw, *Prodelegation*, *supra* note 66 (assessing arguments in favor of broad delegation to administrative agencies); Metzger, *supra* note 66, at 86–91 (arguing that delegation is both a tool for effective governance and constitutionally mandated); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*,

More importantly, 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 constitutional and statutory restrictions on their powers.[129] 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.[130]

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 influence policy choices.[131] 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).[132]

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.[133]

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105 HARV. L. REV. 1511, 1515 (1992) (recognizing that agencies make decisions under less political pressure and with greater expertise than legislators or elected officials).

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

130. *See, e.g.*, THE FEDERALIST NOS. 37, 47–48, 51 (James Madison), NOS. 78–80 (Alexander Hamilton); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 524, 536–47 (1998) (reviewing Federalist arguments that the limited enumerated power of the federal government would prevent encroachments on personal liberties). 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) (examining the fears of consolidated power). 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).

131. *See Dep't of Com.*, 139 S. Ct. at 2573.

132. *Id.* (internal citations omitted).

133. *See, e.g.*, Cass, *Motive*, *supra* note 91, at 421 (examining the APA's statutory limits on the scope of judicial review).

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,[134] the majority opinion appreciates that the assignment of discretionary policymaking 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.[135] Unsurprisingly, long-term government employees 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.[136] 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.[137]

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.[138] These expressions

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134. *Dep't of Com.*, 139 S. Ct. at 2561–62; *id.* at 2584–95 (Breyer, J., concurring in part and dissenting in part).

135. *See, e.g.*, Cass, *Motive*, *supra* note 91, at 425–27.

136. *See* Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 185–87 (1978) (examining different arguments regarding agency appointees); James Q. Wilson, *The Dead Hand of Regulation*, 25 PUB. INT. 39, 48 (1971) (arguing that agency staff tend to regulate according to their own preferences for regulation, rather than political considerations); *see also* Cass, *Motive*, *supra* note 91, at 425–26 (explaining that deference to policy-making officials is supported by the frequent barriers to change imposed by long-term agency staff and the need for political accountability).

137. *See* Cass, *Motive*, *supra* note 91, 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) (arguing in favor of expanding arbitrary and capricious review to consider political influences).

138. *See* Gundy v. United States, 139 S. Ct. 2116, 2138–40 (2019) (Gorsuch, J., dissenting) (arguing that the Court has failed to enforce the "intelligible principle" behind the nondelegation doctrine); Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 57 (2015) (Alito, J., concurring) (noting that "[l]iberty requires accountability"); *id.* at 77 (Thomas, J., concurring in the judgment) (asserting that the "intelligible principle" test has been inadequate for preserving and reinforcing the separation of powers); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (criticizing the "intelligible principle" test as having no basis in the Constitution); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1040–41 (2007) (characterizing delegations as

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.[139] Arguments of this sort, however, open a door to substituting judicial governance for constitutional governance.[140] This solution is contrary to the rule of law—misconstruing a legal standard to compensate for courts' failure to enforce a

"nonexclusive licenses"); Cass, *Delegation Reconsidered*, *supra* note 14 (arguing for an alternative test to strengthen the nondelegation doctrine); Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY_475, 478–80 (2016) (arguing that administrative law has failed to reflect the checks and balances mandated by the APA); Lawson, *Delegation*, *supra* note 14 (finding that courts struggled early to enunciate a clear principle for reviewing issues of delegation); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2172–73 (2004) [hereinafter Merrill, *Rethinking*] (questioning whether the nondelegation doctrine and *Chevron* are consistent with one another); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1508 (2015) (observing there is scant enforcement of nondelegation by the Court despite proclamations of its importance); 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) (proposing that Congress should not be able to delegate broad goals that leave agencies to fill in the details); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–26, 1229–34 (1985) [hereinafter Schoenbrod, *Substance*] (critiquing the nondelegation doctrine as both too vague and inconsistently applied by the Court); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 996–98, 1002–03 (2018) (advocating for an "as-applied" nondelegation doctrine). *See generally* HAMBURGER, *supra* note 130 (describing the background and history of American and continental laws' limitations on unchecked administrative power).

139. 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 generally Bamzai, *Interpretive Discretion*, *supra* note 69, at 172–76 (discussing the nondelegation doctrine and deference to agency decisions); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849 (2019) (reviewing the nondelegation doctrine and the intelligible principle); John F. Manning, *The Nondelegation Doctrine as a Canon of Constitutional Avoidance*, 2000 SUP. CT. REV. 223 (2000) (highlighting the Court's use of constitutional construction to employ the nondelegation doctrine); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (examining nondelegation cannons of construction); Wurman, *As-Applied*, *supra* note 138, at 977–78, 990–91 (outlining the benefits of the as-applied nondelegation doctrine).

