

CHIEF JUSTICE ROBERTS'S HARD LOOK REVIEW

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The U.S. Supreme Court's 1983 decision in Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co. announced a framework for judicial review of agency actions that are challenged as arbitrary and capricious. The decision, however, left two significant questions unresolved: How much political influence in agency decision-making is too much to fail judicial review? And may a reviewing court scrutinize the agency's substantive policy choice or not? This Note argues that Department of Commerce v. New York and Department of Homeland Security v. Regents of the University of California—the Court's most recent applications of State Farm—settle these questions.

This Note argues that Chief Justice Roberts's answer to the question of how much political influence is "too much" under State Farm is that this is the wrong question to be asking. An agency's "unstated reasons" for acting—such as political influences, motivations, presidential agendas, and the like—are excluded from the State Farm analysis. The only question for a court reviewing an agency decision pursuant to State Farm is whether the agency sufficiently engaged in reasoned decision-making.

Next, this Note maintains that Chief Justice Roberts's answer to the question of whether judicial review pursuant to State Farm permits scrutiny of an agency's substantive policy decision is a firm no, because it is the agency, and not the reviewing court, that must engage in substantive decision-making. The focus of judicial review pursuant to State Farm is not the substance of an agency's decision but the reason-giving process that led the agency to its substantive decision.

Putting these two arguments together, this Note argues that the application of State Farm in Department of Commerce and Regents—referred to as Chief Justice Roberts's "hard look review"—makes clear that it is an agency's reasons for acting and its reasoning process that sit at the center of the Court's review under State Farm.

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INTRODUCTION

“Do you get the impression the Supreme Court doesn’t like me?”¹ President Donald Trump tweeted this question shortly after the U.S. Supreme Court published its decision in *Department of Homeland Security v. Regents of the University of California*,² in which it rejected the rescission of the Deferred Action for Childhood Arrivals (DACA) program by the secretary of the U.S. Department of Homeland Security (DHS).³ The Supreme Court split 5-4 in concluding that the secretary’s rescission of DACA was arbitrary and capricious, in violation of § 706(2)(A) of the Administrative Procedure Act⁴ (APA), because DHS failed to comply “with the procedural requirement that it provide a reasoned explanation for its action.”⁵ Chief Justice Roberts penned the majority opinion and subsequently faced several attacks from Republican lawmakers: Representative Jim Jordan of Ohio stated that Chief

1. Donald Trump (@realDonaldTrump), TWITTER (June 18, 2020, 11:10 AM), <https://twitter.com/realDonaldTrump/status/1273634152433188865> [https://perma.cc/7SYW-T6JW].

2. 140 S. Ct. 1891 (2020).

3. See *id.* at 1912; see also Mark Moore, *Trump Suggests Supreme Court ‘Doesn’t Like’ Him After DACA Ruling*, N.Y. POST (June 18, 2020, 12:23 PM), <https://nypost.com/2020/06/18/trump-says-supreme-court-doesnt-like-him-after-daca-ruling> [https://perma.cc/WU3M-7C8W].

4. 5 U.S.C. §§ 551–559, 701–706.

5. *Regents*, 140 S. Ct. at 1916.

Justice Roberts was “convoluting the law to appease the DC establishment,” and Senator Ted Cruz of Texas criticized the decision as “lawless.”⁶

Conservative figures similarly lambasted the Chief Justice for his majority opinion in *Department of Commerce v. New York*,⁷ accusing him of acting like a politician⁸ and “betray[ing] the US Constitution.”⁹ In that decision, Chief Justice Roberts determined that the secretary of the U.S. Department of Commerce’s attempt to reinstate a citizenship question in the 2020 Census was not arbitrary or capricious¹⁰ but rejected the action as pretextual, holding that the reason proffered for the change was contrived.¹¹

Are these critiques of the Chief Justice warranted? Can one fairly read these two decisions as stretching the law or applying an unlawful standard of review? Answering these questions requires an understanding of the legal standard agencies must meet to survive arbitrary and capricious judicial review—a standard the Supreme Court has historically left hazy.¹²

In both *Department of Commerce* and *Regents*, the Supreme Court reviewed the arbitrary and capricious challenges pursuant to the framework laid out in its 1983 opinion, *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*¹³ Cited in over 700 D.C. Circuit opinions, *State Farm* remains the seminal case on arbitrary and capricious review.¹⁴ The *State Farm* Court is considered to have “reaffirmed the judiciary’s central role in ensuring regularity with the core administrative value of reasoned decision-making”¹⁵ by embracing “hard look review” for arbitrary and capricious challenges to agency action.¹⁶

State Farm, however, as a split decision, showed how reasonable minds can disagree on what constitutes reasoned decision-making,¹⁷ and legal

6. Devan Cole & Jamie Ehrlich, *GOP Lawmakers Tear into John Roberts Over DACA Ruling*, CNN (June 18, 2020, 6:50 PM), <https://www.cnn.com/2020/06/18/politics/republican-criticism-john-roberts-daca-supreme-court/index.html> [<https://perma.cc/TR3N-LZ5J>].

7. 139 S. Ct. 2551 (2019).

8. See Josh Gerstein, *Conservatives Blast Roberts as Turncoat*, POLITICO (June 27, 2019, 8:54 PM), <https://www.politico.com/story/2019/06/27/conservatives-blast-roberts-1386124> [<https://perma.cc/M32Q-A3TY>].

9. Sebastian Gorka (@SebGorka), TWITTER (June 27, 2019, 2:28 PM), <https://twitter.com/SebGorka/status/1144311489941135360> [<https://perma.cc/ZRZ3-ERYA>].

10. See *Dep’t of Com.*, 139 S. Ct. at 2571.

11. See *id.* at 2575.

12. See, e.g., Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 428 (2009) (noting that the Supreme Court has “left the doctrine for reviewing agency rulemaking in shambles”).

13. 463 U.S. 29 (1983); see also *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020); *Dep’t of Com.*, 139 S. Ct. at 2569.

14. See Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 34 n.149 (2019).

15. *Id.* at 35.

16. See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 772 (2008) (“*State Farm* was widely taken to have ratified the hard look doctrine.”).

17. See Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look,”* 92 NOTRE DAME L. REV. 331, 348 (2016).

scholars have since debated what *State Farm*'s hard look review actually requires of agencies.¹⁸ This Note focuses on two of the debates raised in *State Farm*.

First, scholars and courts have grappled with determining the permissible extent of political influence in agency decision-making, beyond which agency action would fail *State Farm*'s arbitrary and capricious judicial review.¹⁹ The second highly debated question is whether hard look review penalizes an agency for substantive *and* procedural defects in its decision-making or whether *State Farm* requires courts to scrutinize *only* procedural defects. This Note argues that the recent decisions in *Department of Commerce* and *Regents* settle these two issues regarding hard look review that *State Farm* left unresolved. Specifically, *Department of Commerce* and *Regents* show that political influence is permissible in agency decision-making—albeit irrelevant to the reviewing court's analysis under *State Farm*—and that *State Farm* exclusively scrutinizes an agency's reasoning process but not the substance of its policy decision.

Part I explains the origins of the reasoned decision-making requirement and explores its development in the formative cases of *State Farm*, *Department of Commerce*, and *Regents*. Part II discusses how legal scholars have treated, and attempted to make sense of, the two aforementioned issues in *State Farm*. Having considered the relevant background and leading academic commentary, Part III offers an answer to these unresolved questions by arguing that *Department of Commerce* and *Regents* show: (1) an agency decision will survive arbitrary and capricious review when, even if motivated by politics, it was the product of reasoned decision-making; and (2) hard look review is a procedural tool used to ensure that agencies adequately discuss and justify their actions, rather than a substantive analysis.

I. THE GENESIS OF THE REASONED DECISION-MAKING REQUIREMENT

A long-standing principle of administrative law is that the APA, for purposes of regulating agency behavior, requires agencies to engage in “reasoned decisionmaking.”²⁰ The phrase “reasoned decisionmaking,” however, does not appear in the APA, and the Supreme Court did not use the phrase prior to decisions from its 1982 term²¹—specifically, *Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc.*²² and *State*

18. See *infra* Part II.

19. See Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 CONN. L. REV. 1, 66 (2020) (noting that subsequent Supreme Court decisions applying *State Farm* have failed to resolve the tension between expertise and deference to political influence that divided the Justices).

20. See, e.g., *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (stating that the APA establishes a scheme of reasoned agency decision-making that courts enforce to ensure regulations are “supported by the reasons that the agencies adduce”); John F. Duffy, *Reasoned Decisionmaking vs. Rational Ignorance at the Patent Office*, 104 IOWA L. REV. 2351, 2352 (2019).

21. See Duffy, *supra* note 20, at 2360.

22. 462 U.S. 87 (1983).

Farm.²³ Nonetheless, the idea that an agency must justify its actions existed at the Supreme Court prior to the Court's use of the phrase and in administrative law even prior to the APA's enactment.²⁴

A. *Judicial Review Pre-State Farm*

Indeed, in a 1947 decision, the Supreme Court held that when “dealing with a determination or judgment which an administrative agency alone is authorized to make, [the Court] must judge the propriety of such action solely by the grounds invoked by the agency.”²⁵ In *SEC v. Chenery Corp.*²⁶ (*Chenery II*), the Court affirmed the Securities and Exchange Commission's denial of a holding company's reorganization plan—a decision the Court originally rejected a few years prior—on grounds that now the commission had thoroughly expressed the reasons for its decision.²⁷ The Court found that the agency's decision was “the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts.”²⁸

The Supreme Court's decision in *Chenery II* is couched in the fundamental principle of administrative law that, unlike Congress, agencies must articulate reasons for their policymaking.²⁹ By focusing judicial review on how an agency has justified its action, the *Chenery II* decision made explicit reason-giving a significant part of agency policymaking.³⁰

Some legal scholars have traced the roots of reasoned decision-making to before the 1947 *Chenery II* decision—specifically, to President Woodrow Wilson's late nineteenth-century vision of the administrative state.³¹ President Wilson envisioned an administrative state comprised of a “technically schooled civil service”³² with the “best minds,”³³ “removed

23. 463 U.S. 29, 52 (1983).

24. See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 420 (1971) (stating that courts must engage in “a thorough, probing, in-depth review” and that “since the [administrative] record may not disclose the factors that were considered . . . it may be necessary for the District Court to require some explanation . . . to determine . . . if the Secretary's action was justifiable”); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (“There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion.”).

25. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

26. 332 U.S. 194 (1947).

27. See *id.* at 199.

28. *Id.* at 209.

29. See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 955–56 (2007) (“At its core, the *Chenery* principle directs judicial scrutiny toward what the agency has said on behalf of its action, not simply toward the permissibility or rationality of its ultimate decision . . .”).

30. *Id.* at 957.

31. See Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 501–02 (2019); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 33 & n.138 (2009).

32. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 216 (1887).

