AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers: Presidential Power to Execute the Law

**Department of Commerce v. New York**, \_\_\_ U.S. \_\_\_ (2019)

*In March 2018, Wilbur Ross, the Secretary of the Department of Commerce, declared that he was adding a question about citizenship to the 2020 census that determines the allocation of Representatives among the states under the Constitution and the allocation of federal funds under many federal statutes. Ross claimed to be responding to a request from the Justice Department, which claimed to need the information to administer the Voting Rights Act. Evidence soon emerged that Ross had been determined to add the citizenship question and had requested the memo from the Justice Department to provide a justification for a decision made on other grounds. Concerned that the citizenship question would increase non-response rates that would reduce their representation in Congress and federal funds, New York and other states filed a lawsuit claiming that adding the citizenship question violated the Enumeration Clause of the Constitution and the Administrative Procedure Act (APA). The district court declared that the Department of Commerce had acted arbitrarily and capriciously in violation of the APA. The Department of Commerce appealed to the Supreme Court of the United States, which agreed to bypass the Court of Appeals for the Second Circuit, given the need to finalize what questions would be asked on the 2020 Census.*

 *The Supreme Court, by a 5-4 vote, sustained the decision of the federal district court. Chief Justice John Roberts maintained that neither the Constitution nor the APA forbade including questions about citizenship on the census, but that Ross had acted arbitrarily and capriciously in giving a pretextual reason for his decision to include that question. Why did Roberts maintain that neither the Constitution nor the APA forbade including questions about citizen on the census? Does Justice Stephen Breyer opinion raise constitution or statutory objections to this claim? Who has the better of the argument? Why does Roberts insist that pretextual justifications are arbitrary and capricious? Do the dissents by Justices Samuel Alito and Clarence Thomas raise constitutional or statutory objections to this claim? Who has the better of the argument? Compare the Roberts opinion in this case to the Roberts opinion in the health-care case,* NFIB v. Sebelius *(2012)*. *Was this a statesmanlike effort to split the difference between conservatives and liberals, or a rank political compromise? If the latter, who got the better of the compromise?*

Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea) delivered the opinion of the Court.

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In order to apportion Members of the House of Representatives among the States, the Constitution requires an “Enumeration” of the population every 10 years, to be made “in such Manner” as Congress “shall by Law direct.” In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census “in such form and content as he may determine.” . . . The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States and to draw electoral districts. . The census additionally serves as a means of collecting demographic information, which “is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies.” Over the years, the census has asked questions about (for example) race, sex, age, health, education, occupation, housing, and military service. It has also asked about radio ownership, age at first marriage, and native tongue. The Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies.

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. . . . The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population. . . .

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We begin with jurisdiction. Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue. . . . To have standing, a plaintiff must “present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.” . . . . Several state respondents here have shown that if noncitizen households are undercounted by as little as 2%—lower than the District Court’s 5.8% prediction—they will lose out on federal funds that are distributed on the basis of state population. That is a sufficiently concrete and imminent injury to satisfy Article III, and there is no dispute that a ruling in favor of respondents would redress that harm. . . . . The evidence at trial established that noncitizen households have historically responded to the census at lower rates than other groups, and the District Court did not clearly err in crediting the Census Bureau’s theory that the discrepancy is likely attributable at least in part to noncitizens’ reluctance to answer a citizenship question. Respondents’ theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties. . . .

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary’s decision. The text of that clause “vests Congress with virtually unlimited discretion in conducting the decennial ‘actual Enumeration,’ ” and Congress “has delegated its broad authority over the census to the Secretary.” . . . All three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population. Since 1790, Congress has sought, or permitted the Secretary to seek, information about matters as varied as age, sex, marital status, health, trade, profession, literacy, and value of real estate owned. . . . That history matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that “has been open, widespread, and unchallenged since the early days of the Republic.”