140. This essentially is the same argument that is engaged more generally under the headings of non-interpretivist versus interpretivist methodologies for judicial decisionmaking. *See generally* Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529 (1998) [hereinafter Prakash, *Unoriginalism*] (reviewing originalism as a method of constitutional interpretation); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–56, 862–64 (1989) [hereinafter Scalia, *Originalism*] (comparing originalism and non-originalism).

constitutional standard—and lacks an obvious mechanism for establishing limits to the judicial adventurism it authorizes.[141]

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

When it came to considering 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.[142] It is as if the Court patterned the opinion on an Agatha Christie novel where the surprise ending reveals an unpredictable twist based on considerations hidden from the unsuspecting reader.[143]

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."[144] The Chief Justice's opinion for the Court in *Trump v. Hawaii*[145] in 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.[146]

The Court's *Department of Commerce* opinion, however, did not 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*[147] that, despite the usual rule against looking into a decisionmaker's thinking, inquiry into the "mental processes of [an] administrative [decisionmaker]" might be permitted where there is a "strong showing of bad faith or improper behavior."[148] 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 VRA.[149] 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

141. *See infra* discussion and sources cited at text and notes 248–264.

142. Dep't of Com. v. New York, 139 S. Ct. 2551, 2574–76 (2019).

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

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

145. 138 S. Ct. 2392 (2018).

146. *Id.* at 2418–19.

147. 401 U.S. 402 (1971).

148. *Dep't of Com.*, 139 S. Ct. at 2573–74 (quoting *Overton Park*, 401 U.S. at 420).

149. *Id.* at 2574–76.

to the court below did not provide a suitable basis for judicial review.[150] In other words, the majority concluded that the actual motivation for the decision was a suitable ground for setting aside its just-reached finding that the Secretary's decision was reasonable—not because the motivation was improper, but because it differed from the stated justification.[151]

Years earlier, in the *Morgan IV* case—the fourth case to make it to the Supreme Court in a long-running fight over the application of Department of Agriculture regulations to the Morgan Sheep Company[152]—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.[153] In *Morgan II*, the Court had declared that it is "not the function of the court to probe the mental processes of the Secretary."[154] 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.[155] He added that after-the-fact inquiry into the thinking of a judge "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."[156]

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."[157] 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 the invalidation of the Secretary's decision as pretextual, none of those Justices agreed to uphold the Secretary's action on its stated basis.[158] None of the remaining Justices agreed that it was appropriate to inquire into the Secretary's thinking beyond what he stated in his contemporaneous explanation.[159]

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150. *Id.*

151. *See id.* at 2575–76.

152. *See* United States v. Morgan (*Morgan IV*), 313 U.S. 409, 413–14 (1941); United States v. Morgan, 307 U.S. 183, 198 (1939); Morgan v. United States (*Morgan II*), 304 U.S. 1, 22 (1938); Morgan v. United States, 298 U.S. 468, 482 (1936).

153. *Morgan IV*, 313 U.S. at 421–22.

154. *Morgan II*, 304 U.S. at 18.

155. *Morgan IV*, 313 U.S. at 421–22.

156. *Id.* at 422.

157. Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (Thomas, J., concurring in part and dissenting in part).

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

159. *Id.* at 2576, 2596–97.

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 the University of California*,[160] 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 preceding Obama Administration.[161] As with the two cases discussed above, *Homeland Security* alters a rule of judicial review.[162]

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[163] who arrived in the United States as children.[164] Approximately 1.7 million such residents became eligible to avail themselves of that status under DACA.[165] 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.[166]

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).[167] At the same time, DHS created a related

160. 140 S. Ct. 1891 (2020).

161. *Id.* at 1901–03.

162. *Id.* at 1901.

163. The term "illegal alien resident" is used in this Article when referring to persons seeking status under the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs rather than terminology such as "undocumented immigrants" that is presently preferred by some commentators. The latter term is inapposite to the settings addressed here where the issue is not a lack of documentation caused by oversight or by a loss of documentation but rather the entry into the United States by persons who have not complied with immigration law. The persons covered by DACA and DAPA moved (either voluntarily or in custody of others moving voluntarily) from outside the United States' borders to inside the United States' borders without complying with legal requisites, acquiring legally required documentation, and passing through customs controls.