33. *Id.* at 221.

from the hurry and strife of politics.”³⁴ His view of agencies as apolitical, expert institutions that could best address societal problems justified the explosive growth of the administrative state during the New Deal.³⁵ Then contemporary luminaries believed that agency expertise alone warranted Congress’s broad delegations of power to agencies.³⁶

Other scholars have argued that reasoned decision-making is not a legacy of President Wilson’s expertise model but is better traced to the interest group model of the administrative state, which became an accepted justification for agency rulemaking by the early 1970s.³⁷ The interest group model emerged following the New Deal, due to increasing skepticism that expertise was not all that guided agency decision-making.³⁸ That agencies made value judgments in the course of exercising their broad directives from Congress grew apparent as groups that regularly sustained the costs of an agency’s rulemakings organized to have their interests represented.³⁹ Rather than being apolitical experts, agencies were increasingly seen as entities prone to “capture” by the industries they regulated, raising concerns of political accountability to those outside the regulated industry who were inevitably affected by agency actions.⁴⁰ Courts responded to the threat of capture by creating a more aggressive standard of judicial review of agency action—one that “force[d] agencies to engage in technocratic decisionmaking open to participation by varying interest groups”—by imposing a burden of explanation on the agency when it adopted or amended a rule.⁴¹

Although § 706(2)(A) of the APA already instructed federal courts to invalidate agency decisions that were “arbitrary” or “capricious,”⁴² various judges on the D.C. Circuit in the 1960s and 1970s ramped up this judicial review to require that an agency survive a “hard look.”⁴³ The hard look doctrine requires agencies to offer “encyclopedic[] explanations for their conclusions, to respond to counterarguments, to justify departures from past practices, and to give careful consideration to alternatives to the proposed

34. *Id.* at 209.

35. Roesler, *supra* note 31, at 502.

36. *See* Sullivan & Chabot, *supra* note 19, at 9; *see also* Watts, *supra* note 31, at 33–34 (stating that through the New Deal, “agencies derived their legitimacy from the notion that they were made up of professional and capable government ‘experts’ pursuing the ‘public interest’”).

37. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 148–49, 153 (2012).

38. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761 (2007).

39. *See* Roesler, *supra* note 31, at 502; *see also* Seidenfeld, *supra* note 37, at 154 (“Agency staff members often share the professional background of the employees of the companies they regulate and . . . interact closely with their industry compatriots on a day-to-day basis.”).

40. *See* Roesler, *supra* note 31, at 502–03, 502 n.49.

41. Watts, *supra* note 31, at 34; *see also* Seidenfeld, *supra* note 37, at 155 (“The doctrinal details of the reasoned decision-making standard respond to the cautionary message of the interest group model.”).

42. 5 U.S.C. § 706(2)(A).

43. *See* Miles & Sunstein, *supra* note 16, at 761.

course of action.”⁴⁴ The reasoned decision-making requirement of hard look review was intended to serve as a source of legitimacy for an agency’s action and to ensure that the agency was a responsible agent of Congress, faithfully exercising its granted discretion.⁴⁵ In *State Farm*, the Supreme Court signed on to the idea that arbitrary and capricious review requires courts to take a “hard look” at agency action.⁴⁶

B. *State Farm’s Hard Look Review*

Seen as the moment when the Court endorsed the reasoned decision-making requirement,⁴⁷ the *State Farm* decision has since been criticized as providing limited guidance to lower courts on how to apply what has become a controversial standard of review.⁴⁸ At issue in *State Farm* was whether the National Highway Traffic Safety Administration’s (NHTSA) rescission of Modified Motor Vehicle Safety Standard 208 was arbitrary and capricious.⁴⁹ This rule required manufacturers to equip vehicles produced after September 1982 with airbags or automatic seat belts.⁵⁰

Congress enacted the National Traffic and Motor Safety Act of 1966⁵¹ to “reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.”⁵² The Act directed the secretary of the U.S. Department of Transportation to issue—after considering “relevant available motor vehicle safety data”—vehicle safety standards that were “reasonable, practicable and appropriate” and “me[t] the need for motor vehicle safety.”⁵³

As initially promulgated in 1967, Safety Standard 208 required the installation of seat belts in all passenger cars.⁵⁴ Employing these seat belts, also known as “active belt systems,” required passengers to manually secure the lap and shoulder belts.⁵⁵ NHTSA later found that although “highly effective” when worn, the “low usage rate of active seat belt systems negate[d] much of their potential safety benefit.”⁵⁶ Thus, in July 1969, the agency invited public comment on a revised safety standard mandating passive-restraint systems in passenger cars.⁵⁷ Unlike active belt systems—

44. *Id.*

45. See Sullivan & Chabot, *supra* note 19, at 31 & n.207.

46. See Miles & Sunstein, *supra* note 16, at 771–72.

47. Seidenfeld, *supra* note 37, at 154.

48. Keller, *supra* note 12, at 438.

49. See Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 38 (1983).

50. *Id.*

51. Pub. L. No. 89-563, 80 Stat. 718, *repealed by* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 745, 1379.

52. *Id.*

53. *Id.* § 103(a), (f)(3), 80 Stat. 718 at 719.

54. See Initial Federal Motor Vehicle Safety Standards, 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967) (to be codified at 23 C.F.R. pt. 255).

55. See Occupant Restraint Systems, 42 Fed. Reg. 34,289, 34,290 (July 5, 1977) (to be codified at 49 C.F.R. pt. 571).

56. *Id.* at 34,289–90.

57. See Inflatable Occupant Restraint Systems, 34 Fed. Reg. 11,148, 11,148 (proposed July 2, 1969).

which depend on manual buckling to provide safety—passive restraints deliver crash protection without requiring passengers to take any action because they deploy automatically upon entry or collision.⁵⁸

In 1977, after repeated revisions to Safety Standard 208⁵⁹ and a subsequent suspension of the regulation due to widespread public opposition,⁶⁰ President Jimmy Carter's secretary of transportation issued Modified Standard 208, a new "automatic passive restraints" regulation that obliged auto manufacturers to equip passenger cars with either airbags or passive seat belts.⁶¹ NHTSA estimated that these precautions would prevent over 9000 deaths and 65,000 injuries annually.⁶²

In April 1981, however, President Ronald Reagan's secretary of transportation proposed a rescission of Modified Standard 208 due to the "economic difficulties of the automobile industry."⁶³ In October 1981, NHTSA promulgated a final rule rescinding the requirement that auto manufacturers install either airbags or passive seat belts.⁶⁴ The agency explained that it could no longer determine whether the passive restraint requirements would provide more than "minimal safety benefits,"⁶⁵ and thus, imposing the substantial costs of the requirements on the public would be unreasonable.⁶⁶ It was this decision to rescind that insurance companies challenged for being arbitrary and capricious.⁶⁷

Ultimately, the Supreme Court concluded in *State Farm* that NHTSA's rescission of the passive restraint requirement was arbitrary and capricious because NHTSA's explanation failed to convince the Court that the

58. *See id.*

59. *See, e.g.*, Occupant Crash Protection, 37 Fed. Reg. 3911, 3911 (Feb. 24, 1972) (to be codified at 49 C.F.R. pt. 571) (noting that the passive-restraint requirement would be effective in August 1975); Occupant Crash Protection in Passenger Cars, Multipurpose Passenger Vehicles, Trucks, and Buses, 35 Fed. Reg. 16,927, 16,927 (Nov. 3, 1970) (to be codified at 49 C.F.R. pt. 571).

60. *See* Ernest Holsendolph, *Coleman Puts off Air-Bag Ruling; Proposes a Limited Voluntary Plan*, N.Y. TIMES (Dec. 7, 1976), <https://www.nytimes.com/1976/12/07/archives/coleman-puts-off-airbag-ruling-proposes-a-limited-voluntary-plan.html> [<https://perma.cc/Z9SH-52EN>] (stating that President Gerald Ford's secretary of transportation was concerned the passive restraints "would be badly received by the driving public").

61. Occupant Restraint Systems, 42 Fed. Reg. at 34,289–90.

62. *See id.* at 34,298.

63. Occupant Crash Protection, 46 Fed. Reg. 21,205, 21,206 (Apr. 9, 1981) (to be codified at 49 C.F.R. pt. 571).

64. *See* Occupant Crash Protection, 46 Fed. Reg. 53,419, 53,419 (Oct. 29, 1981) (to be codified at 49 C.F.R. pt. 571).

65. *Id.* at 53,424. If Modified Standard 208 were to go into effect, NHTSA stated that "the assumed life-saving potential of air bags would not have been realized" because manufacturers "planned to install them in less than 1 percent of new cars," and "the overwhelming majority of new cars would be equipped with automatic belts that are detachable," which "might only approach [usage] levels similar to those currently achieved with manual belts." *Id.* at 53,421–22.

66. *Id.* at 53,420, 53,423 ("Vehicle price increases would have amounted to approximately \$1 billion per year.")

67. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 39 (1983).

rescission “was the product of reasoned decisionmaking.”⁶⁸ In reaching this conclusion, the Court framed arbitrary and capricious review in “expert-driven terms”⁶⁹: an agency’s decision would be arbitrary if the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . or is so implausible that it could not be . . . the product of agency expertise.”⁷⁰

The Court stated further that the “scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency” but requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action, including a ‘rational connection between the facts found and the choice made.’”⁷¹ Notably, the Court, referencing *Chenery II*, reiterated that if a reviewing court identifies deficiencies in an agency’s explanation, it “may not supply a reasoned basis for the agency’s action that the agency itself has not given.”⁷²

When applying this standard to NHTSA’s rescission of Modified Standard 208, all nine Justices agreed that the agency acted arbitrarily and capriciously because it failed to consider whether to modify the regulation to impose an airbags-only requirement.⁷³ Given NHTSA’s earlier determination that “airbags are an effective and cost-beneficial lifesaving technology,” the Court referred to an airbags-only requirement as “the logical response.”⁷⁴ The Justices split 5-4, however, on whether—in light of auto manufacturers’ plans to largely install detachable automatic belts⁷⁵—NHTSA’s decision to rescind the safety standard as to the passive seat belts was also arbitrary and capricious.⁷⁶

Justice Byron White, writing for the majority, recognized that “[e]xpert discretion is the lifeblood of the administrative process” and determined that the agency failed to “bring its expertise to bear on the question.”⁷⁷ The majority found no evidence to support NHTSA’s conclusion that detachable automatic belts would yield usage levels similar to those currently achieved with manual belts⁷⁸ and provided that NHTSA “failed to articulate a basis for not requiring nondetachable belts.”⁷⁹

Conversely, Justice William Rehnquist, in dissent, determined that NHTSA’s “explanation, while by no means a model, [was] adequate” because it articulated a rational basis for its conclusion—namely that the

68. *Id.* at 52.

69. Watts, *supra* note 31, at 7.

70. *State Farm*, 463 U.S. at 43.

71. *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

72. *Id.* (citing *Chenery II*, 332 U.S. 194, 196 (1947)).

73. *Id.* at 46.

74. *Id.* at 48, 51.

75. *See supra* note 65.

76. *See State Farm*, 463 U.S. at 57–58 (Rehnquist, J., concurring in part and dissenting in part).

77. *Id.* at 48, 54 (majority opinion).

78. *Id.* at 52–53.

