THE POLITICAL TURN IN AMERICAN ADMINISTRATIVE LAW: POWER, RATIONALITY, AND REASONS

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ABSTRACT

Reason giving is central to U.S. administrative law and practice. Traditionally, courts and scholars alike have located both the constraining and the legitimating force of reasons in the constraining and legitimating force of Reason, or rationality, but several recent developments signal a political turn in understandings of administrative justification. First, in upholding the decision of the Federal Communications Commission (FCC) to penalize broadcasters for televising "fleeting expletives" in the Fox Television *case, the U.S. Supreme Court signaled the diminished importance of reasoned administrative justification and a broadened acceptance of political justifications for changes in agency policy. Second, motivated by a gathering movement to reconceptualize the legitimacy of administrative agencies in terms of their political—and specifically, their presidential—accountability, prominent administrative-law scholars advocate approaches to arbitrary-and-capricious review that would encourage or require agencies to articulate explicitly the political reasons for their actions.*

This Article takes seriously the challenges to the rationalist reason-giving paradigm posed by political reason-giving models, but it categorically rejects their urge to renovate administrative law's fundamental commitment to reasoned justification. Instead, it develops a new theoretical framework that sees reasoned justification as a constraint embodied not in doctrine or politics, but in the way that law and political control structure the organizational characteristics and social interactions of agencies. Drawing on this framework, the Article critiques models of political reason giving for

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undermining the social and organizational structures that shape and constrain what agencies do and for failing to offer a coherent alternative theory of administrative reason giving. The Article concludes by arguing more broadly that reform projects must consider the institutional dimensions of agency constraint and think more deeply about what kinds of agencies they would create.

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INTRODUCTION

Reason giving is central to U.S. administrative law and practice. Courts and legislatures require agencies to support their actions with reasons, and administrative-law scholars theorize the practice of reason giving as central to constraining and legitimating administrative agencies. Traditionally, courts and scholars alike have located both the constraining and legitimating force of reasons in the constraining and legitimating force of Reason, or rationality, but several developments signal a shift in this understanding.

First, in upholding the decision of the Federal Communications Commission (FCC) to penalize broadcasters for televising "fleeting expletives" in *FCC v. Fox Television Stations, Inc.*,[1] the U.S. Supreme Court engaged in its most sustained discussion of agency reason giving since *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*[2] Justice Scalia's analysis in *Fox* signaled the diminished importance of reasoned decisionmaking and a broadened acceptance of political justifications for changes in agency policy.[3] Second, scholars have shown renewed interest in agency reason giving, with prominent administrative-law scholars advocating approaches to arbitrary-and-capricious review that would encourage or require agencies to articulate explicitly the political reasons for their actions.[4] Among both Supreme Court Justices and legal commentators, the pendulum appears to be swinging from an understanding of reasons as rationality to an understanding of reasons as politics.

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1. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009).

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

3. *See infra* Part II.A. *But see* Judulang v. Holder, 132 S. Ct. 476, 479 (2011) (confirming the ongoing importance of reasoned administrative decisionmaking). Although *Judulang v. Holder*, 132 S. Ct. 476 (2011), might be read to cabin the more radical implications of *Fox*, the *Fox* decision nonetheless suggests the conditions under which some members of the Court might be willing to accept political justifications as reasonable, and it has motivated an independent body of scholarship pressing for the broader acceptance of political reason giving. *See infra* Part II.B.

4. *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010) ("We should require that a significant agency rule include at least a summary of the substance of executive supervision."); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) ("[W]hat count as 'valid' reasons under arbitrary and capricious review should be expanded to include certain political influences . . . , so long as the political influences are openly and transparently disclosed in the agency's rulemaking record.").

This political turn in the doctrine governing agency reason giving is closely connected with a gathering movement to reconceptualize the legitimacy of administrative agencies in terms of their political—and specifically, their presidential—accountability as opposed to their expertise,[5] their fidelity to statutory commands,[6] or their role as fora for robust citizen participation and deliberation.[7] Then-Professor Elena Kagan makes the signal case for "presidential administration" as the reigning model of agency legitimacy, arguing that presidential control over administrative agencies promotes their accountability and their efficacy, two touchstones of legitimate governance.[8] Despite the fact that multiple nonpresidential models of agency legitimacy continue to inform administrative practice, doctrine, and theory, recent scholarship has proclaimed[9]—or has simply assumed[10]—the supremacy of the presidential model of administration and has set about the task of overhauling administrative-law doctrine to comport with this understanding.

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5. *See generally* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938) (advocating expertise as the core justification for the New Deal administrative state); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (chronicling various justifications for the administrative state, including expertise).

6. *See* Stewart, *supra* note 5, at 1676 (referring to strict fidelity to statutory commands as the "transmission belt" model of administrative law).

7. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992) ("[G]overnment's primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach a consensus on the common good."); Stewart, *supra* note 5, at 1679 (noting that rigorous enforcement of procedural requirements, such as hearings, may enhance agency legitimacy by affording broader citizen access to agencies).

8. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001).

9. *See* Watts, *supra* note 4, at 38–39 ("[O]ne major advantage of rethinking hard look review . . . is that hard look could be better harmonized with administrative law's current embrace of political decisionmaking."). Professor Kathryn Watts suggests that political-control models have not merely supplemented, but have supplanted, expertise-based models of administration. *Id.* She argues that they have "widespread acceptance" among scholars, *id.* at 35, and that they drive key doctrinal areas of administrative law, most notably the doctrinal framework created by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Watts, *supra* note 4. at 13, 84. She does not discuss the erosion of *Chevron*'s force and coherence in *Christensen v. Harris County*, 529 U.S. 576 (2000), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), and its ongoing contestation—or, in the view of some, its "ongoing obfuscation"—in more recent cases such as *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011). *Id.* at 1340 n.5 (Scalia, J., dissenting). These doctrinal developments are difficult to square with a strong version of the presidential-control model.

10. *See, e.g.*, Mendelson, *supra* note 4, at 1130 (asserting that whereas presidential administration is assumed to play a positive role in agency action, "presidential . . . influence on an agency decision is not clearly good or bad").

The Administrative Procedure Act's (APA's)[11] arbitrary-and-capricious standard[12] has been identified as an important area for renovation. Under prevailing understandings of the arbitrary-and-capricious standard, a court's role in reviewing agency exercises of policymaking discretion is to ensure "that agencies have engaged in reasoned decisionmaking."[13] To make this assessment, courts have required "that an agency provide reasoned explanation for its action,"[14] establishing a "rational connection between the facts found and the choice made."[15] Traditionally, valid reasons establishing this connection have taken the form of empirical evidence, policy arguments, agency expertise, or logical arguments based on statutory language or the purpose of the broader statutory scheme administered by the agency.[16] Political reason-giving models would expand the universe of valid reasons for agency action to include a claim by the agency that it followed a presidential directive that was itself supported by good reasons.[17] This shift in the object of judicial review—from demanding rational reasons and evidence developed by an agency to inquiring into conformance with well-supported presidential directives—has the potential to alter fundamentally not only the nature of arbitrary-and-capricious review but also the way agencies structure their decisionmaking processes and conceptualize their policymaking role.

This Article resists the drive to renovate administrative law's fundamental commitment to reasoned justification and seeks more broadly to force a searching and skeptical consideration of doctrinal reform motivated by the intellectual vogue for presidentialism. The

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11. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006).

12. *See id.* § 10(e)(B)(1), 5 U.S.C. § 706(2)(A) (The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .").

13. Judulang v. Holder, 132 S. Ct. 476, 483–84 (2011).

14. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).

15. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)) (internal quotation marks omitted).

16. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 82 (2008).

17. For a more detailed description and analysis of how political reasons have been defined by their proponents and for examples of what counts as a valid political reason under the proposed models, see *infra* Part II.B. In addition, Professor Watts would also accept certain kinds of congressional influence as valid justification for agency action. *See* Watts, *supra* note 4, at 63 ("[C]ongressional influences could serve as yet another possible source of political influence that—if openly disclosed—could help to adequately explain an agency's rulemaking decision for purposes of arbitrary and capricious review.").

Article has two immediate aims. First, it provides a deep critique of political reason-giving proposals, not through a point-by-point rebuttal as others have ably done,[18] but rather by exposing the inconsistency of these proposals with any credible theory of administrative justification. Second, it develops a new theoretical framework for understanding the mechanisms by which reasoned justification shapes and constrains administrative agencies. Agencies are disciplined not solely by the constraints of rationality, legal doctrine, and political power, but also by the social and institutional environments in which they are embedded.[19] Using a novel application of sociological theory to deference doctrine, this theory of administrative justification demonstrates how reason giving shapes agencies through their organizational structures and their social interactions with the other branches of government. The sociological theory of reason giving further highlights the real danger of political reason giving: it is likely to erode the social mechanisms that shape agencies as organizations and that discipline their day-to-day activities.

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18. *See* Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573, 574–79 (2010) (arguing that political reason giving is contrary to the goal of the comment process in that it undermines the importance of citizen participation and evidence-based decisionmaking); Stephen M. Johnson, *Disclosing the President's Role in Rulemaking: A Critique of the Reform Proposals*, 60 CATH. U. L. REV. 1003, 1033 (2011) (arguing that courts might have difficulty discerning what weight to give to political factors and that this difficulty might lead to more uncertainty in judicial review); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 893–97 (2012) (arguing that political reason giving may undermine deliberative democracy).

19. *See, e.g.*, DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 5 (2001) (arguing that an agency's autonomy and influence are dependent on the network of interests in which it is embedded); Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 383–84 (2006) (exploring how the delegation of regulatory interpretation to regulated private firms shapes agency accountability); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426 (2009) (discussing the interrelationship between separation-of-powers doctrine and institutional constraints on the executive branch); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1675–91 (2006) (describing how the structure of the intelligence bureaucracy shapes the nature and efficacy of administrative national-security policies); *see also* Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953*, 76 U. CHI. L. REV. 587, 591 (2009) (demonstrating how the organizational structure of the Federal Security Agency enhanced presidential control).

Beyond the immediate debate about political reason giving, this theoretical framework provides a new way of thinking about administrative-law reform more generally. If the constraints of administrative law are ultimately enacted at the micro- and meso-levels through organizational structures and social interactions, then administrative-law doctrine must attend to its impact on these crucial structures and processes. It is important to understand how different rules might support or undermine the mechanisms that so deeply influence what agencies do. Administrative-law scholarship should think not only about the formal coherence of doctrine but also about what kinds of agencies different doctrinal frameworks might create.

This Article proceeds as follows. Part I introduces the doctrinal framework for administrative reason giving and the rationalist theories of reason giving that have developed to explain and justify it. Part II identifies the political turn in administrative reason giving that court decisions and scholarship have taken, revising conventional rationalist accounts of what should count as a valid reason to encompass certain political justifications for administrative action. Part III explores possible theoretical bases for political reason giving, including presidential-control theory and information-disclosure theory, and concludes that neither supports the practice. Part IV draws on sociological accounts of reason giving to develop a new theory of administrative justification that sees its constraints embodied not solely in doctrine or politics, but also in the way that those forces structure the organizational characteristics and social interactions of agencies. I conclude by drawing out the implications of this analysis more generally, suggesting that administrative-law reform should attend to how doctrine might influence the social and organizational structures that shape agencies. A viable doctrinal framework must be defensible in these terms.

I. THE PREVAILING ACCOUNT OF ADMINISTRATIVE REASON GIVING

A. *Arbitrary-and-Capricious Review Doctrine*

Administrative-law doctrine places reason giving at the center of agency policymaking and judicial review. The APA explicitly requires

agencies to provide reasons for certain decisions,[20] and courts have demanded that agencies supply reasons more broadly as an essential basis for judicial review. Since 1943, in *SEC v. Chenery Corp.*,[21] the Court has made clear that agency actions will stand or fall based on the reasons that the agency itself provides, even if other reasons could be found to support those actions.[22] In *Citizens To Preserve Overton Park, Inc. v. Volpe*,[23] the Court adapted this generalized reason-giving requirement to arbitrary-and-capricious review under the APA, demanding that agencies "disclose the factors that were considered" as well as the agency's "construction of the evidence" in order to facilitate judicial review.[24] Agencies responded by supplying reasons to justify their policy actions, and courts have long viewed their role as ensuring that those reasons establish a "rational connection between the facts found and the choice[s] made"[25] by the agencies.

Since 1983, *State Farm* has supplied the standard for assessing the adequacy of an agency's reasons for its decisions. Although *State Farm* stressed the "narrow" scope of judicial review under the arbitrary-and-capricious standard and cautioned that a "court is not to substitute its judgment for that of the agency,"[26] it also commanded reviewing courts to "consider whether [a] decision [had been] based on a consideration of the relevant factors and whether there ha[d] been a clear error of judgment."[27] *State Farm* articulated several factors that are "relevant"[28] to the question of an administrative decision's validity, including (1) whether the agency relied on factors that Congress had not intended it to consider;[29] (2) whether the

20. *See* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(c)(3)(A) (2006) ("All [agency] decisions [with respect to procedures requiring a hearing] . . . shall include a statement of . . . findings and conclusions, and the reasons or basis therefor . . . .").

21. SEC v. Chenery Corp., 318 U.S. 80 (1943).

22. *See, e.g.*, *id.* at 89 (holding that the Securities and Exchange Commission's action "must be judged by the standards which the Commission itself invoked," even if other reasons might have supported it).

23. Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

24. *Id.* at 420.

25. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)) (internal quotation marks omitted).

26. *Id.*

27. *Id.* (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974)) (internal quotation marks omitted).

28. *Id.*

29. *Id.*

agency looked at all important aspects of the problem, including viable policy alternatives;[30] (3) whether the agency's explanation for its decision was consistent with the evidence before it;[31] and (4) whether the agency's view was "so implausible" that it could not be considered a mere policy judgment or product of agency expertise.[32]

State Farm's version of hard-look review[33] not only made reason giving central to administrative policymaking but also made clear what kinds of reasons will suffice. Specifically, it endorsed what Professors Sidney Shapiro and Richard Levy describe as the "rationalist" model of reason giving.[34] In contrast with earlier, highly deferential standards of review that upheld agency action "as long as it was 'conceivably' supported by the facts in the record,"[35] the rationalist approach represents a more searching model that places the onus on the agency (1) to document reasons for its decisions; (2) to compile evidence supporting those reasons; (3) to consider,

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30. *Id.* at 43, 51.

31. *Id.* at 43.

32. *Id.*

33. Hard-look review is a doctrinal framework that developed in the D.C. Circuit during the 1970s and that was generally perceived as increasing the stringency with which courts reviewed agency decisions. Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 406. Some have characterized it as requiring courts to take a hard look at the substance of an agency's decision and the process through which that decision was adopted; others have characterized it as requiring courts to ensure that the agency itself took a hard look at the issues. *See generally id.* at 419–22 (describing the "'hard look' review" standard). There is some controversy over which version the Court adopted and whether the Court's version is as stringent as the D.C. Circuit's. *See, e.g.*, Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 633, 655 (D.C. Cir. 1976) ("The Commission's action in cutting off consideration of waste disposal and reprocessing issues in licensing proceedings based on the cursory development of the facts which occurred in this proceeding was capricious and arbitrary."), *rev'd sub nom.* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978); Ethyl Corp. v. EPA, 541 F.2d 1, 55, 66–67 (D.C. Cir. 1976) (affording "careful and exhaustive" consideration to proposed Environmental Protection Agency regulations); Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973) (remanding for further proceedings an agency's decision to deny a suspension of the requirements of the Clean Air Act, 42 U.S.C. §§ 1857–1857*l* (1970), with respect to a truck manufacturer). And some commentators argue that *State Farm* should not be read to have adopted hard-look review at all. *E.g.*, Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 452–57 (2009). I do not address these debates here, but I note that it is conventional in the literature to refer to the *State Farm* standard as hard-look review. *E.g.*, Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1777–78 (2007).

34. Shapiro & Levy, *supra* note 33, at 411.

35. *Id.* at 410 (quoting Pac. States Box & Basket Co. v. White, 296 U.S. 176, 182 (1935)).

analyze, and reject contrary evidence; and (4) to consider, analyze, and reject important alternatives to its preferred policy based on the available evidence.[36] Although many have charged that the intensive justificatory practices that developed in response to the doctrinal demands of hard-look review are an onerous drag on agency policymaking,[37] a substantial literature has developed to explain and justify hard-look review's reason-giving requirement. The next Section examines the theoretical bases for rationalist reason giving by administrative agencies.

B. Rationalist Theories of Reason Giving

The legal literature has developed an extensive account of the work reasons do in the administrative context. According to this literature, the rationalist reason-giving requirement provides external checks on agency power, constrains internal decisionmaking processes, demonstrates respect for governed subjects, and enhances the legitimacy of agency decisions by rationalizing them. I summarize each argument in this Section.

First, reason giving facilitates external checks on the exercise of agency power. Reasons provide two interrelated mechanisms for "policing official behavior"[38]: first, they promote political accountability, and second, they enable judicial review. Reason giving

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36. *Cf. id.* at 423–24 (summarizing the "substantive content" that the Court introduced into arbitrary-and-capricious review in *State Farm*).

37. *E.g.*, STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 49 (1993); CARNEGIE COMM'N ON SCI., TECH. & GOV'T, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 107 (1993); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 199, 224–55 (1990); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 262 (1987); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 532–36 (1997); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419, 1444 (1992) [hereinafter McGarity, *Some Thoughts*]; Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. AM. U. 81, 83 (1996); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 72 (1997) [hereinafter Pierce, *Judicial Review of Agency Actions*]; Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) [hereinafter Pierce, *Seven Ways*]; Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 37 DUKE L.J. 300, 301 (1988); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 8 (1991).

38. Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 103 (2007).

promotes political accountability by making the administrative decisionmaking process more transparent and thus more accessible to citizens and more amenable to congressional oversight. As one commentator puts it, "The reason-giving administrator is . . . more subject to general public surveillance."[39] Moreover, citizens who can survey administrative processes are more empowered to participate in those processes[40] so as "to evaluate, discuss, and criticize [agency] action, as well as potentially to seek political or legal reform."[41] Reason giving also facilitates congressional oversight and control of agencies by making them more transparent both to members and to their constituents.[42] Rationalist reasons are therefore a key mechanism of democratic and political oversight. In addition, reasons are a "protector of judicial review."[43] Reasons render the administrative process more transparent for judges and, at the same time, create a record that will enable judicial review.[44] Robust judicial review, in turn, reinforces and makes more credible the exercise of external control by informed citizens who can sue the agency if it fails to take account of their views.[45]

Second, in addition to facilitating external policing of agency action, reason giving shapes the internal decisionmaking dynamics of agencies in ways that tend to cabin administrative discretion. Here as well, two distinct mechanisms are at work. First, many argue that the imperative to provide rational reasons has a "decision-disciplining"

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39. Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 181.

40. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 529 (2003) ("[T]he [reasoned-decisionmaking] requirement may promote accountability by ensuring public participation in or oversight of the administrative process. It may even coincide with political control of the administrative process.").

41. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278 (2009).

42. *See* Bamberger, *supra* note 19, at 403 ("[W]ide managerial discretion may . . . obscur[e] the reasons underlying particular decisions. In this way, broad leeway can imperil the ability of democratic or constitutional institutions like the public, Congress, and the courts to oversee agencies and review their decisions."); Bressman, *supra* note 33, at 1780 (arguing that reasoned decisionmaking is "a special form of accountability related to legislative monitoring").

43. Mashaw, *supra* note 38, at 111 (emphasis omitted).

44. *See* Shapiro, *supra* note 39, at 182 ("[O]nce a judge has a record, anything is possible."); *see also* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (remanding the case for lack of a record of the reasons for the agency decision).

45. *See, e.g.*, Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 736–37 (1996) (describing how litigation can be part of an ongoing relationship between interest groups and regulators).

effect[46] that improves the quality of agency decisionmaking. Professor Martin Shapiro argues, for instance, that "[a] decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat."[47] Such a decisionmaker is also more likely to consider all of the evidence for and against a given policy. This deliberative stance toward policy decisionmaking is said to filter out tendencies toward "bias, self-interest, insufficient reflection, or simply excess haste"[48] on the part of administrators who know that they must justify their actions in rational terms. Second, reasons are said to exercise a kind of prospective discipline on an agency by narrowing the choices it can make in the future and the grounds on which it can make them. Reasons given to support one decision tend to shape and constrain an agency's future decisions through a path-dependent logic. Reasons commit the reason giver to a certain amount of consistency, "although not inviolably so."[49] Although reasons articulated in one case do not strictly bind a decisionmaker in future cases, as a matter of social practice the reason giver commits herself to deciding some range of future cases in accordance with the general principles embodied by the reasons given in a prior case.[50] At the very least, reasons provide interested parties with grounds on which to argue that prior reasoning should guide future decisions.

Third, reason giving lends a kind of moral force to agency decisions because the act of giving reasons demonstrates respect for the governed subject. Reason giving is "a way to bring the subject of the decision into the enterprise."[51] It "emphasizes the obligation of public officials and citizens to engage with one another on the substance of policy issues with an attitude of mutual respect."[52] The implied alternative is a tyrannical government that imposes its policies on citizens without respect for their wishes or their personhood. As Professor Jerry Mashaw cautions, the exercise of "[a]uthority without reason is literally dehumanizing."[53]

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46. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657 (1995).
47. Shapiro, *supra* note 39, at 180.
48. Schauer, *supra* note 46, at 657.
49. *Id.* at 656.
50. *Id.* at 656–57.
51. *Id.* at 658.
52. Staszewski, *supra* note 41, at 1286.
53. Mashaw, *supra* note 38, at 118.

Finally, reason giving legitimates the exercise of administrative power. Civic republicans and others partial to deliberative-democratic models of agency legitimacy see reasons as a mechanism for facilitating dialogue toward the end of generating public consensus around policy outcomes.[54] The reasons agencies give for their decisions provide the basis for citizen deliberation and dialogue with the government, and this dialogue can shape preferences and promote "broad consensus around a particular solution."[55] This broad consensus legitimates agency policy. Even when agencies' public-regarding rationales fail to achieve consensus, "reasoned consistency" can supply its own form of legitimacy by demonstrating the objective rationality of a given decision.[56] A dominant view among scholars of reason giving is that rationality is "the touchstone of legitimacy in the liberal, administrative state,"[57] ultimately eclipsing political and other forms of accountability.[58] According to this view, "the legitimacy of bureaucratic action resides in its promise to exercise power on the basis of knowledge,"[59] and reasons provide evidence that the agency has, in fact, done so. As Professor Mashaw writes, "The path of American administrative law has been the path of the progressive submission of power to reason."[60]

II. THE POLITICAL TURN IN ADMINISTRATIVE REASON GIVING

If the *State Farm* majority defined the rationalist reason-giving paradigm, a partial concurrence in that case contained the seeds of what I describe as the political turn. On review in *State Farm* was the Reagan administration's rescission of a safety standard issued by President Carter's Department of Transportation (DOT) that required auto manufacturers to install either air bags or automatic

54. *See, e.g.*, Seidenfeld, *supra* note 7, at 1514 ("[G]overnment's primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good."); Staszewski, *supra* note 41, at 1280 ("It is not enough for a decision maker to follow her own or her constituents' pre-political preferences, but she must instead be capable of explaining why a particular course of action is best for the community as a whole.").

55. Staszewski, *supra* note 41, at 1282.

56. Bressman, *supra* note 40, at 474 (internal quotation marks omitted).

57. Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 25 (2001).

58. *See supra* note 40.

59. Mashaw, *supra* note 38, at 117.

60. Mashaw, *supra* note 57, at 26.

seat belts in new-model cars.[61] Although politics had clearly motivated this decision[62]—President Reagan had run on a deregulatory agenda,[63] presumably supported by the majority of citizens that elected him—the Justices in the *State Farm* majority failed to consider the implications of the president's electoral mandate for the validity of this change in policy. Instead, the Court invalidated the DOT's rescission on the ground that the agency's justifications had failed to meet the appropriate standard of "reasoned decisionmaking."[64] Specifically, the Court held that the DOT had failed to consider alternatives to a complete rescission[65] and that the agency had failed adequately to explain evidence before it that was inconsistent with its proffered basis for the decision.[66]

Although the Justices in the partial concurrence authored by then-Justice Rehnquist agreed that the agency had failed adequately to justify key aspects of its decision, they also criticized the majority for ignoring the political context of the agency's decision:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.[67]

Long a boundary-pushing hypothetical for professors of administrative law, this passage now motivates an emerging theory of political reason giving in administrative law based on Justice Rehnquist's intuition that politics should count in courts' appraisals of

61. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34–36 (1983).

62. *Cf. id.* at 59 (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party.").

63. MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 30 (1985).

64. *State Farm*, 463 U.S. at 51–52 (majority opinion).

65. *Id.* at 56.

66. *Id.* at 54.

67. *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part) (footnote omitted).

administrative decisions. The following Sections outline the contours of the political turn that has emerged in courts' and commentators' views of reason giving.

A. *The Court's Political Turn?*

In 2009, the Supreme Court engaged in its most extensive reflection on administrative reason giving since *State Farm* in a case filed by Fox Television and other broadcasters against the FCC for the agency's repeal of a longstanding "safe harbor" policy protecting isolated utterances of profanity on broadcast television.[68] The Court's decision in *Fox* upheld the FCC's order declaring actionably indecent Fox's broadcast of profane utterances by Hollywood stars as they accepted and presented awards during live telecasts of the 2002 and 2003 Billboard Music Awards.[69] The FCC rested its order on the statutory "indecency ban," which prohibits broadcasting of "any . . . indecent . . . language."[70] Although the ban had been in effect since 1948,[71] it had long been tempered by the FCC's "safe harbor" policy, under which the agency had declined to prosecute violations involving "fleeting expletives," or isolated utterances of single, vulgar words used as expletives rather than to refer literally to sexual or excretory activities.[72]

In 2000, the FCC for the first time pursued an enforcement action against a broadcaster for televising a single, fleeting expletive.[73] It cited NBC for a broadcast of the Golden Globes in which the singer Bono, upon winning an award, had exclaimed, "This is really, really, fucking brilliant!"[74] The FCC used this enforcement action to announce its changed position on the safe-harbor policy.[75] Then, on

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68. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009).

69. *Id.* at 1819.

70. 18 U.S.C. § 1464 (2006).

71. Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683, 769 (codified as amended at 18 U.S.C. § 1464 (2006)).

72. *See Fox*, 129 S. Ct. at 1809 (discussing the FCC's departure from the safe-harbor policy); Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4980 (2004) ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, . . . we conclude that any such interpretation is no longer good law.").

73. *Fox*, 129 S. Ct. at 1807.

74. Complaints Against Various Broad. Licensees, 19 FCC Rcd. at 4976 n.2.

75. *See id.* at 4980 ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted

the basis of the Golden Globes order,[76] the FCC cited Fox for similar infractions on its awards shows.[77] Fox challenged the FCC's 2006 order in part on the ground that the FCC's change to the safe-harbor policy had been arbitrary and capricious—specifically, that the change had not been sufficiently justified by the reasons the agency gave for it.[78]

In its Golden Globes order, the FCC provided four reasons in support of its rescission of the safe-harbor policy and its new policy of citing broadcasters for fleeting expletives. First, it argued that the distinction between literal and nonliteral uses of offensive words was incoherent, especially with respect to the "F-word."[79] Even when the word had not been used literally, the FCC found it to be "patently offensive" because, the FCC maintained, it "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language."[80] Second, the FCC argued that categorically exempting fleeting expletives from enforcement would encourage more widespread use of offensive language, albeit one word at a time.[81] Third, it argued that enforcement action was necessary to "safeguard the well-being of the nation's children,"[82] who would be forced to suffer the harmful "first blow"[83] of fleeting profanities. Finally, the FCC noted that advances in technology had made it easier to bleep

upon, consistent with our decision today we conclude that any such interpretation is no longer good law. . . . We now clarify . . . that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.").

76. Complaints Against Various Broad. Licensees, 19 FCC Rcd. 4975 (2004).

77. Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 13,299, 13,329 (2006). At the 2002 Billboard Music Awards, aired live on Fox, award winner Cher said, "[F]uck 'em," in response to her critics. *Id.* at 13,300. At the 2003 Billboard Music Awards, again aired live on Fox, Nicole Richie said, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.*

78. *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 446–47 (2d Cir. 2007) (explaining that Fox was challenging the FCC's "notices of apparent liability" on, among others, administrative grounds and holding that the change in policy was arbitrary and capricious because "the FCC ha[d] failed to articulate a reasoned basis for this change in policy"), *rev'd*, 129 S. Ct. 1800 (2009).

79. Complaints Against Various Broad. Licensees, 19 FCC Rcd. at 4978 ("[W]e believe that, given the core meaning of the 'F-word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.").

80. *Id.* at 1479.

81. *Id.*

82. *Id.*

83. Complaints Regarding Various Television Broads., 21 FCC Rcd. at 13,308.

out offensive language in live broadcasts without compromising the integrity of the program.[84] The FCC provided no evidence supporting its reasons. Instead, it based them on commonsense intuitions about the sensibilities of children and the behavioral proclivities of broadcasters.

The Supreme Court upheld the FCC's orders on the basis that the FCC had satisfied the reason-giving requirement as articulated under the arbitrary-and-capricious standard.[85] In his opinion supporting this result, Justice Scalia made some provocative suggestions about the nature of administrative reasons.

First, Justice Scalia's opinion suggested that reasons need not necessarily be well reasoned. Justice Scalia acknowledged that aspects of the FCC's explanation for its change in the fleeting-expletives policy "may not [have been] entirely convincing."[86] Nonetheless, his opinion accepted the agency's justification on the ground that, at a minimum, it demonstrated "that the Commission knew it was making a change."[87] Although Justice Scalia did not address this tension squarely, his acceptance of minimally persuasive reasons suggests that agencies that are changing policy need not be convincing; they need only be aware. It was apparently sufficient that the agency had not changed its policy accidentally and that it had not actively tried to conceal the change.

Second, Justice Scalia's opinion suggested that reasons need not necessarily be supported by empirical evidence—even when they make empirical claims. Justice Scalia opined that courts must accept the reality that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them."[88] According to his opinion, an agency cannot be expected to conduct its own controlled experiments testing the effects of indecency on children to support its empirical claims about these effects.[89] More controversially, Justice Scalia tacitly endorsed the FCC's failure to address the existing studies cited by the dissent that found no evidence of a connection between broadcast profanity and children's well-being. Thus, the

84. Complaints Against Various Broad. Licensees, 19 FCC Rcd. at 4980.
85. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009).
86. *Id.* at 1812.
87. *Id.*
88. *Id.* at 1813.
89. *Id.* at 1813–14.

Court's new model of administrative reason giving arguably absolves an agency of the responsibility to locate and address existing research on the subject it is regulating.[90]

Third, Justice Scalia's opinion suggested that reasons need not necessarily be apolitical. When an agency has changed its policy, the Court implied that it would credit the fact that the agency simply "*believe*[*d*] [the new policy] to be better" than the old.[91] This signal opened the door, at least in theory, to arbitrary-and-capricious review of the type imagined by Justice Rehnquist in *State Farm*—a level of review that would defer to agency policies that reflect "the philosophy of the administration."[92]

To be sure, a more measured reading of *Fox* than the one I have suggested is possible,[93] and such a reading may, in fact, more accurately reflect the significance (or lack thereof) of this decision. Five Justices in *Fox* disavowed any reliance on politics in the review of agency decisions.[94] A unanimous Court has since affirmed the central importance of rationality in agency policymaking,[95] to some extent quelling fears about the more radical implications of *Fox*. This

90. Note that this position stands in stark contrast to the Court's approach in *State Farm*, in which a majority suggested that the DOT should conduct its own studies to resolve gaps and conflicts in existing research. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 53–54 (1983) (urging the National Highway Traffic Safety Administration to "bring its expertise to bear" on gaps in industry studies regarding the effect of inertia on the effectiveness of detachable automatic seatbelts).

91. *Fox*, 129 S. Ct. at 1811.

92. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part). What is perhaps most notable about the Court's exegesis on administrative reason giving is that it took place in the context of the adjudication of a regulated entity's rights in an enforcement action. Even academic advocates of political reason giving decline to extend their models to the adjudicatory context, much less to the enforcement context. *See, e.g.*, Mendelson, *supra* note 4, at 1131 ("[A]djudication is beyond the scope of this Article."); Watts, *supra* note 4, at 8 n.14 ("In the rulemaking context, agencies act as mini legislatures, whereas agencies act as mini courts in the adjudicatory context. This distinction may well demand a different role for politics in rulemaking vs. adjudication.").

93. *See, e.g.*, Armijo, *supra* note 18, at 581 (arguing that "at most, *Fox* means that . . . the APA does not require an agency to harmonize its past policies when undertaking a new policy direction outside of notice-and-comment rulemaking").

94. Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsberg, discusses the importance of "regulation that does not bend too readily before the political winds." *Fox*, 129 S. Ct. at 1829–30 (Breyer, J., dissenting). Although Justice Kennedy joins most of Justice Scalia's majority opinion, he writes separately to stress that agency policies must be "justified by neutral principles and a reasoned explanation." *Id.* at 1823 (Kennedy, J., concurring in part and concurring in the judgment).

95. *See* Judulang v. Holder, 132 S. Ct. 476, 485 (2011) (requiring agencies to limit their statutory scope "in some rational way").

Section's aim is not to articulate what the *Fox* decision, taken as a whole, does or should mean, but instead to highlight the outer boundaries of what Justice Scalia's decision in that case could be read to mean and to suggest how hospitable that reading is to the politicization of agency reason giving. Although it is not clear what a valid political reason would look like under Justice Scalia's analysis, commentators have already begun exploring the possibilities created by his approach to administrative reason giving.

B. The Political Turn in Legal Scholarship

Whatever the doctrinal significance of *Fox*, the case was followed closely by prominent calls by legal academics for political reason giving. In the *Yale Law Journal*, Professor Kathryn Watts argues that courts should rework the doctrine governing hard-look review to take account of the political reasons for agencies' decisions.[96] Professor Nina Mendelson argues in the *Michigan Law Review* that agencies should be statutorily required to disclose the political influences on their actions and that they should receive greater deference on judicial review when those reasons are "public-regarding."[97] Both these models of political reason giving build on earlier work by Dean Christopher Edley[98] and then-Professor Kagan[99] advocating greater political control of the bureaucracy and suggesting that deference doctrines should adopt the flexibility to account for political influences on agencies. But Professors Watts and Mendelson go much further in their analysis and advocacy of political reason giving, and their scholarship thus epitomizes the political turn addressed in this Article.

Professor Watts argues that traditional conceptions of arbitrary-and-capricious review should be expanded beyond what she

96. Watts, *supra* note 4, at 12–13.

97. Mendelson, *supra* note 4, at 1168. As I have noted, the academic commentary on political reason giving is confined to the rulemaking context on the theory that political justifications for the adjudication of individual rights would pose thornier problems. Watts, *supra* note 4, at 8 n.14.