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The Administrative Procedure Act [APA] embodies a “basic presumption of judicial review,” and instructs reviewing courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” . . . To be sure, the Act confers broad authority on the Secretary. . . But they do not leave his discretion unbounded. In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the [APA] exception for action committed to agency discretion “quite narrowly, restricting it to ‘those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” . . . [T]he Census Act constrains the Secretary’s authority to determine the form and content of the census in a number of ways. Section 195, for example, governs the extent to which he can use statistical sampling. Section 6(c), which will be considered in more detail below, circumscribes his power in certain circumstances to collect information through direct inquiries when administrative records are available. . . .

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At the heart of this suit is respondents’ claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary’s exercise of discretion under the deferential “arbitrary and capricious” standard. Our scope of review is “narrow”: we determine only whether the Secretary examined “the relevant data” and articulated “a satisfactory explanation” for his decision, “including a rational connection between the facts found and the choice made.” . . .

The Secretary examined the Bureau’s analysis of various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizenship data from administrative records to fill in the gaps. He considered but rejected the Bureau’s recommendation to use administrative records alone. As he explained, records are lacking for about 10% of the population, so the Bureau would still need to estimate citizenship for millions of voting-age people. . . .The evidence before the Secretary supported that decision. As the Bureau acknowledged, each approach—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. . . . [T]he choice between reasonable policy alternatives in the face of uncertainty was the Secretary’s to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the court improperly substituted its judgment for that of the agency.

The Secretary then weighed the benefit of collecting more complete and accurate citizenship data against the risk that inquiring about citizenship would depress census response rates, particularly among noncitizen households. In the Secretary’s view, that risk was difficult to assess. . . . The Secretary justifiably found the Bureau’s analysis inconclusive. Weighing that uncertainty against the value of obtaining more complete and accurate citizenship data, he determined that reinstating a citizenship question was worth the risk of a potentially lower response rate. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census.

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 We now consider the District Court’s determination that the Secretary’s decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency. We start with settled propositions. First, in order to permit meaningful judicial review, an agency must “disclose the basis” of its action. Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record. That principle reflects the recognition that further judicial inquiry into “executive motivation” represents “a substantial intrusion” into the workings of another branch of Government and should normally be avoided. Third, a court may not reject an agency’s stated reasons for acting simply because the agency might also have had other unstated reasons. . . . Finally, we have recognized a narrow exception to the general rule against inquiring into “the mental processes of administrative decisionmakers.”

. . . .

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. . . . The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ’s Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility that DOJ’s Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued. Even so, it was not until the Secretary contacted the Attorney General directly that DOJ’s Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ’s interest was directed more to helping the Commerce Department than to securing the data. . . .

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary’s telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process. . . . Our review is deferential, but we are “not required to exhibit a naiveté from which ordinary citizens are free.” 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. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

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Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea) and Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea) join, concurring in part and dissenting in part.

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For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency’s otherwise adequate rationale. . . . The Court’s holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law. . . . Unable to identify any legal problem with the Secretary’s reasoning, the Court imputes one by concluding that he must not be telling the truth. . . . The law requires a more impartial approach. Even assuming we are authorized to engage in the review undertaken by the Court—which is far from clear—we have often stated that courts reviewing agency action owe the Executive a “presumption of regularity.” The Court pays only lipservice to this principle. . . .

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As relevant here, the APA requires courts to “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. We have emphasized that “[r]eview under the arbitrary and capricious standard is deferential. . . . [T]he opinion of the Court correctly applies this standard to conclude that the Secretary’s decision survives ordinary arbitrary-and-capricious review. That holding should end our inquiry.

. . . . [T]he APA contemplates review of the administrative “record” to determine whether an agency’s “action, findings, and conclusions” satisfy six specified standards, None instructs the Court to inquire into pretext. , , , If an agency’s stated findings and conclusions withstand scrutiny, the APA does not permit a court to set aside the decision solely because the agency had “other unstated reasons” for its decision, such as “political considerations” or the “Administration’s priorities.” Ante, at 2573 – 2574.