79. *Id.* at 55.

small increase in seat belt usage would not be worth the cost of requiring detachable automatic belts.⁸⁰ Moreover, Justice Rehnquist acknowledged that NHTSA's decision to rescind Modified Standard 208 "seem[ed] to be related to the election of a new President of a different political party" but nonetheless argued that, "[a]s long as the agency remains within the bounds established by Congress," a "change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal of" its regulations.⁸¹

State Farm's split decision became the seminal case on arbitrary and capricious review.⁸² Apart from establishing the standard of review for future § 706(2)(A) challenges, *State Farm* also foreshadowed how the Supreme Court would resolve these actions—in lengthy opinions featuring some disputing Justices. The next section discusses two recent Supreme Court cases applying *State Farm*, both of which echo the 1983 decision and notably display even more contentiousness among the Justices.

C. *State Farm in Recent Supreme Court Cases*

1. *Department of Commerce v. New York*

In March 2018, President Trump's secretary of commerce, Wilbur Ross, announced his decision to reinstate a citizenship question on the 2020 Census.⁸³ This decision was an exercise of the authority delegated by Congress to the secretary to "take a decennial census . . . in such form and content as he may determine."⁸⁴

Secretary Ross stated that changing the census to include a citizenship question would provide improved citizen voting-age population data, which would then be used by the U.S. Department of Justice to better enforce the Voting Rights Act of 1965⁸⁵ (VRA) and its ban on minority vote dilution.⁸⁶ Secretary Ross explained in a memorandum that, in his judgment, reinstating a citizenship question on the Census, while also enhancing the U.S. Census Bureau's administrative records, would provide the most accurate citizen voting-age population data in comparison to other available alternatives.⁸⁷

80. *Id.* at 58 (Rehnquist, J., concurring in part and dissenting in part); see also *supra* notes 65–66 and accompanying text.

81. *State Farm*, 463 U.S. at 59.

82. See Livermore & Richardson, *supra* note 14, at 34 n.149.

83. Memorandum from Wilbur Ross, Sec'y of Com., to Karen Dunn Kelley, Under Sec'y for Econ. Affs., on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf [<https://perma.cc/E6XY-84WZ>].

84. 13 U.S.C. § 141(a).

85. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

86. See Ross, *supra* note 83, at 2.

87. *Id.* at 4–5 (explaining that posing the citizenship question to the entire population provides each respondent an opportunity to answer and may eliminate the need for the Census Bureau to have to impute an answer for millions of people).

Secretary Ross said that he considered the argument that reinstatement of the citizenship question would depress the response rate.⁸⁸ But, because the Census Bureau failed to present definitive evidence showing how responsiveness would be impacted, Secretary Ross ultimately determined that more complete and accurate data from surveying the entire population outweighed the responsiveness concern.⁸⁹ Secretary Ross's decision was challenged in federal district court on grounds that, *inter alia*, the decision violated the APA.⁹⁰

Chief Justice Roberts, writing for the majority, held that Secretary Ross's decision was neither arbitrary nor capricious because he appropriately examined the Census Bureau's alternatives for collecting improved data, weighed the risks and benefits of each, and explained why reinstating the citizenship question presented the best course.⁹¹ Because the Secretary—not the Census Bureau—is authorized by statute to choose “between reasonable policy alternatives in the face of uncertainty” and because the secretary's decision was “reasonably explained,” the Court concluded that the reinstatement decision was not arbitrary or capricious.⁹²

The majority opinion strongly critiqued Justice Breyer's dissent,⁹³ which argued that the secretary acted arbitrarily and capriciously because he failed to defer to the Census Bureau's expertise.⁹⁴ The majority rejected Justice Breyer's acclaim of agency expertise by stating that “policymaking is not a ‘rarified technocratic process, unaffected by political considerations’” and that a court may not set aside an agency's policy solely because it might have been prompted by a president's agenda.⁹⁵ By second-guessing the secretary's reasonable exercise of discretion and requiring the secretary to defer to the Census Bureau's position, Chief Justice Roberts maintained that Justice Breyer was substituting his judgment for that of the agency—a long-standing violation of *State Farm*.⁹⁶

Although Secretary Ross's decision survived arbitrary and capricious review, the Court set it aside because the sole reason proffered for reinstating the citizenship question—to better enforce the VRA—seemed “contrived.”⁹⁷ Chief Justice Roberts based this conclusion on the fact that the record failed to show the secretary considered VRA enforcement when deciding to

88. *Id.* at 5.

89. *Id.*

90. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2563 (2019).

91. *Id.* at 2570.

92. *Id.* at 2570–71.

93. *Id.* at 2571.

94. *Id.* at 2590, 2593 (Breyer, J., concurring in part and dissenting in part).

95. *Id.* at 2573 (majority opinion) (quoting *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981)).

96. *Id.* at 2571 (“It is not for us to ask whether his decision was ‘the best one possible’ or even whether it was ‘better than the alternatives.’” (quoting *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016))).

97. *Id.* at 2575 (stating that the secretary's decision was “unlike a typical case in which an agency may have both stated and unstated reasons for a decision”).

reinstate the citizenship question, although he began this project early in his tenure.⁹⁸

In rejecting the secretary's decision, the Chief Justice established that a "court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons."⁹⁹ But where, as here, the explanation for the secretary's decision is "incongruent with what the record reveals," Chief Justice Roberts maintained that Secretary Ross violated the reasoned decision-making requirement and that the decision could not stand on such a disingenuous rationale.¹⁰⁰

Commentators considered *Department of Commerce* to be a surprising result for reasons ranging from the Court's use of pretext to its decision to leave undetermined whether a citizenship question would appear on the 2020 Census.¹⁰¹ However, this would not be the last time the Court "decided an important case without deciding the questions that make it so important."¹⁰² The Court's opinion in *Regents*, decided one year later and discussed in the next section, was especially similar to *Department of Commerce* in this respect.¹⁰³

2. *Department of Homeland Security v. Regents of the University of California*

On June 15, 2012, President Barack Obama's secretary of DHS announced DACA, an immigration relief program.¹⁰⁴ DACA allows undocumented persons who entered the United States as children and have continuously resided here since 2007 to apply for a two-year forbearance of removal, subject to renewal.¹⁰⁵ DACA also made its recipients eligible for work authorization and other federal benefits, including Social Security and Medicare, during the period of deferred action.¹⁰⁶

On September 4, 2017, President Trump's attorney general, Jeff Sessions, sent a letter to Acting DHS Secretary Elaine Duke, advising her to rescind

98. *Id.*

99. *Id.* at 2573.

100. *Id.* at 2575–76.

101. See Nicholas Bronni, *Census Symposium: Unusual Facts Make for Unusual Decisions*, SCOTUSBLOG (June 28, 2019, 11:51 AM), <https://www.scotusblog.com/2019/06/census-symposium-unusual-facts-make-for-unusual-decisions> [https://perma.cc/K4PC-VG76].

102. Nicholas Bronni, *Symposium: DACA Déjà Vu*, SCOTUSBLOG (June 19, 2020, 3:17 PM), <https://www.scotusblog.com/2020/06/symposium-daca-deja-vu> [https://perma.cc/ZTM4-DUAF].

103. See *id.*

104. See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., for David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [https://perma.cc/7UGS-8ZCK].

105. *Id.* at 2–3.

106. *Id.* at 3; see also 42 C.F.R. § 417.422(h) (2020); 8 C.F.R. § 1.3(a)(4)(vi) (2021).

DACA.¹⁰⁷ Attorney General Sessions warned that the DACA program shared the “same legal and constitutional defects” the Fifth Circuit and Supreme Court had recognized in the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and thus, was likely unlawful.¹⁰⁸ Among other defects, the Fifth Circuit found that the Immigration and Nationality Act¹⁰⁹ foreclosed DAPA’s conferment of eligibility for federal and state benefits.¹¹⁰ Secretary Duke rescinded the DACA memorandum the following day, citing the attorney general’s letter and the Supreme Court and Fifth Circuit rulings as the bases for her decision.¹¹¹ Multiple plaintiffs challenged the rescission as arbitrary and capricious, in violation of § 706(2)(A).¹¹²

Chief Justice Roberts, writing again for the majority, set aside DACA’s rescission after finding that it violated *State Farm*.¹¹³ Notably, the Chief Justice reaffirmed that arbitrary and capricious review under *State Farm* requires the Court to be unconcerned with the wisdom of DACA or its rescission.¹¹⁴ Rather, the Court is to address only whether the secretary “complied with the *procedural* requirement that it provide a reasoned explanation for its action.”¹¹⁵

Chief Justice Roberts held that Secretary Duke’s justification for DACA’s rescission involved the same error as NHTSA’s rescission of Modified Standard 208 in *State Farm*, which required consideration of an airbags-only requirement.¹¹⁶ *State Farm* established that for an agency’s rescission of its prior policy to survive arbitrary and capricious review, the agency’s reasoned analysis must consider the “‘alternative[s]’ that are ‘within the ambit of the existing [policy].’”¹¹⁷ Chief Justice Roberts stated that, with respect to DACA, retaining the program’s forbearance benefit was not just “within the ambit of the existing [policy]” but was its “centerpiece.”¹¹⁸ Consequently, the secretary’s rescission of DACA required a reasoned explanation as to

107. See Letter from Jefferson B. Sessions III, Att’y Gen., to Elaine C. Duke, Acting Sec’y, Dep’t of Homeland Sec. (Sept. 4, 2017), <https://www.justice.gov/opa/speech/file/994651/download> [<https://perma.cc/574A-S93Q>].

108. *Id.*

109. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 and 22 U.S.C.).

110. See *Texas v. United States*, 809 F.3d 134, 181 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

111. Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs. et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/XT7P-475C>].

112. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020).

113. *Id.* at 1912.

114. *Id.* at 1916.

115. *Id.* (emphasis added).

116. *Id.* at 1912.

117. *Id.* at 1913 (alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)).

118. *Id.* (alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)).

why retaining the forbearance component of the policy, while eliminating benefits eligibility—an option within the secretary’s discretion—was inappropriate.¹¹⁹ Chief Justice Roberts concluded that Secretary Duke’s failure to consider whether to retain DACA’s forbearance component and to provide an explanation for its termination constituted arbitrary and capricious agency action.¹²⁰

In dissent, Justice Thomas criticized Chief Justice Roberts’s reliance on *State Farm*, arguing that the ruling was inapplicable because, in his view, DACA is an unlawful policy and has been since its inception.¹²¹ Because *State Farm* only establishes what an agency must do to rescind a lawful policy, Justice Thomas argued that the Court lacked authority to even scrutinize DHS’s reasons for rescinding DACA, noting that the rescission of an unlawful program is plainly reasonable.¹²²

Regents, decided nearly forty years after *State Farm*, and a similarly split decision, shows how the Supreme Court continues to divide over what the standard of review for § 706(2)(A) challenges actually entails. *State Farm* raised many questions that subsequent decisions have left unanswered, two of which this Note discusses in the next part.¹²³

II. WHAT *STATE FARM* LEFT UNRESOLVED

First, tension remains between Justice White’s emphasis on reasoned decision-making and Justice Rehnquist’s deference to a new president’s political agenda.¹²⁴ Although hard look review always requires that reasoned decision-making and expertise guide an agency’s actions, the Justices continue to disagree on how much political influence is too much.¹²⁵ Second, the Supreme Court in *State Farm* did not clarify whether the agency’s action was arbitrary and capricious because it *failed to explain* its decision not to adopt the “the logical response,” or because it *failed to adopt* “the logical

119. *Id.* at 1912.