98. *See generally* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990) (providing "a critical exposition of how administrative law shapes governance, especially through judicial review of actions taken by executive branch agencies and departments").

99. *See* Kagan, *supra* note 8, at 2385 (urging the "modification of certain administrative-law doctrines in ways that will promote presidential control of administration").

characterizes as a "singular technocratic focus"[100] on data and expertise. Instead, she contends, arbitrary-and-capricious review should credit "certain political influences."[101] She envisions an approach to arbitrary-and-capricious review that attends to the blend of statutory, factual, empirical, and political factors that produce administrative decisions.[102] In her scheme, an agency would receive enhanced deference on judicial review if it could demonstrate that its policy choice had been based on legitimate political reasons.[103]

Professor Mendelson takes a different approach to political reason giving. Rather than expanding deference doctrine to encourage the disclosure of political reasons for administrative actions, she would statutorily require agencies to disclose executive influence on significant rulemaking decisions.[104] Critically, she would require agencies to disclose not only presidential influences that might be seen as legitimating, ostensibly justifying greater judicial deference in the manner envisioned by Professor Watts, but also those that might be seen as delegitimating.[105] Like Professor Watts, however, Professor Mendelson argues that so long as agencies disclose all relevant political influences on their decisions, courts should defer to agencies when those disclosures reveal legitimate political reasons for their actions.[106]

Professors Watts and Mendelson have similar conceptions of what constitutes a valid political reason deserving of judicial deference. As a baseline matter, they agree that legitimate political reasons for an agency's action must be consistent with the agency's statutory mandate.[107] Within this domain, they argue that valid

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100. Watts, *supra* note 4, at 84.

101. *Id.* at 52. Professor Watts includes within the purview of "certain political influences" those that flow from Congress as well as from the president. Her article's dominant focus, however, is on the implications of presidential influence and the article is situated within the theoretical literature on presidential control. *Id.* at 8–9. It is beyond the scope of this Article to address the suggestion that influences from individual members of Congress might warrant heightened judicial deference toward agency actions.

102. *Id.*

103. *Id.*

104. Mendelson, *supra* note 4, at 1130.

105. *Id.* at 1140–41.

106. *Id.* at 1175.

107. *See id.* at 1142 ("[T]he agency remains bound by the statute."); Watts, *supra* note 4, at 45 ("[F]ederal administrative agencies . . . must act consistent with congressional intent and must consider only factors that Congress intended the agency to consider."). Although both scholars see this proviso as an important constraint on the executive's "unfettered discretion to

political reasons must be public-regarding and must reflect the value choices of the administration. Professor Watts says that legitimate political influences should embody "some kind of 'public value'"[108] or be based on "political considerations tied to policy choices."[109] Professor Mendelson similarly suggests that courts should defer to political reasons that represent "value preferences or policy calls."[110]

Critically, both scholars stress that not all types of political reasons are legitimate. Professor Watts, for instance, would exclude "raw politics, crass political horse trading, or pure partisanship" from preferential treatment on judicial review.[111] And Professor Mendelson elaborates that courts should reject political influence as a justification for administrative action if it (1) advances the personal interests of the intervening politician or the narrow agenda of some special-interest group,[112] (2) pressures the agency to go beyond the agency's statutory bounds,[113] or (3) pressures the agency to disregard facts that the agency has found[114] or to find facts in a way that favor a preordained policy prescription.[115]

Applying these heuristics, Professor Watts argues that it would be illegitimate for the Food and Drug Administration (FDA) to justify its revocation of a preemption regulation based on the following reason: "The President directed us to rescind the

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direct the outcome of an agency's decision," Watts, *supra* note 4, at 55; *see also* Mendelson, *supra* note 4, at 1134 (noting that these constraints "protect . . . rule-of-law values"), neither considers the adequacy of this constraint in light of the *Chevron* doctrine, which arguably makes administrative agencies the primary arbiters of these statutory boundaries, *see* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

108. Watts, *supra* note 4, at 53.

109. *Id.* at 54.

110. Mendelson, *supra* note 4, at 1171.

111. Watts, *supra* note 4, at 54.

112. Mendelson, *supra* note 4, at 1144. The precise overlap between these articulations of what constitutes a valid political reason and Justice Scalia's articulation in *Fox* is not clear. The most significant issue raised by Justice Scalia's plurality opinion is when reasons based on values should trump reasons based on empirical evidence. Although both Professor Watts and Professor Mendelson maintain that political pressures would be invalid if they caused an agency to disregard or alter the facts, neither addresses how and where the line between fact-based and value-based determinations should be drawn in an already politicized administrative environment in which the two are often blurred.

113. *Id.* at 1141. It is not clear how significant this limitation is under a *Chevron* regime that gives agencies significant latitude to define precisely what those statutory bounds are.

114. *Id.* at 1142.

115. *Id.* at 1143.

preemption regulations in order to reward the trial lawyers, who provided significant campaign support to the President."[116] Similarly, she argues, "an agency's assertion that it adopted a particular standard . . . because 'the President made us do it' should not fare any better."[117] The first political reason fails, presumably, because it reflects "raw politics" or "crass political horse trading."[118] The second fails because it does not contain any "public-regarding,"[119] values-based justification for the president's policy directive.[120] By contrast, a valid political reason would look something like the following: In justifying an action like its 2009 endangerment finding under the Clean Air Act,[121] the Environmental Protection Agency (EPA) might state, "Our conclusion that carbon dioxide emissions endanger the public health and welfare serves the President's overarching policy goal of protecting the environment and is consistent with the President's foreign policy initiatives, including his promises to foreign leaders that he will work to combat global warming to the extent possible."[122] This political reason would qualify because it invokes the broad purposes of the EPA's statutory scheme and situates the president's policy choice in terms of public values recognized by the statute.

Significantly, these models of political reason giving lodge the primary responsibility for developing and articulating the substantive reasons for administrative action with the president rather than with the agency. In the EPA example, the importance of protecting the environment and fostering good foreign relations is a justification articulated, in the first instance, by the president. These reasons are merely cited by the agency as support for its reliance on the president's authority. The model envisions no independent role for the agency in developing public-regarding political reasons. This structure of reason giving is very different from the rationalist paradigm, in which an agency is an active participant in developing the justifications for its actions. Although no proponent of political reasons professes to accept as valid an agency's statement that "the

116. Watts, *supra* note 4, at 54 (internal quotation marks omitted).
117. *Id.* at 55.
118. *Id.* at 54.
119. Mendelson, *supra* note 4, at 1168.
120. *See* Mendelson, *supra* note 4, at 1165.
121. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006 & Supp. III 2009).
122. Watts, *supra* note 4, at 56 (internal quotation marks omitted).

president made me do it," a political reason is, at base, a citation by the agency to the authority of the president, albeit one based on the good reasons that the president has articulated. In the remainder of this Article, reasons structured in this way are called "political" reasons. Reasons based on other sources of authority—legal or deductive reasoning, empirical evidence, policy analysis, or expertise, for instance—are encompassed by the "rational" reason-giving paradigm.

III. THEORIZING POLITICAL REASON GIVING

Although Professors Watts and Mendelson detail the potential doctrinal and policy benefits that would follow from political reason giving, they fail to address deeper questions about the function of reasons and reason giving in the administrative process. They do not engage with existing rationalist theories of reason giving, and perhaps more troubling, they fail to articulate their own coherent theory of administrative reason giving. In this Part, I identify and outline two theoretical frameworks that seem to have inspired, and that might arguably accommodate, models of political reason giving—presidential-control theory and information-disclosure theory—and I explain why neither provides adequate justification for deference to political reasons.

A. Presidential-Control Theory

Paving the way for the political turn in administrative reason giving was a political turn—or, more precisely, a presidential turn—in theories about the control and legitimation of the bureaucracy. Presidentialism is rooted in unitary-executive theory, which emerged in its modern guise in the 1980s as President Reagan attempted to take the reins of a sprawling bureaucracy whose denizens were often at odds with his policy preferences.[123] Since then, three major strands of presidential-control theory have developed. The first argues that strict presidential control of the bureaucracy is constitutionally compelled.[124] The second argues that, even if not constitutionally

123. *See* Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 315–18 (2010) (describing President Reagan's presidentialism as the "weak theory of the unitary executive").

124. *E.g.*, STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 14–15 (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 549–50

compelled, strict presidential control of the bureaucracy is normatively desirable.[125] The third argues that strict presidential control of the bureaucracy is simply an empirical fact that administrative-law doctrine must accommodate.[126] This Section reviews each of these positions and draws out the complex relationship between presidentialism and political reason giving. I conclude that presidential-control theory does not compel political reason giving and arguably does not even support it.

1. *Different Strands of Presidential-Control Theory*. Unitary-executive theory holds that the Constitution compels the president's authority to control personnel and policy in administrative agencies.[127] Under this view, the president has the constitutional authority to remove executive officers—and perhaps even civil-service employees in the executive branch—from their positions if they refuse to comply with the president's policy directives.[128] Unitary-executive theory also posits that independent agencies are unconstitutional because, under the theory, Congress has no authority to assign executive powers to a body that is outside the plenary control of the president.[129]

Although many have questioned claims that the Constitution compels this kind of presidential control over administration,[130] some

(1994); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 730 (2005).

125. *See, e.g.*, Kagan, *supra* note 8, at 2252 ("[I]n comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism.").

126. *See, e.g.*, *id.* at 2246 ("We live today in an era of presidential administration.").

127. *See supra* note 124 and accompanying text.

128. Tushnet, *supra* note 123, at 315; *see also* Calabresi & Prakash, *supra* note 124, at 597 (reasoning that Article II, based on structural, historical, and textual arguments, gives the president a removal power); Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 293–96 (2006) (distinguishing between a removal power and directive authority over executive officers).

129. Tushnet, *supra* note 123, at 319; *see also* CALABRESI & YOO, *supra* note 124, at 4 ("[C]ongressional efforts to insulate executive branch subordinates from presidential control by creating independent agencies and counsels are in essence unconstitutional.").

130. *E.g.*, JOHN P. MACKENZIE, ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION 55 (2008) (arguing that the unitary executive is not constitutionally compelled); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 769 (2008) (arguing that, outside the military context, the Constitution does not compel a unitary conception of the executive); Louis Fisher, *The Unitary Executive: Ideology Versus the Constitution*, *in* THE UNITARY EXECUTIVE AND THE MODERN

have argued that such control is nonetheless normatively desirable given the immense power exercised by contemporary regulatory agencies and the imperative to legitimate its exercise. Professors Lawrence Lessig and Cass Sunstein, for instance, argue that the values embodied in the Constitution's institutional design—in particular, political accountability and the avoidance of factionalism—are best served in the contemporary administrative state by strong presidential control over agencies.[131] Then-Professor Kagan similarly argues that presidential control makes agencies both more effective and more accountable to the public, a result that enhances their legitimacy.[132]

A third strand of presidentialist argument asserts that regardless whether the president legally must or normatively should control the bureaucracy, for all intents and purposes, he does. Then-Professor Kagan was the first to announce that "[w]e live today in an era of presidential administration."[133] Professor David Barron has argued that, since the 1980s, presidents have taken control of the bureaucracy through the political appointment process.[134] And Professors Eric Posner and Adrian Vermeule suggest that at the dawn of the twenty-first century, Americans live in a postliberal world of administered governance, one in which presidential electoral politics provides the only meaningful mechanism constraining the actions of the executive branch.[135]

2. *Presidential-Control Theory and Political Reason Giving*. The models of political reason giving proffered by Professors Watts and Mendelson, as well as the one suggested by Justice Scalia in *Fox*, are all deeply influenced by presidential-control theory. Justice Scalia has been the Court's most outspoken proponent of unitary-executive

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PRESIDENCY 17, 17 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010) ("Although the framers looked to the president to provide responsibility, accountability, and unity, the model of the unitary executive was never adopted or intended . . . .").

131. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994).

132. Kagan, *supra* note 8, at 2331–46.

133. *Id.* at 2246.

134. *See* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008).

135. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 113–14 (2010) ("[T]he system of elections, the party system, and American political culture constrain the executive far more than do legal rules created by Congress or the courts . . . .").

theory,[136] and his opinion in *Fox* reflects a deeply antagonistic attitude toward interference with executive prerogatives.[137] Professor Watts asserts that the prevailing justification for administrative agencies in the U.S. regulatory state has shifted from an "outmoded" expertise-based model to a "more current" politically based model typified by presidential-control theories, and she suggests that administrative review should adjust to reflect these changes.[138] Professor Mendelson likewise starts from the premises that presidents can and do exercise a great deal of control over the bureaucracy and that executive control has been asserted as a basis for administrative legitimacy.[139]

If the presidentialists are correct that presidential control is becoming increasingly important as an empirical fact and as a basis for legitimating agency action, it would seem to follow that administrative law should reflect these changes.[140] What is not clear is

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136. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting) (explaining the fundamental importance of presidential power in the U.S. constitutional scheme and detailing how the independent-counsel provisions of the Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 601–602, 92 Stat. 1824, 1867–74 (codified as amended at 28 U.S.C. §§ 49, 591–598 (2006)), infringed on this power).

137. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1817 (2009) (plurality opinion) ("There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive." (citation omitted)).

138. Watts, *supra* note 4, at 33.

139. *See* Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2456 (2011) (explaining that even scholars who argue that the president cannot command an agency to issue regulations "concede that the President may oversee and substantially influence agency decisions").

140. Presidential-control theories have much to say about the political nature of administration and the president's role in it, but they say very little about what those realities imply for administrative law outside of a few narrow areas. The focus of this literature is on the president's ability to control the bureaucracy, primarily through staffing decisions and policy directives. Thus, discussions of administrative law in this literature are confined largely to the scope of the president's constitutional or statutory authority to direct policy, *e.g.*, Calabresi & Prakash, *supra* note 124, at 549–50; Kagan, *supra* note 8, at 2319; Lessig & Sunstein, *supra* note 131, at 2–3; Mendelson, *supra* note 139, at 2455; Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696 (2007); Yoo et al., *supra* note 123, at 730, the scope of the president's appointment and removal powers, *e.g.*, CALABRESI & YOO, *supra* note 124; Yoo et al., *supra* note 124, and Congress's authority to insulate administrative agencies from presidential influence, *e.g.*, David P. Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19, 19–20; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 41. Before the political turn described in this Article, only Dean Edley and then-Professor, now-Justice Kagan discussed the implications of presidentialism for broader principles of administrative law, and these analyses were peripheral to their larger projects and thus not fully developed. *See, e.g.*, EDLEY, *supra* note 98, at 192–93 (arguing that review should focus on the quality of the political influences); Kagan, *supra* note 8, at 2380 (arguing that a

whether presidential-control theory supports the practice of political reason giving, and the theory's proponents have made no sustained argument explicitly integrating the two or explaining why one should follow from the other. Although it is conceivable that such an argument could be made, it would be difficult to make a case for political reason giving—at least as the practice has been proposed—based on the premises and normative commitments of presidential-control theory. Political reason-giving models stray outside the traditional province of presidential-control theory. They do not speak to the president's power over policy or bureaucratic personnel, and they bracket the relationship between presidential and congressional policymaking power. Instead, they address themselves primarily to two other governmental institutions: agencies and courts. Specifically, they ask agencies to justify their actions in terms of their fidelity to presidential policy preferences, and they ask courts to evaluate more deferentially agency actions that are so justified. Both demands sit uneasily with presidential-control theories.

a. Agencies as Political Reason Givers. The first demand, directed at agencies, is the less controversial of the two, but it is not without complication, especially under models that would require the disclosure of political reasons. Such a requirement could divide the interests of the agency and the president. Agencies will always want deference, but presidents may not always want the politics of their decisions revealed.[141] If the president has the power to direct agencies to adopt particular policies, as presidentialists assert,[142] it seems clear that he also has the power to order agencies to make explicit the political bases for their policy decisions. If, however, the president does not wish for political justifications to serve as the basis for administrative action, it seems equally clear that he could ask agencies to justify their decisions on other grounds, assuming such grounds are available.

A president might prefer one mode of justification to another for many reasons. For instance, he might believe, as the rationalists do,[143]

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modified approach to hard-look review could take into account political factors such as presidential leadership).

141. *See* Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1758–60 (2009) (discussing the presidential preference for secrecy and unitary-executive theory's support for presidential secrecy).

142. *See supra* note 140 and accompanying text.

143. *See supra* Part I.B.

that rational justification can build consensus around a policy, promoting compliance and thus easing agency enforcement burdens. The president might be promoting a policy because he has been persuaded by the rational case for it and thinks the public will be persuaded, too. Or his preference for nonpolitical reasons might be based on political strategy—perhaps a desire to highlight his role in some policies while distancing himself from others. What seems clear, from the presidentialist perspective, is that such decisions are entirely within the president's power to make. It defies logic to encourage agencies to adopt political justifications in the name of enhancing executive control when political justifications might turn out to be contrary to the president's wishes.

b. Judicial Deference to Legitimate Political Reasons. More vexing still is the demand that courts give greater deference to agency decisions that have been justified in legitimate political terms. Presidential-control theory provides little guidance in this area, as presidentialists have little to say about courts. Unitary-executive theory merely "allocates control within the executive branch; it does not entail a particular relationship between the President and the courts."[144] Although those who support presidentialism on normative grounds advocate deferential judicial review of administrative actions—presumably on the ground that such review will encourage the kind of presidential control they see as desirable[145]—this proposition has operated as a kind of background assumption in the literature, one that is unsupported by detailed analysis of the relationship between courts and the president in the administrative state. Finally, those who see presidential control of the bureaucracy as an established fact have quite divergent views on its implications for judicial review. These views run from those of then-Professor Kagan, who believes that presidential control warrants greater judicial deference to administrative actions,[146] to those held by other

144. Stack, *supra* note 128, at 303.

145. *See, e.g.*, EDLEY, *supra* note 98, at 192–93 (arguing for a deferential standard of review for the right kind of political influences); Kagan, *supra* note 8, at 2380 (arguing for deference when political leadership and accountability are clear).