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Respondents conceptualize pretext as a subset of “arbitrary and capricious” review. It is far from clear that they are correct. But even if they were, an agency action is not arbitrary or capricious merely because the decisionmaker has other, unstated reasons for the decision. . . .

. . . .

Th[e] evidence fails to make a strong showing of bad faith or improper behavior. Taken together, it proves at most that the Secretary was predisposed to add a citizenship question to the census and took steps to achieve that end before settling on the VRA rationale he included in his memorandum. . . . Even if it were appropriate for the Court to rely on evidence outside the administrative record, that evidence still fails to establish pretext. None of the evidence cited by the Court or the District Court comes close to showing that the Secretary’s stated rationale—that adding a citizenship question to the 2020 census questionnaire would “provide ... data that are not currently available” and “permit more effective enforcement of the [VRA],” did not factor at all into his decision.

Once again, the evidence cited by the Court suggests at most that the Secretary had “other unstated reasons” for reinstating the citizenship question. For example, the Court states that the Secretary’s Director of Policy “initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ’s Executive Office for Immigration Review.”. But this hardly shows pretext. It simply suggests that the Director believed that citizenship information could be useful in tackling problems related to national security and illegal immigration—a view that would also explain why the Secretary might not have been “considering VRA enforcement” early on.

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Today’s decision marks the first time the Court has ever invalidated an agency action as “pretextual.” Having taken that step, one thing is certain: This will not be the last time it is asked to do so. Virtually every significant agency action is vulnerable to the kinds of allegations the Court credits today. . . .

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea) join, concurring in part and dissenting in part.

. . . .

There is no serious dispute that adding a citizenship question would diminish the accuracy of the enumeration of the population—the sole constitutional function of the census and a task of great practical importance. The record demonstrates that the question would likely cause a disproportionate number of noncitizens and Hispanics to go uncounted in the upcoming census. That, in turn, would create a risk that some States would wrongfully lose a congressional representative and funding for a host of federal programs. And, the Secretary was told, the adverse consequences would fall most heavily on minority communities. The Secretary decided to ask the question anyway, citing a need for more accurate citizenship data. But the evidence indicated that asking the question would produce citizenship data that is less accurate, not more. And the reason the Secretary gave for needing better citizenship data in the first place—to help enforce the Voting Rights Act of 1965—was not convincing.

. . . .

Three sets of laws determine the legal outcome of this case. First, the Constitution requires an “actual Enumeration” of the “whole number of persons in each State” every 10 years. It does so in order to “provide a basis for apportioning representatives among the states in the Congress.” . . . Second, the Census Act . . . reflect(s) a congressional preference for keeping the short form short, so that it does not burden recipients and thereby discourage them from responding. Third, the APA prohibits administrative agencies from making choices that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”. . .

. . . .

Throughout most of the Nation’s history, the Federal Government used enumerators, often trained census takers, to conduct the census by going door to door. The enumerators would ask a host of questions, including place of birth, citizenship, and others. But after the 1950 census, the Bureau began to change its approach. Post-census studies revealed that the census had failed to count more than 5 million people and that the undercount disproportionately affected members of minority groups. . . . Beginning with the 1960 census, the Bureau consequently divided its questioning into a short form and a long form. The short form contained a list of questions—a short list—that the census would ask of every household. That list included basic demographic questions like sex, age, race, and marital status. The short form did not include, and has never included, a question about citizenship. . . . The long form (and now the ACS) has often included a question about citizenship.

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The administrative record includes repeated Census Bureau statements that adding the question would produce a less accurate count because noncitizens and Hispanics would be less likely to respond to the questionnaire. The Census Bureau’s chief scientist said specifically that adding the question would have “an adverse impact on self-response and, as a result, on the accuracy and quality of the 2020 Census.” . . . [T]he Census Bureau estimated that adding the question to the short form would lead to 630,000 additional nonresponding households. . . .