164. *Dept. of Homeland Sec.*, 140 S. Ct. at 1901; *id.* at 1918 (Thomas, J., concurring in the judgment in part and dissenting in part).

165. *Id.* at 1918, 1920 (Thomas, J., concurring in the judgment in part and dissenting in part).

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

167. *Id.* at 1902.

program named Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).[168] 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 coverage period.[169]

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.[170] Before those efforts failed, 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.[171] A lawsuit filed 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 would have to be promulgated through notice-and-comment rulemaking under the APA.[172] The district court and the court of appeals found those complaints about DAPA's legality persuasive, granting injunctive relief on the claims' likely

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

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

170. Justice Thomas's opinion in *Department of Homeland Security* states that more than two dozen attempts were made to address the issues through legislation. *Id.* at 1918 (Thomas, J., concurring in the judgment in part and dissenting in part).

171. *See, e.g.*, Glenn Kessler, *Obama's Royal Flip-Flop on Using Executive Action on Immigration*, WASH. POST (Nov. 18, 2014, 6:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2014/11/18/obamas-flip-flop-on-using-executive-action-on-illegal-immigration/ (reviewing Obama's changing positions on executive action for immigration); Michael D. Shear, *For Obama, Executive Order on Immigration Would Be a Turnabout*, N.Y. TIMES (Nov. 17, 2014), https://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html (examining Obama's interests in immigration reform).

172. *See Dept. of Homeland Sec.*, 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 *Department of Commerce* over the reinstatement of a census question respecting citizenship on the main census form. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2561–62, 2686–87 (2019). 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, 604 n.1 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

success, and an equally divided Supreme Court affirmed.[173] As a result, DAPA never went into effect.[174]

After President Trump took office, bringing an Administration with very different priorities on immigration issues than his predecessor's, DHS rescinded the DAPA memo.[175] 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.[176] 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.[177]

Again, a collection of states and groups opposed to the policy represented by the rescission filed suit, this time in various federal district courts.[178] Two courts issued nationwide injunctions expecting that plaintiffs would succeed on the claim that the recission 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.[179]

Secretary Nielsen, who had succeeded Duke, issued a memorandum explaining why Duke's decision was correct.[180] 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 individuals' and entities' reliance on the program.[181] 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.[182]

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173. Texas v. United States, 86 F. Supp. at 677–78 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, 188 (2015), *aff'd by equally divided Court*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

174. *Dep't of Homeland Sec.*, 140 S. Ct. at 1903.

175. *Id.*

176. *Id.* at 1903.

177. *Id.*

178. *Id.*

179. *Id.* at 1903–04.

180. *Id.* at 1904.

181. *Id.* at 1904.

182. *Id.* at 1904–05.

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.[183] 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.[184] 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.[185] If it was lawfully adopted as a matter of administrative discretion over enforcement, a similar method of decision should suffice to rescind it.[186]

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.[187] In its decision in *National Cable & Telecommunications Association v. Brand X Internet Services*,[188] the Court stated that "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.'"[189] Similarly, the Court's decision in

183. *See id.* at 1932 (Alito, J., concurring in the judgment in part and dissenting in part).

184. *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).

185. *See id.* at 1918, 1921–26 (Thomas, J., concurring in the judgment in part and dissenting in part) (agreeing that the Department of Homeland Security (DHS) had no statutory authority to implement new provisions regarding DACA, especially not by a memorandum). Justices Alito and Gorsuch joined Justice Thomas's opinion.

186. *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).

187. *See, 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); 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); 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).

188. 545 U.S. 967 (2005).

189. *Id.* at 981 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)).

Federal Communications Commission v. Fox Television Stations, Inc.,[190] explained that an agency that is adopting a change in policy:

> [N]eed 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[.][191]

On occasion, the Court has deemed a 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.[192]

The majority in *Homeland Security* took a different tack. Its assessment of whether the rescission of the prior Administration's policy is permissible 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.[193] 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.[194] 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 decisionmaking (rulemaking or adjudication) provides the essential background and record for administrative action.[195] 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.[196] Instead, it asked the

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190. 556 U.S. 502 (2009).

191. *Id.* at 515 (emphasis in original).

192. *See, e.g.*, FDA 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 for example Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016).

193. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1907–10 (2020).

194. *See id.* at 1910–15.

195. *See, e.g.*, Michigan v. EPA, 576 U.S. 743, 748—49 (2015) (examining the record for the decisions made under the Clean Air Act); Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 645 (1986) (reviewing the administrative record to confirm agency decision was adequately supported); Camp v. Pitts, 411 U.S. 138, 143 (1973) (reviewing the administrative record to confirm that the agency decision was adequately supported). Chief Justice Roberts's opinion in *Homeland Security* relies on these cases. *See Dep't of Homeland Sec.*, 140 S. Ct. at 1907–09.