146. *See* Kagan, *supra* note 8, at 2372 ("A sounder version of [*Chevron* and *State Farm*] doctrines of judicial review would take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled.").

prominent scholars who argue that it counsels greater judicial scrutiny of administrative actions.[147]

In sum, the existing body of literature contains no clear indication as to how courts should treat administrative actions that are the product of presidential control. This uncertainty places a significant, and as-yet unmet, burden on proponents of political reason giving to explain why presidential-control theory supports the kind of relationship they advocate between courts and agencies. Although this Article does not purport to offer a definitive case against political reason giving on the ground of presidential control, making such a case might be difficult for three reasons.

First, models of political reason giving shift the onus for giving reasons for administrative action from the agency to the president. As discussed in Part II.B, under the political reason-giving paradigm, agencies justify their actions based on citations to the authority of the president, as supported by his articulation of legitimate reasons for his invocation of that authority. Professor Mendelson defines political reasons as "those contributed by . . . the President" as well as "White House officials entrusted with regulatory oversight," on the theory that these high-level staff members' views "are highly likely to reflect the President's positions."[148] Similarly, Professor Watts argues that executive influence that deserves deference comprises presidential directives and private communications as well as directives from other high-level White House staff presumed to speak for the president.[149] Thus, if courts are to review political reasons to assess whether those reasons support agency action, they will be reviewing reasons developed by the president—or his immediate staff—and not by an agency.[150]

147. *See, e.g.*, Barron, *supra* note 134, at 1137 (suggesting the need for more stringent review of agency actions through doctrines that force agencies "to bring their scientific expertise to bear on controversial questions"); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (arguing that in an era of presidential administration, Americans must make a greater effort to check the president's power).

148. Mendelson, *supra* note 4, at 1128–29.

149. Watts, *supra* note 4, at 57–62.

150. The fact that the agency has adopted the president's reasons as its own should not change this analysis. As discussed in Part II.B, an agency's invocation of the president's reasons is ultimately to justify its acquiescence to his authority. This is different from the adoption by an agency of reasoning from other nonpresidential sources, such as comments submitted in rulemaking, for instance. Because the agency's adoption of presidential reasons implicates the

Setting aside the violence this arrangement would do to foundational administrative-law doctrine,[151] the prospect of courts reviewing reasons developed by the president is highly problematic from the perspective of presidential-control theory. In *Franklin v. Massachusetts*,[152] the Court held that the APA does not permit review of the president's actions because the president is not an "agency" made subject to the APA's requirements.[153] Concurring in that case, Justice Scalia wrote that "[i]t is incompatible with [the president's] constitutional position that he be compelled personally to defend his executive actions before a court."[154] Although proponents of political reason giving do not contemplate that the president would be called upon personally to defend the reasons behind his administrative policies, judicial review of such reasons raises the same kinds of concerns as does judicial review of the president's actions directly.

In *Dalton v. Specter*,[155] the Court similarly refrained from reviewing presidential approval of military-base closures pursuant to the Defense Base Closure and Realignment Act of 1990.[156] The Court reaffirmed its holding in *Franklin* that the APA does not apply to presidential action and further held that the Court cannot review presidential exercises of statutory discretion.[157] "How the President chooses to exercise the discretion Congress has granted him," the majority commented, "is not a matter for our review."[158] A cornerstone of presidential-control theory is the notion that the president has the discretion, pursuant to statutes delegating power to administrative agencies, to gap-fill for the purpose of executing a

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exercise of presidential authority, political reason giving raises issues analogous to those raised in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and *Dalton v. Specter*, 511 U.S. 462 (1994).

151. *See* SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) (holding that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained"); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 955 (2007) (arguing that *Chenery* established the bedrock principle of administrative law that the validity of agency action turns on the validity of the contemporaneous justification the agency has supplied for that action).

152. Franklin v. Massachusetts, 505 U.S. 788 (1992).

153. *Id.* at 801.

154. *Id.* at 827 (Scalia, J., concurring in part and concurring in the judgment).

155. Dalton v. Specter, 511 U.S. 462 (1994).

156. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, tit. XXIX, pt. A, 104 Stat. 1808 (codified as amended at 10 U.S.C. § 2687 note (2006)).

157. *Dalton*, 511 U.S. at 470.

158. *Id.* at 476.

statutory scheme[159] and to issue policy directives ordering agencies to exercise their discretion under their respective statutory schemes in a particular way.[160] Whether based on constitutional[161] or statutory[162] interpretation, this premise is foundational to establishing the president's power to control the bureaucracy. Under either view, the president's directives to agency administrators represent an exercise of his statutory discretion. Consequently, those directives are arguably unreviewable under *Dalton*.

Second, even if the reasons for presidential actions, as opposed to the actions themselves, are reviewable, the prospect of courts' passing on the legitimacy of such reasons would undermine the normative foundations of presidential-control theory. Models of political reason giving are quite explicit that courts should defer not to all political reasons, but only to legitimate political reasons. These models instruct courts to accept political reasons that reflect "public values"[163] or "value preferences or policy calls"[164] but to reject those that reflect "raw politics, crass political horse trading, or pure partisanship"[165] and those that "slant[] or ignor[e] the results of a scientific or technical analysis."[166] But presidential-control theory provides no support for the proposition that courts should pass on the legitimacy of the president's reasons for executive action. To the contrary, it suggests that "any constitutionally permissible policy decision by an administrative agency that is consistent with its governing statute and supported by the President should be upheld by the judiciary."[167]

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159. *See* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (describing "the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme" as "the President's completion power").

160. *See* Kagan, *supra* note 8, at 2302–06 (describing how President Clinton used policy directives to effectively influence agency healthcare and firearm policies).

161. *E.g.*, Goldsmith & Manning, *supra* note 159, at 2303–04.

162. *E.g.*, Kagan, *supra* note 8, at 2251 ("I argue that a statutory delegation to an executive agency official—although not to an independent agency head—usually should be read as allowing the President to assert directive authority . . . over the exercise of the delegated discretion."); Mendelson, *supra* note 139, at 2462.

163. Watts, *supra* note 4, at 53.

164. Mendelson, *supra* note 4, at 1171.

165. *Id.*

166. *Id.* at 1172.

167. Staszewski, *supra* note 18, at 873.

Finally, and also contrary to the normative thrust of presidential-control theory, models of political reason giving ignore fundamental constitutional separation-of-powers principles. Although presidential-control theories are themselves concerned with the power and authority of the president, their broader concern is the preservation of constitutional structures that protect the separation of powers.[168] To effectuate a balanced system of governmental power, the Constitution allocates authority not only to the president but also to Congress and the courts. Among other powers, the Constitution confers on Congress the power to create lower federal courts[169] and to define their jurisdiction.[170] This power includes the ability to specify the scope of judicial review of actions taken pursuant to statutes.[171] Thus, it is impossible to determine how courts should or should not assess political reasons without first considering precisely what latitude Congress has given them to review agency actions.

Congress has given the federal courts jurisdiction to review agency actions under the APA[172] and has defined, in the same statute, the standard under which courts are to review agencies' policy decisions. Specifically, courts are to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[173] Proponents of political reason giving do not deny that reviewing courts must act within these statutory bounds. But they fail to explain how deferring to political reasons for agency action comports with courts' statutorily conferred review authority. Courts

168. *See, e.g.*, Lessig & Sunstein, *supra* note 131, at 4 (arguing that a unitary conception of the executive should be adopted because it is the most faithful way to translate the Framers' structure into a radically changed contemporary political context).

169. U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in . . . such inferior Courts as the Congress may from time to time ordain and establish.").

170. *Id.* art. III, § 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."); *see also* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers. . . . The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by [the lower courts]; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.").

171. Granted, the Constitution may require a different standard of review—for instance, concerning actions alleged to violate the Due Process Clause, U.S. CONST. amend. V, the Equal Protection Clause, *id.* amend. XIV, § 1, or the First Amendment, *id.* amend. 1.

172. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (2006).

173. *Id.* § 10(e)(B)(1), 5 U.S.C. § 706(2)(A).

are obliged under the APA's review standard to set aside agency actions that are arbitrary or capricious, meaning that they may uphold only those agency actions that are neither arbitrary *nor* capricious.

It is not clear how political reasons would assist courts in dispatching their statutory duty to determine whether an agency action has surpassed the mandatory threshold of nonarbitrariness. In fact, politically motivated decisions are often the very definition of arbitrariness. Presidential policy directives, especially those that might be insulated from judicial review, depend on the president's "individual discretion"[174] and do not "adhere to any set scheme" for deciding what policies to adopt.[175] Often they are "not supported" by evidence or rational argument.[176] Political reasons for agency decisions may give those decisions many salutary qualities. What they do not do is render those decisions nonarbitrary. If an agency's decision is arbitrary and capricious, the idea that courts may nonetheless defer to it in defiance of their congressionally conferred authority is constitutionally suspect.

In sum, political reason giving, as conceptualized by its proponents, is arguably incompatible with the presidential-control theories in which it purports to ground itself. To be sure, I do not dismiss as impossible the project of making a case for presidential control as a motivating theory of political reason giving. This Article merely seeks to demonstrate the difficulties that accompany making such a case and to highlight the absence of any serious attempt to address these issues. Granted, this line of critique is only applicable if models of political reason giving do, in fact, rest on presidential-control theory. Proponents of these models may cite presidential-control theory as a referent and a motivation, but it is not entirely clear that enhancing presidential control is political reason giving's normative aim.

As this discussion suggests, models of political reason giving might be viewed, instead, as subversive of presidential control, conferring a new source of leverage on agencies that could be used against the president and subjecting the president's policy decisions and political justifications to judicial scrutiny. Professor Mendelson's political reason-giving requirement, in particular, is arguably

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174. *Cf.* MERRIAM-WEBSTER DICTIONARY 64 (11th ed. 2004) (defining the word "arbitrary" as "depending on individual discretion").

175. Judulang v. Holder, 132 S. Ct. 476, 486 (2011).

176. *Id.* at 490.

structured as a challenge to theories of presidential control.[177] Professor Mendelson suggests that it might be necessary to obtain a better account of what presidential supervision actually entails before definitively adopting the story that such supervision lends needed legitimacy to administrative agencies.[178] Perhaps, despite the language of presidential control that frames political reason-giving proposals, what they actually seek to induce through political reason giving is the disclosure of information about the nature of the president's control over the bureaucracy, with the ultimate end of undermining it. In the next Section, I evaluate political reason giving as a strategy for forcing the revelation of this kind of information.

B. Information-Disclosure Theory

Information-disclosure theory provides another possible theoretical basis for models of political reason giving. Although their proponents do not explicitly characterize them as such, these models are designed and justified much like common forms of information-disclosure regulation, and the revelation of information about the political bases for administrative decisions appears to be their primary normative aim. Both Professor Watts and Professor Mendelson express deep concerns about the "transparency" of the administrative process.[179] This concern verges on suspicion that agencies are not only opaque but that they are also obfuscating the real reasons for their actions. Agencies are said to "couch their decisions in technocratic, statutory, or scientific language, . . . hiding political influences that factor into the mix."[180] Rationalist reasons are said to be "façades"[181] that have "submerged"[182] the real reasons for agency action. Putting aside for the moment whether such suspicions are warranted, this Section examines whether an information-

177. Professor Mendelson's requirement perhaps challenges, for example, then-Professor, now-Justice Kagan's view in *Presidential Administration*, *supra* note 8.

178. Mendelson, *supra* note 4, at 1141 ("[W]hether presidential influence is a negative influence on agency decision making, rather than, on another view, the main force shoring up the administrative state, largely turns on the likely content of that influence, about which we do not currently possess sufficient information.").

179. *See id.* at 1130 (arguing that transparency will increase political accountability and reduce inappropriate executive influence); Watts, *supra* note 4, at 33 (arguing that disclosure of political influences will increase transparency and lead to greater accountability).

180. Watts, *supra* note 4, at 23.

181. *Id.* at 42.

182. Mendelson, *supra* note 4, at 1163.

disclosure regime of the type embodied in political reason-giving models is likely to reveal the true basis for administrative actions.

Information-disclosure regulation has long been used as a strategy to force parties to reveal information about themselves that they might otherwise prefer to conceal.[183] The first generation of information-disclosure policy in the United States grew out of "right-to-know" movements in the 1960s and 1970s that sought more openness and less secrecy in government.[184] Right-to-know laws sought to inform the public about the workings of government and typically required simply that the government make existing documents and activities publicly available.[185] As experience with disclosure regulation developed, the regulation became much more targeted in its design. Its goals shifted from merely informing the public to using information as a vehicle for shaping individual behavior to comport with regulatory goals.[186] Targeted information-disclosure regulation seeks to provide individuals with information that will steer their choices toward a particular desired regulatory outcome without explicitly mandating the outcome. So, for instance, nutrition labels seek to promote healthier diets by giving people the information they need to select healthier food. Targeted information-disclosure strategies have been employed in a wide range of regulatory arenas, from health and safety hazards[187] to financial risk,[188] with varying degrees of success.

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183. *See* Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 460–65 (2012) (stating that "purpose-based" laws achieve this objective).

184. ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 24–28 (2007).

185. *Id.* The Freedom of Information Act, 5 U.S.C. § 552 (2006), and the Government in the Sunshine Act, 5 U.S.C. § 552b (2006), are both examples of right-to-know laws.

186. *See* FUNG ET AL., *supra* note 184, at 39 ("[W]hereas right-to-know policies aim to generally inform public discourse, targeted transparency aims to influence specific choices.").

187. *See, e.g.*, 7 U.S.C. § 1638a (2006) (requiring retailers of covered commodities to inform consumers of a commodity's country of origin); 20 U.S.C. § 1092(f) (2006) (requiring colleges and universities to report crime statistics for the previous three years and to describe their crime-prevention programs and procedures for handling sex crimes); 42 U.S.C. § 11023(g)(1)(C)(iii)–(iv) (2006) (requiring regulated facilities to report annually the total amounts of regulated chemicals released into the air, soil, surface water, and offsite locations); CAL. HEALTH & SAFETY CODE § 25249.6 (West Supp. 2012) (requiring any person in the course of business to give a warning if she is aware that an individual will be exposed to a chemical known to cause cancer or reproductive toxicity); 21 C.F.R. § 101.9 (2011) (requiring nutrition labeling on food packaging).

188. *See, e.g.*, 17 C.F.R. § 240.14a-3 (2011) (providing that a solicitation cannot be made without first disclosing all relevant information to all shareholders).

Like other models of information-disclosure regulation, models of political reason giving either require or incentivize agencies to reveal information that they might prefer to conceal: the political bases for their action. Professor Watts's model rewards agencies with greater judicial deference for disclosing the public-regarding political bases of their actions.[189] Professor Mendelson envisions a mandatory-disclosure model that would require agencies to reveal all executive political influences on their actions but that would reward them if these influences, taken together, reflected the administration's value preferences or policy calls.[190] Information-disclosure regulation can be evaluated along three dimensions. First, is the disclosure design likely to change the behavior of information receivers and disclosers in the desired way? Second, irrespective of whether it will shape behavior, is it likely to provide good information or to tell us something that is both hidden and true about the administrative process? Finally, will the disclosure design produce any perverse or unintended effects that might outweigh its benefits?

1. *Disclosure of Political Reasons Is Unlikely To Change Behavior*. Political reason-giving models are poorly designed to shape behavior toward targeted ends. Much research has been conducted on information-disclosure regulation, resulting in a sophisticated understanding of the factors that tend to lead to such regulation's success or failure. Well-designed information-disclosure regulation generally has five characteristics: (1) a specified policy purpose or problem to be solved by disclosure, (2) specified disclosure targets, (3) a specified scope of information, (4) a defined information structure and vehicle, and (5) an enforcement mechanism.[191] In addition, to shape behavior successfully, the disclosures made under the regulation must become embedded in the decisionmaking routines of both information receivers and information disclosers.[192]

Although Professors Watts and Mendelson clearly articulate a policy purpose for political reason giving, their models are not

189. *See* Watts, *supra* note 4, at 13 (arguing for courts openly to credit political judgments in their reviews, enabling them to defer more readily to agency decisions).

190. *See* Mendelson, *supra* note 4, at 1163 (arguing for increasing political accountability by requiring disclosure).

191. FUNG ET AL., *supra* note 184, at 39.

192. *Id.* at 54–55.

designed to achieve it. The policy purpose of these models is to enhance the accountability of the political actors who ostensibly control administrative agencies.[193] Professor Watts suggests that arbitrary-and-capricious review's focus on the scientific, technical, and statutory factors that influence agency decisions tends to mask the political factors at work in these decisions, obscuring political responsibility for agency decisions.[194] Professor Watts contends that political reason giving can empower citizens to monitor the political influences on agencies and, presumably, to hold democratically elected politicians accountable for the choices that they impose on agencies.[195] Professor Mendelson similarly argues that political reason giving would make the president more accountable to the electorate. Forcing agencies to disclose the policy preferences imposed on them by the executive will prevent presidents from transferring blame for unpopular decisions onto "an unelected agency official."[196] Instead, the electorate will "see the value-laden aspects of the [agency's] decision as a reflection of presidential preferences,"[197] enabling voters to judge the president on the merits of his policy preferences.