120. *Id.* at 1913. The Chief Justice also found DACA’s rescission violated *State Farm* because the secretary failed to consider and adequately explain the reliance interests of the program’s beneficiaries weighed against competing policy concerns. *Id.* at 1914.

121. *Id.* at 1919 (Thomas, J., dissenting in part).

122. *Id.* at 1919, 1930.

123. See Sullivan & Chabot, *supra* note 19, at 9.

124. *Id.*; see also Note, *Judicial Review of Informal Administrative Rulemaking*, 1984 DUKE L.J. 347, 375 (“Should the courts defer to agency decisions ‘encouraged’ by changes in administration? The dissenters in *State Farm* would be more likely to accept such politically motivated decisions.”).

125. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (disagreeing with Justice Breyer’s position that courts should be more vigilant of political influences when reviewing policy decisions from independent agencies); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1141 (2010) (“In general, courts have not offered clear guidance on whether political reasons, if offered, can serve as an adequate basis for an agency’s decision.”); see also *The Supreme Court, 2018 Term—Leading Cases*, 133 HARV. L. REV. 372, 377 (2019) (“[A]gencies cannot take actions that are excessively politically driven, and it can be difficult for courts to figure out which types of political judgments are acceptable and which are arbitrary and capricious.”).

response.”¹²⁶ Accordingly, ambiguity remains as to whether courts applying hard look review should vacate an agency’s action for its procedural defects only or for its substantive ones as well.¹²⁷

A. *Balancing Political Influence and Expertise*

Following *Department of Commerce*, some have characterized Chief Justice Roberts’s and Justice Breyer’s positions as evidencing a tension between political influence and expertise that is reminiscent of Justice Rehnquist’s and Justice White’s opinions in *State Farm*.¹²⁸ Understanding this analogy requires a review of how commentators have interpreted the Rehnquist-White debate to determine the proper balance between political influence and expertise permitted by *State Farm*.

Commentators widely read *State Farm*—specifically the debate between Justices White and Rehnquist—as the Supreme Court’s condemnation of political considerations in agency decision-making.¹²⁹ To support this reading of *State Farm*, these commentators rely on the fact that only Justice Rehnquist’s partial dissent conveyed the position that political influences can reasonably motivate an agency’s rulemaking (assuming, of course, that the agency also respects the statutory boundaries set by Congress), whereas the majority opinion stood for the requirement that agencies justify their decisions in technocratic, expert-driven terms.¹³⁰

Others, however, criticize this reading of *State Farm* as an exaggerated interpretation of Justice White’s opinion, noting that the majority neither addressed Justice Rehnquist’s endorsement of political influence as a legitimate basis for reappraising agency policy, nor considered the political context of NHTSA’s decision beyond mentioning that changes in administration had occurred.¹³¹ These commentators posit that Justice White’s silence should not be taken as a rejection of political influence; that

126. See *State Farm*, 463 U.S. at 48 (“[T]he logical response to the faults of detachable seatbelts would be to require the installation of airbags. At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.”).

127. Compare Miles & Sunstein, *supra* note 16, at 771 (“[T]he Court endorsed both procedural and substantive aspects of the hard look doctrine.”), with Watts, *supra* note 31, at 16 (stating that courts “scrutinize the substantive elements of agency decisions” when applying hard look review).

128. See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 36–37 (explaining how Chief Justice Roberts evidenced a “desire to reaffirm the importance of judicial deference to the policy choices of agencies’ political leadership,” whereas Justice Breyer “tied deference for discretionary agency decisions closely to expertise”).

129. See Watts, *supra* note 31, at 19 (“[T]he opinion has been widely read over time to represent the triumph of expertise to the exclusion of politics.”).

130. *Id.* at 6 (“Ever since the Court handed down *State Farm*, agencies, courts, and scholars alike generally seem to have accepted the view that influences coming from one political branch or another cannot be allowed to explain administrative decisionmaking, even if such factors are influencing agency decisionmaking.”).

131. See Mendelson, *supra* note 125, at 1138.

silence is better explained by the fact that NHTSA did not justify the rule's rescission by referencing the change in administration.¹³²

Legal scholars who conclude that *State Farm* does not prohibit politics from influencing an agency's decision-making debate the precise role of politics envisioned by the 1983 Supreme Court. Nina Mendelson,¹³³ Kathryn Watts,¹³⁴ and now Justice Kagan¹³⁵ advocate for greater transparency regarding political influence in an agency's rulemaking. Watts, for example, argues had NHTSA openly disclosed that President Reagan's deregulatory position influenced its decision to rescind the passive seat belt requirement, the agency should have satisfied the Court with an adequate explanation sufficient to survive arbitrary and capricious review.¹³⁶ Similarly, Justice Kagan praised Justice Rehnquist for recognizing the role that President Reagan's election played in NHTSA's decision-making and for easing the demand for expertise in NHTSA's justification accordingly.¹³⁷ Justice Kagan argued that although the change in administration could not relieve NHTSA of considering obvious regulatory alternatives, it was sufficient to justify NHTSA's value judgment between reasonable policy choices.¹³⁸

In response, Mark Seidenfeld argues that other legal scholars' calls for greater transparency about political influence rest on a misguided reading of *State Farm*.¹³⁹ Seidenfeld maintains that hard look review does not prohibit an agency from engaging in "politically motivated" rulemaking but rather prevents an agency from using political considerations to *justify* its actions.¹⁴⁰ Whether politics have influenced an agency's decision is irrelevant to the reviewing court's inquiry under *State Farm* because, irrespective of political influence, an agency cannot survive arbitrary and capricious judicial review¹⁴¹ if it fails to justify its decision pursuant to the

132. *Id.* at 1138–39; Watts, *supra* note 31, at 19.

133. See Mendelson, *supra* note 125, at 1130 (proposing that agencies be required to disclose executive influence on their decisions to increase accountability and deter overreach).

134. See Watts, *supra* note 31, at 8 (arguing that courts engaging in arbitrary and capricious review should consider political influences that are disclosed in an agency's rulemaking record as legitimate justifications for the agency's action).

135. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2381–82 (2001) (arguing that when presidential policy justifies an agency's action, it should be publicly disclosed "to receive judicial credit").

136. Watts, *supra* note 31, at 72, 77 (proposing that the *State Farm* opinion could be read as "penalizing" NHTSA because the rescission seems to be based on "secret political influences").

137. See Kagan, *supra* note 135, at 2380–81 (suggesting a revised approach to hard look review that would relax a reviewing court's scrutiny "when demonstrable evidence shows that the President has taken an active role in" the decision).

138. *Id.* at 2381.

139. Seidenfeld, *supra* note 37, at 144–45 ("Watts and her fellow critics of hard-look review are correct that courts have not credited citations to political influence in evaluating whether agency rulemaking meets the hard-look standard. But, . . . this does not reflect any hostility within the standard to such influence.").

140. *Id.* at 150 ("A policy that is motivated by the president's desire to provide benefits to his political supporters may nonetheless be defensible as good policy.").

141. *Id.* at 163–64 (providing the example that, had NHTSA rescinded Modified Standard 208 to protect the autonomy of car owners to buy the cars that they prefer, the Supreme Court

factors Congress authorized it to consider when making policy.¹⁴² Seidenfeld argues that because the judiciary is least accountable to the polity, a reviewing court has “no business”¹⁴³ penalizing an agency for an “unstated rationale” in its decision-making if the stated justification is within Congress’s permissible bounds—provided that the agency’s proffered explanation is not so implausible that it is pretextual.¹⁴⁴ This position, Seidenfeld asserts, is consistent with *State Farm*’s hard look review because it ensures transparency in agency decision-making by evaluating its stated justifications but allows an agency to make value judgments that Congress authorized it to make without judicial constraint, by keeping an agency’s unstated reasons out of the court’s review.¹⁴⁵

Following the Chief Justice’s opinion in *Department of Commerce*, more commentators have framed the unresolved tension between expertise and political influence in *State Farm* as an issue of how a reviewing court should consider an agency’s unstated reasons for its policy. Jennifer Nou, for example, argues that although the majority in *Department of Commerce* set aside the secretary’s decision on pretextual grounds, administrative law has always tolerated some pretext.¹⁴⁶ To support this argument, Nou relies on Chief Justice Roberts’s assertions in *Department of Commerce* that agency decisions may appropriately rest on both “stated and unstated reasons” and that a court may not set aside an agency action only because unstated political considerations influenced the agency’s decision-making process.¹⁴⁷ The “new principle” introduced in *Department of Commerce*, Nou argues, is that arbitrary and capricious review under *State Farm* rejects “wholly implausible rationale[s]”—in other words, an agency’s explanation must at least be supported in the administrative record to avoid being set aside as pretextual.¹⁴⁸

In contrast, some commentators have bolstered Justice Thomas’s argument in dissent regarding the unprecedented nature of the Court’s

likely would have held the rescission was arbitrary and capricious because car owner autonomy is not a factor that NHTSA’s authorizing statute allowed it to consider).

142. In *State Farm*, the factors the Court looked for in NHTSA’s explanation of its decision included, inter alia, whether NHTSA established, based on “relevant available motor vehicle safety data,” that Modified Standard 208 was no longer “reasonable, practicable and appropriate” and would not “meet the need for motor vehicle safety.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 436 U.S. 29, 33–34 (1983) (quoting National Traffic and Motor Safety Act of 1966, Pub. L. No. 89-563, § 103(f)(1), (3)–(4), 80 Stat. 718, 719, repealed by Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 745, 1379).

143. Seidenfeld, *supra* note 37, at 159.

144. *See id.* at 162.

145. *Id.*

146. Jennifer Nou, *Census Symposium: A Place for Pretext in Administrative Law?*, SCOTUSBLOG (June 28, 2019, 12:54 PM), <https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law> [<https://perma.cc/RTU8-WBPR>]; *see also* Watts, *supra* note 31, at 40 (arguing that agencies undergoing arbitrariness review “dress up their decisions . . . to hide political influences”).