196. *See Dep't of Homeland Sec.*, 140 S. Ct. at 1933–34 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

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.[197] 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.[198] 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,[199] the opinion asserts that Acting Secretary Duke erred by not realizing that the illegality found by the federal courts, which the Supreme Court affirmed, 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.'"[200] 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.[201] 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.[202] Not only *could* she have done that, but she also 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.[203]

The version of arbitrary-capricious review used by the majority in *Homeland Security* leans heavily on the Supreme Court's *State Farm* decision.[204] *State Farm* is regarded as the high-water mark for intrusive ("hard look") judicial

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

198. See *id.* at 1908–09.

199. *Id.* at 1910.

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

201. *Id.* at 1912.

202. *Id.* 1911–15.

203. *See id.* at 1914–15.

204. *See* Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co. (*State Farm*), 463 U.S. 29, 43 (1983) (noting that agency decisions that do not "consider important aspects" of an issue are arbitrary and capricious). The majority decision in *Homeland Security* references *State Farm* at least a dozen times. *See Dep't of Homeland Sec.*, 140 S. Ct. at 1910–15.

review of discretionary decisionmaking.[205] Apart from the analytical differences between *State Farm* and other Supreme Court precedents on arbitrary-capricious review,[206] 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 sixty rulemaking notices and proceedings and was issued at the conclusion to yet another rulemaking proceeding.[207] Unlike the DACA program—which was adopted by memorandum without any rulemaking proceeding, or indeed any similar process, and rescinded in a similar manner—the background proceedings for *State Farm* had gathered, analyzed, and relied on considerable evidence.[208] This was true both for the decision being overturned and for the decision being reviewed.[209] 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*.[210] Second, the Court does not provide guidance on how to choose

205. *See* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 145 (8th ed. 2020); Sunstein, *Hard-Look*, *supra* note 66; *see also* Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 879–80, 909–10 (2020) (noting that "hard look" review can be exacting and questioning whether it is supported by the APA). *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. However, it 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).

206. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009) (noting that *State Farm* does not require a more searching review of changes in policy); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 989 (2005) (clarifying that that agency inconsistency does not necessarily make deference inappropriate); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–47 (1996) (explaining that agency changes in policy are not fatal to deference); Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87, 108 (1983) (holding that a prior rule's ambiguity is not fatal); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 778, 814 (1978) (holding that where agencies are required to make judgments based on expert knowledge, complete factual support in the record is not necessarily required).

207. *See State Farm*, 463 U.S. at 34–40 (providing a history of the rulemaking at issue).

208. *See id.* at 35–39 (highlighting the extensive review and analysis undertaken in association with the rulemaking).

209. *See id.*

210. Of course, decisions exercising judicial review of administrative decisions can be

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.[211]

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 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

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characterized in different ways. 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). *Id.* at 2122. The Department's interpretation of the rule and the underlying FLSA provision had been relatively stable for decades before it finally initiated a rulemaking proceeding to codify judicial decisions and agency practice. *Id.* at 2123. Shortly afterward (following a change in presidential administration), the Department changed course. *Id.* 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. *Id.* at 2123–24. *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 205, 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, 1591–96 (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.

211. The goal of 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 for example CASS, RULE OF LAW, *supra* note 3, at 65, 90–91, 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 the 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 RRR509 (2016) (proposing that Chief Justice Roberts, at least in certain cases, is motivated by an "anti-disruption principle").

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.[212]

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.[213]

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.[214] 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

212. *See, e.g.*, Joseph Allegretti, *Rights, Roles, Relationships: The Wisdom of Solomon and the Ethics of Lawyers*, 25 CREIGHTON L. REV. 1119, 1130–33 (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 generally Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) [hereinafter Schauer, *Bad Law*]; Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases*, in REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 45–70 (Daniel P. Kessler ed., 2011).

213. *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).

214. *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) (explaining that barons created "due process of law" to ensure the "common law rights of Englishmen"); Thomas M. Scanlon, *Due Process*, in NOMOS XVIII, *supra*, at 93–125 (noting that institutions grant due process when intervening and controlling the lives of some people to promote "moral acceptability").

likelihood of law's neutral implementation.[215] It also is the origin of protections that are conceptually derivative of due process, such as the prohibitions on ex post facto laws and bills of attainder as well as rights to trial by jury.[216]

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.[217] 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.[218]

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.[219] In the United States, however, the English practice gave way to a stricter separation of people as well as of functions.[220] 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:

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

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

217. *See, e.g.*, Chapman & McConnell, *supra* note 215 (reviewing the Due Process Clause and evaluating its application to recent controversial cases).