Both Professor Watts and Professor Mendelson suggest that these accountability enhancements would occur through a straightforward mechanism: Political reasons will tether the president more closely to the actions he directs agencies to take. This tethering effect, in turn, will allow the electorate to hold him responsible at the ballot box for these actions. The prospect of electoral discipline will shape the president's behavior while in office, thereby prompting him to promote policies that the electorate supports.[198] Unfortunately, political reason-giving models are unlikely to promote this behavioral cycle.

The first significant design defect in these models is their confusion over the disclosure targets for the information contained in political reasons. If models of political reason giving seek ultimately

193. *See* Mendelson, *supra* note 4, at 1161 (discussing the virtues of "greater disclosure to the electorate"); Watts, *supra* note 4, at 42 (calling enhanced political accountability "perhaps the most important reason" for political reason giving).

194. *See* Watts, *supra* note 4, at 43 (suggesting that political reason giving could reduce the "monitoring gap" that often thwarts the detection of political influence on agency decisions).

195. *See id.* (explaining the "accountability benefits" that would ensue from disclosure).

196. Mendelson, *supra* note 4, at 1165.

197. *Id.*

198. *Id.* at 1163–66 (explaining how agencies could become more politically accountable through greater disclosure of their influences); Watts, *supra* note 4, at 42–44 (same).

to shape the behavior of voters, one would think that citizens would be the target audience for this information. But the disclosure format envisioned—in the *Federal Register*, along with all of the agency's other reasons for a given action—is highly unlikely to reach this audience. Although *Federal Register* publication would make political reasons publicly available as a formal matter, as a practical matter it would mean that those reasons never reach the vast majority of citizens. To state the obvious, "[d]isclosees cannot use information until they get it."[199] Courts represent another possible target of political reasons, but it is not clear that the receipt of political reasons by courts for purposes of arbitrary-and-capricious review will have any effect on the behavior of voters. And the models do not theorize the mechanism through which courts might serve as an information intermediary for the citizens who are to hold politicians accountable for their regulatory policies.

Of course, watchdog groups and the media might monitor the *Federal Register* and court dockets, much as they already do,[200] and report political-influence disclosures to the public. But they would necessarily do so selectively, depriving citizens of a full picture of presidential influence and perhaps unfairly characterizing the nature of that influence. Moreover, as commentators point out, "[T]he conditions under which such groups form and become engaged as agents of information users are often very demanding"[201]—these groups often form in times of crisis, and public attention generally fades as soon as the crisis is over[202]—so it cannot be assumed that such groups will serve as effective information intermediaries. At the very least, the potential influence of political disclosures will be blunted by the fact that whatever information reaches citizen-targets will not reach them directly, but will first be filtered through some third party.

This confusion around a fundamental design element seriously undermines the ability of information-disclosure policies to shape behavior. "Successful transparency policies . . . place the individuals and groups who will use information at center stage,"[203] but the

199. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 709 (2011).

200. *See* FUNG ET AL., *supra* note 184, at 42 (explaining the role of intermediary groups in compelling risk disclosure).

201. *Id.*

202. *See id.* at 106, 110 (describing the crisis-driven formation of information intermediaries).

203. *Id.* at 11.

citizens who ostensibly drive the electoral-discipline mechanism underlying Professor Watts's and Professor Mendelson's envisioned policies do not even appear to be in the theater.

Even if citizens do ultimately receive the information contained in the political reasons that are provided by agencies, that information will shape their electoral choices only if it becomes embedded in their decisionmaking routines. Information is most likely to embed itself when three conditions are present. First, receivers must perceive the benefit of getting the information.[204] Second, the information must be disclosed in a way that is compatible with the way people typically make decisions.[205] Third, receivers must be able to comprehend the information disclosed and, specifically, "to relate it to the decisions they face."[206]

Political reason giving meets none of these criteria. First, there has been no broad public demand for more information about the political control of the bureaucracy, much less for information about the intricacies of, say, review by the Office of Information and Regulatory Affairs (OIRA). People tend to make political, and especially presidential, decisions based on much different criteria.[207] That voters desire the kind of information contemplated by Professors Watts and Mendelson is not at all clear.[208]

Second, disclosure in the *Federal Register* is likely to be remote in time from when most citizens are focused on electoral decisions

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204. *See id.* at 55 ("Few people spend time and energy obtaining information for its own sake. Most people must perceive that the information will be valuable in achieving their goals.").

205. *Id.* at 56.

206. *Id.* at 59.

207. *See generally* GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK (2d ed. 2002) (arguing that political preferences are determined by deeply ingrained cognitive structures that can be triggered by political rhetoric); DREW WESTEN, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION (2007) (providing evidence from clinical-psychology research on the emotional basis of political decisionmaking).

208. Although it is true that the media have demanded information in certain high-profile, politicized administrative decisions, such as OIRA's refusal to open an e-mail from EPA regarding its greenhouse-gas-endangerment finding during President George W. Bush's administration or President Barack Obama's request that the EPA withdraw its final National Ambient Air Quality Standard for ozone pollution, it is not clear that the catalyst for these demands was voting citizens. Moreover, even if the demand is citizen-driven, the fact that events such as these have been widely reported in the popular press suggests that the information is available and is being disseminated in fora that are far more accessible to citizens than court filings or *Federal Register* notices.

and remote from the location where they actually cast their votes. Disclosed information is most likely to shape behavior when it is made "available at a time and place where users are accustomed to making decisions."[209] This is why the FDA places nutrition information directly on products at the point of purchase rather than in some agency archive. By contrast, disclosed political reasons for agency actions do not have the same kind of immediacy and relevance to voters' decisions.

Finally, even if the information encapsulated in political-influence disclosures were to reach citizens at a time and in a format that made it relevant to their voting decisions, they might not comprehend either the information itself or its relation to their electoral choices. Information receivers in all contexts have difficulty understanding the information that is disclosed to them. Many are functionally illiterate,[210] still more are "innumerate"[211]—that is, have trouble comprehending mathematical and probabilistic information—and all have a well-catalogued list of inherent cognitive limitations that inhibit their ability to make sense of the information they get.[212] These limitations have been observed among receivers of even relatively straightforward information, such as the fat content of food or the presence of carcinogens in consumer products.[213] Information about political influences on agency policymaking decisions is vastly more complex, not least because, as proponents of political reason giving admit, it has no fixed normative valence.[214] Unlike carcinogens in food, political influence is not self-evidently good or bad, nor is it something obviously to be avoided or encouraged. The chance of

209. FUNG ET AL., *supra* note 184, at 57.

210. Ben-Shahar & Schneider, *supra* note 199, at 711.

211. *Id.* at 712; *see also* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1440–44 (1999) (arguing that consumers do not understand and are often tricked by disclosed numbers); Paul Slovic, *Perception of Risk*, 236 SCIENCE 280, 281 (1987) (arguing that individuals' nonnumerical perceptions of risk affect outcomes).

212. *See* Ben-Shahar & Schneider, *supra* note 199, at 670 (describing a study that found multiple cognitive limitations that rendered disclosure ineffective, including motivations, thought processes, and the perceived uncertainties of science); Hanson & Kysar, *supra* note 211, at 1451 (arguing that manufacturers can successfully manipulate perceptions of risk).

213. Hanson and Kysar, *supra* note 211, at 1451, 1467–68; *see also* Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 667 (1993) (observing that, because of the way people process information, risk disclosure can cause people to dramatically overestimate risks).

214. *See supra* Part II.B.

influencing receiver behavior under these circumstances is vanishingly small.

Even if these barriers could be overcome, one more set of daunting conditions must be met for information to create a virtuous cycle of behavior: information disclosures must bend the decisionmaking curve not only of information receivers but also of information providers. The Toxic Release Inventory[215] was deemed a success not because it prompted neighbors of polluting factories to move, but rather because it changed the way that those factories measured and managed toxic releases, resulting in significant emissions declines.[216] Similarly, saccharine labeling was deemed to be effective not because wealthy, well-educated consumers understood the information and were able to avoid personally ingesting products made with the carcinogen but because that powerful group of consumers created demand pressure that induced manufacturers to reformulate their products.[217]

Likewise, the litmus test for political reason giving should be not merely whether voters are able to use the information obtained to make better electoral decisions and to throw out politicians who deviate from electoral preferences each election cycle, but whether the prospect of such electoral discipline changes the decisionmaking function of politicians while they are in office, making them more likely to choose policies that the electorate favors. For this dynamic to occur, politicians must perceive and comprehend the altered choices of voters and understand those altered choices as responding to disclosed information.[218] Information-disclosure regulation can discipline the behavior of disclosers only if the information disclosed ends up "being routinely incorporated into management routines and

215. The Toxic Release Inventory, created by the Emergency Planning and Community Right-To-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1728 (codified as amended at 42 U.S.C. §§ 11001–11050 (2006)), created a publicly available database containing information on toxic chemical releases emitted by industrial facilities in the United States. *E.g.*, Am. Chem. Council v. Johnson, 406 F.3d 738, 738 (D.C. Cir. 2005).

216. JAMES T. HAMILTON, REGULATION THROUGH REVELATION: THE ORIGIN, POLITICS, AND IMPACTS OF THE TOXICS RELEASE INVENTORY PROGRAM 230–31 (2005); MICHAEL E. KRAFT, MARK STEPHAN & TROY D. ABEL, COMING CLEAN: INFORMATION DISCLOSURE AND ENVIRONMENTAL PERFORMANCE 53–55 (2011).

217. *See* Sunstein, *supra* note 213, at 664 ("The data show that after the warning labels [for diet soft drinks containing saccharin] were required, there were significant adverse effects on sales. The initial effects were produced primarily by well-educated and high-income households.").

218. FUNG ET AL., *supra* note 184, at 6.

decisionmaking processes."[219] Disclosures must not be merely discrete exercises; they must be part of an iterative process that feeds back to the disclosing organization, shaping the way that it does business.[220] When the receiver's response to information is as attenuated as it is in this context, it will have little, if any, disciplinary effect on the behavior of disclosers. As one source comments, if receivers "respond to information in ways that do not directly affect disclosers, the behavior of disclosers is unlikely to change."[221] If the information provided to the electorate by political reason giving does not change politicians' behavior while they are in office, it will not provide accountability in any meaningful sense.

In sum, the provision by agencies of political reasons for their actions is unlikely to affect the behavioral dynamics of presidential voting and thus of presidential behavior in office. Of course, even if the information provided by political reasons fails to change behavior in accountability-enhancing ways, it might still have some inherent value, satisfying citizens' "right to know" what their government is up to, in the tradition of "sunshine" policies. Accepting the implicit presumption that political motivations for agency action are hidden,[222] the question then becomes whether the disclosure of political reasons

219. HAMILTON, *supra* note 216, at 230.

220. *See* KRAFT ET AL., *supra* note 216, at 31 ("Disclosure of information to the public creates a dynamic which spurs industrial facilities to improve their environmental performance.").

221. FUNG ET AL., *supra* note 184, at 66.

222. Whether the political reasons that agencies give are likely to tell Americans anything they do not already know, at least at some level of abstraction, about political involvement in administration is unclear. Ordinary citizens have proven quite capable of attributing administrative actions to the political and values-based motives of the president. *See, e.g.*, Molly Worthen, *Leaps of Faith*, N.Y. TIMES, CAMPAIGN STOPS BLOG (Mar. 1, 2012, 10:23 PM), http://campaignstops.blogs.nytimes.com/2012/03/01/leaps-of-faith (describing how a decision by the U.S. Department of Health and Human Services to require most nonchurch employers to provide their employees with insurance that covers birth control was viewed by many as an effort by President Obama to oppress religious expression and undermine religious values in favor of his own and his supporters' secular values). Research has also suggested that citizens' perceptions of the president's values-based motives for policy already influence their electoral decisions, perhaps even more than their economic or material interests. JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2012). An agency's disclosure that a particular decision was influenced in a particular way by the public-regarding value choices of the sitting administration would add little to the existing levels—or accuracy—of public knowledge about political influence, given information-processing and comprehension constraints. Worse, a political reason-giving model that credited only public-regarding political reasons would be unlikely to elicit additional information from agencies about the less savory political motivations behind agency actions.

for agency action provides citizens with high-quality information that reveals something true about the administrative process and the president's role in it.

2. *Disclosure of Political Reasons Is Unlikely To Reveal High-Quality Information*. Economic theory describes two ways of revealing hidden information: disclosure and signaling. Disclosure is the direct revelation of hidden information,[223] whereas signaling is the indirect communication of hidden information through costly actions.[224] These mechanisms can provide valuable tools for revealing hidden information, but only under certain conditions. Disclosure can reveal hidden information accurately when revelation is both voluntary and costless or when revelation is both mandatory and policed by strong enforcement for misrepresentation.[225] When these conditions are absent, direct revelation of information is likely to be no more than "cheap talk," revealing no information of value, especially if preferences are misaligned between the discloser and the receiver.[226] Signaling, by contrast, seeks to overcome the pitfalls of disclosure by directing attention to an actor's choices or actions—rather than to her direct statements—to communicate hidden information.[227] Signaling reveals hidden information effectively when the actions taken by "good types" to signal the high quality of their products—or the high-mindedness of their motivations—would be too costly for "bad types" to imitate.[228]

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223. BLACK'S LAW DICTIONARY 531 (9th ed. 2009).

224. *See* Michael Spence, *Signaling in Retrospect*, 92 AM. ECON. REV. 434, 436–39 (2002) (illustrating the basic signaling model in the job market, in which a potential employee's level of education is used as a proxy for that potential employee's future productivity).

225. *See* Robert H. Gertner, *Disclosure and Unravelling*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 605, 605–06 (Peter Newman ed., 1998) ("The foundation of the theory of verifiable-information disclosure is the unravelling result. The unravelling result is simply that if certain conditions[—including costless information transmission—]hold, all verifiable information will be revealed.").

226. Vijay Krishna & John Morgan, *Cheap Talk*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 751, 751–52 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

227. *Id.* at 751.

228. ERIC A. POSNER, LAW AND SOCIAL NORMS 20–21 (2002). In the classic example, used-car dealers tend to rely on signals rather than disclosure to communicate the truth to consumers about the quality of their cars. Because it is difficult for inexpert consumers to confirm the veracity of direct claims about auto quality, they tend to rely on the sellers' actions, such as their willingness to offer warranties on their cars, to ascertain its quality. *Cf.* George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (using the used-car market to illustrate problems posed by asymmetry of information between

Political reason giving is a disclosure regime that seeks to induce agencies directly to reveal the political bases for their actions. Professor Watts's design is particularly ill suited for producing meaningful disclosures. Professor Watts would encourage, but would not require, the disclosure of political reasons, by rewarding agencies with deference if they disclose political influence truthfully and if the disclosed political influence is public-regarding.[229] The model contains no enforcement mechanism for punishing incomplete or inaccurate disclosures. Agencies would be, in essence, invited to disclose good information about themselves in exchange for a reward. This arrangement would surely create incentives for agencies to offer what they might regard as salutary political reasons for their actions, but it would offer no incentive for them to disclose less savory political reasons for their actions. Political reason giving under this model would provide only one side of the story, thus opening the door to a cacophony of "cheap talk" about the basis of agency decisions.[230]

Professor Mendelson's mandatory-disclosure model is better designed, in theory, to elicit meaningful information. Professor Mendelson would *require* agencies to reveal *all* executive influences on their rulemaking, regardless of whether those influences might be perceived as good or bad.[231] Her model also contains an enforcement mechanism: courts would not uphold rules if these influences had not been completely and accurately disclosed.[232]

Although mandatory disclosure may avoid reward-driven cheap talk, it has its own set of pitfalls. First, disclosers often simply resist or ignore mandates,[233] especially when enforcement mechanisms are weak or uneven. Because courts would have difficulty determining whether all relevant executive influence on an agency decision had

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the buyer and the seller and observing that warranties can "counteract" the effects of quality uncertainty").

229. *See supra* note 189 and accompanying text.

230. Michael W. Toffel & Jodi L. Short, *Coming Clean and Cleaning Up: Does Voluntary Self-Reporting Indicate Effective Self-Policing?*, 54 J.L. & ECON. (forthcoming 2012) (arguing that voluntary programs that offer firms rewards for self-regulating are likely to be ineffective). Conceivably, courts faced with an ongoing parade of commendable political reasons might begin to question those reasons' veracity, but Professor Watts's model provides no account of the mechanism by which mere questioning might discipline agencies into providing negative information about themselves. And the model does not explain or justify the power of judges and litigants to inquire into undisclosed political reasons for agency action.

231. *See supra* note 104 and accompanying text.

232. *See supra* notes 104–06 and accompanying text.

233. Ben-Shahar & Schneider, *supra* note 199, at 700.

been fully and truthfully disclosed without running up against thorny separation-of-powers issues,[234] courts are unlikely to be vigorous enforcers of that requirement, and agencies might be able to resist it with impunity. Second, when a mandate is stated in broad terms, disclosers often interpret it—either conservatively or strategically—to require the disclosure of every last detail.[235] This response produces disclosures so detailed and exhaustive that they can be unintelligible.[236] Third, disclosure mandates are often met with creative compliance strategies that put a positive spin on the negative facts sought to be disclosed.[237] For instance, as Professors Omri Ben-Shahar and Carl Schneider explain, when health plans were required to reveal the basis for incentive payments to their doctors, "'almost none' mentioned 'the potential negative impact that incentive arrangements might have on physician behavior.' They more often bathed 'incentives in a positive light' by saying, for example, that they rewarded better care."[238] The political influences on agencies likely would be spun in a similar fashion.