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The upshot is that the Secretary received evidence of a likely drop in census accuracy by a number somewhere in the hundreds of thousands, and he received nothing significant to the contrary. The Secretary pointed out that the Census Bureau’s information was uncertain, i.e., not “definitive.” But that is not a satisfactory answer. Few public-policy-related statistical studies of risks (say, of many health or safety matters) are definitive. . . .

Now consider the Secretary’s conclusion that, even if adding a citizenship question diminishes the accuracy of the enumeration, “the value of more complete and accurate data derived from surveying the entire population outweighs ... concerns” about diminished accuracy. That conclusion was also arbitrary. The administrative record indicates that adding a citizenship question to the short form would produce less “complete and accurate data,” not more.

The Census Bureau informed the Secretary that, for about 90% of the population, accurate citizenship data is available from administrative records maintained by the Social Security Administration and Internal Revenue Service.. The Bureau further informed the Secretary that it had “high confidence” that it could develop a statistical model that would accurately impute citizenship status for the remaining 10% of the population. . . . First, consider the 90% of the population (about 295 million people) as to whom administrative records are available. The Government agrees that using these administrative records would provide highly reliable information about citizenship, because the records “require proof of citizenship.” By contrast, if responses to a citizenship question were used for this group, the Census Bureau predicted without contradiction that about one-third of the noncitizens in this group who respond would answer the question untruthfully, claiming to be citizens when they are not. . . . Second, consider the remaining 10% of the population (about 35 million people) for whom the Government lacks administrative records. . . . Start with the category of about 22 million people who would answer a citizenship question if it were asked. Would their answers regarding citizenship be more accurate than citizenship data produced by statistical modeling? The Census Bureau said no. That is because many of the noncitizens in this group would answer the question falsely, resulting in an estimated 500,000 inaccurate answers. . . . Next, turn to the more than 13 million remaining people who would not answer the citizenship question even if it were asked. As to this category, the Census Bureau would still need to use statistical modeling to obtain citizenship data, because there would be no census response to use instead. Hence, asking the citizenship question would add nothing at all as to this group. . . .

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The reason that the Secretary provided for needing more accurate citizenship information in the first place—to help the DOJ enforce the Voting Rights Act—is unconvincing. The Secretary stated that adding the citizenship question was “necessary to provide complete and accurate data in response to the DOJ request.” . . . . This rationale is difficult to accept. One obvious problem is that the DOJ provided no basis to believe that more precise data would in fact help with Voting Rights Act enforcement. . . . Another problem with the Secretary’s rationale is that, even assuming the DOJ needed more detailed citizenship data, there were better ways of obtaining the needed data. The Census Bureau offered to provide the DOJ with data using administrative records, which, as I have pointed out, are likely just as accurate, if not more accurate, than responses to a citizenship question. . . .

Normally, the Secretary would be entitled to place considerable weight upon the DOJ’s expertise in matters involving the Voting Rights Act, but there are strong reasons for discounting that expertise here. The administrative record shows that DOJ’s request to add a citizenship question originated not with the DOJ, but with the Secretary himself. . . .

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The Court explains, and I agree, that a court normally should not “reject an agency’s stated reasons for acting simply because the agency might also have had other unstated reasons.” Ante, at 2573. But in this case, “the evidence tells a story that does not match the explanation the Secretary gave for his decision.” Ante, at 2575. This evidence strongly suggests that the Secretary’s stated rationale was pretextual. I consequently join Part V of the Court’s opinion (except insofar as it concludes that the Secretary’s decision was reasonable apart from the question of pretext). And I agree that the pretextual nature of the Secretary’s decision provides a sufficient basis to affirm the District Court’s decision to send the matter back to the agency.

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As I have said, I agree with the Court’s conclusion as to pretext and with the decision to send the matter back to the agency. I do not agree, however, with several of the Court’s conclusions concerning application of the arbitrary and capricious standard. In my view, the Secretary’s decision—whether pretextual or not—was arbitrary, capricious, and an abuse of his lawfully delegated discretion. I consequently concur in the Court’s judgment to the extent that it affirms the judgment of the District Court.