218. *Id.* at 1672; Manning, *supra* note 28, at 631 (noting the danger of placing both rulemaking and rule interpretation in the hands of one brand).

219. 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, 571–72 (2014).

220. *See, e.g.*, Chapman & McConnell, *supra* note 215, 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 competencies). 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).

> 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.[221]

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 division of power between state and national governments, provided a critical protection for both democratic governance and individual rights.[222]

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 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."[223] 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."[224]

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,"[225] 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).[226] This authority stands in distinction to the tasks of implementing and applying the laws in specific instances, the provinces of the executive branch[227] and the judicial branch (so far as needed to decide disputes about law).[228] Yet Congress also historically has enacted an array of private bills, laws

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

222. THE FEDERALIST NO. 51, at 348 (James Madison) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NOS. 37–51 (James Madison), NOS. 67–73, 78–80 (Alexander Hamilton).

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

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

225. THE FEDERALIST NO. 37, at 235 (James Madison) (Jacob E. Cooke ed., 1961)

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

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

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

specifically admitting individuals into the country or otherwise providing recognition or benefits to them.[229] Singling individuals out for special *punishment* was a concern of the Framing generation; granting special *privileges* was not.[230] 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.

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 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.[231] 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 decisionmaking, 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.[232] 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.[233]

Commentators have objected to judicial decisionmaking—as relevant to the 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 decisionmaking based on externally (legislatively) given rules, which is supposed to be the domain

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229. *See generally* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010).

230. In fact, as the Supreme Court decided in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–88 (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.

231. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 89–90 (1998); CASS, RULE OF LAW, *supra* note 3, at 4, 7; FULLER, *supra* note 6, at 38–39; HAYEK, *supra* note 3, at 80–81; Scalia, *Law of Rules*, *supra* note 3, at 1179.

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

233. *See, e.g.*, Schauer, *Bad Law*, *supra* note 212, at 886–88 (focusing primarily on common law and constitutional adjudication); Schauer & Zeckhauser, *supra* note 212, at 45–46 (noting both common law adjudication and adjudication of statutory questions, and specifically addressing antitrust cases).

of courts.[234] This criticism views judging at its core to be an umpire-like endeavor, with non-compliant judges mistaking their role for that of the legislature[235]—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.[236] Put in colloquial terms, the complaint is that judges should (but fail 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

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234. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 6–7 (1991) (rejecting the idea that courts should make policy); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17–18 (Amy Guttman ed., 1997) [hereinafter SCALIA, FEDERAL COURTS] (cautioning against the potential for judges to make rulings based on their own perceptions of what the law should be rather than what it is); Gary Lawson, *Reflections of an Empirical Reader (or Could Fleming Be Right this Time?)*, 96 B.U. L. REV. 1457,1458–59 (2016) (advocating for maintaining the original intent of the law's drafter); Prakash, *Unoriginalism*, *supra* note 140, at 530–31 (arguing that construing meaning from law requires an originalist approach); Scalia, *Originalism*, *supra* note 140, at 852 (critiquing nonoriginalist construction as the act of judges determining what they desire for the law to mean).

235. *See, e.g.*, SCALIA, FEDERAL COURTS, *supra* note 234, at 22–23, 37–47; Kavanaugh, *supra* note 6, at 685–86, 689–90; *see also* Lawrence B. Solum, *Originalist Methodology*, 94 U. CHI. L. REV. 269, 269–70 (2017) [hereinafter Solum, *Originalist Methodology*] (explaining the bases for originalism as well as the functions performed and implications of its components).

236. *See*, MAGNA CARTA, 1215, ch. 39 (establishing the early concepts of due process); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *136; 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129–38 [hereinafter BLACKSTONE, COMMENTARIES] (describing the writ of habeas corpus); 2 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND 45–51 (London, E. and R. Brooke, Bell-Yard 1797) (laying our early due process requirements for various punishments and offenses); Chapman & McConnell, *supra* note 215, at 1679 (discussing the evolution of due process and its application to the legislature). This fundamental requirement of due process is antecedent to, though related to, the Constitution's 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 ET AL., THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 18 (2013) (noting that the framers were concerned with creating an all-powerful legislature). 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, at 472–74 (Alexander Hamilton) (making note of those Constitutional provisions protecting due process); 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, 614–17 (2018) (arguing that the Fifth Amendment had less due process significance than some contend).

like umpires and generally *should not* try to do that.[237] 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 that 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.[238] 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.[239]

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.