147. Nou, *supra* note 146.

148. *Id.*

invalidation on pretext grounds.¹⁴⁹ Louis Murray, for example, criticizes the Court for reading a prohibition on pretext into § 706 of the APA.¹⁵⁰ Murray argues that because the APA lacks a “sincerity requirement,” an agency should survive arbitrary and capricious review as long as it offers a reasonable justification and even if it masks the true motivation behind its action.¹⁵¹ Samuel Estreicher also rejects Chief Justice Roberts’s invalidation on pretext grounds because he argues that it disqualifies Secretary Ross—who is deemed the decision maker by Congress on this issue—from making an otherwise legally justified decision.¹⁵²

Gillian Metzger defends Chief Justice Roberts’s pretext analysis on the ground that, although courts do not usually speak in terms of pretext, *State Farm* made a prohibition on pretextual decision-making a part of arbitrary and capricious review.¹⁵³ Metzger explains that the Supreme Court rejected NHTSA’s justification for rescinding Modified Standard 208—that the measure would not achieve its predicted safety benefits—because NHTSA did not adequately consider obvious alternatives that would promote safety.¹⁵⁴ In doing so, the Supreme Court implied that safety was not actually motivating NHTSA’s decision-making.¹⁵⁵ Thus, *State Farm* rejects pretextual justifications without labeling them as such.¹⁵⁶ An advantage of including pretext as part of arbitrary and capricious review, Metzger argues, is that it allows courts to avoid delineating what extent of political influence is legitimate in agency decision-making.¹⁵⁷

Evidently, the White-Rehnquist debate between reasoned decision-making and deference to a president’s political agenda continues; the question of how a reviewing court should consider political influence on agency decision-making when engaging in *State Farm*’s hard look review remains unresolved. The next section discusses another ambiguity in *State Farm*: whether courts applying hard look review should vacate an agency’s action for its procedural defects only or for its substantive ones as well.

B. The Logical Response: A Failure to Discuss or a Failure to Adopt?

Whether *State Farm* penalizes an agency for failing to discuss other regulatory alternatives or failing to adopt those alternatives is rooted in the

149. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2576, 2579 (2019) (Thomas, J., concurring in part and dissenting in part) (arguing that under settled principles of administrative law, a reviewing court is never to inquire into pretext).

150. See Louis Murray, Note, *Reconceptualizing Pretext’s Role in Administrative Law*, 57 HARV. J. ON LEGIS. 481, 487–88 (2020).

151. *Id.* at 483, 493.

152. See Samuel Estreicher, “Pretext” and Review of Executive Decisionmaking in the *Citizenship Census Question Case*, JUSTIA (July 9, 2019), <https://verdict.justia.com/2019/07/09/pretext-and-review-of-executive-decisionmaking-in-the-citizenship-census-question-case> [<https://perma.cc/RA4X-XM82>].

153. See Metzger, *supra* note 128, at 33–34.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

broader question of whether a reviewing court is to scrutinize the agency's decision-making process only or the substance of its ultimate decision as well.

Commentators have argued that *State Farm's* hard look review solely scrutinizes an agency's reasoning process, noting that the Court there rejected NHTSA's rescission of Modified Standard 208 because the agency failed to consider alternatives and thus engaged in a flawed decision-making process.¹⁵⁸ Jacob Gersen and Adrian Vermeule approach this issue with evidence that, between 1983 and 2016, the Court reached the merits on sixty-four arbitrariness challenges but held an agency's decision was arbitrary and capricious only 13 percent of the time.¹⁵⁹ In showing that surviving hard look review is "hardly a heroic task," Gersen and Vermeule imply that the Court does not use *State Farm* to set aside an agency's decision "simply because the court is unhappy with the result reached"—i.e., for failing to adopt an alternative policy.¹⁶⁰

Others are not so certain that process is all that is in play.¹⁶¹ Now Attorney General Merrick Garland, who served as counsel for State Farm Automobile Insurance Company in *State Farm*, argues that the decision presents a "quasi-procedural" standard for judicial review.¹⁶² The standard is "quasi-procedural" because it imposes substantive requirements for the agency's decision-making record but leaves the method for producing the record up to the agency.¹⁶³ Garland finds support for this position in Justice White's majority opinion, in which the Court stated that an agency must supply a reasoned analysis to justify its decision.¹⁶⁴ The Court found NHTSA failed to do so because it rescinded the entire passive-restraint rule without explaining its reasons for rejecting, or even considering, an airbags-only requirement—"the logical response."¹⁶⁵

Garland also argues that although Justice White's opinion is couched in "quasi-procedural rhetoric," to read *State Farm* as identifying no substantive component to hard look review is incorrect.¹⁶⁶ The Court's substantive review is evidenced by its charge that the agency failed to explain why it did not impose a nondetachable seat belt requirement, when, as Garland argues,

158. Patrick Garry, *The Values and Viewpoints Affecting Judicial Review of Agency Actions: A Focus on the Hard-Look Doctrine*, 53 WASHBURN L.J. 71, 73 (2014); see also Seidenfeld, *supra* note 37, at 155 (arguing that *State Farm's* hard look review "is essentially process based" because outcomes need not "meet any particular substantive standard" but must only be justified by "addressing factors . . . relevant to its decision").

159. Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1362 (2016) (noting that it would have been "only 8 percent of the time if we confine ourselves to pure arbitrariness cases").

160. *Id.* at 1360, 1362.

161. See Keller, *supra* note 12, at 452 (arguing that "*State Farm* opened the door for courts to scrutinize the substantive policy decisions made by agencies").

162. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 507, 543 (1985).

163. *Id.* at 530.

164. *Id.* at 543.

165. *Id.* at 543–44.

166. *Id.* at 545.

Justice Rehnquist's dissent showed that NHTSA proffered a detailed explanation on this issue.¹⁶⁷ Because NHTSA "could have 'considered' and 'explained' until it was hoarse, yet still not have changed the Court's ultimate conclusion," Garland maintains that the Court penalized NHTSA both for failing to consider (process) and for failing to adopt (substance), the logical response.¹⁶⁸

Another way of analyzing the difference between process and substance with respect to *State Farm's* hard look review is to consider whether the agency, on remand, can revise the defect that led the reviewing court to deem the action arbitrary and capricious. Garland argues that if the defect is a failure to consider or adequately explain a regulatory alternative, then it is procedural, and the agency may improve its decision-making process on remand by better explaining itself.¹⁶⁹ Once corrected, the agency may adopt the same policy as originally planned, and a court must uphold it.¹⁷⁰ If, however, the defect is a failure to adopt a specific policy, then the issue is substantive, and a court will preclude the agency from readopting the same policy on remand.¹⁷¹ Thus, the only solution available to an agency on remand for a substantive defect is to adopt a different policy.¹⁷²

This question between process and substance seemed to be top of mind during oral argument in *Regents*. Justice Kavanaugh, for example, asked whether DACA's rescission would "still fall short" if "it were detailed more fully" on remand.¹⁷³ Justice Gorsuch proposed that if the secretary's error is a failure to adequately explain the rescission, "What more is left to be said?"¹⁷⁴ Similarly, Justice Breyer asked whether there was any purpose to remanding when the secretary would "come out the same way," noting that prior Justices have urged courts to refrain from "playing ping pong with the agency" if there is nothing to gain on remand.¹⁷⁵

Some have described Chief Justice Roberts's decision to remand to DHS for further explanation as being one of process, noting that the Court took issue with the secretary's decision-making process but not the outcome.¹⁷⁶

167. *See id.* at 546 ("By any measure, the agency's explanation was not only detailed, but seemingly rational.").

168. *Id.* at 548–49.

169. *Id.* at 570.

170. *Id.*

171. *Id.*

172. *Id.*

173. Transcript of Oral Argument at 86, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (No. 18-587).

174. *Id.* at 58.

175. *Id.* at 82.

176. *See* Peter Margulies, *The DACA Case: Agencies' "Square Corners" and Reliance Interests in Immigration Law*, 2019–2020 CATO SUP. CT. REV. 127, 128 (arguing that Chief Justice Roberts's review "is deliberative, not substantive" because he "conceded that DHS had the power to end DACA"); Cristian Farias, *How Trumpian Incompetence Led to Chief Justice Roberts's DACA Ruling*, VANITY FAIR (June 18, 2020), <https://www.vanityfair.com/news/2020/06/how-trumpian-incompetence-led-to-chief-justice-robertss-daca-ruling> [<https://perma.cc/D8CQ-FCNB>] ("Did Sessions and Trump's then acting secretary . . . dot all their *is* and crossed [sic] all their *ts* in rolling back the program?").

Others criticize the majority for simply delaying the final resolution of DACA, as its opinion tells DHS “to go back and try again.”¹⁷⁷ Others question whether Chief Justice Roberts would have found a memo that addresses reliance interests and says they do not outweigh the policy interests in rescinding DACA to also be “procedurally defective.”¹⁷⁸ If this is so—if any explanation offered by DHS would fail to satisfy the Court—it would support Garland’s view that NHTSA could have only changed the Court’s ultimate conclusion in *State Farm* by adopting a substantively different policy.¹⁷⁹

In sum, nearly forty years after *State Farm*, judges, litigators, and law students continue to debate whether *State Farm*’s hard look review is procedural or substantive. The same is true for the question of how a reviewing court should consider political influence in agency decision-making when faced with a § 706(2)(A) challenge.¹⁸⁰

As the next part explains, Chief Justice Roberts’s decisions in *Department of Commerce* and *Regents* suggest clarifications of these two issues in *State Farm*. Specifically, Part III argues Chief Justice Roberts’s hard look review (1) provides that an agency will survive arbitrary and capricious review when its decision, even if motivated by politics, was the product of reasoned decision-making; and (2) serves as a procedural tool to ensure that agencies adequately discuss and justify their actions, rather than a substantive analysis.

III. HOW *DEPARTMENT OF COMMERCE* AND *REGENTS* CLARIFY *STATE FARM*

State Farm has long been criticized for presenting a muddled standard that lower courts struggle to apply and for politicizing judicial review.¹⁸¹ Because the Supreme Court has failed to provide a precise definition of what constitutes reasoned decision-making, some argue that *State Farm* invites judges to vary their scrutiny of an agency’s explanation according to their political attitudes and ideologies, making judicial review unpredictable and riddled with disagreement.¹⁸² For example, Gillian Metzger maintains that the majority in *Department of Commerce*, when invoking *State Farm*, “dial[ed] down [its] scrutiny” of the secretary’s decision-making, whereas the dissent “dial[ed] it up.”¹⁸³ Others maintain that *State Farm*’s hard look

177. Bronni, *supra* note 102.

178. Christopher J. Walker, *What the DACA Rescission Case Means for Administrative Law: A New Frontier for Cheney I’s Ordinary Remand Rule*, YALE J. ON REGUL.: NOTICE & COMMENT (June 19, 2020), <https://www.yalejreg.com/nc/what-the-daca-rescission-case-means-for-administrative-law-a-new-frontier-for-cheney-is-ordinary-remand-rule> [<https://perma.cc/3DC8-38LJ>].