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ifd0e95e598be11e9a76eb9e71287f4ea&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifd0e95e598be11e9a76eb9e71287f4ea), concurring in part and dissenting in part.

. . . .No one disputes that it is important to know how many inhabitants of this country are citizens. And the most direct way to gather this information is to ask for it in a census. The United Nations recommends that a census inquire about citizenship, and many countries do so.

 Asking about citizenship on the census also has a rich history in our country. Every census, from the very first one in 1790 to the most recent in 2010, has sought not just a count of the number of inhabitants but also varying amounts of additional demographic information. . . .

Now, for the first time, this Court has seen fit to claim a role with respect to the inclusion of a citizenship question on the census, and in doing so, the Court has set a dangerous precedent, both with regard  to the census itself and with regard to judicial review of all other executive agency actions. . . . To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons. . . .

The APA authorizes judicial review of “agency action” taken in violation of law, but . . . the APA bars judicial review of agency actions that are “committed to agency discretion by law.” . . . In considering whether the general presumption in favor of judicial review has been rebutted in specific cases, we have identified factors that are relevant to the inquiry: whether the text and structure of the relevant statutes leave a court with any “ ‘meaningful standard against which to judge the agency’s exercise of discretion,’” whether the matter at hand has traditionally been viewed as committed to agency discretion; whether the challenged action manifests a “general unsuitability” for judicial review because it involves a “complicated balancing of a number of factors,” including judgments regarding the allocation of agency resources or matters otherwise committed to another branch,; and whether judicial review would produce “disruptive practical consequences.”

. . . . The provision that directly addresses this question . . . gives the Secretary unfettered discretion to include on the census questions about basic demographic characteristics like citizenship. . . . . The information that must be “necessary” (whatever that means in this context) is “other census information.” That refers to information other than that obtained in the “census of population,” and as explained, the term “census of population” includes not just a head count but other “matters relating to population,” a category that encompasses basic demographic information such as citizenship. . . . . [T]he Secretary, in conducting the “census of population,” has discretion to choose the form and content of the vehicles used in that project, and among the methods that he may employ, if he sees fit, are sampling and special surveys.

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. . . . The Constitution gives Congress the authority to “direct” the “Manner” in which the census is conducted, and by imposing . . . . reporting requirements, Congress retained some of that supervisory authority. It did not transfer it to the courts. Respondents protest that congressional review may not be enough to guard against a Secretary’s abuses, especially when the party in control of Congress stands to benefit. But that complaint simply expresses disagreement with the Framers’ choice to vest power over the census in a political body. . . .

In addition to requiring an examination of the text and structure of the relevant statutes, our APA . . . cases look to whether the agency action in question is a type that has traditionally been viewed as committed to agency discretion or whether it is instead one that “federal courts regularly review.” . . . Here, there is no relevant record of judicial review. We are confronted with a practice that reaches back two centuries. The very first census went beyond a mere head count and gathered additional demographic information, and during virtually the entire period prior to the enactment of the APA, a citizenship question was asked of everyone. Notably absent from that long record is any practice of judicial review of the content of the census. Indeed, this Court has never before encountered a direct challenge to a census question. . . .

In sum, neither respondents nor my colleagues have been able to identify any relevant, judicially manageable limits on the Secretary’s decision to put a core demographic question back on the census. And without an “adequate standard of review for such agency action,” courts reviewing decisions about the “form and content” of the census would inevitably be drawn into second-guessing the Secretary’s assessment of complicated policy tradeoffs, another indicator of “general unsuitability” for judicial review.

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Throughout our Nation’s history, the Executive Branch has decided without judicial supervision or interference whether and, if so, in what form the decennial census should inquire about the citizenship of the inhabitants of this country. Whether to put a citizenship question on the 2020 census questionnaire is a question that is committed by law to the discretion of the Secretary of Commerce and is therefore exempt from APA review. The District Court had the authority to decide respondents’ constitutional claims, but the remainder of their complaint should have been dismissed.

. . . .