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237. *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 4; McKee, *supra* note 5; Michaels, *supra* note 5; Siegel, *supra* note 5.

238. *See* McKee, *supra* note 5, at 1716–18 (stating that despite the obvious dangers in allowing subjectivity to influence judging, there are some legal questions that can only be resolved through a judge's personal experience, background, and beliefs, such as determining what "shocks the conscience"); Michaels, *supra* note 5, at 414–15 (declaring that "baller" judges play important roles in considering unsettled first-order principles and tackling normatively contestable questions, unlike umpire judges who eschew philosophical debate as outside the realm of judicial decisionmaking); Siegel, *supra* note 5, at 702 (arguing that the analogy of umpires simply deciding constitutional cases based on text and precedents overlooks a critical purpose of constitutional rules to "express social vision" and that it is the job of the judiciary to articulate "a vision of social order that resonates with fundamental public values" to sustain its institutional legitimacy); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 19, 24, 60–62, 66 (1984) (emphasizing the indeterminacy of judicial decisions and asserting that legal theory is even more indeterminate than ordinary speech because it must answer difficult moral questions that cannot merely follow a mechanical formula); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 818, 823–24 (1983) (urging that the idea of judges finding neutral principles for a hard case shows that they have implicitly recognized a standard to measure their role in "shaping and applying the rules in controverted cases").

239. *See* DWORKIN, LAW'S EMPIRE, *supra* note 4 (advocating interpretive modes that advance better values rather than modes that better reflect the values of those who drafted legal texts and endeavored to embed those values in the texts); Brest, *supra* note 4, 228–29 (arguing that "customs, social practices, conventional morality, and precedent" are time-bound and play essential roles in interpretation); Fiss, *Forms of Justice*, *supra* note 4, at 1–2, 11 (stating that judges interpret rules to reflect public values and morality of the time).

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

The problem with the Not-a-Player complaint is one of measurement. The complaint is not that *any* degree of judgment in judicial decisionmaking 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.[240] The test that the Not-a-Player criticism 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.[241] 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.[242] 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

240. *See, e.g.*, SCALIA, FEDERAL COURTS, *supra* note 234, 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 generally* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 95 MICH. L. REV. 1509, 1514–15 (1998) (reviewing SCALIA, FEDERAL COURTS, *supra* note 234, 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, 265, 267, 269 (2020) (preferring a more formalistic to a more contextual version of textualism on this ground).

241. *See*, *e.g.*, Solum, *Originalist Methodology*, *supra* note 235, at 270–71 (discussing the varying methods that can be employed to interpret and apply meaning where it is ambiguous in the text).

242. 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 divergence" (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 [hereinafter SCHAUER, PLAYING BY THE RULES] 1, 3, 6–7, 10, 15, 229 (1991).

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."[243]

Concerns about how one can keep the judgment aspect of decisionmaking 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 rulemaking 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.[244]

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*,[245] 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.[246]

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."[247]

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243. 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 decisionmaking. *See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 52–62, 228–38; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1977) (arguing against the use of principles, policies, and standards in applying rules of law); Ackerman, *Constitutional Politics*, *supra* note 4, at 455; Ackerman, *Storrs Lectures*, *supra* note 4, at 1071–72; Michaels, *supra* note 5, at 414–16.

244. *See* Cass, *Delegation Reconsidered*, *supra* note 14, 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 14, at 353–55 (identifying that it is difficult to determine when judicial and administrative discretion crosses into the realm of legislative delegation); Merrill, *Rethinking*, *supra* note 138, at 2169–71 (arguing for an exclusive delegation doctrine); Schoenbrod, *Substance*, *supra* note 138, at 1224–26, 1229–34 (noting that the Supreme Court has failed to develop a coherent and consistent test for delegation issues).

245. 488 U.S. 361 (1989).

246. *Id.* at 415 (Scalia, J., dissenting)

247. *Id.* at 416.

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 made as part of the Umpire Mirage complaint 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.[248] 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 do not require explanation, even if enforcers 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 did not 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.[249] One would expect that appealed cases would be especially likely to

248. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 242, at 191–96 (providing a careful analysis of the degree to which linguistic indeterminacy affects operation of rules that constrain legal and other decisionmaking); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 283, 285–86 (1989) (examining how the indeterminacy of law impacts the legitimacy of judicial decisions); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463, 466–67, 495–97 (1987) (discussing the indeterminacy thesis).