Finally, disclosers often "obey the letter of a mandate but flout its spirit," engaging in symbolic or "[m]echanical compliance."[239] The same kind of boilerplate that stands in for meaningful disclosure in a

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234. *See* Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 719 (1993) ("Executive privilege is based on the constitutional doctrine of separation of powers and exempts the executive branch from certain disclosure requirements if an exemption is necessary for carrying out important executive responsibilities that are part of official government duties."); *see also* Stephen C.N. Lilley, *Suboptimal Executive Privilege*, 2009 BYU L. REV. 1127, 1132 (describing the courts' tendency to abstain from disputes over executive privilege). *But see* United States v. Nixon, 418 U.S. 683, 711 (1974) (holding that executive privilege, although "constitutionally based," does not override the right to production of all evidence in a criminal trial). Although *United States v. Nixon*, 418 U.S. 683 (1974), did confront the issue of executive privilege, the case is widely relied upon to support the assertion that the president's discussions with advisors are generally confidential because of the need for "complete candor and objectivity." *Id.* at 706; *see also* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 110–11 (1994) (quoting the "complete candor and objectivity" language in support of the same assertion).

235. Ben-Shahar & Schneider, *supra* note 199, at 684; *see also* Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629, 1632 (2009) (arguing that a broad mandate to disclose certain tax-shelter transactions led to overdisclosure by taxpayers, hampering Internal Revenue Service enforcement efforts).

236. Ben-Shahar & Schneider, *supra* note 199, at 686–87.

237. *See id.* at 700 (mentioning ways that disclosers can resist mandates).

238. *Id.* (footnote omitted) (quoting Mark A. Hall, *The Theory and Practice of Disclosing HMO Physician Incentives*, 65 LAW & CONTEMP. PROBS. 207, 227 (2002)).

239. *Id.* at 701.

variety of consumer-disclosure arenas might also come to dominate the discourse of political reasons. For instance, regulations repealing environmental protections, granting trade preferences, promoting green energy, enacting federal curriculum standards, or revising Medicare coverage could all be justified on the grounds that they comport with a president's public-regarding program to, say, "rebuild the foundations of the American economy on the principles of free enterprise, hard work, and innovation."[240] An administration will always be able to conjure some broad, public-regarding principle for its policy preferences, but this principle will likely do little to convey the real politics behind any particular decision. The recitation of political platitudes in support of administrative policies would seriously undermine the goal of enhancing meaningful political discourse and accountability.

3. *Disclosure of Political Reasons May Have Unintended Costs*. Even if political reason giving is not optimally designed to produce the desired information, one might argue that it will produce some amount of new information—albeit of varying quality—and that more information is always better than less information. In considering whether to seek disclosure of this additional information, policymakers should consider what the costs of obtaining it might be.

First, as Professors Ben-Shahar and Schneider observe, new sources of information "can crowd out useful information" that already exists.[241] Information disclosers have finite information-generation and disclosure capacities. Thus, a directive to focus on the political reasons for agency action may shift resources away from the production of information about other reasons supporting agency action.

Second, information receivers similarly have finite information-retention and processing abilities, and new disclosures may prevent them from acquiring or comprehending other information that may turn out to be more important.[242] Political reasons seem especially likely to induce such a crowding-out effect because they are

240. This particular political platitude was taken from Mitt Romney's presidential-campaign website. *Jobs and Economic Growth*, ROMNEY: BELIEVE IN AMERICA, http://www.mittromney.com/jobs (last visited Apr. 11, 2012).

241. Ben-Shahar & Schneider, *supra* note 199, at 737 (emphasis omitted).

242. *Id.*; Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 566 (2006).

inherently more comprehensible than rational reasons. The rational reasons given to support agency policy decisions—including policy analysis, synthesis of conflicting empirical data, and explanations of how different interests have been mediated—can be extraordinarily complex and thus difficult to digest and understand. By contrast, a statement that the agency has adopted a policy because that policy comports with the president's view of the public interest is a simple cause-effect account that is cognitively straightforward to comprehend. Given both types of reasons, the one that is simpler and more straightforward is the one that is likely to stick.[243] Because information-processing and retention capacities are limited, the more straightforward account is likely to crowd out information contained in other accounts.

These information-processing mechanisms suggest two significant problems with political reason giving as an information-forcing device. First, political reason giving would not generate *more* information about the administrative process; it would generate *different* information about the administrative process. This reality raises the question whether the information that political reason giving produces is the focal narrative that should be told about administrative policymaking. The administrative process is much richer and more complex than the political context in which it occurs. To focus citizens' limited cognitive capacities on politics, to the possible exclusion of other aspects of the process—such as the attempt to translate scientific knowledge into policy insight or the struggle to reconcile competing interests or determine what policy values are in the interest of the broader society—would both degrade policy discourse and diminish the universe of what observers can know about administration. Second, the fact that political reasons are cognitively simpler to comprehend does not render them any truer or more accurate than other kinds of reasons. If the core goal of political reasons is simplification, they achieve it admirably. They are less likely, however, to reveal deeper truths about the administrative process.

4. *Signaling as an Alternative to Disclosure*. None of this discussion means that citizens and courts are consigned to ignorance

243. *See* Sunstein, *supra* note 213, at 670–71 ("Excessive detail should be avoided; the relevant information should be crisp and simple. Any disclosure requirements should attend to difficulties in processing information.").

about the political bases for administrative action. The political reason-giving project itself suggests that people know quite a bit about the political bases for administrative action, both as a general matter and in specific cases. In addition, research suggests that existing administrative-law doctrine builds in signals about the level of political support for a given administrative action. These signals arguably provide more credible information than direct statements would about a given policy's consistency with the president's policy preferences.[244] Hard-look review calls upon agencies to disclose the rational bases of their actions under penalty of remand if the evidence or explanation is insufficient.[245] This design is mandatory and contains a clear enforcement mechanism. Disclosures made pursuant to this regime convey a great deal of information about the logical and empirical bases for an agency's decisions. Moreover, in addition to the direct information these reasons provide about the rational bases for agency decisions, they also send a signal about the level of political support for those decisions. Justifying agency actions in a way that will survive hard-look review is, as many have observed, a costly endeavor.[246] The fact that an agency has invested significant

244. *See, e.g.*, Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 470 (2007) ("[T]he effect of the [cost that an agency must incur to adopt a new regulation] on agency expertise depends on whether the agency would adopt the new regulation if its efforts to acquire additional information are unsuccessful."); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 755 (2006) [hereinafter Stephenson, *A Costly Signaling Theory*] (arguing that "judicially-imposed explanation requirements can help reviewing courts overcome their comparative informational disadvantage for reasons that are independent of the (in)ability of courts to understand or verify the substantive content of the justifications advanced by government decisionmakers" and assuming that "the court can use the quality of the government's explanation . . . as a rough proxy for the costs the government incurred in producing this explanation"); Matthew C. Stephenson, *Evidentiary Standards and Information Acquisition in Public Law*, 10 AM. L. & ECON. REV. 351, 377 (2008) ("Allowing action without hard evidence dampens research incentives; allowing action in the presence of adverse evidence strengthens research incentives."); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1427 (2011) ("[D]ifferent institutional arrangements (arrangements that are often determined or shaped by law) might affect the production of useful information by government agents.").

245. *See supra* notes 27–33 and accompanying text.

246. Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals To Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 498–99 (1997); Sidney A. Shapiro, *Substantive Reform, Judicial Review, and Agency Resources: OSHA as a Case Study*, 49 ADMIN. L. REV. 645, 652 (1997); *see also* John S. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control*, 9 YALE J. ON REG. 277, 286 (1992) ("The government has finite resources with which to investigate problems, develop regulations, and enforce its decisions. A major regulatory initiative that will have a

resources in a decision is likely to indicate not only that the decision has been carefully researched and considered and is rationally justifiable, but also that it has strong political support.

Professor Matthew Stephenson demonstrates in formal models that the rationalist reason-giving requirement of hard-look review has significant information-forcing qualities. In addition to the information it conveys by its terms, the requirement signals to inexpert, apolitical judges the level of support a policy has received from the administration.[247] Professor Stephenson argues that an agency's willingness and ability "to produce a high-quality explanation signals that the government believes the benefits of the proposed policy are high."[248] Moreover, agencies with little political support for their agendas probably could not fake such signals consistently.[249] Thus, the quality of an agency's rational explanation for its policy provides reviewing courts with important information about the political support for agency decisions that may be more reliable than direct disclosure. Under a political reason-giving regime, agencies could recite boilerplate language asserting that their policies are consistent with the president's public-regarding political agenda, but they would have difficulty surviving hard-look review if the administration were not actually putting resources behind them. Thus, the signals sent by rationalist reasons may be a better mechanism than direct disclosure for producing information about the level of political support for administrative policy. Recognizing these dynamics, Professors Posner and Vermeule call for the development of "institutional mechanisms that impose heavier costs

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significant economic impact on the regulated industry is likely to be, for that reason alone, highly controversial." (footnote omitted)); McGarity, *Some Thoughts*, *supra* note 37, at 1392 ("[T]he agencies are understandably reluctant to rock the boat when to do so requires an enormously expensive rulemaking in which a successful outcome is by no means assured."); Pierce, *Judicial Review of Agency Actions*, *supra* note 37, at 70 ("Many administrative law doctrines have powerful effects on the amount of resources an agency must expend to perform a statutorily assigned mission.").

247. Stephenson, *A Costly Signaling Theory*, *supra* note 244, at 755.

248. *Id.* It is important to note that other considerations, apart from political support, drive agency resource-allocation decisions. For instance, the existence of statutory deadlines may drive investments of agency resources. The existing literature focuses on political support, but its insights may apply more broadly to other strong bases of authority for administrative action, such as statutory or judicially imposed deadlines.

249. Although agencies sometimes invest significant resources in an effort to bulletproof policies that are politically controversial—as opposed to politically well-supported—agencies would be unlikely to engage in such a strategy successfully over the long term and against the wishes of an antagonistic administration.

on ill-motivated" executive actors to hinder self-serving characterizations of executive action and to amplify the credibility of the signals that well-meaning executives send about their policy commitments.[250] To the extent that information forcing is the normative goal of political reason giving, it may already be served adequately by conventional models of administrative reason giving.

In sum, the case for political reason giving is not supported by the theoretical frameworks in which that model is grounded. Even if the political reason-giving model fails to provide a viable alternative to rationalist theories of reason giving, however, its great contribution is that it forces a critical examination of rationalist theories and, in particular, the relationship between reason and power in governance. The deep flaw of rationalist theories is their suggestion that power somehow can be separated from or tempered by rationality. The virtue of reasons, in the rationalist account, is that they insulate citizens from the raw exercise of government power. There is something deeply unsatisfying about such a claim, about the way it obfuscates the arbitrary abuses of power that occur every day within rationalized legal systems,[251] and about the way it brackets the inevitable presence of political power behind all administrative action. As an alternative to rationalist models, however, political reason giving does little better. From this perspective, reasons do not temper power; they mask it. The work of reasons, from a political perspective, is not to rationalize, but to reveal the power behind administrative action so that it can be tempered electorally.

The problem with both perspectives is that they see reason and power as distinct from and in tension with each other, and this understanding leads them to characterize reason giving as external to the political power dynamics within agencies. In both conceptions, reason giving is a means of imposing external sources of discipline on agencies. What is largely missing from these perspectives is an

250. POSNER & VERMEULE, *supra* note 135, at 122–23.

251. *See, e.g.*, JAYA RAMJI-NOGALES, ANDREW IAN SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009) (performing a statistical analysis of outcomes in asylum adjudications and concluding "that the outcome of a refugee's quest for safety in America should be influenced more by law and less by a spin of the wheel of fate that assigns her case to a particular government official"); Mashaw, *supra* note 57, at 29 (rejecting "general explanations for . . . discontent with the rationalized administrative state" and asserting that at an extreme, "there is no real difference between the administrative rationality of the U.S. Social Security administration and the administrative rationality of the Rwandan military police").

understanding of reason giving as a social practice that shapes administrative behavior intrinsically. The next Part outlines a theory of administrative reason giving as a social and organizational practice that fundamentally shapes the way administrative agencies look and the actions they take. These kinds of constraints are critical in a sprawling administrative apparatus that simply cannot be controlled by one individual—or her deputies—using hierarchical command. The real danger of political reason giving is that it would undermine these intrinsic sources of discipline without offering any alternative means of controlling agencies and getting things done.

IV. TOWARD A SOCIOLOGICAL THEORY OF REASON GIVING

Social theory posits a number of functions served by both reasons themselves and the practice of reason giving. Reasons help human actors make sense of complex events. They "provide interpretations and explanations of experience. They make actions imaginable and consequences interpretable."[252] In this way, reasons construct how actors perceive the world and invest it with meaning. Similarly, the imperative to give reasons constructs individuals and organizations as particular types of actors and defines the terms on which they can sustain social ties with one another.[253] Reason giving may not itself promote democratic deliberation or rationalize power as the rationalist account would maintain. It may not itself promote presidential control or electoral accountability as the political account would maintain. What reason giving does, however, is create social relationships and organizational structures that tend to channel the exercise of agency discretion within politically and socially acceptable parameters.

The social and organizational framework supported by reason giving empowers agencies to do their jobs; it regularizes—if not rationalizes—the way that they do these jobs in reasonably predictable ways, and it constrains the kinds of actions that agencies deem possible and desirable to take. It does so through two

252. JAMES G. MARCH & JOHAN P. OLSEN, DEMOCRATIC GOVERNANCE 141 (1995) (citations omitted).

253. *See* LUC BOLTANSKI & LAURENT THÉVENOT, ON JUSTIFICATION: ECONOMIES OF WORTH 41 (Catherine Porter trans., Princeton Univ. Press 2006) (1991) ("Very diverse beings . . . turn out to be connected and arranged in relation to one another in groupings that are sufficiently coherent for their involvement to be judged effective, for the expected processes to be carried out, and for the situations to unfold correctly . . . .").

mechanisms. First, reason giving constitutes agencies as organizations, shaping everything from routine staffing decisions to agency culture and the cognitive scripts that guide agency decisionmaking processes. Second, reason giving structures agencies' interactions with citizens and with other legal and political institutions. In both respects, reason giving fundamentally shapes what agencies look like and how they act. In this Part, I discuss each of these mechanisms and explain how political reason giving would undermine them.

A. Reason Giving Constitutes Agencies as Organizations

For better or for worse, hard-look review has deeply influenced the organizational structure of contemporary administrative agencies. Agencies hire experts to study and corroborate their policy decisions, staff to review and respond to comments, economists to evaluate the costs and benefits of different policies, and lawyers to draft preambles explaining the reasons for policy decisions and to defend agency actions. Although all of this activity may be driven by the prospect of either reversal on judicial review or discipline by the executive, these professionals, occupying defined roles within the agency organization, shape and constrain the agency's behavior on a day-to-day basis. The imperative to give reasons also shapes the culture of administrative agencies, or the way the agencies understand themselves as organizations. Taken together, these elements of an organization's culture create taken-for-granted understandings about what it is possible and desirable for the organization to do. The following Sections first provide a general overview of theories of organizational structure and control and then discuss how key organizational structures that empower and constrain administrative agencies are supported by hard-look review and would be undermined by political reason giving.

1. *Structural Mechanisms That Shape and Constrain Organizations*. Although they often occupy a rarefied space in the political and legal imagination, political institutions like agencies and legislatures are, at base, organizations. Organizations are social groups that have been "established for the explicit purpose of achieving certain goals."[254] Organizations pursue these goals, in part, by establishing structures and social relationships to channel the

254. PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH 5 (1962).

decision processes and behaviors of individual members.[255] Thus, the behavior of actors in political institutions is a function not only of the distribution of political preferences and resources but also of the way those organizations are structured.[256] Four broad types of structural mechanisms shape and constrain the way decisions are made within organizations: (1) specialization and division of labor, (2) standardized routines, (3) formal and informal authority structures, and (4) staff training.[257]

First, organizations typically divide labor in a way that allows individuals to specialize and focus on discrete tasks.[258] Within the organization, this practice creates groups of individuals who not only are focused on similar activities but who also often share similar professional or personal values.[259] Depending on the power of these internal constituencies, their values can come to shape the organization's decisionmaking practices and understanding of its mission more broadly.[260] A famous example of this phenomenon in the organizational literature is the "flak-catching" office:

> [F]lak-catchers, who are commissioned to protect an organization from flak and to symbolize a commitment to deal appropriately with flak, quickly learn to enhance the importance of flak. The mechanisms are familiar. Partly, flak-catchers are chosen because of some willingness to deal with outsiders, perhaps because of prior affinity to them. Partly, they learn from their association with outsiders to identify with them. Partly, they discover that their importance in the organizations depends on the existence of flak.[261]

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255. *See* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS 102–03 (1948) (describing the mechanisms "organization[s] employ[] to influence the decisions of individual members").

256. *See* James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 738 (1984) (describing how organizational structure and procedure help support political institutions).

257. SIMON, *supra* note 255, at 102–03.

258. *Id.* at 102.

259. *See, e.g.*, SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 6 (1984) (arguing that "[e]nvironmental analysts not only help their agency by pointing out legal and political vulnerabilities on environmental issues, but also tend to have distinctive personal values").

260. *See* CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY 58–59 (2002) (describing how the value system of an organization is formed to handle issues faced by the organization).

261. Martha S. Feldman & James G. March, *Information in Organizations as Signal and Symbol*, 26 ADMIN. SCI. Q. 171, 181 (1981).