179. See Garland, *supra* note 162, at 548–49.

180. See *supra* Part II.A.

181. See Keller, *supra* note 12, at 459.

182. See Shapiro & Murphy, *supra* note 17, at 354–55.

183. Metzger, *supra* note 128, at 35; see also Christopher J. Walker, *What the Census Case Means for Administrative Law: Harder Look Review?*, YALE J. ON REGUL.: NOTICE & COMMENT (June 27, 2019), <https://www.yalejreg.com/nc/what-the-census-case-means-for-administrative-law-harder-look-review> [<https://perma.cc/8TD2-ZNYT>] (referring to Chief

review is a significant cause of ossification of administrative policymaking and recommend relaxing or eliminating the standard altogether.¹⁸⁴

Despite these alleged weaknesses, *State Farm*'s hard look review is recognized as an essential tool for legitimatizing agency actions because it serves as a significant counterbalance to Congress's broad delegations of power to agencies.¹⁸⁵ It cannot be overstated—and *Department of Commerce* and *Regents* adequately show—that decisions made by agencies can have profound consequences. Had the secretary of commerce successfully added the citizenship question to the 2020 Census, the predicted lower response rate would have “affect[ed] how hundreds of billions of dollars in federal spending [were] distributed.”¹⁸⁶ Similarly, had DHS lawfully rescinded DACA, 700,000 young adults would have lost their protection from deportation.¹⁸⁷

Because people may organize their lives around such policy decisions, administrative law principles like the reasoned decision-making requirement and *State Farm*'s hard look review are intended to protect the public from unreasonable, irrational, poorly justified, and narrowly considered policy changes.¹⁸⁸ Expecting courts to adequately apply a muddled doctrine to decisions of such great significance is like playing Russian roulette: the method is irrational, the injury can be catastrophic, and the outcome is inherently unpredictable.¹⁸⁹ This part explores how *Department of Commerce* and *Regents* have clarified *State Farm*'s hard look review so that its future application will be more reasonable and obvious and less arbitrary and capricious.

Justice Roberts's analysis in *Department of Commerce* as “more searching than *State Farm*'s ‘hard look’ review”).

184. See, e.g., Kagan, *supra* note 135, at 2380.

185. See William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1580 (2019) (arguing that, because *State Farm* establishes that an agency action will “rise and fall based on the justification provided,” courts fulfilling their reviewing functions ensure that agencies act in accordance with their enabling statutes).

186. Adam Liptak, *On Census Citizenship Question, Supreme Court's Conservatives Appear United*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/us/politics/supreme-court-census-citizenship.html> [<https://perma.cc/MQH9-TB3M>].

187. See Adam Liptak & Michael D. Shear, *Trump Can't Immediately End DACA, Supreme Court Rules*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/trump-daca-supreme-court.html> [<https://perma.cc/73QM-2QGJ>].

188. See Stephen Lee, Opinion, *DACA and the Limits of Good Governance*, REGUL. REV. (July 29, 2020), <https://www.theregreview.org/2020/07/29/lee-daca-good-governance/> [<https://perma.cc/2ZC8-GLC3>] (arguing that arbitrary and capricious judicial review allows courts to “curb[] the worst of the federal government's tendencies” but that doing so in *Regents* did not offer a permanent solution for undocumented persons).

189. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., dissenting in part) (stating that courts have “beefed-up arbitrary-and-capricious” review “so much so that, on occasion, the courts' arbitrary-and-capricious review itself appears arbitrary and capricious”).

A. *Justice Rehnquist v. Justice White—Who Won?*

Review of Chief Justice Roberts's *Department of Commerce* opinion evidences a close alignment with Justice Rehnquist in *State Farm*. First, both Justices explicitly acknowledge the role a president's political agenda plays in agency policymaking. Just as Justice Rehnquist stated that "a change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal of" its regulations,¹⁹⁰ so too did Chief Justice Roberts insist that "a court may not set aside an agency's policymaking decision solely because it might have been . . . prompted by an Administration's priorities."¹⁹¹

Second, while both Justices show a commitment to enforcing the reasoned decision-making requirement, their as-applied interpretation of what constitutes reasoned decision-making appears more relaxed than that of others on the Court. Indeed, NHTSA's explanation for rescinding Modified Standard 208 as to the passive seat belt requirement adequately satisfied Justice Rehnquist, even though he determined it was "by no means a model."¹⁹² Justice White, however, felt NHTSA "failed to articulate a basis for not requiring nondetachable belts."¹⁹³ Similarly, because the Census Bureau failed to present definitive evidence showing how responsiveness would be impacted, Secretary Ross's inclusion of the citizenship question despite concerns of resulting inaccuracies convinced Chief Justice Roberts that the secretary adequately explained himself, even if the decision was not "the best one possible."¹⁹⁴ The same explanation, however, failed to persuade Justice Breyer that Secretary Ross engaged in reasoned decision-making.¹⁹⁵

Metzger argues that in reaching the conclusion that Secretary Ross's action was not arbitrary and capricious, Chief Justice Roberts reaffirmed the importance of judicial deference to the "choices of an agency's political leaders."¹⁹⁶ This argument is similar to Justice Kagan's interpretation of Justice Rehnquist's *State Farm* dissent as exhibiting a relaxation in the demand for NHTSA's expertise, due to an acknowledgment that President Reagan's election to office influenced NHTSA's decision-making.¹⁹⁷ Metzger's position would be persuasive if Chief Justice Roberts's opinions only echoed Justice Rehnquist's political deference in *State Farm*. A close reading of Chief Justice Roberts in *Regents*, however, also reveals traces of Justice White's emphasis on reasoned decision-making.

190. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

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

192. *State Farm*, 463 U.S. at 58 (Rehnquist, J., concurring in part and dissenting in part).

193. *Id.* at 55 (majority opinion).

194. *Dep't of Com.*, 139 S. Ct. at 2570–71.

195. *Id.* at 2590 (Breyer, J., concurring in part and dissenting in part) (arguing that even if not definitive, the Census Bureau's evidence showed a likely drop in response accuracy and that *State Farm* requires the secretary to explain why he included the question without searching for more conclusive evidence).

196. See Metzger, *supra* note 128, at 36.

197. See Kagan, *supra* note 135, at 2381–82.

First, Chief Justice Roberts recognized the error in Secretary Duke's decision-making process as the same error Justice White identified in NHTSA's reasoning.¹⁹⁸ NHTSA's determination that, given the prevalence of automatic seat belts, Modified Standard 208 would provide minimal safety benefits did "not cast doubt" on the life-saving efficacy of airbags.¹⁹⁹ Similarly, Chief Justice Roberts held the Fifth Circuit's determination that DAPA's benefits component was unlawful did not cast doubt on the legality of DACA's forbearance component.²⁰⁰ This analogy became central to Chief Justice Roberts's conclusion that DACA's rescission without the secretary's consideration of a forbearance-only program was arbitrary and capricious: just as the Supreme Court in 1983 held NHTSA could not completely abandon the passive-restraint regulation without explaining why an airbags-only requirement was an insufficient alternative,²⁰¹ so too, Chief Justice Roberts argued, the Court could not permit DHS to rescind DACA in full without consideration of a forbearance-only program.²⁰²

Second, echoing Justice White's finding that NHTSA failed to "bring its expertise to bear on the question,"²⁰³ Chief Justice Roberts found it problematic that Secretary Duke relied on the attorney general's conclusion as to the illegality of DACA's conferment of benefits to rescind the entire program—without explaining the rescission as to forbearance.²⁰⁴ Recognizing that Congress delegated authority for establishing national immigration policy to the DHS secretary alone and that a forbearance-only option was within the secretary's discretion, Chief Justice Roberts concluded that failure to consider this important aspect of DACA's rescission meant that Secretary Duke failed to do her job.²⁰⁵ That is, DACA's rescission required Secretary Duke to bring DHS's expertise to bear on the issue, but implementing the attorney general's advice without a complete explanation failed to satisfy *State Farm* and flouted Congress's delegation to DHS.²⁰⁶

Finally, just like Justice White in *State Farm*,²⁰⁷ Chief Justice Roberts did not consider whether and to what extent political influence played a role in Secretary Duke's decision, beyond mentioning DACA's genesis in the Obama administration and its attack under the Trump administration.²⁰⁸ At

198. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020) ("While the factual setting is different here, the error is the same.").

199. *Id.* (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 47 (1983)).

200. *Id.*

201. See *State Farm Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

202. See *Regents*, 140 S. Ct. at 1913 ("That omission alone renders Acting Secretary Duke's decision arbitrary and capricious.").

203. *State Farm*, 463 U.S. at 54.

204. See *Regents*, 140 S. Ct. at 1912.

205. *Id.* at 1912–14.

206. *Id.*

207. See *supra* notes 130–31 and accompanying text. *But see supra* note 81 and accompanying text.

208. See *Regents*, 140 S. Ct. at 1903.

most, both Justices identified the respective changes in administration, but that was all the explicit airtime given to politics.

Finding that *Department of Commerce* resonates more with Justice Rehnquist and *Regents* with Justice White seems to thicken the age-old *State Farm* smog: that the standard is unpredictable and invites judges to vary their scrutiny of an agency's explanation depending on whether they approve of the agency's policy choice.²⁰⁹ This position, however, overlooks key factual differences between Secretary Ross's action in *Department of Commerce* and Secretary Duke's in *Regents*, which logically lead to opposite outcomes when reviewing pursuant to *State Farm*.

Even when Chief Justice Roberts endorsed a role for political influence in agency decision-making in *Department of Commerce*,²¹⁰ his finding that Secretary Ross's decision was not arbitrary or capricious exclusively turned on the explanation the secretary provided for including the citizenship question on the Census.²¹¹ Whatever "unstated reasons" Secretary Ross may have had for changing the Census were beyond Chief Justice Roberts's review—even if it is safe to assume that satisfying President Trump's political agenda constituted one of those reasons.²¹² What mattered to the Chief Justice was that the secretary considered alternatives to the citizenship question, discussed the costs and benefits of each, and explained that, in light of the Census Bureau's uncertainty as to how the citizenship question would affect the response rate, the benefits of having more complete data from surveying the entire population outweighed the potential cost of decreased responsiveness.²¹³ In other words, Secretary Ross did not "entirely fail[] to consider an important aspect of the problem."²¹⁴

Conversely, when Chief Justice Roberts made no mention of political influence in *Regents*—aside for the implications that come with a change in administration—his finding that Secretary Duke's decision *was* arbitrary and capricious depended solely on the *lack* of explanation provided for rescinding all of DACA.²¹⁵ Indeed, the Chief Justice did not even consider, for example, whether President Trump's agenda motivated the decision to rescind DACA, although there is little popular doubt that it did.²¹⁶ All that mattered was that Secretary Duke "entirely failed to consider an important aspect of the problem."²¹⁷

The commonality, then, is clear: Chief Justice Roberts's hard look review is only concerned with the sufficiency of the agency's proffered explanation

209. See *supra* notes 181–82 and accompanying text.

210. See *supra* text accompanying notes 190–91.

211. See *supra* text accompanying notes 91–92.

212. See *supra* text accompanying notes 94–95.

213. See *supra* text accompanying notes 86–92.

214. See *supra* text accompanying note 70; see also *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2571 (2019) ("The Secretary was required to consider the evidence and give reasons for his chosen course of action. He did so.").

215. See *supra* notes 115–20 and accompanying text.

216. See Farias, *supra* note 176.

217. See *supra* text accompanying note 70; see also *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

of its action, looking to see that the agency has done its job in considering important aspects of the problem before it. As for an agency's "unstated reasons" for acting—such as political influences, motivations, and agendas—these are excluded from the Court's analysis.²¹⁸ Thus, Chief Justice Roberts's answer to the question of how much political influence is too much under *State Farm* is that this is the wrong question for courts to be asking. The only inquiry for a court engaging in arbitrary and capricious review pursuant to *State Farm* is whether the agency considered important aspects of the problem and explained its choice among competing alternatives.