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

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.[250]

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.[251] 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.[252] 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.[253] 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,[254] but it consistently reaches unanimity more often than any other

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250. *Id.* at 78–79.

251. 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 generally* CASS, RULE OF LAW, *supra* note 3, at 72–97; Vicki C. Jackson, Cook v. Gralike*: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 299–301, 327–31, 345 (2001); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 399–401, 439 (1985).

252. *See, e.g.*, Cass, *Nationwide Injunctions*, *supra* note 6, at 52–57 (discussing how nationwide injunctions have led to the courts being inserted into politicized and partisan issues).

253. *See* CASS, RULE OF LAW, *supra* note 3, at 77–79, 150–51 (discussing highly political cases and the interpretation of rules of law in those cases); *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 ninety-eight 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 (stating that judges must have an open mind, shed political allegiances, and learn from your colleagues). *But see* Richard L. Revesz, *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).

254. Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 753 (1964) (noting that the Court was issuing around 125 written opinions per term by 1964); Ryan J. Owens &

outcome and decides the great majority of its cases with lopsided majorities.[255] 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.[256]

David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225 (2012) (finding that the average number of cases decided dropped to 80 per term since 2005); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366 (2005) (examining reasons behind the Court's shrinking docket in recent years). 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, § 4.4 (11th ed. 2019) (explaining circuit splits carry importance because of the need to bring uniformity to legal matters among the federal courts of appeals); 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).

255. *See, e.g.*, CASS, RULE OF LAW, *supra* note 3, at 64–65 (finding that in the 1999 term thirty-two of seventy-three cases had no dissenters, with another fifteen having two Justices or less dissenting). 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*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2019-2020 (last visited Aug. 9, 2021) (listing cases and votes); *see also* STEPHEN J. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 110 (2005) (exploring why judges tend to decide cases in the same vein of reasoning).

256. This includes some cases routinely discussed as evidence that political influences dominate Supreme Court decisionmaking. 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 Board*, 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, 1407–09 (2001) (suggesting the Court was motivated by partisan ideology); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1093–95 (2001) (discussing how people believed *Bush v. Gore* was decided along political lines); 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) (finding the rule of law was damaged by partisan decisionmaking by the Court); Jonathan Chait, *Yes,* Bush v. Gore *Did Steal the Election*, N.Y. MAG. (Jun. 25, 2012),

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 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.[257] Of course, that belief also rests on the assumption that judges'

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https://nymag.com/intelligencer/2012/06/yes-bush-v-gore-did-steal-the-election.html (finding the public believed *Bush v. Gore* decided the election of 2000); Sanford Levinson, *Return of Legal Realism*, NATION (Dec. 22, 2000), https://www.thenation.com/article/archive/return-legal-realism/ (questioning whether the merits of the *Bush v. Gore* majority can be reconciled with a belief in safeguarding of equality); Elspeth Reeve, *Just How Bad Was* Bush v. Gore?, ATLANTIC (Nov. 29, 2010), https://www.theatlantic.com/politics/archive/2010/11/just-how-bad-was-bush-v-gore/343247/ (highlighting consequences of the *Bush v. Gore* decision); Jeffrey Toobin, *Precedent and Prologue*, NEW YORKER (Dec. 6, 2010), https://www.newyorker.com/magazine/2010/12/06/precedent-and-prologue (finding the Court's majority *in Bush v. Gore* violated the principles of judicial restraint). 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 (2000).

257. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 2, 7, 11 (1996) (advocating for a moral view on political decency and justice to inform legal judgments); DWORKIN, LAW'S EMPIRE, *supra* note 4, at 226–29, 231, 239 (examining interpretive tools); Ackerman, *Constitutional Politics*, *supra* note 4, at 454 (arguing that old philosophical views need to be discarded); Ackerman, *Storrs Lectures*, *supra* note 4, at 1015 ("we must transcend the Framers' vision if we are to make our Constitution fit the needs of a modern democratic society"); Brest, *supra* note 4, at 205, 237 (supporting the nonoriginalist approach); Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 526–27 (1993) (presenting a constitutional argument for a right to basic subsistence in order to further social justice goals); Michaels, *supra* note 5, at 414 (connecting legal reasoning with morality and political economy); Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 962–64 (1973) (examining concepts of distributive justice); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 767, 798 (1969) (arguing for use of the Equal Protection Clause to open up zoning restrictions and create more opportunity for low-income groups); Siegel, *supra* note 5 at 701-02; *see also* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 4–5 (2020) (supporting broad administrative delegations based on welfarist principles).

moral values will replicate the moral values of the academic critic.[258]

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.[259] 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,[260] but it is difficult to imagine people willingly giving coercive, supervening power to judges freed from bonds of external rules

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258. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 44–45 (1980) (discussing how societal expectations of a judge's morality and values are unreasonably expected to be similar); 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) (discussing the diverging interpretations of law between scholars and judges); 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, 1269 (1997) (evaluating Dworkin's FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION as applied in the judicial context).