Through these mechanisms, "staff become involved in advocacy for their functions that can alter power relations within organizations over the long run."[262]

An organization can be shaped in significant ways by empowered internal constituencies that are committed to a particular set of values. For instance, a number of studies have found that compliance professionals are crucial to improving corporate compliance with regulatory goals.[263] The improvement happens as compliance professionals embed issues of compliance into the routine decisionmaking processes of corporate managers and employees.[264] Of course, the mere existence of compliance personnel, or internal constituencies committed to a defined set of values, hardly ensures the realization of a normative vision that might otherwise stand in tension with other organizational goals, such as profit maximization or political obedience. Rather, to embed their values in the decisionmaking process, internal norm generators must have "autonomy and influence"[265] or "clout"[266] within the organization. They must, in other words, be "seen as adding value to the [organization] as knowledgeable, reasonable, and politically important insiders."[267]

A second structural mechanism channeling organizational behavior is the set of routines or standard practices that organizations establish to guide the actions of their members.[268] Routines embody

262. Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 42 AM. SOC. REV. 147, 150 (1983).

263. *E.g.*, PARKER, *supra* note 260, at 23–25; *see also* FIONA HAINES, CORPORATE REGULATION: BEYOND 'PUNISH OR PERSUADE' 165–66 (1997) (describing how internal compliance helps to decrease workplace-related fatalities); JOSEPH V. REES, REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY 85–174 (1988) (describing corporate responses to the creation of the Occupational Safety and Health Administration); Valerie Braithwaite, *The Australian Government's Affirmative Action Legislation: Achieving Social Change Through Human Resource Management*, 15 LAW & POL. 327, 341–52 (1993) (looking at corporate compliance with Australia's affirmative-action legislation).

264. PARKER, *supra* note 260, at 125.

265. TAYLOR, *supra* note 259, at 256 (emphasis omitted).

266. JOHN BRAITHWAITE, CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY 359 (1984).

267. DAVID P. MCCAFFREY & DAVID W. HART, WALL STREET POLICES ITSELF: HOW SECURITIES FIRMS MANAGE THE LEGAL HAZARDS OF COMPETITIVE PRESSURES 176 (1998).

268. JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 21 (1989); SIMON, *supra* note 255, at 102; Martha S.

the collective experience of the organization in addressing particular kinds of problems.[269] They facilitate the coordination of different strands of activity within the organization and mitigate conflicts.[270] They promote efficient organizational operation by relieving individual members of the burden of determining anew each time a task arises how it should be done.[271] More importantly, scholars have found that organizational routines exert "strong inertial pressures"[272] because they are "independent of the individual actors who execute them and are capable of surviving considerable turnover in individuals."[273] Thus, although individuals within organizations invariably have a certain amount of discretion, that discretion is channeled by "the allocation of attention, standards of evaluation, priorities, perceptions, and resources" sedimented in the organization's routines.[274]

Third, organizations shape the actions of their members through what Professor Herbert Simon describes as "systems of authority and influence."[275] Hierarchical authority structures may be important in shaping the attention and priorities of an organization's members, but they are not the only forms of authority operating in organizations. Equally important are the informal systems of power and influence that develop in organizations based on the status of individual members and their relationships with one another.[276] In bureaucratic organizations of all types, status and influence flow from individual

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Feldman & Barry T. Pentland, *Reconceptualizing Organizational Routines as a Source of Flexibility and Change*, 48 ADMIN. SCI. Q. 94, 94 (2003).

269. *See* MARCH & OLSEN, *supra* note 268, at 24 ("Routines embody collective and individual identities, interests, values, and worldviews, thus constraining the allocation of attention, standards of evaluation, priorities, perceptions, and resources." (citations omitted)).

270. *Id.*

271. SIMON, *supra* note 255, at 102; *see also* RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM 119 (1992) ("Standard operating procedures are the memory of the organization.").

272. Heather A. Haveman, *Between a Rock and a Hard Place: Organizational Change and Performance Under Conditions of Fundamental Environmental Transformation*, 37 ADMIN. SCI. Q. 48, 49 (1992).

273. MARCH & OLSEN, *supra* note 268, at 22.

274. *Id.* at 24.

275. SIMON, *supra* note 255, at 103.

276. *Id.*

members' professional prestige,[277] their possession of information,[278] or their role as conduits for important information possessed by others.[279] A common misconception, identified by Professors Richard Cyert and James March, is that "organizations are hierarchies in which higher levels control lower levels, and policies control implementation."[280] As Professors Cyert and March observe, "Portrayals built on such conceptions of order seem, however, to underestimate the confusion and complexity surrounding actual decision making."[281] Such portrayals also tend to overestimate managers' ability to impose order through hierarchical commands—a point captured by Professor W. Richard Scott's comment that "[n]o planners are so farseeing or omniscient as to be able to anticipate all the possible contingencies that might confront each position in the organization."[282] Instead, informal authority structures "play a larger role in producing dependable behavior than do commands or sanctions"[283] and allow the organization to "impos[e] elements of order on a potentially inchoate world."[284]

Finally, the decisions of individuals operating within organizations are shaped by the training that those individuals receive about their organization's procedures, its core goals and values, and their superiors' expectations. Organizations socialize and educate their members to internalize norms about appropriate and inappropriate behavior, and this sense of what constitutes appropriate action in the organizational context becomes essential to defining and maintaining individuals' organizational identities.[285] As Professor

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277. *See, e.g.*, Carol A. Heimer, *Explaining Variation in the Impact of Law: Organizations, Institutions, and Professions*, *in* 15 STUDIES IN LAW, POLITICS, AND SOCIETY 29, 45 (Austin Sarat & Susan S. Silbey eds., 1995) (comparing the privileges among members of a healthcare team and observing that physicians have more control over decisionmaking than nurses or social workers).

278. *See* 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 993–98 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1922) (emphasizing the importance of specialized knowledge in bureaucracies).

279. W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS 75 (1981).

280. CYERT & MARCH, *supra* note 271, at 232.

281. *Id.*

282. SCOTT, *supra* note 279, at 84.

283. *Id.* at 75.

284. March & Olsen, *supra* note 256, at 743.

285. James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943, 948 (1998).

Simon notes, "The organization member acquires knowledge, skill, and identifications or loyalties that enable him to make decisions, by himself, as the organization would like him to decide."[286] Organizations function more efficiently and predictably when their members anticipate institutional expectations rather than acquiescing to specific commands from superiors.[287]

These four structural features of organizations, individually and in combination with one another, "account for much of the regularity and patterning that exist" in organizations,[288] but their influence goes beyond merely shaping behavior. They generate normative and cognitive structures that are absorbed by the individual members of organizations, guiding not only their behavior but also their understanding of what is right and appropriate to do in a given situation. As stated by Professor March and his colleague Professor Johan Olsen, "Organizational action requires a model of the world,"[289] and organizational structures provide such a model. The rituals, roles, and routines embedded in organizational structures serve a "sense-making" function, helping individuals understand complex environments and conveying norms and values about what is right and appropriate in a given situation.[290] In this way, organizational structures define individuals' perception of appropriate alternatives, likely consequences, and the normative desirability of their actions.[291] Professors Dennis Gioia and Peter Poole summarize this point: "People in organizations know how to act appropriately because they have a working knowledge of their organizational world. They enact the 'right' behaviors most of the time in part because they retain a cognitive repertoire of scripts fitting

286. SIMON, *supra* note 255, at 103.

287. *See id.* at 129 (explaining that when a subordinate anticipates commands, "authority will need to be exercised only to reverse an incorrect decision").

288. SCOTT, *supra* note 279, at 14.

289. JAMES G. MARCH & JOHAN P. OLSEN, AMBIGUITY AND CHOICE IN ORGANIZATIONS 19 (1976).

290. *See* Harrison M. Trice & Janice M. Beyer, *Studying Organizational Cultures Through Rites and Ceremonials*, 9 ACAD. MGMT. REV. 653, 654 (1984) ("[C]ultural messages . . . express . . . norms and values that proclaim to system members the rightness of certain beliefs and practices over others.").

291. *See* James G. March & Johan P. Olsen, *Institutional Perspectives on Political Institutions*, 9 GOVERNANCE 247, 250 (1996) ("Rational action depends on subjective perceptions of alternatives, their consequences, and their evaluations. . . . [I]nstitutional conceptions see such calculations and anticipations as occurring within a broader framework of rules, roles, and identities." (citations omitted)).

a host of organizational settings."[292] Thus, when an organization acts, its action is often motivated less by a calculation about the desirability of a particular outcome than by the reality that "it would be unthinkable to do otherwise."[293]

2. *Deference Doctrine and the Organizational Structure of Agencies*. Placing the onus on agencies to articulate rational reasons for their actions, as the traditional deference regime does, fosters these kinds of internal disciplinary structures in administrative organizations. Hard-look review has encouraged agencies to develop internal constituencies of professionals who are committed to scientific, analytical, and reasoned decisionmaking; and even more importantly, it has given those constituencies some measure of policymaking clout within agency organizations. Agencies often face tremendous political pressure to adopt a particular policy position. The fact that they must ultimately justify their decisions on rational grounds gives these professionals a voice in the organization that they might not otherwise have. Hard-look review, among other factors, has also prompted agencies to develop routines that force consideration of the opinions and evidence provided by the agency's expert constituencies.[294] These routines, in turn, have given these constituencies informal authority within the agency organizations that rely on them for information. Taken together, these effects have produced an agency culture that focuses agencies' attention on

292. Dennis A. Gioia & Peter P. Poole, *Scripts in Organizational Behavior*, 9 ACAD. MGMT. REV. 449, 450 (1984).

293. Christine Oliver, *Strategic Responses to Institutional Processes*, 16 ACAD. MGMT. REV. 145, 149 (1991).

294. What I characterize here as "routines," in the parlance of organizational theory, legal scholarship characterizes as "additional procedures, analytical requirements, and external review mechanisms." *See, e.g.*, McGarity, *Some Thoughts*, *supra* note 37, at 1386. For instance, Professor McGarity argues that agencies subject to hard-look review perceived the need to draft much lengthier and much more technical justifications for their rules than they had done under less stringent deference regimes. *Id.* at 1387. Professor McGarity reports:

> The "concise general statement of basis and purpose" for the original primary and secondary ambient air quality standards promulgated under the Clean Air Act Amendments of 1970 consisted of a single page in the *Federal Register* when they were promulgated in 1971. The preamble to the 1987 revision of a single primary standard consumed 36 pages in the *Federal Register* and was supported by a 100-plus-page staff paper, a lengthy Regulatory Impact Analysis that cost the agency millions of dollars, and a multi-volume criteria document.

Id. (footnotes omitted). Agencies have relied on expert professional constituencies to provide the substantive content for the additional layers of analysis perceived as necessary to survive hard-look review. *Id.* at 1398.

policies that will be publicly justifiable based both on the available evidence and on the grounds for past decisions.[295]

Although models of political reason giving purport to preserve rational grounds for justification as a doctrinal matter, allowing enhanced deference for "legitimate" political reasons would undermine the constituencies within agency organizations that are committed to developing nonpolitical reasons for agency actions in two important ways and would thereby weaken the foundations of internal disciplinary structures. First, political appointees who can justify their decisions on judicial review based, in part, on political motivations will have less need to rely on professional staff to support agency actions. This decreased reliance would significantly diminish the power and informal authority of professional constituencies within agency organizations, along with the values those constituencies embody and the structural processes and routines they tend to support.

Second, and perhaps even more debilitating in the long run, political reason giving would undermine the motivation of the professional members of these constituencies and would lead to their exodus from agency organizations. As Professor Scott points out, "Of all the many resources required by organizations, the most vital are the contributions of [their] human participants."[296] These participants have many choices regarding how to spend their time and thus must be motivated to contribute to the organization's goals. In public service, an arena in which material rewards often do not fully compensate individuals for the effort they expend, many agency professionals are motivated by the meaning that they derive from contributing to the realization of the organization's goals,[297] especially when those goals reinforce their professional identity or personal values.[298] Privileging political reasons for agency action could degrade

295. *See* Schauer, *supra* note 46, at 657 (arguing that the reason-giving model creates consistency and justifiability because "in the future [decisionmakers will] treat their prior statements as constraining" and because the strategy reduces "bias, self-interest, insufficient reflection, or simply excess haste").

296. SCOTT, *supra* note 279, at 158.

297. *See id.* at 160 ("[M]embers join [a purposive organization] because they wish to help in achieving the goals espoused by the organization; and the organization, in achieving its goals, supplies inducements to its members securing their continuing contributions.").

298. *See* GEORGE A. AKERLOF & RACHEL E. KRANTON, IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING 42 (2010) (arguing that pay incentives are less important for a person who "thinks she *should* work on behalf of the firm" because "[h]er ideal is to exert high effort"); DANIEL CARPENTER, REPUTATION AND POWER:

this crucial source of meaning for expert and professional staff, causing demoralization and attrition. For example, dedicated medical researchers would not be highly motivated to work for the FDA if they knew that a court would uphold the agency's approval or disapproval of drugs based on the administration's "value preferences or policy calls."[299]

Of course, it is possible that this kind of deprofessionalization of agencies is exactly what political reason giving aims to achieve. There are certainly drawbacks to the professional cultures and practices that structure agencies under hard-look review, including the kinds of delay and technical opacity often characterized as "ossification."[300] The desire to eliminate ossification may translate operationally into a desire to undo the layers of professional staffing and the culture of justification that surrounds rulemaking. But this enterprise seems a dangerous gamble in the absence of any consideration of what might replace existing organizational structures and what agencies might come to look like under a political reason-giving regime.

Whatever organizational structures political reason giving might produce, hierarchical political control cannot replicate two key functions served by the structures created and supported by hard-look review. First, organizational structures constrain and regularize agency decisions in the absence of direct oversight by either the political branches or the judiciary. This kind of intrinsic discipline is

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ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 48 (2010) ("The identity and esteem of an individual often depend upon wider social evaluations of the organization to which she belongs."); SCOTT, *supra* note 279, at 160 (suggesting that organizations must "sustain the interests of members").

299. Mendelson, *supra* note 4, at 1171. Professor Watts suggests that her proposal is aimed at preserving a space for science by segregating politics into its own distinct sphere. Watts, *supra* note 4, at 40–41. I disagree not only with the fundamental premise that the two can be separated but also with the suggestion that giving greater credence to politics will have the effect of empowering science. The premise that the two can be separated relies on untenable notions of pure scientific objectivity. If scientific objectivity cannot be achieved, the primary goal would have to be more modest, such as preserving some amount of *autonomy* for the development of scientific knowledge. But power is crucial to maintaining autonomy. Hard-look review confers power on scientific constituencies; political reason giving diminishes their sphere of power. This calculus underlies my claims in this Section.

300. For a description of the problem of "ossification," see, for example, William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 394 (2000); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1285 (1989); Pierce, *Seven Ways*, *supra* note 37, at 61; and Paul R. Verkuil, Comment, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 453 (1995).

of critical importance because the bulk of agency activity takes place outside the glare of political or judicial spotlights. Whereas academic literature understandably focuses on the narrow band of significant, high-profile agency policymaking exercises, the mine run of agency activity—issuing licenses, making grants, targeting enforcement, and formulating more mundane policy—will never cross the president's desk or a judge's bench. The discipline constraining these pervasive activities comes largely from the social and organizational structures that shape the way agency staff do their jobs.

Second, these organizational structures give agencies, and expert constituencies within agencies, a means of pushing back against inappropriate exercises of executive power. Although Professors Watts and Mendelson concede that the president cannot direct policy that contradicts statutory mandates or the agency's factual findings, such safeguards are utterly hollow in the absence of internal constituencies that are committed to the values of statutory fidelity and scientific integrity and who are empowered to press their cases up the ranks of the agency.

B. Reason Giving Structures the Interactions Among Legal and Political Institutions

In social theory, reason giving is a practice associated with negotiating social relationships and facilitating cooperation and collective action.[301] Further, it is a way of validating the hierarchies that result from social interaction and of justifying the outcomes of these interactions in widely acceptable terms. As sociologist Charles Tilly explains, "Whatever else they are doing when they give reasons, people are clearly negotiating their social lives. They are saying something about relations between themselves and those who hear their reasons."[302] This insight can be applied to legal institutions

301. *See, e.g.*, BOLTANSKI & THÉVENOT, *supra* note 253, at 37 ("[W]e propose to take seriously the imperative to justify that underlies the possibility of coordinating human behavior . . . ."); ERVING GOFFMAN, RELATIONS IN PUBLIC 162–63 (1971) ("The position is being taken, then, that the individual constantly acts to provide information that he is of sound character and reasonable competency."); CHARLES TILLY, WHY? 30 (2006) ("Most of us feel more comfortable challenging the reasons given by taxi drivers than those proposed by physicians. But in either case we are, among other things, negotiating definitions of the relations between us."); C. Wright Mills, *Situated Actions and Vocabularies of Motive*, 5 AM. SOC. REV. 904, 907 (1940) ("[A]cts often will be abandoned if no reason can be found that others will accept. Diplomacy in choice of motive often controls the diplomat.").

302. TILLY, *supra* note 301, at 15.

balancing their relationships with one another in a government of divided powers. The problem with political reason giving is that it would circumscribe the terms of this negotiation and establish a fixed hierarchy among institutions through the back door of deference doctrine.