Chief Justice Roberts's rejection of Secretary Ross's decision to include the citizenship question on pretext grounds further supports this conception of *State Farm*.²¹⁹ Chief Justice Roberts concluded that Secretary Ross's decision was not arbitrary or capricious before he began the inquiry into whether it was pretextual.²²⁰ Thus, unlike Professor Metzger's suggestion,²²¹ the pretext analysis is separate from the Court's review under *State Farm*. This separation supports the conclusion that hard look review only scrutinizes the sufficiency of the agency's explanation for its decision and is unconcerned with its political motivations.²²² Secretary Ross stated that the goal in adding the citizenship question to the Census was to ultimately better enforce the VRA.²²³ Chief Justice Roberts, however, only analyzed this VRA enforcement rationale when engaging in the pretext analysis and excluded it from the Court's application of *State Farm*.²²⁴ Chief Justice Roberts's *State Farm* analysis may seem to have left out one of the secretary's "stated reasons," but this is not the case.

Secretary Ross hoped to improve VRA enforcement²²⁵—this was his motive for engaging in the policy change. But, Chief Justice Roberts showed that *State Farm* is unconcerned with motive.²²⁶ The focus of Chief Justice Roberts's arbitrary and capricious review in *Department of Commerce* was the secretary's justification for choosing the citizenship question as his course of action.²²⁷ Chief Justice Roberts confined his application of *State Farm* to scrutiny of the secretary's conclusion that including the citizenship question would accomplish the stated goal of VRA enforcement, but Roberts did not discuss whether enhanced VRA enforcement was a wise policy

218. See Seidenfeld, *supra* note 37, at 150 (arguing that whether politics have influenced an agency's decision is irrelevant to the reviewing court's inquiry under *State Farm*); *supra* notes 139–45 and accompanying text.

219. See *supra* notes 97–100 and accompanying text.

220. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) ("We now consider the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis.").

221. See Metzger, *supra* note 128, at 33–34 (discussing the benefits of "approaching pretext as part of a general arbitrary and capriciousness review").

222. See Seidenfeld, *supra* note 37, at 150.

223. See Ross, *supra* note 83, at 2.

224. See *Dep't of Com.*, 139 S. Ct. at 2573–76.

225. See Ross, *supra* note 83, at 2.

226. See Seidenfeld, *supra* note 37, at 150.

227. See *Dep't of Com.*, 139 S. Ct. at 2569–71.

objective.²²⁸ In doing so, the Chief Justice affirmed that *State Farm* aims to ensure that an agency's final action "was the product of reasoned decisionmaking" and that its policy decision to pursue a particular course of action is justified in light of alternatives and supported by evidence.²²⁹ Scrutiny of the agency's motivation for its policy change is simply beyond the Court's analysis.

The fact that the Court's prohibition on pretext is absent from its arbitrary and capricious review does not then mean that the Court read a "sincerity requirement" into § 706 of the APA.²³⁰ Rather, the prohibition on pretext is baked into administrative law as a principal holding of *Chenery II*—that a reviewing court must judge the propriety of an agency's "action solely by the grounds invoked by the agency."²³¹ Finding that the proffered motivation to improve VRA enforcement was "contrived,"²³² the Court could not fulfill its *Chenery II* duty because the genuine "grounds invoked by the agency" remained undisclosed by Secretary Ross.²³³

So, whom did Chief Justice Roberts select as the winner? This question is not entirely appropriate because it assumes that Justices White and Rehnquist stood in stark opposition to each other in *State Farm*. In reality, the two Justices agreed on much, and Chief Justice Roberts echoes both.²³⁴

What can be said with more certainty, however, is that Chief Justice Roberts put to rest the widely held reading of *State Farm* as a "triumph of expertise to the exclusion of politics."²³⁵ Rather, *Department of Commerce* and *Regents* affirm that political influence *is* permissible in agency decision-making, because a court will ignore an agency's political motivations for its action—whether stated or unstated—when engaging in arbitrary and capricious review.²³⁶ These decisions also suggest that "expertise" inappropriately describes the kind of explanation needed to survive arbitrary and capricious review because it implies a very high bar for agencies to meet. The Court, however, does *not* require the agency to prove it adopted the best course of action among alternatives or that it considered every possible alternative.²³⁷ Instead, as applied by Chief Justice Roberts, *State Farm* requires a showing that the agency's action was the product of reasoned decision-making—that the agency considered alternatives, weighed the pros and cons of each, and explained why the selected course of action was chosen. To hold, then, that an agency survived arbitrary and capricious review under *State Farm* is to affirm that, irrespective of the role politics may have played in the agency's decision-making, the agency showed its work.

228. See *supra* notes 91–96 and accompanying text.

229. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52 (1983).

230. Murray, *supra* note 150, at 493, 500.

231. *Chenery II*, 332 U.S. 194, 196 (1947).

232. See *Dep't of Com.*, 139 S. Ct. at 2575.

233. See Metzger, *supra* note 128, at 29 & n.132.

234. See *supra* Part III.A.

235. Watts, *supra* note 31, at 19.

236. See *supra* note 218 and accompanying text.

237. See *supra* notes 94–96 and accompanying text.

As argued, Chief Justice Roberts's hard look review comprises 0 percent politics, regardless of the role politics played in the agency's decision-making process. The next section shows that 100 percent of Chief Justice Roberts's hard look review involves the sufficiency of the reasoning *process* and not the agency's substantive policy decision.

B. Get with the Process

Chief Justice Roberts's application of *State Farm* in *Department of Commerce* and *Regents* firmly supports the prevailing position that hard look review exclusively scrutinizes an agency's reason-giving process.²³⁸ As discussed above, the contradictory outcomes in these two cases turned on key factual differences between Secretary Ross's proffered explanation in *Department of Commerce* and Secretary Duke's in *Regents*.²³⁹ Secretary Ross acknowledged major drawbacks of reinstating the citizenship question, discussed the costs and benefits of alternative policies, and explained why—despite the drawbacks and in comparison to alternatives—the citizenship question still proved to be a reasonable course of action.²⁴⁰ In contrast, Secretary Duke deferred to the attorney general's recommendation to rescind DACA in its entirety without considering whether an alternative, forbearance-only program would solve DACA's potential illegality while preserving the reliance interests of its beneficiaries.²⁴¹ Secretary Duke's reasoning process outlined in her memorandum failed to convince the Court that DHS had considered all important aspects of the issue.²⁴²

Although Garland argues it would be incorrect to read *State Farm* as identifying no wholly substantive component to hard look review,²⁴³ this argument is less persuasive when applied to *Department of Commerce* and *Regents*. Garland supports his position by gleaning from Justice White's opinion that NHTSA could not have proffered an explanation supporting full rescission of Modified Standard 208 that would have satisfied the Court.²⁴⁴ This argument is inherently speculative because another explanation for NHTSA's rescission of Modified Standard 208 never came before the Court. Garland, however, is not alone in reading *State Farm* as failing to clarify whether NHTSA would have been permitted to reach the same result on remand if it had provided a different explanation.²⁴⁵

Notably, this lack of clarity in *State Farm* is absent from Chief Justice Roberts's opinions in *Department of Commerce* and *Regents*. Unlike

238. See *supra* note 158 and accompanying text.

239. See *supra* Part III.A.

240. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2570–71 (2019); see also *supra* Parts I.C.1, III.A.

241. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020).

242. *Id.*; see also *supra* Parts I.C.2, III.A.

243. See Garland, *supra* note 162, at 545; see also *supra* notes 166–68 and accompanying text.

244. See Garland, *supra* note 162, at 548–49, 549 n.247.

245. See *supra* note 126 and accompanying text.

Justices White and Rehnquist, Chief Justice Roberts explicitly provided that the decisions Secretary Ross and Secretary Duke attempted to implement were substantively lawful as ultimate policy decisions and within their delegated authority to implement.²⁴⁶ Specifically, Chief Justice Roberts stated that Secretary Ross's decision to reinstate the citizenship question was *not* "substantively invalid,"²⁴⁷ and he acknowledged both that the law broadly authorizes the secretary to structure the content of the Census and that the Census historically inquired into citizenship.²⁴⁸ Chief Justice Roberts similarly affirmed that Secretary Duke had the authority to rescind DACA²⁴⁹ and that the Court was only to address DHS's compliance "with the procedural requirement that it provide a reasoned explanation for its action."²⁵⁰ In sum, Chief Justice Roberts clarified that Secretary Ross's and Secretary Duke's actions were substantively permissible.

But he did not stop there. Chief Justice Roberts also drew a definitive line concerning the Court's responsibilities when reviewing an arbitrary and capricious challenge, an issue that *State Farm* only quietly addressed.²⁵¹ Per Chief Justice Roberts, the question of whether the agency's action *actually* constitutes good policy is beyond the Court's review.²⁵² In *Regents*, Chief Justice Roberts wrote that the Court does not resolve whether DACA or its rescission are wise decisions, acknowledging that this determination is within the secretary's discretion.²⁵³ Similarly, in *Department of Commerce*, Chief Justice Roberts stated that the Court's role is not to ensure Secretary Ross made the best possible decision and that if the Court were to second-guess his decision, it would be impermissibly substituting its judgment for that of the secretary.²⁵⁴ Thus, a more defined role for courts applying *State Farm* emerges, one that promotes judicial restraint when reviewing agency actions.

Next, consider that Chief Justice Roberts's resolution in both *Department of Commerce* and *Regents* was to remand to the agency.²⁵⁵ Garland's framing of the distinction between process and substance proves particularly useful here, supporting the conclusion that Chief Justice Roberts's hard look review is not substantive.²⁵⁶ As Justice Alito put it, by remanding, the Court told the agency to "go back and try again."²⁵⁷ According to Garland, implicit in this resolution is that the agency can cure whatever defect the Court identified and later adopt the same policy it initially intended.²⁵⁸ This, in

246. *See infra* text accompanying notes 247–50.

247. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019).

248. *Id.* at 2567–68.

249. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020).

250. *Id.* at 1916.

251. *See supra* text accompanying note 72.

252. *See supra* notes 228–29 and accompanying text.

253. *See Regents*, 140 S. Ct. at 1916.

254. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2571 (2019).

255. *Id.* at 2576; *see also Regents*, 140 S. Ct. at 1916.

256. *See supra* text accompanying notes 168–72.

257. *Regents*, 140 S. Ct. at 1932 (Alito, J., concurring in part and dissenting in part).