259. *See*, *e.g.*, SCALIA, FEDERAL COURTS, *supra* note 234 (arguing judges endeavoring to interpret the intent of lawmakers inevitably will be influenced by their personal view of what that intent ought to have been); Robert A. Burt, *What Was Wrong with* Dred Scott, *What's Right About* Brown?, 42 WASH. & LEE L. REV. 1, 17–18 (1985) (stating that the *Dred Scott* decision was affected by the dominant moral convictions of the time); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943–44 (1973) (explaining that the Court in *Roe v. Wade* crafted its decision by "indulging in sheer acts of will" rather than by implementing established rules of law); Mary Ann Glendon, *Comment*, in SCALIA, *supra* note 234, at 95, 112–14 (agreeing with Justice Scalia that the American court system often makes decisions based on will, politics, morals, etc. and not based on less personally influenced interpretation of the law); McConnell, *supra* note 258, at 1269–70 (disputing Dworkin's arguments that judges should be more loosely constrained in decisionmaking by "text, history, tradition, and precedent" than has been generally asserted); Prakash, *Unoriginalism*, *supra* note 140, at 542, 544 (arguing for more law-bound interpretation and asserting that the law means nothing if the interpretation of the law can vary across time and interpreters); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 920, 221, 243–49 (1973) (stating that the courts should apply the moral principles of the time to decisionmaking).

260. *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 258; FULLER, *supra* note 6, at 96–106; HAYEK, *supra* note 3, at 80–81; MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER VALUES 387–89, 390–91 (1991).

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.[261] Every readily 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.[262]

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 the development of individual values

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261. *See, e.g.*, SCALIA, FEDERAL COURTS, *supra* note 234, 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.

262. *See generally* THE FEDERALIST NOS. 45–48 (James Madison) (discussing the merits of a governmental system with state and federal governments and the separation of judicial, executive, and legislative powers); *id.* at 78–80, 84 (Alexander Hamilton) (discussing the need for an independent judiciary and the relation of the rights of the people to a federal government established by a constitution and the need for a bill of rights); ALEXANDER HAMILTON, *NOS. LXXVIII-LXXX, LXXXIV*, *IN* HAMILTON ET AL., THE FEDERALIST 574–95, 627–39 (J. B. Lippincott & Co. ed., 1877) (arguing for the rule of the people by a federal government under a constitution to maintain individual rights); BRUTUS NO. XI (Jan. 31, 1788), *reprinted in* THE ANTI-FEDERALIST PAPERS, *supra* note 129, at 293–98 (arguing that the federalist structure would raise the judiciary to the level of a king); BLACKSTONE, COMMENTARIES, *supra* note 236, at 1:136, 3:129–38 (arguing that the history of monarchies in Europe demonstrate that they fail to advance individual liberties and justice); COKE, INSTITUTES, *supra* note 236, at 2:45–51 (including the Magna Carta text which addresses the protection of the rights of the individual under the king); MONTESQUIEU, *supra* note 213 (arguing that government under a monarchy inherently results in loss of individual rights and liberty); DE TOCQUEVILLE, *supra* note 130, at 100–06 (contrasting the American government structure with other confederations and republics and the role such government structure plays in protecting individual liberties); Chapman & McConnell, *supra* note 215, at 1679 (discussing the problem of royal prerogative influencing the judiciary and the need for the separation of the judiciary from the legislative and executive branches); 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").

and liberty.[263] 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.[264] And urging judges to think of their enterprise in terms of judgments less bound by traditional legal materials and rules weakens professional commitments that likely explain much of the legal certainty and law-boundedness the current legal system exhibits.[265]

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*

263. *See, e.g.*, BARNETT, *supra* note 231, 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.

264. *See, e.g.*, SCHAUER, PLAYING BY THE RULES, *supra* note 242; Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1192, 1202–4 (1994) (exploring the 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).

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

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. 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 a 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.[266] 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.

266. Fairness requires admission that even great jurists make bad law. No one—not even the best judges—is infallible. But great judges err less often. And they less often are misled by the greatness of the case. That is the result to be hoped for by all who are devoted to the law.