1. *The Sociology of Reason Giving*. In his book *Why?*,[303] Professor Tilly articulates a matrix of different modes of reason giving and argues that the types of reasons that are given—and accepted—reveal significant information about the status positions or social roles within a given relationship.[304] In Tilly's typology, reason types are situated along two axes, as demonstrated in Table 1: one axis that runs from formulaic reasons to reasons that attempt to explain cause-effect relationships, and another that runs from popular to specialized discourses.[305] The key distinction for purposes of understanding the effect of political reason giving is between formulaic reasons and cause-effect accounts. Formulaic reasons "identify an appropriate correspondence" between the event, action or outcome to be explained and some antecedent event or action, but they make little attempt to articulate the causal chain connecting the two.[306] By contrast, cause-effect accounts "trace causal lines" between antecedent actions and subsequent actions or outcomes.[307] In the following discussion, I describe the different types of reasons that Tilly's matrix generates and I illustrate what a reason in each category might look like by reference to a hypothetical example of a social situation in which reason giving is demanded: imagine that a partner at a large law firm asks an associate why she works so hard.

303. TILLY, *supra* note 301.

304. *Id.* at 15. These are, of course, ideal types, and many reasons may fall somewhere in between these stylized categories.

305. *Id.* at 19.

306. *Id.* at 20.

307. *Id.*

Table 1. Reason-Giving Typology

	Popular	Specialized
Formulas	*Conventions:* Generally accepted reasons for events that require explanation	*Codes:* Rule-based explanations of actions based on authoritative source such as a legal or religious prescription
Cause-Effect Accounts	*Stories:* Explanatory narratives incorporating cause-effect accounts of unfamiliar phenomena or exceptional events	*Technical Accounts:* Reasons that claim to identify reliable relations of cause and effect based on expert knowledge

As illustrated by Table 1, formulaic reasons come in two flavors: *conventions*, which are popular,[308] and *codes*, which are specialized.[309] *Conventions* are the generally accepted colloquialisms of social interaction: "Why did you get the job?" "Just lucky, I guess." "How could you forget our coffee date?" "My head's just not on straight these days." "How did you twist your ankle?" "I'm such a klutz." *Conventions* make no claim to causal adequacy.[310] They are the reasons that individuals give because it would be too exhausting, if not cognitively prohibitive, to articulate the cause-and-effect relationships of every action or situation in which reasons are demanded.[311] So, for instance, if the hypothetical associate were to explain her diligence with a *convention*, she might say something like, "Idle hands are the devil's playground."

Codes likewise "involve no pretense of providing adequate causal accounts,"[312] but they rely for their force on the authority of expertise or specialization.[313] *Codes* typically take the form of categories, procedures, and rules.[314] Reasons in the form of *codes* purport to justify actions or explain situations by citation to these sources of authority. Professor Tilly explains that, in contrast to

308. Popular reasons are those grounded in "practical knowledge not only from individual experience but also from the social settings in which we live." *Id.* at 21. They are context specific and "vary from one social setting to another." *Id.*

309. Specialized reasons "rely[] on extensive training" in a particular discourse or discipline. *Id.* at 19.

310. *Id.* at 40.

311. *Id.* at 15–16.

312. *Id.* at 15.

313. *Id.* at 125 ("Codes emerge from the incremental efforts of organizations to impose order on the ideas, resources, activities, and people that fall under their control." (citation omitted)).

314. *Id.* at 102.

cause-effect accounts, "codes need not bear much explanatory weight so long as they conform to the available rules."[315] Turning back to the hypothetical associate, she could answer her partner by citation to a *code*: "The employee compensation manual requires that associates bill 2,200 hours per year in order to be eligible for promotion."

Cause-effect accounts similarly come in two flavors: *stories*, which are popular, and *technical accounts*, which are specialized. *Stories* draw on common knowledge and everyday experience to weave a narrative that attempts to causally explain actions, events, or outcomes.[316] The fact that the receivers of *stories* may "find those causal lines absurd or incomprehensible" is irrelevant to their categorization.[317] It is the attempt to articulate a causal chain that counts rather than that chain's credibility.[318] If the hypothetical associate were to answer with a *story*, it might look something like the following: "My parents immigrated to this country and worked hard to make a living to provide for our family. I work hard because that's what they taught me to do and because I want to honor their sacrifice."

Finally, *technical accounts* in Professor Tilly's scheme are specialized reasons that "claim to identify reliable connections of cause and effect" based on the formal training and accumulated expertise of the reason giver.[319] Thus, they often depend on the reason giver's disciplinary background, and they can be technical or opaque to inexpert receivers.[320] For instance, if the overworked associate had been trained as a sociologist, her *technical account* might go something like this: "I am working to overcome the structural disadvantage I suffer in the workplace because of my gender." Or if she had been trained as a psychologist, she might say, "Working hard

315. *Id.* at 17. Professionals often derive *codes* by synthesizing and abridging the ordinary *stories* people tell. So, for example, medical professionals who hear countless *stories* about illnesses and ailments distill those *stories* into categories that provisionally suggest diagnoses or treatment. *Cf. id.* at 103 ("Within any . . . arena [of professional expertise], authorities commonly change the rules as they encounter some new problem; accumulated rules therefore provide a map of significant earlier problems people have faced in their arena.").

316. *See id.* at 15 ("*Stories:* explanatory narratives incorporating cause-effect accounts of unfamiliar phenomena or of exceptional events . . . .").

317. *Id.* at 20.

318. *Id.* at 20–21.

319. *Id.* at 18.

320. *See id.* at 171–73 (illustrating the specialization of technical accounts with an example of students in different fields).

and getting ahead reinforces my identity as a feminist committed to workplace equality."

The significance of these categories lies in what the different kinds of reasons reveal about the social relationships in which they are proffered and either accepted or rejected. For instance, formulaic reasons are more likely to suffice if the reason giver occupies a superior social rank to the reason receiver. In the words of Professor Tilly, "Givers who offer formulas thereby claim superiority and/or distance" from receivers.[321] Were the overworked associate to turn the tables and ask the partner why she works so hard, it would be entirely within the conventional social boundaries of this relationship for the superior to quip, "Idle hands are the devil's playground!" But reason receivers do not always accept formulaic accounts. When a reason receiver rejects a proffered formulaic response and demands a cause-effect account, this demand implicitly challenges the reason giver's assumption of superiority.[322] Even when the reason giver clearly has superior status or authority, the reason receiver can prompt cause-effect accounts if she has some means of what Professor Tilly describes as "visible power to affect [the] giver's subsequent welfare."[323]

Typically, the type of reasons given corresponds with the giver's presumed relationship with the receiver.[324] But reasons do not always match the apparent nature of the relationship, and in such situations, the reasons proffered may represent a proposed redefinition of the relationship and the status positions within it.[325] So, for instance, one would not expect the law firm associate to respond to a query about her work habits from her managing partner by quipping, "Idle hands are the devil's playground." If she did so, one might surmise that she was signaling a shift in the power dynamics of the relationship: perhaps she was planning to leave the firm and no longer cared how she was perceived. It is in this way that reason giving defines the boundaries of relationships and either acknowledges or negotiates the status of the parties within them.

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321. *Id.* at 174 (emphasis omitted).

322. *Id.*

323. *Id.* at 175 (emphasis omitted).

324. *Id.* at 173.

325. *See id.* ("[T]he giving of reasons creates, confirms, negotiates, or repairs relations between the parties.").

2. *Reason Giving and Interbranch Status Hierarchy*. Viewed through this sociological lens, the debate about political reason giving is a debate about the status relationships of different legal institutions. Political reasons take the form of *codes*, or citations to authority: if an agency is acting both within its statutory authority and in accord with legitimate presidential authority,[326] it should be upheld. In this view, courts lack the status to ask the executive to give a causal account of its actions. One view of *Fox* would be that Justice Scalia merely acknowledged the agency's statutory and executive authority to enact a policy that the administration believed was better than the old, and that this information is all a court needs to know.

Hard-look review can be thought of as a demand by courts that agencies go beyond mere *codes* to provide reasons that will specify the cause-effect relationships that produced the outcome at issue. This characterization is precisely why hard-look review has been so controversial. It is, at base, the courts resisting executive claims to a fixed, superior status. Hard-look review allows courts to evaluate the adequacy of the executive's cause-effect explanations.

Many commentators have taken hard-look review to be a demand by courts for *technical accounts*, requiring an agency to marshal expertise to craft a causal explanation about why its policy is justified.[327] In fact, this conception is what appears to be motivating Professor Watts's critique of hard-look review.[328] Consider, however, that courts have applied this standard of review in a way that also encompasses less technical and more popular cause-effect narratives. In fact, in *Fox,* the Court did not merely defer to the FCC's authority, but rather examined the substance of the reasons given by the agency for its decision. The central reasons for the FCC's change to the fleeting-expletives policy could have been characterized as *stories* in

326. As discussed in Part II.B, political reason-giving models would not permit agencies to claim deference merely because "the president made them do it." They would, however, permit agencies to claim deference for actions ordered by the president based on the legitimate reasons articulated by the president. That agencies would cite to reasons articulated by an authority figure rather than to the bald authority of that figure does not change the reasons' status as *codes*, or citations to authority, in the way that term is used in Professor Tilly's matrix.

327. *See, e.g.*, BREYER, *supra* note 37, at 62–63 (describing the virtues of apolitical expertise in the administrative process); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 108–09 (arguing that courts play an "expertise-forcing" role when agencies fail to provide a technical justification for their decisions).

328. *See* Watts, *supra* note 4, at 12 (discussing how the "current demand for technical . . . explanations" is a development exemplifying why the role of politics needs to be better understood).

Professor Tilly's terms. The FCC argued that if it were to exempt fleeting expletives categorically from enforcement, the exemption would encourage more widespread use of single, offensive words, a result that would be harmful to the nation's children and that might encourage children to use more profane language themselves—a consequence that would, presumably, be harmful to the rest of society.[329] There was no evidence for this proposition. The FCC's argument was a narrative that purported to establish causal relationships by drawing on popular understandings and experiences. Perhaps the correct reading of *Fox*, then, is that courts have the status to demand cause-effect accounts of agency actions on judicial review but that these reasons need not be invariably technical. In some circumstances, more popular narratives will suffice.[330]

An understanding of rational justification that encompasses more popular cause-effect accounts would satisfy many of the concerns that political reason-giving models seek to address, but it would do so from within the existing doctrinal framework for arbitrary-and-capricious review and would arguably do so better than mere citation to legitimate political authority. First, *stories* make transparent the values underlying an administrative decision. There is no mistaking what values underlie the FCC's new fleeting-expletives policy. Second, they do so in widely understandable terms. Although *stories* can be criticized because they "enormously simplify the processes involved" in the relationships they describe,[331] this kind of simplification can serve important purposes: as Professor Tilly explains, because *stories* rely "on widely available knowledge rather than technical expertise, they help make the world intelligible."[332] This kind of broad intelligibility is essential to the political accountability of administration that models of political reason giving seek. In articulating *stories* in support of its decision, the FCC was making the

329. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1808–09 (2009).

330. Of course, under the prevailing standard for arbitrary-and-capricious review, Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), courts presented with stories must determine whether those stories provide a "rational connection between the facts found and the choice made," *id.* (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)) (internal quotation marks omitted). This inquiry does not require that the *stories* themselves be rational, but rather that it was rational for the agency to have based its decision on the cause-effect account it provided—in other words, that the agency's account explains in a rational way the path from what the agency knew to what the agency did.

331. TILLY, *supra* note 301, at 65.

332. *Id.* at 64.

provocative suggestion that the primary audience for administrative reasons, at least in certain circumstances, might be the public rather than judges accustomed to receiving and reviewing *technical accounts*. At the same time, requiring agencies to provide cause-effect accounts of their actions instead of formulaic reasons preserves for courts the power and status necessary to police these actions meaningfully.

This social account of reason giving has significant affinities with functional approaches to separation of powers that focus on the "relationships and interconnections"[333] between and among the three constitutional branches and administrative agencies. The functionalist approach seeks to balance and restrain the exercise of government power not through formal limitations, but rather through what Professor Cynthia Farina describes as "the carefully orchestrated disposition and sharing of authority."[334] Professor Emily Meazell demonstrates how this balance gets calibrated, in part, through ongoing dialogues between courts and agencies.[335] Rational reason giving, or reason giving that demands cause-effect accounts, facilitates this kind of dialogue, sharing, and balancing of power among the branches in their day-to-day interactions. By contrast, an approach to reason giving that privileges political reasons, or mere citations to legitimate presidential authority, would arguably fix the roles of these institutions and would circumscribe their ability to calibrate and recalibrate their relationships as circumstances might demand. It would, in other words, formalize a particular vision of the status hierarchy among the various branches, placing the executive squarely at the top in all matters over which agencies have discretion to act. Whatever the merits of a more formal approach to separation of powers, this contested vision of the constitutional constraints on administration should be discussed more thoroughly and explicitly before being imposed de facto through deference doctrine.

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333. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

334. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 496 (1989); *see also* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1952 n.52 (2011) (referring to this proposition as a "functionalist premise").

335. Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1730–43 (2011).

CONCLUSION

Models of political reason giving present a welcome challenge to prevailing views about reason and politics in administrative justification, but they ultimately fail on their own terms, and they fail to meet the challenge of transforming fundamental understandings about the role that reasons play in administration. Arbitrary-and-capricious review is a doctrinal mechanism for enforcing constraints on agency discretion, but rules alone do not constrain. Hard-look review has fostered social and organizational mechanisms that empower and constrain agencies, both in concert with political control and in the vast array of cases in which such top-down guidance is entirely absent. This doctrinal framework should not be discarded until a fuller account is made of what would take its place.

This plea goes beyond the debate about political reason giving. Administrative law is ultimately enacted through the filter of the organizational structures that constitute agencies and the social and institutional relationships in which those structures are embedded. It is crucial to understand how different rules might create and shape the mechanisms that so deeply influence what agencies do. Legal scholarship has begun to recognize the potential power of internal organizational constraints on government institutions. The literature on internal separation-of-powers measures, for instance, has suggested that even in the absence of meaningful judicial or congressional checks, the power of the executive can be constrained, at least to a certain extent, by structuring executive institutions to ensure politically responsive decisionmaking.[336] My argument here is not that the internal organizational structures of agencies are a substitute or a backstop for legal or political constraints on agency action, but rather that they are the mechanism by which these larger constraints get enacted. As Professor Gillian Metzger observes in the

336. *See, e.g.*, WALTER E. DELLINGER, DAWN JOHNSEN, RANDOLPH MOSS, CHRISTOPHER SCHROEDER, JOSEPH R. GUERRA, BETH NOLAN, TODD PETERSON, CORNELIA T.L. PILLARD, H. JEFFERSON POWELL, TERESA WYNN ROSEBOROUGH, RICHARD SHIFFRIN, WILLIAM MICHAEL TREANOR, DAVID BARRON, STUART BENJAMIN, LISA BROWN, PAMELA HARRIS, NEIL KINKOPF, MARTIN LEDERMAN & MICHAEL SMALL, PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL 4 (2004), *available at* http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319 (2006) ("[T]he collapse of external checks and balances . . . demonstrate[s] the need for internal ones."); Metzger, *supra* note 19, at 425 (valuing accountability as a check on the executive but still highly valuing the use of external checks from other branches).

separation-of-powers context, it is important to design doctrinal frameworks in a way that recognizes how "[i]nternal and external checks reinforce and operate in conjunction with one another."[337] Proposals for administrative-law reform should likewise consider how they would impact internal checks on agencies.

This Article's theoretical approach to administrative reason giving and administrative-law reform has three important benefits. First, it highlights the real dangers of a move toward more politicized reason giving. Through this lens, the problem with political reasons is not that they are irrational; it is that they are likely to erode the very social and organizational structures that actually constrain—and enable—agencies in their day-to-day activities without theorizing what would take their place.

Second, a conception of agency constraints as fundamentally social and organizational demonstrates why deference doctrine still matters and why judges, lawyers, and scholars should care about getting it right. Professor David Zaring's finding that courts remand agency actions at roughly the same rate under each level of deference[338] has prompted some soul searching—or at least footnote dropping—among administrative-law scholars concerned that the finding might reduce the importance of which deference standard prevails—and thus their scholarly advocacy of one standard versus another.[339] A focus on the social and organizational manifestation of different doctrinal frameworks helps to move the discussion beyond this rather debilitating insight. The choice of a doctrinal framework may or may not matter to the outcome of litigation once an agency finds itself in court, but it can matter a great deal for the way agencies structure their day-to-day activities. Administrative-law scholarship should be thinking less about the formal coherence of doctrine and more about what kinds of agencies different doctrinal frameworks might create.

Third and finally, this Article's approach provides a richer and more complex way of thinking about the relationship between reason and politics in administration, pushing beyond the view that one or

337. Metzger, *supra* note 19, at 444.

338. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010).

339. *See, e.g.*, Johnson, *supra* note 18, at 1034–35 (suggesting other interpretations of Professor Zaring's statistical analysis); Ronald M. Levin, *Hard Look Review, Policy Change, and* Fox Television, 65 U. MIAMI L. REV. 555, 574 (2011) (responding to Professor Zaring by distinguishing between the breadth and depth of judicial review).

the other dominates administrative decisionmaking and preserving a space for multiple and conflicting narratives about regulation. In the wake of the late twentieth-century regulatory reform movement, aspirational New Deal narratives that saw regulation as the application of expert knowledge to pressing modern problems in service of the public interest have gradually been displaced by economic narratives about regulation as inefficient, beholden to narrow private interests, and, in some sense, impossible, given humans' limited cognitive capabilities.[340] Highlighting political reasons for agency actions is likely to erode further the aspirational narratives about what regulation is and what it might be. Aspirational narratives are inherently fragile because regulation always and inevitably falls short of them. But it is important to ensure that they remain a part of the dialogue about regulation because losing sight of them would deprive the regulatory state of its normative foundation.

340. *See* Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012) (describing the evolution of economic critiques of regulation over the course of the twentieth century).