258. *See Garland, supra* note 162, at 570.

turn, supports the view that hard look review is procedural. The issue with Garland's position, however, is that a reviewing court that believes an agency can only cure its defect by adopting a different policy is also likely to resolve via remand.²⁵⁹ Although Garland suggests that a court in this situation may impose a particular outcome on the agency instead of remanding,²⁶⁰ *State Farm* prohibits such action because a court may not substitute its judgment for that of the agency.²⁶¹

But, the argument that remand proves Chief Justice Roberts's hard look review is procedural is much more persuasive when contextualizing the Court's resolution with its acknowledgment that both Secretary Ross's and Secretary Duke's substantive policy decisions were within their authority to adopt. In *Department of Commerce*, Chief Justice Roberts's remand and emphasis on the substantive validity of reinstating the citizenship question implies that Secretary Ross would satisfy the Court on remand by offering a nonpretextual motivation for the change in policy.²⁶² Similarly, the remand in *Regents* with Chief Justice Roberts's assertion that DHS had the authority to rescind DACA suggests, as Justice Kavanaugh acknowledged, that remanding would only delay DACA's ultimate rescission because a fuller explanation would survive judicial review.²⁶³

Thus, while remand insufficiently clarifies whether the Court was scrutinizing the agencies' reasoning processes or their substantive policy decisions, Chief Justice Roberts explicitly removed the substantive validity of the agencies' policies from his analysis, showing that the defects in the secretaries' reasoning processes were curable on remand and that the Court's review was procedural.

The significant distinction drawn by Chief Justice Roberts in applying *State Farm* is between substance and process. Whether to describe Chief

259. *Id.* at 572 (“[F]ew courts have expressly ordered affirmative relief to correct substantive regulatory failures.”).

260. *Id.* at 570 (“[I]f . . . the court concludes that there is only one reasonable modification or alternative, arguably the court should impose it.”).

261. See *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). While some Justices have criticized remand as being a pointless formality that creates a game of “ping-pong” with the agency, remand actually protects agency decision-making from judicial overreach. See, e.g., *supra* note 175 and accompanying text. Per *Chenery II*, a reviewing court “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *State Farm*, 463 U.S. at 43 (citing *Chenery II*, 332 U.S. 194, 196 (1947)). By remanding to an agency, the court ensures that it does not replace its own judgment for that of the agency.

262. See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2576 (2019) (“[T]he District Court was warranted in remanding to the agency, and we affirm that disposition. We do not hold that the agency decision here was substantively invalid.” (citation omitted)); see also Metzger, *supra* note 128, at 29. Some find Chief Justice Roberts’s resolution in *Department of Commerce* confusing because, by remanding after a finding of pretext, the Court seemed to invite another pretextual rationale. See *The Supreme Court, 2018 Term—Leading Cases*, *supra* note 125, at 380. This argument, however, overlooks that the remand can also be understood as requiring Secretary Ross to proffer the true motivation for reinstatement.

263. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1935 (2020) (Kavanaugh, J., concurring in part and dissenting in part); see also Bronni, *supra* note 102.

Justice Roberts's review as procedural, as opposed to quasi-procedural, provides little value here because the Chief Justice did not engage in this analysis himself. Garland is correct to note that *State Farm* does not establish a step-by-step process that agencies must follow to survive arbitrary and capricious review.²⁶⁴ Garland also identifies seemingly substantive components in hard look review because a court, in reviewing the sufficiency of an agency's explanation for acting, must thoroughly engage with the agency's reasoning process.²⁶⁵ This, however, does not make judicial review pursuant to *State Farm* any less procedural. Chief Justice Roberts's hard look review is procedural because of what it does *not* evaluate: the wisdom of the agency's ultimate policy decision.

It is the agency, and not the reviewing court, that must engage in substantive decision-making. The focus of judicial review pursuant to *State Farm*, then, is not the agency's substantive decision, but the thought process that led to the agency's substantive decision.²⁶⁶ By applying *State Farm* in a way that only scrutinizes the agency's reasoning process, Chief Justice Roberts affirmed that the substance of an agency's action is within the sole discretion of that agency, and the Court's role remains limited.

C. Putting the Issues Together: What Chief Justice Roberts's Hard Look Review Stands For

In sum, Chief Justice Roberts's application of *State Farm* restrains the Court's role in reviewing agency actions. By excluding political influences from the Court's analysis while permitting their presence in agency decision-making, the Court avoids engaging with politics itself but does not hinder the political branch's ability to do so.²⁶⁷ By fixing the scope of its review on the agency's reasoning process and not its ultimate substantive policy decision, the Court recognizes the danger in and seeks to avoid enforcing its own value judgments instead of those of the agency.²⁶⁸

Chief Justice Roberts's application of *State Farm* also holds agencies accountable for their actions by affirming a strong commitment to the reasoned decision-making requirement. By explicitly endorsing a role for politics in agency decision-making,²⁶⁹ Chief Justice Roberts rejected the method for ensuring accountability that President Wilson envisioned—requiring agencies to be apolitical and expert driven.²⁷⁰ But, just because agencies may consider political influences in their decision-making does not mean *State Farm* permits a reviewing court to do so as well. Indeed, Chief Justice Roberts also rejected a different way to increase accountability in agency decision-making—by, as some have proposed,²⁷¹ requiring a

264. See *supra* notes 162–65 and accompanying text.

265. See Garland, *supra* note 162, at 530.

266. See *supra* text accompanying notes 68–71.

267. See *supra* Part III.A.

268. See *supra* Part III.B.

269. See *supra* Part III.A.

270. See *supra* notes 31–36 and accompanying text.

271. See *supra* Part II.A.

reviewing court to show more deference to an agency when the president contributed to the agency's policy.²⁷²

In his application of *State Farm*, Chief Justice Roberts makes clear that the mechanism for agency accountability is neither exclusive reliance on apolitical expertise nor deference to the president's agenda but the reasoned decision-making requirement, a token of the interest group model of the administrative state.²⁷³ By requiring agency decisions to be well reasoned and honestly justified in light of the many different interests the decision may affect, Chief Justice Roberts's commitment to reasoned decision-making in his application of *State Farm* holds agencies accountable for their decisions, which may impact the lives of many.²⁷⁴

In contrast to Chief Justice Roberts's application of *State Farm*, Justice Breyer proposed that courts engaging in arbitrary and capricious judicial review should consider "the nature and importance of the particular decision, the relevance and importance of missing information, and the inadequacies of a particular explanation in light of their importance."²⁷⁵ This proposal seemingly invites judges who disagree with an agency's substantive policy choice to deeply scrutinize it by stressing the importance of the agency's decision and conversely, to lighten up the scrutiny by downplaying a decision's importance when the policy aligns with the judge's views. Thus, Justice Breyer's approach does little to solve one of the main criticisms of *State Farm*—that it invites judges to vary their scrutiny of an agency's explanation according to their own political attitudes and ideologies.²⁷⁶ If implemented, this critique would grow more forceful, as agencies may feel that the outcome of an arbitrary and capricious challenge depends deeply on which judge is assigned to hear the case, making judicial review all the more unpredictable.

Most importantly, however, Justice Breyer's proposal does not reaffirm *State Farm*: it casts *State Farm* anew. The criticisms Chief Justice Roberts received about his opinion being "lawless" ring truer, in fact, for Justice Breyer's opinion in *Department of Commerce*.²⁷⁷ Justice Breyer's proposal does not accord with precedent because *State Farm* never placed judges at the center of arbitrary and capricious judicial review. Rather, *State Farm* assigned judges a narrow role that prohibits them from replacing an agency's judgment with their own. *State Farm* empowered judges to evaluate the agency's proffered explanation and reasoning process to determine whether the agency sufficiently justified and thought through its action in light of alternatives.

272. See *supra* Part III.A.

273. See *supra* notes 37–41 and accompanying text.

274. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019) ("The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.").

275. See *id.* at 2585 (Breyer, J., concurring in part and dissenting in part).

276. See Shapiro & Murphy, *supra* note 17, at 354–55.

277. See *supra* note 6 and accompanying text.

It is these aspects of *State Farm* that Chief Justice Roberts enunciated in *Department of Commerce* and *Regents*. Perhaps muddled previously, Chief Justice Roberts makes clear now that the agency and its reasons for acting sit at the center of the Court's review under *State Farm*. The president, the president's agenda, other political influences, and a judge's beliefs as to what the best policy would be are excluded from a court's review. For Chief Justice Roberts to hold otherwise would really be "convoluting the law" or acting like a politician.²⁷⁸

Predicting how the Supreme Court will approach future arbitrary and capricious challenges from a dataset of only two decisions is inherently speculative—even more so given that the Court's makeup has changed since it decided *Department of Commerce* and *Regents*.²⁷⁹ Time will show whether lower court judges and other Justices on the Court adopt the Chief Justice's hard look review.

But, what can be said with some surety is that unlike *Chevron* deference and the intelligible principle doctrine—both of which have been under recent attack by the current Justices—Chief Justice Roberts's hard look review does not raise the same separation of powers concerns.²⁸⁰ Rather, as applied in *Department of Commerce* and *Regents*, Chief Justice Roberts's hard look review ensures a proper balance of power among the three branches: it restrains the judiciary to protect the executive branch's decision-making authority but also maintains the judiciary's significant function of review to ensure the executive branch faithfully executes Congress's laws.²⁸¹ As such, it is not only possible, but perhaps likely, that the Chief Justice and his hard look review will continue to garner support from his colleagues on the bench when the Court is faced with future arbitrary and capricious challenges.

CONCLUSION

State Farm has long been criticized as providing limited guidance to judges and advocates on what is actually required for an agency to survive an arbitrary and capricious challenge. Chief Justice Roberts's hard look review settles two of *State Farm*'s previously unresolved questions.

278. See *supra* text accompanying notes 6, 8.

279. See Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [<https://perma.cc/UV4P-NUC8>] (reporting on the Senate's confirmation of then Judge Amy Coney Barrett to the Supreme Court to fill the vacancy created by Justice Ruth Bader Ginsburg's death).

280. See, e.g., Mila Sohoni, *Opinion Analysis: Court Refuses to Resurrect Nondelegation Doctrine*, SCOTUSBLOG (June 20, 2019, 10:32 PM), <https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect-nondelegation-doctrine> [<https://perma.cc/P2A8-QTHZ>] (explaining that "there are four justices on the Court willing to reconsider the nondelegation doctrine from the ground up"); see also Daniel Hemel, *Argument Analysis: Hating on Chevron*, SCOTUSBLOG (Nov. 7, 2018, 1:43 PM), <https://www.scotusblog.com/2018/11/argument-analysis-hating-on-chevron> [<https://perma.cc/XL28-7TW8>] (stating that *Chevron* has received criticism from Justice Gorsuch, Justice Thomas, and Justice Kavanaugh).

281. See *supra* notes 267–73 and accompanying text.

As displayed in *Department of Commerce* and *Regents*, an agency's decision will survive arbitrary and capricious review when, even if motivated by politics, it was the product of reasoned decision-making. In other words, Chief Justice Roberts's hard look review requires a reviewing court to be entirely unconcerned with political influence in agency decision-making, regardless of the role politics actually played in the agency's process. *Department of Commerce* and *Regents* also show that hard look review is a procedural tool to ensure agencies adequately discuss and justify their actions, rather than a substantive analysis. It is the sufficiency of the reasoning *process* and not the agency's substantive policy decision that is the linchpin of the Court's review. In settling these two issues from *State Farm*, Chief Justice Roberts both restrains the judiciary's role in reviewing agency actions and holds agencies accountable for their decisions, which impact the lives of many, by affirming a strong commitment to the reasoned decision-making requirement.